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REPORT OF THE PUBLIC DEFENDER

ON THE SITUATION OF

HUMAN RIGHTS AND FREEDOMS

IN GEORGIA

The second half of 2006

Contents

INTRODUCTION

The report on the human rights situation shall be submitted to Parliament by the Public Defender twice every year, as provided for by Article 22 of the Law on the Public Defender of Georgia. This Report contains an analysis of the human rights situation in Georgia for the second half of 2006, provides recommendations on measures to be taken with a view to remedying the situation, and describes the violations found over the reporting period.

The reporting period showed a marked increase in the number of applications referred to the Public Defender's Office. The total number of applications in 2006 was 3467, which is an increase of 1213 compared to 2005, and of 2187 compared to 2004 (see Tables in Annex 4). Notably, the number of applications referred to PDO in the second half of 2006 was greater compared to the earlier half of 2006. This points to increased visibility of PDO and enhanced trust by the public, which is corroborated by numerous survey findings.

Analysis of applications received by PDO in the second half of 2006 shows that the highest proportion of applications addressed issues related to criminal cases, while complaints concerning breaches of social and economic rights decreased in number, though insignificantly (for details, see Annex 4).

Importantly, there was an increase in the number of cases that PDO started to consider proactively, not as a result of an application, but on its own initiative.

At the same time, PDO continues intensive monitoring of custody cells in police, of penal institutions, psychiatric hospitals, childcare institutions and military units, particularly, at so-called "hauptwakhts", or guard-rooms. In December 2006, PDO made the monitoring findings public, and stressed that conditions of detention at four, out of six hauptwakhts present in Georgia, were equivalent to torture and inhuman treatment, after which representatives of the Public Defender have been denied access to haupwakhts to carry out monitoring. PDO has repeatedly addressed the Minister of Defence, as well as the Prime Minister and the Chairman of Parliament. Monitoring of human rights in the army is part of civil-military control, and no obstacles on its way can be acceptable, the more so in a country seeking NATO membership. Concurrently with armed forces in line with NATO standards, membership of the alliance implies building effective mechanism of civil control over the military.

Overall, in 2006 PDO representatives made 865 visits to police stations and preliminary detention facilities across the country (207 visits in the first half of 2006 and 549 visits in the second half of 2007), seeing 1454 persons in custody (321 and 1133 persons, accordingly).

The monitoring revealed 701 facts of breach in proceedings, with 261 persons in custody showing signs of physical injuries (178 persons in the first half, and 83 in the second half of 2006), and 32 persons (23 and 9, accordingly), i.e. 12% of persons with injuries reporting physical pressure by police. Notably, in the later half of the reporting period the number of persons expressing grievances about police behaviour decreased, which is indicative of downward tendency in the use of excessive force – a welcome fact in its own right. However, despite this positive dynamics, there is a persistent problem of inadequate response to the facts of abuse by law-enforcers, such as gross violations of human rights, violence, torture, falsification of evidence, as well as bringing perpetrators to account, the theme covered extensively in the Report.

Over the reporting period PDO prepared a number of constitutional complaints, as well as legislative proposals, aiming to establish a legal environment conducive to protection of human rights.

In the period of reporting PDO provided for translating the UN Convention on Persons with Disabilities, adopted on 13 December 2006 and open for signature from 30 March 2007. It is important for Georgia to ratify this convention in a timely fashion, as it is instrumental in eliminating discrimination of persons with disabilities and providing equal opportunities for them. Equal rights for everyone, as well as equality of opportunity for every member of society should become one of the guiding priorities for our state.

One of the new dimensions of this Report, differently from previous ones, is information on facts of abuse and discrimination perpetrated against Georgian citizens and Russian citizens of Georgian ethnicity in Russia. PDO also sought information on the number of Georgian citizens serving sentences in penitentiary establishments outside Georgia. Unfortunately, most of consulates failed to provide the information in a timely manner; however PDO is hopeful that the requisite information will be made available before the next report, which will give us broader scope for analysis.

One of very important problems, definitely on rise over the reporting period, is seizure of private property and its destruction.

Lawlessness and gross abuse of human rights are persistent in conflict zones. PDO is seeking involvement in the quadripartite monitoring format in place both in Tskhinvali Region and in Abkhazia - in order to get first-hand information on the ground and revisit all facts related to human rights. Regrettably, so far there has been no reaction to our proposal by the State Minister for Conflict Resolution – neither positive nor negative.

THE RIGHT TO FAIR TRIAL

The problems in the judiciary described in the report covering the earlier half of 2006, were largely found persistent in the later half, too.

There still were reasons to question the independence of judges. Independent performance by judges of their functions only within law and without any interference is guaranteed by the Constitutions, though is not always found in practice.

The pressure on judges is one of the themes in the US State Department's report on human rights practices, which mentions, *inter alia*, that: "*Ex parte* discussions between lawyers and judges, and parties and judges were not infrequent, leading to establishing the Soviet type "justice by phone". It is reported that legal professionals including prosecutors, as well as parties to the proceedings employ these practices to exert pressure on judges in order to secure desirable judgements".

Independence of the judiciary, as well as the right of every person to have his/her case examined by an impartial tribunal is guaranteed both by the Georgian law (Articles 82, 84 and 85 of the Georgian Constitution; Articles 6, 7 and 8 of the Organic Law on General Courts; Articles 8 and 9 of the Criminal Procedure Code), as well as universal and regional international instruments (Article 10 of the Universal Declaration of Human Rights; Article 14.1 of the International Covenant on Civil and Political Rights; Article 6 of the European Convention on Human Rights; the UN Basic Principles of Judiciary Independence; the 2004 Declaration on Independence of Judges; the Bangalore Principles on Behaviour of Judges; the Declaration of UN High Commissioner of Human Rights on Independence and Impartiality of Judges and Lawyers, etc.).

Analysis of applications presented to the Public Defender's Office suggests that prosecutors' influence on the judiciary continues to be significant. This can be seen in assignment of often inadequate penalties for crimes of varying seriousness. The impression is that not infrequently judges satisfy motions and appeals by prosecution without going into details of the case, thus breaching grossly the rights of persons on the trial.

Apart from breaching Georgia's obligations under international treaties and agreements and the principle of independence of the judiciary, it is not infrequent that the Georgian judiciary also puts at risk the life and security of persons.

The court represents the only body for the administration of justice. The court shall be the primary guarantor for the protection of human rights. It is the responsibility of the state to ensure competence, independence and impartiality of the court – a legitimate aspiration of every citizen in a democratic state.

Speaking of the impartiality of judges, the European Court of Human Rights in the judgements on such cases as Mehmed Ali Ilmaz v. Turkey, Inkali v. Turkey, Findlay v.UK, Daktaras v. Lithuania explained that there are two aspects of impartiality; 1) judges should be impartial in subjective terms, and 2) the court should be impartial also objectively; it is necessary to see if a judge has provided all necessary guarantees to rule out any legitimate doubts concerning impartiality.

Given below are some examples giving rise to reasonable grounds to suspect that judges made their decisions not out of inner faith and conviction, but rather succumbed to political will and prosecutor's wishes. On prosecutor's demand, a judge assigned a disproportionably large sum of bail to a person for a minor offence, which actually implied leaving him in custody, as the bail

was only formal. On the other hand, disproportionably small sums of bails were given for grave crimes, such as described further:

* * *

The Case of K.Kobaladze and G.Jikuri

The Public Defender was addressed by L.Chachukashvili, defence lawyer of K.Kobaladze and G.Jikuri. According to the applicant, Kakuri Kobaladze, 32, with no previous criminal record, was accused of purchasing a Motorola V3 phone, acquired criminally, and incriminated committal of an offence under Article 186, para.1 of the Criminal Code ("Procurement or disposal of an object with previous knowledge of illegal acquisition" – punishable with fine or corrective labour for up to one year, or deprivation of liberty for up to two years). On 25 October 2006, judge M.Kharebava of the Chamber of Criminal Cases of Tbilisi City Court satisfied the motion by investigator L.Darakhvelidze of the Main Police Authority of Tbilisi, assigning to K. Kobaladze a bail of 170 000 GEL as a restraint measure and allowing one month for depositing bail, with staying in custody for 2 months up until payment of the full amount.

According to L.Chachukashvili, a third-year student G.Jikuri, 22, was also accused of purchasing a Motorola V3 phone, acquired criminally, and incriminated committal of an offence under Article 186, para.1 of the Criminal Code.

On 25 October 2006, Judge L.Shkubuliani of Tbilisi City Court assigned to K. G.Jikuri a bail of 100 000 GEL as a restraint measure and allowed 14 days for depositing bail, with staying in custody for 2 months up until payment of the full amount.

Under Article 159, Para.3 of the Criminal Procedure Code of Georgia, "Custody shall only be applied to persons accused of committing an offence punishable by deprivation of liberty for a period of 2 years or longer".

The persons in question are accused of committing an offence under Article 186, para.1 of the Criminal Code that is punishable by maximum of 2 years of deprivation of liberty. Under Article 168 (2) of the Criminal Procedure Code of Georgia, "The sum of bail shall be established based on the seriousness of the crime and financial capacity of a defendant".

The sum of bail was disproportionately high, to the extent that neither K. Kobaladze, nor G.Jikuri were able of paying it, hence in real practice they were given custodial penalty, not bail, as a restraint measure.

It is important to note that the market price for phones purchased by K. Kobaladze and G. Jikuri did not exceed 300 GEL. Further, G.Jikuri is a student, and it is obvious that his custody would imply disruption of his studies.

Both are from extremely poor social setting, and could in no way pay even one tenth of the bail sums.

In his 2006 Preliminary Observations and Recommendations for Georgia, the UN Special Rapporteur on torture stated that it is necessary to limit preliminary custodial measures in criminal proceedings, particularly for non-violent, minor and less serious offences, and instead introduce such measures as bail and recognizance.

The Case of Ineza Kobalia

Ineza Kobalia, owner of a drugstore, failed to renew her license after it expired, and received an administrative fine. At the same time, preliminary investigation started under article 192, Para 1 of the Criminal Code. On 17 November 2006, Ineza Kobalia was assigned a bail of 30 000 GEL as a restraint measure and allowed one month for payment of the bail.

Under Article 192 (illegal entrepreneurial activity), "Entrepreneurial activity carried out without registration or special permit (licence), or in contravention of license terms, leading to considerable damage, or resulting in high benefits shall be punishable with fine or deprivation of liberty for a period of one to three years".

On 15 December 2006, i.e. two days before the deadline, Ineza Kobalia submitted to the prosecutor's office an application with supporting documents on pledging property, instead of bail, including the audit report issued by Engur-Audit auditing firm. According to the report, the market price for property in village Samiskuri, Khobi district, owned by Omiane Kiria, Ineza Kobalia's husband, compared to market prices for equivalent property and considering depreciation, location as well as average annual income from tangerines, nuts and laurel, equalled USD 18 000, equivalent to 31 500 GEL. Thus, as of December 2006, the market price for the plot of land, owned by Omiane Kiria, together with buildings and structures, was 31 500 GEL.

Under Article 168, para.2 of the Criminal Procedure Code of Georgia, "After defining the sum of bail, an accused person, defendant or any other person acting on his/her behalf, shall have the right to pledge movable or immovable property equivalent to the sum of bail".

On 21 December 2006, i.e. six days after I. Kobalia's submission of the application, the prosecutor's office informed the defendant in writing that she failed to pledge immovable property equivalent to the sum of bail within the timeframe allowed by the judge, and instead presented the audit report, according to which average annual income from tangerines, nuts and laurel was included in the price for immovable property, whereas these items did not represent any immovable property and hence, could not be considered as part of price for property.

According to article 149 of the Civil Code (notion of immovable object), immovable objects include plots of land with mineral deposits underneath, plants growing on the plot, as well as buildings and structures installed firmly on the land. Also, under Article 168, Para 2 of the Criminal Procedure Code, the prosecutor defines a sum of bail. However, this by no means implies that it is within prosecutor's competence to valuate defendant's property. Instead, the prosecutor is supposed to rely on an audit report, or else to question the validity of the report according to the procedure established by the law and raise the issue concerning the liability of the valuer. In the case under question, the prosecutor's office seems to have undertaken auditing powers.

On 23 December 2006, Judge J.Morgoshia of Zugdidi district court satisfied the prosecutor's motion and decided to replace bail with a custodial measure of restraint. It was not possible to arrest I.Kobalia, as she suffered two strokes and is in severe condition up until present.

The examples clearly demonstrate how disproportionate are the bails assigned by judges to the seriousness of offences for which they are imposed. The underlying motives are largely unclear.

The Case of I.Sanadiradze

The Fiscal Police of the Ministry of Finance of Georgia initiated case No.92060883 against Ivane Sanadiradze and others for commission of an offence provided for in Article 210, Para 2(a) of the Criminal Code (punishable by fine or deprivation of liberty fro a period of four to seven years). The offence comprised performing a non-commodity transaction worth of 5025 GEL with an invoice.

On 15 July 2006, the Chamber of Criminal Cases of Tbilisi City Court imposed a bail of 2000000 (two million) GEL as a measure of restraint and allowed I.Sanadiradze one month for depositing the sum. The order of the Chamber of Criminal Cases of Tbilisi City Court was appealed at the Tbilisi Appellate Court that reduced the sum of bail from 2 000 000 (two million) to 500 000 (five hundred thousand) GEL. Needless to say, I. Sanadiradze failed to pledge the requisite amount and was left in custody.

In the course of assigning the measure of restraint by the Chamber of Criminal Cases of Tbilisi City Court I.Sanadziradze, defendant, had heart attack and was transferred to Tbilisi Clinical Hospital.

The Case of B. Tatuashvili and B.Orkodashvili

According to materials of the investigation, two members of Akhalgori district police - police inspectors-investigators, Bondo Tatuashvili and Besik Orkodashvili, went to Akhalgori childcare institution and without even informing teachers, took to police two boys - Levan Kojdoev and Jason Geladze, allegedly for their involvement in theft of electric wiring from Akhalgori post office, in order to get a confession from them. To extract a confession, police officers subjected the boys to physical and psychological pressure, but the boys did not confess, and after some time they were released. Bondo Tatuashvili and Besik Orkodashvili were charged under the following articles of the Criminal Code:

Article 333, Para.3 (a), (b), (c) (exceeding official powers) – punishable with deprivation of liberty for a period from five to eight years;

Article 144^1 (torture), Para 2 (a), (b), (c), (d) - punishable with deprivation of liberty for a period from nine to fifteen years;

Article 369, Para.2 (falsification of evidence) - punishable with deprivation of liberty for up to three years.

By decision of Mtskheta District Court, both accused persons were given two-month detention as a restraint measure. However, later, according to information from the Prosecutor General's Office, instead of detention as a measure of restraint they were subjected to bail of 5 thousand GEL each, a much lighter restraint by all criteria, and released.

Under Article 168, Para.3 of the Criminal Procedure Code, "bail, generally, is not applied to persons accused of committing an especially grave crime".

The Case of David Asatiani

On 8 January 2006, PDO got informed that the Investigative Department of the Ministry of Justice opened investigation into the fact of beating of D. Asatiani, defendant, kept at Rustavi Prison No.6 of the Penal Department.

PDO representatives visited D. Asatiani who said that on 3 January 2007 he was physically assaulted by convoy officers. According to E.Beselia, D. Asatiani's defence counsel, her client was physically assaulted by six officers of the quick response special unit under the Penal Department.

The Public Defender addressed the Investigative Department of the Ministry of Justice with a request to make information concerning the criminal case in question, as well as the investigation results, available to PDO.

According to the response letter of the Ministry of Justice, received by PDO on 17 January 2007, on 3 January 2007, at about 6 pm David Asatiani, defendant, was brought back to Rustavi prison No.6 from the trial. When examined, he displayed injuries. According to the defendant, he received injuries after he was returned from the court, as result of physical violence by officers of the special unit. The forensic report of 4 January 2007 points to multiple bruises in the spine area, not contradicting in terms of time with the date of incident, as indicated in the factual background of the case.

On 16 January 2007, M.Giorgadze and K.Gulbani, officers of the quick response special unit of the Penal Department, received charges under Article 333, Para 1 of the Criminal Code of Georgia (exceeding official powers resulting in substantial impairment of the rights of a physical or legal person or legitimate interests of the state – punishable with deprivation of liberty for a period of up to three years, and withdrawal of the right to hold an office for up to three years)/

On 18 January 2007, the Chamber of Criminal Cases of Tbilisi City Court ordered imposing on M.Giorgadze and K.Gulbani a bail of 3 thousand GEL each as a measure of restraint.

Recommendations of the Committee for the Prevention of Torture (CTP) explicitly state that the state should give priority to establishing the human rights culture, to which end it is vital to institute zero tolerance to the use of force both by police and officers of penitentiary institutions.

The Case of D.Bagaturia and G. Dzimtseishvili

Underage Alexander Kovalchuk and David Zarandia were beaten and tortured by their class-mates (Vepkhia Ardbilava, Irodi Absandze and Isak Telia) at Zugdidi Prison No. 4 of the Penal Department of the Ministry of Justice. Violence continued for four days. The persons concerned were made liable under Article 144^3 (2) of the Criminal Code (inhuman and degrading treatment: subjecting a person to debasing treatment or coercion, or to inhuman and degrading conditions which cause severe physical or mental pain or suffering, committed by two persons or more – punishable with deprivation of liberty for a period from four years to six years and fine, with or without withdrawal of the right to hold an office and carry out activity for up to five years) Article 144^3 is applied when the act committed by a persons (persons) contains no signs of long and intensive suffering (torture).

On 4 December 2006, the Samegrelo-Zemo Svaneti Regional Prosecutor's Office opened preliminary investigation into the fact of neglect of official duty by prison administration of Zugdidi Prison No 4. On 19 January 2007, David Bagaturia and Guram Dzimtseishvili, officers in charge of the regime division at the prison, were made criminally liable for offence stipulated by Article 342 (1) of the Criminal Code (neglect of official duty – punishable by fine or deprivation of liberty for up to three years).

On 19 January, the judge of Zugdidi district court ordered assigning D.Bagaturia and G.Dzimtseishvili a bail of 2000GEL each, as a measure of restraint.

The Case of Michael Svanidze

The Public Defender was addressed by Manana Oniani. In her application M.Oniani said that on 26 October 2006 law enforcers arrested M. Svanidze on suspicion of his involvement in murder of her son, Skender Khabuliani. M.Svanidze was accused of committing a crime stipulated in Article 108 of the Criminal Code (intentional murder - punishable with deprivation of liberty for a period of seven to fifteen years).

On 31 October 2006, Tbilisi City Court rejected a motion made by M.Svanidze's defence lawyer to assign the suspect a bail of 30000 GEL as a measure of restraint and satisfied instead the prosecutor's motion on arresting M.Svanidze. On 10 November 2006 Tbilisi Appellate Court retained the decision concerning the measure of restraint made by Tbilisi City Court. On 16 December 20006 Judge Sh.Guntsadze of Tbilisi City Court granted the defendant's motion on changing the measure of restraint from detention for a bail of 30000 GEL.

Under Article 168, Para.3 of the Criminal Procedure Code, "bail, generally, is not applied to persons accused of committing a grave or especially grave crime". Also, under Article 168, Para.2 of the Criminal Procedure Code of Georgia, "The sum of bail shall be established based on the seriousness of the crime and financial capacity of a defendant".

The above case meets none of the requirements of the law.

The Case of Varlam Pkhakadze

On 7 December 2006, Varlam Pkhakadze lost his life as a result of neglect of official duty and excessive use of force by patrol police inspectors Ivane Kapatadze, David Minashvili, Avalo Gabrichidze and Kakha Gabunia. Inspector of Patrol Police Ivane Kapatadze was charged with criminal offence under Article 114 of the Criminal Code (murder through excessive use of force when arresting an offender) and was given two-month detention as a measure of restraint.

Inspectors D.Minashvili, A.Gabrichidze and K.Gabunia were charged with criminal offence stipulated in Article 342 (2) of the Criminal Code, namely neglect of official duty, resulting in loss of life or other grave outcome). The Regional Prosecutor's Office made a motion requesting the court to assign the above police officers with a bail of 2000 each as a measure of restraint. The court granted the prosecutor's motion.

* * *

One more example, which leaves it absolutely unclear as to why the judge approved the plea bargain between the person known as an offender who committed an especially grave crime, and the prosecutor. The offender was released on probation and only had to pay fine.

The Case of Z.Gonashvili

Z.Gonashvili was owner and general director of a controlling interest of Super-Service-LI Ltd, in 2000 located at 5 Sanapiro street in Tbilisi. Z.Gonashvili's partner, M,Tabagua wanted to buy out the controlling interest owned by Z. Gonashvili, however the latter refused to sell one. M. Tabagua knew that T.Khangoshvili, residing in village Duisi in Akhmeta district, established a criminal group for the purpose of attacking and assaulting people.

In Noveber 2000, M.Tabagua contacted the criminal group, proposed to take Z.Gonashvili as a hostage and demand a certain sum of money as ransom. M.Tabagua reasoned that Z.Gonashvili did not have money for ransom and that he would request him, M.Tabagua, for help. Instead, M.Tabagua would take the assets of Super-Service-LI Ltd.

On 13 November 2006, Z.Gonashvili was in the centre of village Pichkhovani of Akhmeta district in his car, together with other people. They were attacked by T.Khangoshvili's gang carrying automatic weapons. The gang forced Z.Gonashvili to leave the car, threatening him with the use of firearms, put him into a car and kidnapped him.

Z.Gonashvili was brought to T. Khangoshvili's house in village Khalatsani of Akhmeta district and placed in a room where they kept T.Molakhshia. The gang demanded that Z.Gonashvili and his family paid USD 200 000 as ransom for release.

On 29 December 2000, M.Tabagua went to Pankisi Valley, where with the help of gang members and threatening to kill him, he forced Z.Gonashvili to write a release note on transfer of company assets to M.Tabagua. Instead M.Tabagua would have him released from captivity. M. Tabagua took the release note to Tbilisi and was trying to officially register the transfer of assets owned by Z. Gonashvili to him.

M.Tabagua and members of the criminal groups failed to realise their criminal plans, as on 11 January 2001 Z.Gonashvili and V.Makoev, also in captivity of the criminal group, took firearms away from one member of the criminal group and opposed it. The incident attracted attention of Pankisi residents who came to the site and handed the hostages over to police.

Apart from the crime described above, M. Tabagua illegally bought from an unidentified persons 50 pieces of 9 mm calibre Leger type cartridges and kept them in his residential house located inTskneti, Vake-Saburtalo district of Tbilisi.

M.Tabagua was charged with crime comprising a number of acts, such as: taking a hostage for mercenary motives with the help of an organised criminal group, keeping him for more than 7 days, the use of violence and threat of violence to coerce a person into an action for the sake of being released. Besides, M.Tabagua illegally bought and kept ammunitions.

On 16 February 2006, Judge L. Duishvili of Akhmeta district court approved a plea bargain between prosecutor G.Bachiashvili of Kakheti Regional Prosecutor's Office and the accused M.Tabagua. M.Tabagua was found guilty of offence stipulated in Article 144 (2) (taking a hostage for mercenary motives for more than 7 days, using violence and/or threat of violence to coerce a person into an action for the sake of being released – punishable with deprivation of liberty for a period of nine to fourteen years), Article 144 (3) (taking a hostage by an organised criminal group, to coerce an organisation or an individual to perform or not to perform an action - punishable with deprivation of liberty for a period of 13 to 18 years), and Article 236 (1) (illegal purchase and carriage of forearms – punishable with fine or deprivation of liberty for up to three years). M.Tabagua was sentenced to 5 years of deprivation of liberty. Based on Articles 63 and 64 of the Criminal Code, the judge reckoned the penalty as conditional 5 years with probation and imposed a fine of 30 000 GEL as additional penalty.

* * *

In the context of the judicial power it is important to note one more issue: Article 336 of the Criminal Code of Georgia (issuance of illegal sentence or other decision by court) represents a tool for the prosecution to pressurise the court. Verification of the lawfulness and legality of court decisions is a prerogative of appellate and cassational courts. However, the existence of

provisions contained in Article 336 of the Criminal Code of Georgia provides an avenue for the prosecutor's office, too, to review court judgements, which virtually turns the prosecution into the fourth judicial instance, thus coming in conflict with the principle enshrined in Article 84 of the Constitution, according to which no one shall have the right to make a judge accountable in a particular case and all acts limiting the independence of judges shall be considered null and void.

The existence of provisions contained in Article 336 of the Criminal Code of Georgia infringes the principle provided for in Article 8 of the Criminal Procedure Code, namely that the judiciary shall not be held accountable to the legislative or executive branches of power. The legal provision that entitles the prosecutor's office, which is part of the executive branch, to conduct an investigation into a wrongful sentence or judgement made by a judge comes into conflict with the above principle.

Besides, Article 336 of the Criminal Code allows the prosecutor's office to exert influence on a judge (through threatening imposition of criminal liability) and interfere into the administration of justice, which in itself jeopardises the principle of judicial independence and the rule of law.

The Public Defender addressed the Parliament with a suggestion to amend Article 336 of the Criminal Code of Georgia.

The Council of Europe in its Recommendation Rec(2000)19, dealing with the role of public prosecutor in the criminal justice system, points out that the state should take all necessary steps to ensure that the legal status, competence and the role of prosecution side in the proceedings be defined in a manner to rule out any doubts concerning independence and impartiality of judges.

INADEQUATE QUALIFICATION AND COMPETENCE OF JUDGES, AND DERELICTION OF A DUTY BY JUDGES

On top of the extremely important issue described above, there is another problem in the judiciary, i.e. lack of professional competence among judges. Besides, not infrequently some of judges show neglect of their duty, the one implying a high degree of responsibility. To illustrate, let us consider some examples:

The case of Alexander L.

On 21 November 2006, Judge Luiza Kuparadze of Samtredia District Court meted out a penalty in the form of 30 days of administrative arrest to Alexander L. born on 14 November 2007. According to the ruling issued by Judge L. Kuparadze, Alexander L. was arrested in Samtredia on 21 November at 13:10 and checked for the use of drugs. Alexander L. was found to have used marijuana, i.e. committed an offence, stipulated by Article 45 of the Code of Administrative Offences.

Alexander L. has a previous conviction record. He was convicted for committing an offence under Article 177 of the Criminal Code and sentenced to 3 years of imprisonment, later changed for conditional penalty for the same term. It is this circumstance that guided Judge L. Kuparadze's decision not to apply a non-custodial penalty for Alexander L.

Under Article 32 (3) of the Code of Administrative Offences, "Administrative arrest shall not be imposed on pregnant women, mothers of children under 12 years of age, persons under 18 years of age, as well as invalids of categories 1 and 2." The judge appeared to grossly violate the relevant legal provision.

Based on the above, PDO concluded that L.Kuparadze's action contained signs of a crime stipulated by Article 342 of the Criminal Code (neglect of an official duty, i.e. failure by a public servant or his/her equivalent persons to discharge his/her official functions or inadequate discharge of functions resulting from dereliction of an official duty that led to material violation of the rights of a physical or legal persons, or legitimate interests of society or a state).

Considering these facts, the Public Defender suggested to the Prosecutor General that Alexander L. be released from unlawful detention, and requested to open investigation against judge L.Kuparadze for dereliction of an official duty.

The documents made available by the Prosecutor General's Office suggest that the latter acted on the Public Defender's request and opened preliminary investigation into criminal case No.74068449 concerning the unlawful decision of Judge L.Kuparadze of Samtredia District Court to prescribe administrative arrest as a penalty for underage Alexander L. – an offence stipulated in Article 336 (1) of the Criminal Code.

Interestingly, following the press conference convened by the Public Defender on 29 November 2006 to discuss the unlawful decision by the court, Judge L.Kuparadze who had issued the decision in question, applied to Kutaisi Appellate Court requesting revocation of the said decision.

Kutaisi Appellate Court examined the application and decided partially to meet the judge's request. Namely, the decision of 21 November 2006 made by Samtredia District Court was amended leading to revocation of administrative arrest prescribed for Alexander L. as a penalty and meting out a fine of GEL 500 instead.

According to Article 271 of the Code of Administrative Offences, "A ruling made in respect of an administrative offence, as well as a decision resulting from examination of the case dealing with an administrative offence on the scene, in accordance with the procedure established in Article 234[1] of the Code can be challenged by a person to whom the decision refers, by an aggrieved party, or by a person compiling the administrative offence report".

A judge issuing a ruling can in no way be considered as included into the list of persons entitled to appealing against a decision. It is not clear what guided the president of the appellate court when the latter admitted the application submitted by Judge L. Kuparadze, and what norms the court invoked when it decided to amend the ruling of 21 November 2006, knowing that Article 278 of the Code of Administrative Offences explicitly stipulates that:

1. When examining a complaint or protest, the relevant body (or official) shall decide in one of the following ways:
a) Retain the contested ruling, and refuse to satisfy the complaint or protest;
b) Revoke the ruling and remit the case for further enquiry;
c) Revoke the ruling and terminate the case;
d) Revoke the ruling as a result of examination of the case dealing with an administrative offence on the scene in accordance with the procedure established in Article 234[1] of the Code and release the person concerned from administrative penalty;
e) Change the measure of administrative penalty within the limits prescribed by the law.

In the case under consideration one can see the change of the form of penalty, not the measure, as prescribed by Article 278 (e) of the Code of Administrative Offences.

The following administrative penalties can be applied in the case of committing an administrative offence:

a) Warning;
b) Fine
c) Withdrawal of an item used as a tool for commission of an administrative offence, or an object of violation of customs rules, or means of transportation of goods;
d) Confiscation of an item, used as a tool for commission of an administrative offence, or an object of violation of customs rules, or means of transportation of goods;
e) Withdrawal of a special right (driving license);
f) Corrective labour;
g) Administrative arrest.

In this case one form of administrative penalty was changed for another form, namely administrative arrest was changed for fine, which is not in conformity with the existing law.

Importantly, Alexander L. was unlawfully kept in custody for 7 days, and later required to pay the fine.

The Case of Temur Mikia

On 14 July 2006, officers of traffic police Kakha Lataria and Temur Shurgulaia arrested Temur Mikia, an IDP from Abkhazia near the Nabadi bridge in Poti. Officers Kakha Lataria and Temur Shurgulaia transferred the arrested person to the premises of Poti Traffic Police without compiling any arrest report or any other requisite documents. After an hour and a half, Sh.Beraia, chief of the Criminal Investigation Department of Poti Police Authority handed over to Murtaz

Migineishvili, deputy chief of the Criminal Investigation Department, a search warrant issued by Head of Poti Police Authority, Tornike Sajaia. On instruction from Sh. Beraia, M.Migineishvili and inspectors of police Emzar Sarsania and Kote Kharebava took Temur Mikia out of the building of the traffic police and went to Nabada bridge, where they framed up Mikia's arrest. They mimicked a seizure of a video allegedly stolen by T.Mikia, and compiled a report. Later they transferred T.Mikia to the premises of Poti Police Authority, though they failed to compile any arrest report - either near the bridge where they made a faked arrest, or in the premises of police.

Details of the investigative action were made known to George Kharchilava, Prosecutor of Poti. On the latter's instruction, Gogi Pachulia, deputy prosecutor of Poti, made a motion before the court to legitimize personal search performed by police. Judge Alexander Goguadze of Poti City Court made a decision legitimizing the investigative action performed by police.

M.Migineishvili was tasked with carrying out an enquiry into the case, and he presented materials of the investigation to Marlen Smagin, chief of Poti criminal police, who issued an ordinance on instituting a criminal charge against T.Mikia. When presenting materials of investigation to the chief of the criminal police, M.Migineishvili said that the file contained no arrest report or reports of officers who conducted arrest. Chief of the criminal police said that he would later have the arrest report added to the case file.

Thus, by the time when the search report was legitimised by the court, there was no arrest report in the file, which implies that the judge should not have legitimised the search based on urgent necessity.

At about 11.30 Marlen Smagin handed over to M. Migineishvili the case file, including the judge's ruling on legitimising the investigative action performed without a search warrant, invoking urgent necessity as grounds for legitimisation. M.Migineishvili interviewed T.Mikia, issued a decision on his detention and recognition as a suspect and took the suspect to the duty unit. At about 3 pm the officer of the investigative department A. Sikhuashvili, acting on instruction from Marlen Smagin, took T.Mikia out of remand facility and led him to M. Migineishvili's office.

At about 8 pm, on verbal instruction from M.Migineishvili, officers Eldar Mikadze, Hamlet Kapanadze and Kakha Akhalaia transferred T.Mikia to the investigative department of Poti Police, to the office of inspector Z.Khorava, where the suspect rushed to the window, broke the glass and jumped out from 6.2m to escape. However, he fell on the protective wiring of the temporary detention facility and then on the ground, inflicting himself multiple bodily injuries. T.Mikia was transferred to hospital where he died.

On 28 December 206, the Public Defender addressed a recommendation to the General Prosecutor's Office of Georgia and the High Council of Justice concerning the responsibility of the Deputy Prosecutor of Poti, Gogi Pachulia, and judge of Poti City Court, Alexander Goguadze.

It is the responsibility of a judge to take a decision based on materials of the case. The case file did not contain any arrest report, which implies that any further action in respect of T. Mikia was illegal. The judge's decision led to retaining T.Mikia in custody in contravention of the law, and ultimately to his death.

The Public Defender requested the High Council of Justice to initiate disciplinary proceedings on the case.

* * *

Importantly, the High School of Justice has already been launched. The training schedule for 2007 has been defined. Two regional training facilities have been made operational. Candidates for judgeship will only be appointed as judges after having taken a full course of studies, both theoretical and practical, at the school. Their appointment will be without a time-limit. Currently the school is carrying out the training of trainers. It is believed that the High School of Justice will help to address the problem of inadequate qualification of judges in Georgia's judiciary system.

Compared to 2005, there is a tendency towards a decrease in the number of motions concerning the assignment of detention as a restraint measure, which is clearly a positive development. The prosecutor's office not infrequently used to enter motions for applying detention as a restraint measure, and most of them were satisfied by court. Over 2005, a total of 9962 motions on restraint measures (detention, recognizance, and bail) were made to courts, of which 9042, or 90% of all motions, concerned detention. 7159 motions for detention were granted, constituting 79% of all motions.

Over the first 6 months of 2006, a total of 8301 motions on restraint measures (detention, recognizance, and bail) were made to courts. Of these, 5868 motions, or 70% (20% less, compared to the previous year) concerned detention. It should be noted, however, that 5156 motions were granted, which constitutes about 90% of all motions - an increase compared to the previous year.

In the period from 1 July to 31 December 2006, a total of 9418 motions on restraint measures (detention, recognizance, and bail) were made to courts. Of these, 5893 motions, or 62.2% concerned detention. It should be noted, however, that 5202 motions were granted, which constitutes about 88 % of all motions.

One aspect deserves special attention. Despite the fact that prosecutor's offices motion more frequently for non-custodial restraint measures, this by no means impacts the absolute number of detainees, as the total number of people kept in custody has increased dramatically. If in 2005 the overall number of motions for custodial restraint measures was 9042, in 2006 the number increased to 11761. Notably, in the second half of 2006 the number of motions for custodial restraint was higher (by 25 motions) compared to the first half of 2006.

The Public Defender believes it is advisable for courts to limit application of custodial sentences in respect of lesser crimes, which would at the same time help to solve the problem of overcrowding in penal institutions.

Notably, compared to 2005, the number of granted motions for bail and recognizance applied as a measure of restraint has increased. More specifically, in the earlier half of 2006, as many as 2121 out of 2212 motions for bail and 216 out of 221 motions for recognizance were granted. In the later half of 2006, as many as 3362 out of 3445 motions for bail and 80 out of 80 motions for recognizance were granted. These figures refer only to motions made by the prosecutor, whereas according to information available to PDO, motions made by the defence party are granted very seldom, if at all. Regrettably, PDO was not able to get hold of the relevant statistics in the Supreme Court of Georgia.

Statistics on Measures of Restraint

	Prosecutor made a motion before the court on:	Granted:
2005	**Bail - 736 Recognizance - 180 Custody- 9042**	**Bail - 710 Recognizance - 178 Custody - 7159**
1 January – 30 June 2006	**Bail - 2212 Recognizance - 221 Custody - 5868**	**Bail - 2121 Recognizance - 216 Custody - 5156**
1 July – 31 December 2006	**Bail - 3445 Recognizance - 80 Custody - 5893**	**Bail - 3362 Recognizance - 80 Custody - 5202**

A brief note on the statistics of acquittals is in order. Compared to 2005, the number of judgements of acquittal has decreased: if in 2005 the first instance general courts awarded the verdicts of not guilty on 64 cases and in respect of 79 persons, in the earlier half of 2006 the judgements of acquittal were awarded on 12 cases and in respect of 17 persons; in 2005 the courts of appeal awarded the verdicts of not guilty on 7 cases and in respect of 8 persons, whereas in the earlier half of 2006 the judgements of acquittal were awarded on 5 cases and in respect of 5 persons; in 2005 the court of cassation awarded the judgement of acquittal on 11 cases and in respect of 11 persons, while in the period between 1 January to 1 July 2006 acquittal was awarded on 4 cases and in respect of 5 persons. In the later half of 2006 the first instance general courts awarded the verdicts of not guilty on 20 cases, the courts of appeal awarded the verdicts of not guilty on 8 cases, and the court of cassation awarded the judgement of acquittal on 2 cases.

Statistics on Acquittals

	First instance general courts	Courts of appeal	Court of cassation
2005	**In respect of 64 cases and 79 persons**	**In respect of 7 cases and 8 persons**	**In respect of 11 cases and 11 persons**
1 January – 30 June 2006	**In respect of 12 cases and 17 persons**	**In respect of 5 cases and 5 persons**	**In respect of 4 cases and 5persons**
1 July – 31 December 2006	**In respect of 20 cases**	**In respect of 8 cases**	**In respect of 2 cases**

Statistics on individual rulings obtained from the Supreme Court looks as follows: the number of individual rulings issued over the first 6 months of 2006 is 16, including: 15 rulings on breaches in the course of investigation and one ruling concerning causes conducive to offence. As far as individual rulings concerning the violation of defendant's rights are concerned, such data are not found in statistical reporting forms. (In 2005, a total of 25 individual rulings were issued, including 23 rulings on breaches in the course of investigation and 2 rulings concerning causes conducive to offence.). The above statistics remained unchanged over the second half of 2006. Proceeding from statistics, in the second half of 2006 there were no documented procedural violations in the course of investigation.

Concerning the issue of conditional release on parole, in the second half of 2006, as many as 86 petitions were examined, of which 40 were granted. In the earlier half of 2006, 290 out of 507 petitions were granted, constituting 57%. In the later 6 months of 2006, there were no petitions concerning a replacement of an unserved part of the sentence with a lighter penalty. In the first 6 months of 2006, as many as 2 petitions concerned a replacement of an unserved part of the sentence with a lighter penalty, but none of them was satisfied. In 2005, general courts considered 2036 petitions concerning a conditional release on parole and a replacement of an unserved part of the sentence with a lighter penalty, of which 1745 petitions (i.e. 85%) were satisfied. (In 2005 cases falling under these 2 categories were recorded in statistical reporting forms together). Clearly, compared to previous years, the number of persons released on parole has decreased.

In what concerns the remission of a penalty as a result of illness, in the later 6 months of 2006 there were 5 petitions to that effect, of which three were granted. To compare, in the initial 6 months of 2006 there were 10 petitions to that effect, of which two were granted. In 2005, there were 15 petitions concerning remission of a penalty as a result of illness, of which five were granted.

In what concerns the remission of a penalty because of an old age, in the initial 6 months of 2006 there were no petitions to that effect reaching the courts. (In 2005 cases falling under this category were not included in statistical reporting forms).

Over 2006, first instance general courts received 2547 cases in respect of a plea bargain, and 13302 cases with indictment; of these 1330 cases ended in plea bargains (procedural agreements). Overall, a plea bargain was approved for 3791 cases, which accounts for about 35% of all cases. Plea bargain was denied on 10 cases.

LEGISLATIVE CHANGES

In the context of the judiciary it is important to note one aspect. In accordance with a constitutional amendment, judges will no longer be appointed by the President of Georgia. They will be appointed by the High Council of Justice without any time limit. This change is expected to foster and promote the judiciary independence.

Speaking of the impartiality of judges, the European Court of Human Rights in the judgements on such cases as Mehmed Ali Ilmaz v. Turkey, Inkali v. Turkey, Findlay v.UK, Daktaras v.Lithuania explained that in order to examine the issue on independence of the judiciary, one has to look at the procedure of appointment of judges, their term in office and the availability of safeguards from pressure and interference.

The Council of Europe in its Recommendation **No. R (94) 12** that the decision-making body on designation of judges should be other than government or other authority. In order to guarantee independence of judges, it is necessary to secure, through relevant norms that judges are elected by the judiciary and that they themselves decide on rules and regulations to govern their activity.

Another matter of concern in the context of the judiciary is delayed examination of cases, which is largely a result of inadequate number of judges, which tells on the efficiency and effectiveness of the court. It is important to note lack of necessary technical conditions, though the situation in this respect has definitely improved and these issues are now part of the Action Plan for the Judiciary. Since 2006, work has been underway to renovate and upgrade the courts. This process will be completed in 2008. The judges' level of remuneration has also increased;

the career-based principle for promotion of judges has been developed. However, unless the most important issue is addressed, that of judiciary independence, all these interventions will not lead to expected results.

PROSECUTOR'S OFFICE

Prosecutor's Office is a body that carries out criminal prosecution in accordance with the procedure and within the limits established by the law. To ensure proper discharge of this function, the Prosecutor's Office provides procedural guidance in the preliminary investigation phase, carries out preliminary investigation into cases of crime and wrongful acts, as provided by the criminal procedural law, oversees full and consistent observance of the law by law-enforcement and investigative bodies, supports the public prosecution side in the course of court proceedings, contests unlawful and unfounded verdicts and other decisions by court, etc.

Hence, one of the main responsibilities of the Prosecutor's Office is to ensure effective oversight of the compliance with the law in the course of investigation. This notwithstanding, members of public often apply to the Public Defender to point out violation of their procedural rights in the course of criminal investigation conducted by the prosecutor's office; also, the prosecutor's office fails to act on properly on breaches in the course of investigation. What is implied here is restriction of the right to legal defence, guaranteed by Article 42 of the Constitution of Georgia, as well as criminal procedure legislation; unlawful arrests, biased investigations, failure to properly assess the available evidence, impunity of perpetrators, and the like.

In carrying out its work, the Prosecutor's Office should be guided by principles of the rule of law, integrity and inviolability of person, respect for dignity of person, humanism, democracy, fairness and equality of rights. However, this is not always the case in practice.

The Criminal Procedure Code in its Article 18 provides for one of the main principles to be followed in criminal proceedings - i.e. full, impartial and comprehensive investigation of all circumstances of the case. The investigator, the prosecutor and the judge are obliged to conclusively establish the crime in question, identify the perpetrator and look into all circumstances relevant to the fact in issue – both incriminatory and acquitting evidence for a suspect or defendant, as well as aggravating and attenuating circumstances. It is of paramount importance to follow this requirement in order to rule out conviction of an innocent person. A clear example of neglect of this essential principle by the prosecutor can be found in the following case.

The Case of David Badzgaradze

On 16 December 2006, at 23:30 officers of Isani-Samgori Police Department arrested David Badzgaradze. He was accused of committing an offence under Article 179 (2) of the Criminal Code (robbery) and Article 363 (2) (unlawful appropriation of a document, seal, stamp or official letterhead) and assigned detention as a measure of restraint by decision of 19 December 2005 made by judge of the Chamber of Criminal Cases of Tbilisi City Court. The prosecutor's office sent an indictment to the court.

On 20 August 2006, Judge Nana Maisuradze of the Chamber of Criminal Cases of Tbilisi City Court issued the verdict of not guilty in respect of D.Badzgaradze. Prosecutor Nana Tsikhiseli of Isani-Samgori district prosecutor's office prosecuted an indictment in the course of the trial.

According to the indictment, on 16 December 2005 D.Badzgaradze allegedly committed an assault with intent to rob, stole an ID and other important personal documents. More specifically, it was alleged that on 16 December he contacted other persons, not identified by the investigation; they set up a criminal group with an intent to assault and rob other people, and get hold of their belongings. In the evening, at about 20:00 they went to the garden adjoining 401,

Quarter 4, Varketili district, during which time D.Badzgaradze allegedly attacked with a knife Sofo Zurabishvili and grabbed her black purse.

The judgment of acquittal issued by the court demonstrated that on 16 December 2006, at 20:00 D.Badzgaradze was not present in Tbilisi. According to D.Badzgaradze's testimony, on 16 December 2006, at 17:00 he left Kutaisi together with his friend G.Lagadze to travel to Tbilisi. The purpose of their trip was to start working at a construction site, where his uncle M.Kvilitaia and his cousin R.Kvilitaia worked. He discussed with his uncle his trip to Tbilisi by phone, including by mobile phone immediately before his departure from Kutaisi. Also, he was supposed to collect his military card in Tbilisi. Upon arrival in Kutaisi from the village, D.Badzgaradze and G.Lagadze had lunch. The remaining money was not sufficient to cover the trip to Tbilisi, and they asked the driver to allow payment of 9 GEL for both of them, which the driver refused. After many requests, he sent the friends to the dispatcher of the bus station who appeared to be responsive to the request, accompanied them to the bus driver and asked him to drive them to Tbilisi for 9 GEL. In the bus both D.Badzgaradze and G.Lagadze took a nap, however they were awaken by a strong blow. When they got out of the bus, they saw that the bus drove into a man of about 40 years of age. D.Badzgaradze used his mobile phone to call patrol police. The accident happened at about 21:00 near village Okami (Kaspi district). After patrol police and ambulance arrived to the scene of accident, D.Badzgaradze and G.Lagadze helped to transfer the dead man into the ambulance car. Then they stopped a minibus travelling to Tbilisi and arrived in Tbilisi, to Didube bus station at about 23:00. Then they took underground to Marjanishvili square, where D.Badzgaradze was going to meet his uncle M.Kvilitaia. The latter wanted to invite them for dinner, but it was late and M.Kvilitaia proposed that they drop in the poker club to see his friend D.Dzodzuashvili, then buy food and go home. Immediately after they entered the poker club, police rushed in and arrested D.Badzgaradze.

The court did not question the verity of D.Badzgaradze's testimony, as other evidence collected on the case clearly pointed to his innocence, namely: the testimony of witness G.Lagadze that is identical to D. Badzgaradze's evidence; the evidence provided by witness I.Chelidze (bus driver), very similar to D.Badzgaradze's evidence; testimonies provided by witnesses M.Kvilitaia and R.Kvilitaia; a detailed list of incoming and outgoing calls made from D.Badzgaradze's GEOCELL mobile phone. After the accident, it was D.Badzgaradze who called patrol police. The list of telephone calls confirms that calls to 022 were made from D.Badzgaradze's phone four times: at 20:57, 21:00, 21:02 and 21:03, the latter call from the site of the accident was made after the time of attack on S. Zurabishvili committed in Tbilisi. That D. Badzgaradze did not get rid of his phone is corroborated by calls, made from his phone to his family: his wife, parents and friends. Besides, at the time of search he had a phone charger in his pocket, which is a strong evidence of the journey made to Tbilisi.

To prove D.Badzgaradze's culpability, the prosecution side presented testimony by S.Zurabishvili, the victim, and testimonies given by police officers. The judgement stresses that compared to other evidence existing on the case, these testimonies look highly questionable. For instance: "According to the testimony provided by the victim, one of attackers, D.Badzgaradze was wearing a hat. Despite the fact that the attack took place at about 20:00 when it was completely dark in the public garden, the victim nevertheless managed to identify under the hat the colour of D.Badzgaradze hair, as well as his haircut style. Notably, S. Zurabishvili gave details of D.Bazgaradze's clothes and his haircut after he was presented to her; the victim is either erring in good faith, or is deliberately giving false evidence. As far as testimonies given by police officers are concerned, these can not be considered as conclusive evidence, as witnesses G.Takashvili, G,Gviniahvili and G.Paposhvili explain in their testimony that they arrested D.Badzgaradze based on description given by the victim. As far as witnesses E.Makhramov and

A.Baindurashvili are concerned, their testimonies only corroborate the fact of attack against S.Zurabishvili, and not the involvement of D.Badzgaradze in the said attack".

Proceeding from the above, evidence cited in the indictment, testimonies given by the victim and the police, as well as testimony given by witnesses E.Makhramov and A.Baindurashvili were not verified and, hence, could not be invoked for incrimination. Thus, prosecutor N.Tsikhiseli appeared to have grossly violated provisions of Article 40 (3) of the Constitution of Georgia, according to which "A person can only be proven guilty if the evidence is incontrovertible. Every suspicion or allegation not proven by the right established by law must be decided in favour of the defendant", Article 10 (3) of the Criminal Procedure Code (an ordinance on charging a persons with criminal offence, an indictment and all other procedural decisions shall only be based on incontestable evidence) and Article 18 of the Criminal Procedure Code.

The prosecution contested the judgment of acquittal through the appeal procedure. Gross violation of the law by prosecutor N.Tsikhiseli led to eight months in custody for an innocent person of 21.

Since the action of prosecutor N.Tsikhiseli displayed signs of crime, the Public Defender sent to the Prosecutor General's Office relevant materials. The Prosecutor General's office decided not to open investigation before a final decision by the court.

On 1 February 2007, Tbilisi Appellate Court started examining D.Badzgaradze's case. Prosecutor N.Tsikhiseli moved for interviewing those witnesses who were together with D.Badzgaradze at the time of the accident. Interestingly, during the examination at Tbilisi City Court, D.Badzgaradze's defence lawyer made a similar motion and requesting to interview winesses of the accident, however the motion was not granted. Besides, Prosecutor N.Tsikhiseli moved for interviewing the clerk of the court – Sofi Akhalkatsi, giving as grounds for her motion errors allegedly present in the record of judicial proceedings. Namely: it is stated in the record that S.Zurabishvili alleged that D.Badzgaradze was wearing a hat. According to prosecutor N. Tsikhiseli, S.Zurabishvili never said that; quite the reverse, she stated that D.Badzgaradze was not wearing a hat. The appellate court granted partly the prosecutor's motion.

It is important to note that since the judgement of acquittal stated that "victim S.Zurabishvili was either erring in good faith when exposing D.Badzgaradze as one of the attackers, or deliberately giving false evidence", prosecutor N.Tsikhiseli started preliminary investigation into the fact of false evidence based on her own explanatory note, the investigation that was closed on 31 January 2007 under Article 28 (a) of the Criminal Procedure Code. Preliminary investigation into the criminal case was reopened by Isani-Samgori district prosecutor's office and ended up in D.Badzgaradze's recognition as a victim.

* * *

According to Article 18 of the Constitution of Georgia "the freedom of a person is inviolable". Under Article 18 (3) of the Criminal Procedure Code "the court, the prosecutor and the investigator are under an obligation to release without delay an illegally detained, arrested or otherwise restricted person". According to Article 18 (1) of the Organic Law on the Prosecutor's Office "the prosecutor's office shall immediately take measures to release a persons illegally detained, arrested or otherwise subjected to coercive measures", and under Article 395 of the Criminal Procedure Code "the court, the prosecutor and the investigator are under an obligation to terminate criminal prosecution and/or preliminary investigation once there appear the grounds provided for in Article 28 of the Code".

The Case of Mogeli Tkebuchava

On 21 January 2006, Mogeli Tkebuchava was arrested and charged with offence under Article 332 (1 and 3) of the Criminal Code (abuse of official authority). He was given a custodial measure of restraint. Later, his charges were changed, and the wrongful act he had committed was qualified as offence under Article 333 (1) of the Criminal Code (excess of official authority).

The offence M.Tkebuchava was charged with and convicted for, took place on 5 May 2000, and the relevant law in force at that time was the 1960 Criminal Code. Under that law, the statute of limitation for the offence committed was 5 years. Charges for offence committed on 5 May 2000 were brought against M.Tkebuchava on 20 January 2006, when the statute of limitation under the 1960 had already expired.

Poti City Court and Kutaisi Appellate Court (the Supreme Court refused to admit M.Tkebuchava's cassation, the grounds being that the decision of the appellate court did not differ from the case law of the Supreme Court) reasoned that since charges against M.Tkebuchava were brought under Article 333 of the 1999 Criminal Code, he was subject to the statute of limitation under Article 71 of the same Code (in this case – 6 years, the period that had not expired by the time when M.Tkebuchava was charged with the offence).The judgement of conviction stated that since Article 333 of the 1999 Criminal Code prescribed a lesser penalty (3 years of deprivation of liberty) than Article 187 of the 1960 Criminal Code (excess of official authority – punishable with 5 years of deprivation of liberty), the new law should be given retroactive force, and M.Tkebuchava's act was qualified as offence under Article 333 (1) of the new Criminal Code.

The Public Defender considers that position taken by the prosecutor's office and the court lacks sound legal basis for the following reasons:

Under Article 3 (1) of the Criminal Code: "A criminal law that annuls culpability for an action or prescribes a lighter penalty shall have a retroactive effect. A criminal law that introduces culpability for an action or prescribes a stricter penalty shall not have a retroactive effect". Under Article 3 (3) of the same Code: "if in the period of time between the committal of offence and issuance of judgement, the law changes several times, the lightest law shall apply". If a criminal law institutes a longer statute of limitation, the legal status of a person charged with offence will undoubtedly become graver. Hence, the new Criminal Code made M.Tkebuchava's legal position graver and the court, guiding itself by Article 3 (3) of the Crimianl Code, should have applied the lightest law, in this case, the 1960 Criminal Code, according to which the statute of limitation regarding liability for lesser crimes was 5 years.

In this context it is important also to invoke Article 42 (5) of the Constitution of Georgia according to which "No individual has to answer for an action if it was not considered as the violation of law at the moment it was performed. A law that does not lessen the responsibility or remit a punishment has no retroactive force". In the context of the criminal law this provision should be interpreted to imply that only those laws have a retroactive force that remit the penalty or annul responsibility. Any other interpretation would be against the Constitution. It is important to note that when discussing the retroactive force of the law, Article 42 of the Consitution makes use of the term "responsibility", and not "penalty" or "culpability for action", differently from Article 3 of the Criminal Code. It is not fortuitous that under the Criminal Code, the ground for exempting from criminal responsibility is the statute of limitation. The term "responsibility" used by the legislator in these two legal acts – the Constitution and the Criminal Code - has the same meaning and should be understood in a similar context. The provision of

Article 42 (5) of the Constitution of Georgia according to which: "A law that does not lessen the responsibility or remit a punishment has no retroactive force" should be understood to extend to the criminal law, and any change made in the Criminal Code shall only be applied if it annuls or lessens the responsibility (liability) of a person. Hence, any change that does not annul or lessen the responsibility of a person should not be interpreted as having a retroactive force, as stipulated in Article 42 (5) of the Constitution. In the case of M.Tkebuchava, the court decided otherwise: an increase in the statute of limitation (through interpreting the new law as having a retroactive effect in the case under discussion) led to the liability of the person concerned. Since expiry of the statute of limitation represents a ground for exempting a person from liability, invoking a provision that leads to an increase in the statute of limitation is contrary to the provision contained in Article 42 (5) of the Constitution.

By its content, Article 3 of the Criminal Code serves to protect the interest of a person charged with offence and introduces guarantees to ensure that new, stricter norms are not applied to an act committed before these norms came into force.

Proceeding from the above, the Public Defender considers that the interpretation given by the court in M.Tkebuchava's case is in conflict with the Constitution.

The opinion of the Public Defender on this issue is shared by Levan Bezhashvili, Chairman of the Parliamentary Committee on Legal Issues, and Elene Tevdoradze, Chairman of the Parliamentary Committee on Human Rights and Civil Integration. In his letter No.1462/4-10/242 addressed to lawyer E.Tsotsoria, L. Bezhashvili explained that "a person should be charged for an offence committed in 1992 in accordance with the criminal law in force at that period of time" (the 1960 Criminal Code); the statute of limitation should also be determined in accordance with the criminal law in force when the act was committed, i.e. again in accordance with the 1960 Criminal Code, as according to Article 42 (5) of the Constitution, if a new law leads to higher liability, it does not have a retroactive force. Therefore, in the case in question the issue of statute of limitation for bringing criminal charges against the persons shall be addressed in accordance with the criminal code in force in 1992". . In her letter No.8349/4-2/1110 addressed to lawyer E.Tsotsoria, Elene Tevdoradze pointed out that "the statute of limitation for an offence committed in 1992 starts as prescribed by the criminal law in force at the moment of committal of the offence, i.e. by the relevant article of the 1960 Criminal Code; a criminal law leading to higher liability does not have a retroactive force".

The Prosecutor General's Office formulated its position in the case similar to M.Tkebuchava's case. More specifically, in his letter of 13 October 2005 to lawyer E.Tsotsoria, head of department M.Tsaava pointed out that "the issue concerning G.Sordia's exemption from criminal liability shall be handled in accordance with Article 49 of the 1960 Criminal Code. (The lawyer requested to consider G.Sordia's exemption from criminal liability due to expiry of the statute of limitation.)

According to Article 28 of the Criminal Procedure Code: "Criminal prosecution shall not be opened, and where opened, a criminal prosecution and preliminary investigation shall be closed if the statute of limitation for prosecution, as prescribed by the Criminal Code, has expired. Hence, considering Article 395 of the Criminal Procedure Code, the prosecutor or the court should have terminated criminal proceedings opened against M.Tkebuchava.

The Public Defender sent the relevant materials to the Prosecutor General's Office requesting to initiate preliminary investigation against persons, whose unlawful action resulted in M.Tkebuchava's unlawful detention. The Prosecutor General's Office did not share the Public Defender's line of reasoning and, hence, did not open an investigation.

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According to Article 42 of the Constitution, "the right to defence is guaranteed"; Article 11 of the Criminal Procedure Code provides for the right to defence for a suspect, an accused person, and a defendant. Therefore, the body carrying out the proceedings is under an obligation to ensure the right of a suspect, an accused person, and a defendant to defence, and make it possible for the defence side to ensure defence, making use of all permissible means and tools. However, in real practice it is not infrequent that the avenues for defending legitimate interests of persons at the bar are restricted.

The Case of Irakli Batiashvili

The Division for Fight against Organised Crime, of the Special Operational Department of the Ministry of Internal Affairs carried out criminal proceedings against Irakli Batiashvili (Article 307 of the Criminal Code – high treason; Article 315 – conspiracy or riot with the purpose of violent change of the constitutional order; article 376 – failure to notify of the crime). Before Irakli Batiashvili was arrested, recordings of Irakli Batiashvili's telephone conversation with Emzar Kvitsiani were aired on TV. Irakli Batiashvili's lawyer, in accordance with Article 76 of the Criminal Procedure Code, made a motion before investigator Zurab Beitrishvili on permitting him access to the case file, including the recordings. The investigator granted the motion, but only partially, denying him access to the recordings recognised as physical evidence in the case. He said that the recordings were sent to the Operational and Technical Department of the Ministry of Internal Affairs for decoding. The Public Defender addressed a letter concerning this matter to G.Latsabidze, Deputy Prosecutor General; and R.Zhgenti, head of Department of Procedural Oversight on Investigation Conducted by Territorial Units of the Ministry of Internal Affairs, stressing that Article 76 of the Criminal Procedure Code explicitly provides the right for the lawyer to get fully familiar with materials of the case.

A.Khvadagiani, head of Division of Procedural Oversight on Investigation Conducted by Public Security Services of the Ministry of Internal Affairs informed PDO that I.Batiashvili and his lawyer S.Baratashvili were given access to the materials on 29 July 2006, and said that access to the recordings of telephone conversations, as well as video materials would be provided to them in accordance with the law, after they were decoded. It was promised that recordings of telephone conversations, as well as video materials would be presented to I.Batiashvili within the shortest period of time, as soon as the necessary technical conditions were put in place in Prison No.5.

Later the defence lawyer again addressed the investigator, moving for access to the following materials: 1. Copies of audio recordings of telephone communication between Irakli Batiashvili and Emzar Kvitsiani in the period from 23 July to 29 July; 2. Photocopies of decoded transcripts of telephone communication between Irakli Batiashvili and Emzar Kvitsiani in the period from 23 July to 29 July; 3. Photocopies of decoded transcripts of all telephone conversations referred to in the order concerning charges against I.Batiashvili; 4.A list of all incoming and outgoing calls made to and from I. Batiashvili's mobile phone in the period from 23 July to 29 July. Investigator Z.Beitrishvili made an order on granting the motion, again only partially: namely, I.Batiashvili would be given access to all materials relevant to the case once technical issues were fixed at Tbilisi Prison No. 7. The defendant and his lawyer were refused access to: 1. Copies of audio recordings of telephone communication between Irakli Batiashvili and Emzar Kvitsiani in the period from 23 July to 29 July; 2. Photocopies of decoded transcripts of telephone communication between Irakli Batiashvili and Emzar Kvitsiani in the period from 23 July to 29 July; 3. Photocopies of decoded transcripts of all telephone conversations referred to in the order concerning charges against I.Batiashvili. The investigator argued in his order that the

defence side did not have the right to make copies of undercover audio recordings introduced into the case.

The Public Defender addressed a recommendation concerning this matter to G.Latsabidze, Deputy Prosecutor General, arguing that it is precisely these records that were used as incriminating evidence against I.Batiashvili, whereas restriction of access of the defendant and his defence lawyer to the evidence was in contravention of the law and meant violation of legal provisions such as: the right to defence guaranteed by Article 42 (3) of the Constitution; Article 84 (1) of the Criminal Procedure Code ("The defence lawyer shall use all legal ways and means of defence to identify circumstances exculpating the suspect or the defendant, or lessening his responsibility, and shall be granted the necessary legal assistance"); Article 11 (1) of the Criminal Procedure Code ("Court or an official carrying out the proceedings are under an obligation to provide a suspect, an accused person or a defendant with the right to defence"); Article 76 (1 and 3) of the Criminal Procedure Code ("The defendant shall have the right to use all legal ways and means to defend himself from charges brought against him, and have adequate time and facilities to prepare his defence"). In his recommendation, the Public Defender requested that the rights guaranteed by the law be restored to I. Batiashvili and his defence, and the issue be raised concerning the responsibility of investigator Z.Beitrishvili.

In response to the recommendation, the Prosecutor General's Office informed PDO that the investigator granted the request of the defence party and made available to it: photocopies of decoded transcripts of telephone communication between Irakli Batiashvili and Emzar Kvitsiani in the period from 23 July to 29 July, as well as photocopies of decoded transcripts of all telephone conversations referred to in the order concerning charges against I.Batiashvili. It was also stated in the letter that CD with recordings of telephone communications were recognised to constitute physical evidence, and according to Article 76 (3) and Article 84 (3) of the Criminal Procedure Code, the defendant and his defence lawyer would be granted access to the physical evidence after an indictment was sent to the court. As far as investigator Beitrishvili's responsibility is concerned, the Prosecutor General's Office chose not to raise that issue.

Hence, the defence party was not given access to audio recordings. True, Article 76 (3) of the Criminal Procedure Code stipulates that the defendant and his/her defence lawyer shall be granted access to the physical evidence after an indictment is sent to the court. However, the same article stipulates also that the defence party shall have the right at any stage of criminal proceedings to get access to all evidence introduced in the case and have copies of case materials made at his own expense. Thus, based on the principles of criminal proceedings as provided for in Article 15 (adversarial character of the judicial process) and Article 18 (comprehensive, impartial and full investigation of all circumstances of the case) of the Criminal Procedure Code, the defence part should have been given access to physical evidence in order to be familiar with it.

It is important to note one more aspect in relation to I.Batiashvili's case: when speaking before the media, high-ranking officials publicly discussed I.Batiashvili's alleged culpability, thus violating the presumption of innocence provided for by the Constitution and the procedural law: "Any person shall be presumed innocent until proved guilty in accordance with the procedure prescribed by law and under the final judgment of conviction".

Notably, telephone conversations between I.Batiashvili and E.Kvitsiani, as presented in TV programmes, were not complete, thus leading to prejudged impression on I.Batiashvili's culpability. For instance, in the telephone conversation, as shown on TV, E. Kvitsiani was telling I.Batiashvili that he was contacted by G.Kupalba, deputy minister of defence in the *de-facto*

government of Abkhazia, who offered him assistance with manpower against the Georgian government; however, that E.Kvitsiani's refused to accept the offer was not presented on TV.

* * *

According to Article 22 of the Criminal Procedure Code of Georgia, "a prosecutor, or an investigator with prosecutor's consent, shall open criminal proceedings in case there is sufficient ground for so doing". According to Article 271 of the same code, "preliminary investigation shall be conducted within a reasonable time-frame, but not longer then the statute of limitation prescribed by the criminal law for the respective offence". Proceeding from this legal norm, the investigative body is under an obligation to initiate criminal proceedings against a person if the body of available evidence is sufficient to give rise to reasonable grounds to believe that the person concerned has committed an offence. This notwithstanding, the prosecutor's office fails to follow these norms in respect of various agents of the state, such as judges. However, there has been many a case when ordinary citizens were charged with crime only on the basis of testimony given by the aggrieved party (see the case of D.Badzgaradze).

The Public Defender's Report for the first half of 2006 described an incident in Kutaisi, where Judge Ana Gelegva of the Kutaisi City Court committed underage Zurab Shalikiani to administrative arrest for the duration of 14 days. Under Article 32, Part 3 of the Code of Administrative Offences of Georgia: "Administrative arrest shall not be imposed on pregnant women, mothers of children under 12 years of age, persons under 18 years of age, as well as invalids of categories 1 and 2." Judge Ana Gelegva, supposed to be a **guarantor of the administration of justice** in the state, violated the relevant legal provision herself and committed to administrative arrest a person under the age of 18.

Since the action by the judge contained signs of offence provided for in Article 342 of the Criminal Code (neglect in the discharge of an official duty), on 14 June 2006 the Public Defender sent the relevant materials to the Prosecutor General's Office and made a recommendation to the Prosecutor General, Z. Adeishvili, to open an investigation. On 21 June 2006, the Prosecutor General's Office notified PDO of the commencement of preliminary investigation into the fact of administrative arrest of Z. Shalikiani under Article 342, Part 1 of the Criminal Code of Georgia. On 17 August 2006, PDO sent a letter to the Prosecutor General's Office with a query concerning results of the investigation. On 21 December 2006, the Investigative Department of the Prosecutor General's Office notified PDO that investigation into the criminal case continued.

The case in question required no investigation (the main evidence of culpability on the part of the judge was her unlawful ruling), and the judge should have clearly be held criminally liable, however, up until now the case is in the phase of preliminary investigation.

A similar case occurred in Samtredia district, Judge Luiza Kuparadze of Samtredia District Court meted out a penalty in the form of 30 days of administrative arrest to underage Alexander L. The Public Defender sent the relevant materials to the Prosecutor General's Office to act on the case. On 21 November 2006 PDO was notified of the commencement of preliminary investigation into an offence under Article 336 (1) (issuance of an unlawful judgement or other court decision). The investigation did not initiate any criminal proceedings against the judge.

It is important to note one more aspect in respect of prosecuting bodies. When the prosecutor's office opens investigation into wrongful acts committed by members of law-enforcement bodies, no criminal proceedings are initiated at a subsequent stage against concrete persons. And this despite the fact that the investigation often possesses sufficient evidence to support the accusation, or else the investigation, should it so wished, could expose the culpability of

concrete persons as a result of full examination and investigation into the case. In this context it seems interesting to look at the following examples.

The Case of Amiran Robakidze

The Public Defender's Report for the first half of 2006 looked extensively into the case where On 24 November 2004, in Didube-Chugureti district of Tbilisi near the Didube Church patrol police officers conducted a special operation of apprehension of persons sitting in a BMW type car. Patrol police opened the fire during which 19-year-old Amiran Robakidze was killed with the bullet shot by police officer G.Bashaleishvili. Other five persons: G.Kurdadze, A.Bartaia, K.Azarashvili, L.Dangadze and I.Mikaberidze were arrested. Criminal case was initiated against Robakidze's friends on charges of armed resistance to police officers and illegal possession and carriage of arms. However, analysis of the criminal case gave rise to many doubts, including about the origin of arms and their possession by the defendants (for further details see the Public Defender;s Report for the first half of 2006). The Public Defender addressed a recommendation to the Prosecutor General to initiate immediately criminal proceedings against all those police officers and law enforcers who took part in the arrest operation, search and withdrawal conducted on the site of the incident and officially registered the withdrawn evidence. After G.Bashaleishvili was found guilty and sentenced to four years of imprisonment, the Prosecutor General's Office started investigation on facts relevant to the case under Article 369 ("falsification of evidence") and Article 333 ("excess of authority") of the Criminal Code, however no one has so far been made criminally responsible for the actions committed.

On 1 February 2007, the family of deceased Amiran Robakidze addressed the Public Defender with an application stating that the investigation opened 6 months before on charges of falsification of evidence and excess of authority. This notwithstanding, there had been no investigative action performed in order to establish the truth, and not a single person had been made criminally responsible for the actions committed.

The application also stressed that there was an attempt to temper the evidence, as forearms and ammunitions had been brought to the site after A.Robakidze's murder, which is convincingly proved by the following circumstances. On 24 November 2004, investigator Sh. Nikabadze of Didube-Chugureti district prosecutor's office examined the site and found in 30 cm from the BMW-type vehicle # AEB-710 a Kalashnikov type AK-74 model firearm #2672593, in combat position, with 27 charges. In 40 cm from the left side of the vehicle, two empty cartridges were found. According to original allegation of the investigation side, the firearms belonged to A.Robakidze and 2 cartridges were left after he fired a shot in the direction of G.Bashaleishvili. Later on, the police themselves abandoned this testimony.

Ballistic examination performed on 30 November 2004 concluded that 2 cartridges of AK-74 Kalashnikov model, withdrawn from the site had been shot from AK-74 model gun with the number #2672593.

Preliminary investigation and testimonies of defendant G.Bashaleshvili and witnesses I.Lobzhanidze, G.Chanturia, D.Abuashvili, I.Mikaberidze and A.Bartaia ascertained that on 24 November 2004 shots from automatic firearms were fired only by G.Bashaleishvili, from his Jericho system firearm #34301337. Neither Amiran Robakidze, nor other persons present on the scene of incident made any shots from automatic firearms.

This gives rise to a question - if the automatic submachine gun found on the site belongs to no one (neither to A.Robakidze, no to anyone else present on the scene), how did the gun end up on the scene, as did two cartridges found there?

On 7 February 2007, the Pulbic Defender addressed a letter to the Prosecutor General Z.Adeishvili, asking him to bring under his personal control the preliminary investigation into the facts of falsification of evidence and excess of authority, to ensure full and impartial investigation and establish the truth.

The Case of David Sakvarelidze

The Public Defender's Report for the first half of 2006 provided detailed information on a biased investigation into a road accident of 22 November 2003. On that day, 23-year old David Sakvarelidze and Eteri Tsuliashvili were killed in a clash accident between their private car and a military armoured personnel-carrier, and the latter's minor children Badri, Gocha and Sophiko Tsuliashvili were injured. Examination of materials related to the case indicated that the investigation was biased. Investigation into the case was terminated and renewed twice. Presently, the criminal case is being investigated by Tbilisi Police Department. Despite the fact that the investigation, as well as multiple appraisals by experts, point conclusively that the accident occurred through the fault of the personnel-carrier's driver, Avtandil Mamaladze, working at the Ministry of Internal Affairs.

On 10 November 2006, the Public Defender sent a note to Parliament of Georgia requesting setting up an *ad hoc* commission to look into the case and establish the truth. The Parliament did not find it appropriate to set up such a commission.

Special Operation of 2 May 2006

During a special operation carried out by police on 2 May 2006 on the right bank of Mtkvari River in a crowded area, the police overused force and opened intensive fire at a BMW type vehicle. As a result of a shoot-out, two of the three persons sitting in a car, Alexander Khubuluri and Zurab Vazagashvili, were immediately killed, while Bondo Puturidze was severely injured. Tbilisi Procuracy opened investigation under Article 114 of the Criminal Code of Georgia (murder in overuse of power while detaining criminals).

In the course of investigation, on 10 August 2006, G.Mosiashvili, defence lawyer of Z. Vazagashvili's mother - Ts. Shanava recognised as the victim's successor, addressed I.Kadagidze, director of the Criminal Police Department of the Ministry of Internal Affairs, requesting access to video footage of the special operation. On 18 August 2006, investigator G.Kvinikadze of MIA Criminal Police Department responded in writing that Ts. Shanava and her lawyer were not party to the proceedings (by that time Ts. Shanava had already been recognised as the victim's successor), and hence were not expected to be granted access to video materials or any other information related to the case.

On 4 October 2006, lawyer G. Mosiashvili, petitioned with the body conducting the investigation into the case – the investigative unit of Tbilisi Prosecutor's Office, more specifically investigator V.Latsusbaia, and requested that video-materials be made available by the Ministry of Internal Affairs. On 31 October 2006, the investigator informed the lawyer that Tbilisi Prosecutor's Office had addressed the MIA press service with a request to provide the requisite video materials but received a response on 17 October stating that the press service of the Ministry did not have any video materials related to the special operation of 2 May 2006.

Thus, it is not clear whether there exists any full recording of the special operation. If yes, why was it not requested from the Ministry by the investigative body immediately after commencement of the investigation? If there is no video recording, then was caused its destruction? Clearly, examination of the video footage of the special operation would contribute to comprehensive, impartial and full investigation into the case and help to dispel any doubts concerning it.

Another example of a biased investigation by the prosecutor's office is furnished by the following case:

The Case of Zurab Kakheli

On 26 April 2004, Zestafoni Police Department opened investigation into criminal case No 5204062 against Zurab Kakheli accused of committing an offence under Article 236 (1) and (2) of the Criminal Code. The search conducted by police of Zestafoni in Z.kakheli's private car on 25 April revealed two sawn-off guns and six cartridges. According to the search report, sawn-off guns have identification numbers A35283 and 36478-60. The guns were sent for examination to Imereti Regional Main Police Department, to the criminological unit. Notably, the expert's report says that he examined guns with ID numbers 123599 and A35283, and found them fit for use. Despite the difference in ID numbers indicated in the search report and in the expert's report, investigator A. Machaidze (who already had the experts' report) issues an ordinance on recognising guns as physical evidence. Thus, the expert's report questions the lawfulness of the search (the sawn off gun No. 36478-60 found during the search was not sent to the expert, and its whereabouts are unknown) and leads to an assumption that the investigator might have opened the sealed-up evidence and replaced an unsuitable gun with the one fit for use.

According to Article 122 of the Criminal Procedure Code, "Physical evidence shall be kept by the body carrying out the proceedings in conditions ruling out any chance of it being lost or changing its properties". Hence, once a gun with a different number was sent for examination and the fact became known, it was necessary to immediately initiate criminal proceedings on charges of destruction or falsification of evidence and have the offence resolved "hot on the trail'. However, it was only on 11 November 2005, i.e. one year and seven months after the charges had been brought against Z.Kakheli (now in retrieval) that a separate criminal case No.5205344 was opened into the fact of destruction of physical evidence. Investigation into the case was conducted by Zestafoni Police.

On 19 October 2006, the Public Defender addressed G. Latsabidze, Deputy Prosecutor General concerning this matter. On 1 November 2006 G. Latsabidze ordered that investigation into the case be overseen by the General Inspectorate of the Prosecutor General's Office. Preliminary investigation has not been completed, and no one has been called to account.

* * *

Representatives of the Public Defender's Office carry out regular monitoring of police stations and temporary detention facilities both in the capital city and in the regions of Georgia. The purpose of monitoring is to examine the current situation, as well as human rights and freedoms status in police stations and temporary detention facilities, and follow on violations when these are found. In connection with offences exposed as a result of monitoring, such as physical and verbal assault, psychological pressure, psychic coercion, etc., the Public Defender addresses the relevant authority requesting to open preliminary investigation into the facts and then follows up the course of investigation conducted by investigative bodies.

*** * ***

Monitoring of preliminary investigation revealed a number of tendencies, suggesting a certain pattern in the attitudes of investigative bodies to the facts of beating, torture and inhuman and degrading treatment of persons in custody or imprisonment. There are cases when investigation is merely formal in character and ends in dropping of a criminal case for absence of signs of crime in actions of police. Also, investigation into the facts of beating is not comprehensive and impartial, oftentimes not all of the necessary investigative actions are performed to establish the truth, no forensic examination is fixed to establish the character and severity of bodily injuries. If forensic appraisal still takes place, it is followed by framing-up of absolutely illogical versions by the investigation party to explain the origin of injuries found in the course of forensic examination. Suspicions on police involvement into the crime are allayed by police themselves. Persons in custody often change their initial testimonies and testify in favour of police, which is indicative of their unprotected ness and pressure by police. The procuracy, too, often turns a blind eye to unlawful acts by police.

The Case of G.Toritadze

On 30 June 2005, Vake-Saburtalo District Prosecutor's Office started investigation into criminal case No.0705870 concerning excess of official authority by officers of Vake-Saburtalo District Police Department – offence provided for in Article 333 (1) of the Criminal Code.

Preliminary investigation was triggered by materials sent by PDO to the Prosecutor General's Office, related to bodily injuries of G. Toritadze found by the PDO monitoring group on 5 April 2005 in the course of monitoring at the temporary detention isolator of the Ministry of Internal Affairs of Georgia. The report of examination points to hyperaemia and excoriation of skin on the right jaw, multiple scratches and excoriations on the surface of extremities. According to G. Toritadze, injuries were inflicted at the moment of arrest.

In the course of investigation it was established that on 5 April 2005 officers of Tbilisi Police Department, Special Operational Unit and Vake-Saburtalo District Police Department carried out a joint operation for the purpose of apprehending Gela Toritadze, suspected of committing a crime provided for in Article 179 of the Criminal Code (robbery). A search conducted in his apartment found firearms and ammunitions, kept illegally. G.Toritadze was charged with committing an offence under Article 236 (1) of the Criminal Code (illegal possession and carriage of forearms (except hunting gun), ammunitions, explosive materials and/or devices). Preliminary investigation into the case was completed and the case was sent to the Chamber of Criminal Cases of Tbilisi City Court for examination on merits.

G.Toritadze, inmate of Tbilisi Prison No.1, interviewed as a witness, alleged that when in custody at Tbilisi temporary detention isolator No.2, he was visited by members of the PDO monitoring group, and he told them that his injuries were inflicted by Baksadze at Vake-Saburtalo District Police Department. However, in reality he received those injuries when brought to the said department, where he accidentally hit his head against the open door. Since at that moment he was nervous and disturbed because of the arrest, he thought for himself that police did that to him intentionally, but now he understood it was accidental, not intentional, and no one assaulted him either physically or verbally. In what concerns scratches he displayed when at the temporary detention isolator, he said they appeared as he scratched his arms and legs. G. Toritadze said he had no complaints against anyone.

The investigator also interviewed as a witness K. Tkeshelashvili, inspector of Vake-Saburtalo District Police who said he participated in the operation to arrest the suspect, after which the latter was brought to Vake-Saburtalo District Police where the arrest report was compiled, after

which G.Toritadze was transferred to the temporary detention isolator. According to the witness, police never assaulted G.Toritadze either physically or verbally at the moment of arrest or later, when he was brought to police. Neither did G.Toritadze resist the arrest. He, the witness, did not see if G.Toritadze hit his head against the door, as he was brought into the building by members of the special unit.

G.Tkeshelashvili's testimony was corroborated by other police officers: N.Gvimradze, M.Rukhadze and D. Bichinashvili who took part in G. Toritadze's arrest and personal search.

The letter from the Prosecutor's Office emphasized that G.Toritadze never expressed any dissatisfaction or complaints concerning treatment by police. Therefore, on 30 September 2005, a ruling was made on terminating preliminary investigation into the criminal case, as stipulated in Article 28 (1) of the Criminal Procedure Code (for absence of wrongful act).

According to the letter by the Prosecutor's Office, G.Toritadze was arrested for committing an offence under Article 179 (1) of the Criminal Code punishable by deprivation of liberty for five to seven years. Later he was charged with crime under article 136 (1) of the Criminal Code punishable with deprivation of liberty for up to three years. Hence, difference between sanctions prescribed for these two offences is clear. True, in the course of preliminary investigation it is possible to discover such facts that can potentially lessen or increase charges against a person, or fully exculpate him. Naturally, replacing G.Toritidze's heavier charge for a lesser one does not contradict requirements of the criminal procedure law, if it were not for absolutely illogical and absurd explanations concerning his bodily injuries. According to G. Toritidze, he accidentally hit his head against the door; scratches on legs were attributed to his act of scratching, etc. This leads to a logical question on whether his inconsistent answer resulted from the investigation having proposed certain privileges in exchange for his covering up the police officers.

The investigation did not question credibility of G.Toritadze's statement. However, in order to establish whether or not injuries resulted from running into the door and scratching or something else, it is not enough to have witnesses testifying. It is necessary to perform forensic examination. However, it seems the investigation did not find it necessary to have forensic examination carried out. It is possible for police officers to use force, but the use of force should not be excessive. To establish, whether or not it was excessive, it is necessary to conduct forensic examination. The current criminal procedure law no longer provides for mandatory examination that seems necessary for a number of reasons, including for identifying the character and severity of bodily injuries. Though, when a detained person displays bodily injuries and he says that police physically assaulted him, tracing the origin of injuries and establishing their character and severity is to be seen as important facts of the case. Hence, the investigative body is obliged to appoint forensic examination. Failure to do so would undermine one of the most important principles of the Criminal Procedure Code – the principle of comprehensive, impartial and full investigation of the case.

The case of Z.Kuchukhidze

On 23 October 2006, the Representative of the Public Defender visited Zurab Kuchukhidze, kept in custody in a temporary detention isolator, who displayed various injuries on his body. The report of external examination points to contusions in his face, chin and belly.

According to Z.Kuchukhidze, he was visiting Zugdidi together with his wife to attend funeral of their relative. In Gamsakhurdia Street, near the premises of Odishi TV Company, they noticed a patrol vehicle and slowed down. Patrol police officers asked his wife to show her documents and compiled a charge-sheet for violation of traffic regulations. Z.Kuchukhidze protested. At that

moment a Mercedes type vehicle approached them, and the person in the car ordered the police to take him to police station. On their way to police station, police officers physically assaulted Z.Kuchukhidze. Then they brought him to the building of Samegrelo-Zemo Svaneti Patrol Police Department where they continued beating him. Chief of Patrol Police Department, G.Ninua, assaulted Z.Kuchukhidze both physically and verbally. When brought to a remand facility, Z.Kuchukhidze had multiple bodily injuries, for which reason the staff of the temporary detention isolator called an ambulance, had him examined by a doctor and recorded the injuries found.

On 25 October 2006, the Public Defender sent the relevant materials to the Prosecutor General's Office to act on the case. On 20 November 2006, Zugdidi District Prosecutor's Office informed PDO that on 23 October 2006, Zugdidi Prosecutor's Office started preliminary investigation into case No.5306918 concerning excess of official authority by officers of Samegrelo-Zemo Svaneti patrol police on 22 October 2006 (offence under Article 333 (1) of the Criminal Code), that was closed on 15 November 2006 for absence of crime in the act.

The letter from Zugdidi District Prosecutor's Office alleges that Z.kuchukhidze's wife, N.Kuchukhidze violated parking regulations. Patrol police officers came up to her, explained that she breached traffic regulations and started compiling a report of administrative violation. Z.Kuchukhidze was dissatisfied and he addressed them in rude language. The incident was witnessed by G.Ninua, chief of Samegrelo-Zemo Svaneti Patrol Police Department, who called a mobile team to rule out any further complications. The arriving police officers tried to calm Z.Kuchukhidze, however he was again dissatisfied and using rude language. Patrol police asked Z.Kuchukhidze to follow them to police station, which Z.Kuchukhidze refused to do. He hit patrol inspector D.Jikonaia, swore other police present there. Police officers had to use force to put him into the car, during which time Z.Kuchukhidze continued resisting them and bit inspector M.Chejia on the hand. Samegrelo-Zemo Svaneti Patrol Police Department started preliminary investigation into criminal case No.22060281 against Z.Kuchukhidze under Article 353 of the Criminal Code (putting up resistance, violence or threats against defenders of public order or other state agents – punishable with a fine, or restriction of liberty for up to three years, or deprivation of liberty for two to five years). Z.Kuchukhidze was subjected to custody as a measure of restraint. The letter also stated that Z.Kuchukhidze's bodily injuries fall within the 'slight' category.

In the course of investigation, Z.Kuchukhide requested an additional interrogation. He said that at the moment of arrest he was drunk, that he put up resistance to police, assaulted them physically and verbally and defied legitimate demands by police, which led to his arrest. He received bodily injuries as a result of his resistance to arrest; hence he had no complaints about the police.

G.Ninua, chief of Samegrelo-Zemo Svaneti Patrol Police Department, interviewed as a witness, said that on 22 October, when in line of his duty, he witnessed Z.Kuchukhidze resisting the police, during which time he lost balance and fell down. Police officers then used force to put him into the car and took him to the premises of Samegrelo-Zemo Svaneti Patrol Police Department, where Z.Kuchukhidze went on opposing them, again lost balance and fell down. When fighting with police, Z.Kuchukhidze bit police officer M.Chejia on finger and physically assaulted other police, inflicting light injuries.

It is to be noted that the evidence offered by Z.Kuchukhidze during additional interrogation to the effect that he had no complaints about the police and all bodily injures were self-inflicted gives rise to doubts and looks highly unconvincing. This fact only demonstrates that persons in custody are unprotected and it is very easy for investigation to put pressure on them. This

explains why persons beaten by police at the moment of arrest generally change their testimonies and deny any facts of abuse by police. It seems, this was the case with Z.Kuchukhidze.

The letter from Zugdidi District Prosecutor's Office alleges that police officers who brought Z.Kuchukhidze to police station received light bodily injuries, though it is not clear from the letter that they were examined by forensic experts to determine the severity of their injuries.

Given the fact that many of the circumstances in the criminal case concerning Z/Kuchukhidze;s injuries looked doubtful, the Public Defender, invoking Article 18 (e) of the Organic Law on the Public Defender of Georgia, addressed Zugdidi District Prosecutor's Office with a request to make available to PDO copies of the materials related to the criminal case concerning unlawful actions by police against Z.Kuchukhidze. In its response letter, Zugdidi District Prosecutor's Office stated that Article 18 (e) of the Organic Law on the Public Defender of Georgia did not stipulate any obligation for relevant state bodies to make materials of criminal cases available to the Public Defender. Hence, the Public Defender can familiarise himself with materials related to criminal case No.5306918 at Zugdidi District Prosecutor's Office, whereas the latter is under no obligation to provide such materials to the Public Defender.

In this context it is important to point out that under Article 18 (e) of the Organic Law on the Public Defender of Georgia, the Public Defender enjoys the right to have access to criminal, civil and administrative cases, he decisions on which have entered into force. This means that whatever form of access the Public Defender opts for, be it access to cases on the ground, or having their copies made available to him, it is the responsibility of the prosecutor's office to provide all documents required for examination of the case, as requested by the Public Defender. Under Article 18 of the Organic Law, the Public Defender has the right to have access to criminal cases, which means that materials related to such cases shall be accessible for the Public Defender, so that in the process of familiarising with the materials he could make excerpts, etc. Hence, since the Public Defender is entitled to have access to the case file, it is only natural that he also has the right to have photocopies of those materials made. Besides, it should be noted that in the process of his work the Public Defender frequently contacts the prosecutor's office or other investigative bodies with a request to make copies of materials related to criminal cases available to him, and so far there has never been any problem about that. The reaction of Zugdidi District Prosecutor's Office can be interpreted as administrative violation, provided for in Article 1734 of the code of Administrative Offences, namely failure to meet the Public Defender's legitimate requirement. Therefore, in order to get access to materials related to the case, the Public Defender addressed Samegrelo-Zemo Svaneto Regional Prosecutor, however the latter responded with a letter, identical to the one described above.

The Case of G.Chitidze and L.Khvedelidze

On 31 August 2006, representatives of PDO visited G.Chitidze and L.Khvedelidze kept in custody at temporary detention facility No.2 of the Ministry of Internal Affairs who said that they were physically assaulted by police. On 6 September 2006, the Public Defender sent the relevant materials to Tbilisi Prosecutor's Office. According to the response from Tbilisi Prosecutor's Office, based on the report concerning the breach of law made on 31 August 2006 by PDO representatives, Didube-Chugureti District Prosecutor's Office opened investigation concerning excess of official authority by officers of Didube-Chugureti district police department during arrest of G.Chitidze and L.Khvedelidze, an offence under article 333 (1) of the Criminal Code. The criminal cases were sent for follow-up to the investigative unit of Tbilisi Prosecutor's Office. Investigation found that on 30 August 2006, G.Chitidze and L.Khvedelidze, both drunken, verbally abused one man at a café-bar located in Tbilisi Central Railway Terminal, and then physically and verbally assaulted the police called to the site to defuse the situation.

Both of them were transferred to Didube-Chugureti police station No.5, where G.Chitidze and L.Khvedelidze destroyed investigator's desk and chairs, and verbally abused police officers, after which they were transferred to temporary detention facility No.2 of the Ministry of Internal Affairs.

Police officers interviewed as witnesses did not acknowledge the fact of physical and verbal assault against G.Chitidze and L.Khvedelidze. Neither was it confirmed by G.Chitidze and L.Khvedelidze themselves who said that since they were drunk, they were unable to control their actions, resisted the police and assaulted them. G.Chitidze also said that injuries that he had mentioned in the report compiled by PDO, were self-inflicted in the police station where he, being in a drunken state, was banging his head against the wall.

The investigation into the criminal case was dropped for absence of a crime in the act. As far as G.Chitidze's and L.Khvedelidze's case is concerned, the investigation did not find it necessary have a forensic examination to appraise their injuries.

This case demonstrates one more interesting tendency employed by investigation; namely, in order to ward off responsibility from law-enforcers, it seems to frame up fairly unconvincing accounts concerning the origin of bodily injuries that persons in detention show.

In connection with facts of physical abuse and torture, it is important to note judgements of the European Court of Human Rights holding that: "When a person gets into a police custody in good state of health and is found injured when released, it is the responsibility of the state to give plausible explanation as to how those injuries were caused" (Ribitsch v.Austria, 4 december 1995).

The above cases give every ground to question the impartiality of investigation into facts of infringement of the rights of persons in detention. It is cleat that the investigative body is under an obligation to conduct comprehensive, impartial and full investigation into the facts of violation of the right of persons in custody to establish the wrongful acts by state agents and bring them to account, which in turn will lead to decrease in similar facts.

* * *

In the course of preliminary investigation the issue of recognition of concrete persons as victims is highly problematic. Not infrequently, investigative bodies of the prosecutor's office and the Ministry of Internal Affairs tend to misinterpret the provisions of Article 68 of the Criminal Procedure Code (recognition as a victim) and apply it improperly. To be more specific, investigative bodies are reluctant to recognise respective persons as victims or the victim's legal successors immediately after commencement of preliminary investigation, motivating their reluctance by the need to first carry out investigative actions to establish a crime in the act, and only based on that is it possible to decide on recognising a person as a victim or the victim's successor. Such interpretation of the law by investigative bodies is incorrect. Under Article 68 of the Criminal Procedure Code, victim is defined "as a public, legal or natural person who has suffered moral, physical or material damage as a result of a crime, or wrongful act by a mentally incompetent person, or mentally disabled person". According to Para 2 of the same Article: "In case of crime resulting in death of a victim, his/her rights are assigned to one of his/her close relatives". This means that once preliminary investigation starts (into the fact presumed as wrongful act), it is necessary to immediately recognise a respective person as a victim or the victim's legal successor. This problem is most frequently found in the course of preliminary investigation into the facts of death of suspects or defendants in the course of special operations conducted by the Ministry of Internal Affairs, physical abuse of detained persons, suicide in

custody, etc. Since the investigative bodies choose not to recognise respective persons as victims or victims' legal successors, they are not in a position to avail themselves of the rights provided for in Article 69 of the Criminal Procedure Code (the rights of victims and their legal successors), which, bearing in mind requirements of Article 18 of the Criminal Procedure Code (examination of facts should be comprehensive, impartial and full) gives rise to doubts as to the impartiality of investigation. When opening investigation into such facts, the investigative body itself should be interested to have duly authorised persons posing questions before the investigation concerning suspicious circumstances, and obtain adequate answers through appropriate investigative actions, which eventually will lead to better trust and confidence towards investigation. At the same time, if in the course of investigation it is found that thee are no grounds for recognising a person as a victim, the body carrying out the proceedings can issue a ruling, in accordance with Article 68 (8) of the Criminal Procedure Code, annulling the ruling concerning the recognition as victim. Therefore, the issue of recognition of a person as victim or the victim's successor should not pose a problem for the investigative body.

In this context, it seems interesting to look at several cases.

The Case of V.Gogisvanidze

On 12 September 2006, B.Kiria, the Public Defender's representative in Samegrelo-Zemo Svaneti Region met in Zugdidi prison No.4 with V.Gogisvanidze, defendant (Article 260 of the Criminal Code) and interviewed him. V. Gogisvanidze spoke about physical and psychological pressure on him by officers of Samegrelo-Zemo Svaneti Division of the Special Operational Department. On 22 September 2006, based on Public Defender's submission, V.Gogisvanidze underwent alternative forensic examination. According to the expert's report, V.Gogisvanidze displayed injuries in the eye area (bruises), also contusions and bruises in the arm, lumbar and thigh area, caused by a blunt object and falling within the category of light injuries, coincident in time with the date of his arrest.

The Public Defender sent the relevant materials to the Prosecutor General's Office for investigation to be opened into the case. On 10 October 2006, Poti District Prosecutor's Office opened preliminary investigation into criminal case No. 450639 concerning inhuman treatment of V.Gogisvanidze by officers of Samegrelo-Zemo Svaneti Division of the Special Operational Department – an offence under Article 144^3 (1) and 144^3 (2) of the Criminal Code.

The defence lawyer petitioned with the investigative body to recognise V.Gogisvanidze as a victim in the above case, however his petition was rejected. The defence lawyer applied to the Public Defender for assistance. On 7 Febuary 2007 the Public Defender addressed G.Latsabidze, Deputy Prosecutor General to have V.Gogisvanidze recognised as a victim, as prescribed by the law. The Prosecutor General's Office responded that if the investigative action confirmed the existence of the grounds, as stipulated in the Criminal Procedure Code, V.Gogisvanidze would be recognised as a victim.

* * *

On 9 June 2006, the dead body of convicted prisoner N.Gvichiani, hanging on a bed sheet, was found in cell 39 of Rustavi Prison No. 6. The investigative department of the Ministry of Justice opened preliminary investigation into the fact of leading N.Gvichiani into committing a suicide – an offence stipulated in Article 115 of the Criminal Code. N.Gvichiani's mother, L.Kordzaia, repeatedly petitioned with the investigative body to have her recognised as a legal successor of the victim, N.Gvichiani. However, her petition was not granted. The Public Defender addressed G.Parulava, head of the Department of Procedural Oversight of Investigation at the Ministry of

Justice to have L.Kordzaia recognised as the victim's successor, as prescribed by the law. No response has followed so far.

* * *

A similar request was contained in the application addressed to the Public Defender by G.Mosiashvili, defence counsel of Ts.Shanava, mother of Zurab Vazagashvili killed during the special operation carried out by police on 2 May on the right bank of Mtkvari River. Investigation into the criminal case, opened under Article 114 of the Criminal Code of Georgia (murder in overuse of power while detaining criminals), was carried out by investigator V.Latsusbaia of Tbilisi Prosecutor's Office who refused to satisfy the petition to recognize Ts. Shanava as the victim's legal successor. The Public Defender addressed the Prosecutor General with a recommendation to have Ts.Shanava recognised as the victim's successor, and following the recommendation the investigation recognised her as the legal successor of the victim.

* * *

Under Article 261 of the Criminal Procedure Code, once information on alleged crime is communicated to relevant authorities, the investigator and the prosecutor are under an obligation to open preliminary investigation. Under Article 395 of the same code, the court, or the prosecutor, is under an obligation to terminate criminal proceedings and/or preliminary investigation, once there appear grounds for dismissal of the case. Thus, if having conducted the investigative action, the investigative body fails to establish signs of a crime, it should issue a resolution on termination of the case. Despite this requirement of the law, there are cases when investigation is not initiated despite availability of information concerning an alleged crime.

The Case of B.Kvitsiani

On 6 September 2006, the Public Defender was contacted by B.Kvitsiani, IDP from Abkhazia, who stated that military police were forcibly evicting him from a residential apartment (25, K.Tsamebuli str., Tbilisi) allocated to him for temporary use by the Ministry of Defence. PDO representatives arriving at the site, were met by representatives of Tbilisi Authority of the Military Police Department who were effecting forcible eviction of B.Kvitsiani from his apartment under the guidance of M.Bakashvili, head of Tbilisi Military Police. It became clear from conversation with the latter that eviction was effected without any decision by the court or a writ of execution. According to M.Bakashvili, police were tasked to put an end to unlawful occupation of the premises. However, B.Kvitsiani's defence lawyer presented a warrant issued in 2002 by the Ministry of Defence on transfer of the property to B.Kvitsiani. Importantly, it is not within the competences of military police to follow on such issues (the statute of the Military Police Department of MOD General Staff does not provide for such a function of military police).

Based on these facts, the Public Defender concluded that military police officers, guided by M.Bakashvili, exceeded their official authority, thus committing an offence under Article 333 of the Criminal Code.

The Public Defender addressed Tbilisi Prosecutor's Office requesting to start investigation concerning respective officers. The response letter stated that: "On 23 October 2005 B.Kvitsiani was discharged from the Armed Forces of the Ministry of Defence of Georgia, for which reason the Ministry of Defence warned him to vacate the apartment (included in the fixed assets of the Ministry). On 6 September 2006 B.Kvitsiani was vacating the apartment voluntarily (which is not true). Therefore, no investigation was initiated in respect of military police officers, for absence of signs of a crime in their act".

* * *

The above facts demonstrates conclusively that oftentimes the prosecutor's office fails adequately to exercise powers and responsibilities vested in it by the law, which ultimately undermines citizens' trust towards this institution as a body carrying out and overseeing the investigation. When an overseeing body breaches ad neglects the law, its subordinate bodies feel free to abuse human rights and freedoms. This, in the final analysis, affects the quality of justice, the standard of protection of human rights and the rule of law in the country.

MINISTRY OF INTERNAL AFFAIRS

Police has a crucial role to play in maintaining public law and order in a country and protecting safety and security of its citizens. It is called to fulfil its duties and responsibilities in good faith, to prevent unlawful acts and ensure that residents of the state feel duly protected. Proceeding from their professional duty, police officers should serve their country with full sense of responsibility, upholding the law and protecting from lawlessness each and every person, despite the differences they may have. At the same time, when discharging their duties, police should respect person's honour and dignity, his/her fundamental rights and freedoms.

The Code of Police Ethics was approved by the order of the Minister of Internal Affairs. The Code represents unity of the most fundamental ethical and moral principles and is based on the standards enshrined in different international human rights instruments (the UN universal Declaration of Human Rights, the Declaration on Protection of Every Person from Torture and Other Forms of Cruel, Inhuman or degrading Treatment or punishment, the European Code of Police Ethics, the European Convention on Human Rights ad Fundamental Freedoms, and others). The principles enshrined in the Code of Police Ethics provide guidance for police both at the time of work, and beyond. These principles are: constitutionality, legality, responsibility, humanity, independence, impartiality, good faith and respect of each other in discharging official functions.

Regrettably, not infrequently the police, being a body called to serve public order and security and accountable to the citizens of the country, itself infringes on human rights. The Public Defender's Office receives applications and complaints from the citizens of Georgia in which they point to physical violence or verbal assault by police, unlawful arts, biased character of criminal investigation carried out by investigative bodies of the Ministry of Internal Affairs, their lack of impartiality.

According to Article 18 (4) of the Constitution: "The physical or moral coercion of a detained individual or individual otherwise restricted in freedom is inadmissible". True, compared to previous years, facts of violence by police have decreased both at the moment of arrest and after arrested persons are brought to police facilities (as corroborated by results of the monitoring carried out by the PDO monitoring group at police stations and temporary detention facilities). However, there are cases, still numerous, of police exceeding their authority and assaulting people in custody. Each and every fact of abuse by police that is brought to the attention of PDO is promptly acted on. PDO representatives visit persons in custody, interview them about the incidents, get hold of reports concerning physical injuries, or compile such reports themselves, provide for alternative forensic appraisal to establish the degree of harm to an individual's health, interview persons who witnessed an incident (when such are available), interview the police who took part in the arrest of a suspect (though they almost invariably deny any violence). The materials are then sent to the Prosecutor General's Office for investigation to be opened, and investigations are initiated under the respective provisions of the Criminal Code.

1. According to applicant Mzia Bliadze, on 24 July 2006 officers of Khashuri district police department of the Ministry of Internal Affairs arrested her son, G.Latsabidze, who was brought to the police station where police officers beat him and planted drugs. Concerning the injuries, the applicant referred to the forensic report issued on 26 July 2006 by the expert of the forensic examination service of the National Forensic Bureau under the Ministry of Justice stating that: "G.Latsabidze displays injuries in the form of contusions caused by a blunt object that fall under the category of light injuries not causing any significant harm to health. G.Latsabidze complains of headache and sickness. He is in need of neurological examination".

The Public Defender sent the relevant materials to the Prosecutor General's Office for preliminary investigation to be initiated. In the response letter the Prosecutor General's Office informed the Public Defender that on 4 September 2006 Khashuri District Prosecutor's Office opened preliminary investigation into criminal case No.3806838 concerning the excess of official authority by members of Khashuri district police force during the arrest of G.Latsabidze – an offence under Article 333 (1) of the Criminal Code.

2. On 14 December 2006, PDO representatives visited Tbilisi Prison No.5 of the Penal Department and interviewed inmates Z.Zirakishvili and Z.Chanturia (charged with robbery). It follows from the interview that on 10 December 2006, at about 6 pm, Z.Zirakishvili and Z.Chanturia were travelling by taxi in the vicinity of Dzmoba street, when their car was stopped by police, who took them to Gldani-Nadzaladevi district police station No. 5. On arriving to the police station, they were verbally and physically assaulted by police. Z.Zirakishvili and Z.Chanturia stated that they could recognise the police officers who insulted and abused them. Reports of external examination of Z.Zirakishvili and Z.Chanturia were requested from Tbilisi temporary detention establishment No.2; the reports describe bodily injuries found during the examination and point out that Z.Zirakishvili and Z.Chanturia were physically and verbally assaulted by police officers.

The Public Defender sent the relevant materials to the Prosecutor General's Office for preliminary investigation to be initiated. In the response letter the Prosecutor General's Office informed the Public Defender that on 26 December 2006, Tbilisi Prosecutor's Office opened preliminary investigation into criminal case No.10068261 concerning the excess of official authority by officers of Gldani-Nadzaladevi district police station No.5 during the arrest of Z.Zirakishvili and Z.Chanturia – an offence under Article 333 (1) of the Criminal Code.

* * *

There are cases when police officers display negligence towards breaches of the law and instead of offering due response, themselves feature as infringers of the law.

On 6 October 2006, the Public Defender was addressed by I.Absandze. According to the applicant, on 5 October 2006, during late hours he was in El-Depo snack bar where a stranger insulted him and assaulted him physically. The applicant immediately called patrol police and notified them of the incident. However, when patrol police arrived, they advised I.Absandze to go home, and when the applicant demanded that measures be taken against the assaulter, they verbally abused him.

The Public Defender forwarded I.Absandze's application for follow-on to the Patrol Police Department of the Ministry of Internal Affairs, that informed the Public Defender that the General Inspectorate of the Ministry of Internal Affairs carried out an inspection in connection with the fact described in the application; as a result, patrol inspectors Z.Gelashvili and G.Jabakhidze were dismissed from police, and D.Magradze demoted.

* * *

Law enforcement officials have a vital role in the protection the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights and reaffirmed in the International Covenant of Civil and Political Rights and the European Convention on Human Rights. Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. The means used by law enforcement officials shall be adequate to the concrete situation, in proportion to the seriousness of the offence and the specific

character of the offence. Police officers are prohibited from the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk. The use of force and firearms shall conform to the requirement of respect for human rights.

The UN Resolution on Basic Principles on the Use of Force and Firearms by Law Enforcement Officials enshrines the basic general principles that member states should take into account and respect within the framework of their national legislation and practice. According to Principle 4: "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms, They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result". The Declaration on the Police adopted by the Parliamentary Assembly of the Council of Europe in 1979 enunciates in Paras. 12 and 13 that in performing his duties, a police officer shall use all necessary determination to achieve an aim which legally is required or allowed, but he may never use more force than is reasonable. Besides, police officers shall receive clear and precise instructions as to the manner and circumstance in which they should make use of arms.

The use of firearms by police is regulated by Article 13 of the Law on police, as well as Para.4.2 of the Code of Police Ethics. However, failure to respect these norms continues to be an important problem in Georgia. There are cases when police make use of firearms definitely out of proportion with the circumstances, which leads to a loss of life.

The case of Varlam Pkhakadze

On 7 December 2006, at about 04:30, based on the notice received by patrol police, members of patrol crew No.31 were tasked to drive 48, Chavchvadze Street in Kutaisi, and apprehend thieves that, according to the notice given to patrol police, were in the basement of the building. Patrol police inspectors Ivane Kapatadze and David Minashvili arrived on the site. I.Kapatadze immediately rushed to the entrance door where he dashed against a person – Varlam Pkhakadze - coming out of the entrance door. Patrol inspector I.Kapatadze, whose intention was to apprehend V. Pkhakadze, fired three shots towards him despite the fact that the latter was not armed, neither did he put up any resistance to police. Incidentally, the other inspector, D.Minashvili was at the entrance door, ready to help his colleague. I.Kapatadze and D.Minashvili apprehended V.Pkhakadze and had him sat on the step near the entrance door. Shortly afterwards their colleagues from patrol police crew No. 27, Avalo Gabrichidze and Kakha Gabunia arrived. Despite the suspect being wounded, patrol police inspectors displayed full negligence and failed to provide emergency medical assistance, limiting themselves only to questions concerning the identity of the suspect and calling investigator. V.Pkhakadze, who received injuries, was only transferred to hospital after a group of investigators came, which means an elapse of a certain span of time.

The ruling of judge I.Lekveishvili of Kutaisi City Court (on assigning bail as a measure of restraint for D.Minashvili) states that "negligence by patrol inspectors and improper fulfilment of their functions led to delayed transfer of severely injured Varlam Pkhakadze (who suffered rupture of an artery as a result of gunshot injury) to hospital, failure to timely provide the necessary medical assistance, with resultant acute circular insufficiency and, ultimately, his death on 12 December 2006, 5 days after he was transferred to hospital". R.Kvernadze, Medical Director of Western Georgia National Centre of Intervention Medicine, states in his letter to the Public Defender that "the gunshot injury, significant loss of blood, delayed referral for hospital care, and traumatic hemorrhagic shock resulted in diffusive brain oedema, atonic coma, severe renal insufficiency and cardiovascular insufficiency".

Inspector of Patrol Police Ivane Kapatadze was charged with criminal offence under Article 114 of the Criminal Code (murder through excessive use of force when arresting an offender) and was given two-month detention as a measure of restraint.

Inspectors D.Minashvili, A.Gabrichidze and K.Gabunia were charged with criminal offence stipulated in Article 342 (2) of the Criminal Code (namely neglect of official duty, resulting in loss of life or other grave outcome). The Regional Prosecutor's Office made a motion requesting the court to assign the above police officers with a bail of 2000 each as a measure of restraint. The court granted the prosecutor's motion.

One more aspect is worthy of notice. PDO representatives interviewed residents at 48 Chavchavadze Street, where the incident took place. They said they were awakened by gun shots. When they looked out the window they could see several men brutally beating a man who was crying: "What are you doing? Why are you beating me? Why are you killing me?". Only afterward did they learn that the man was Varlam Pkhkadze.

* * *

Not infrequently, investigators of investigative units fail to fulfil procedural norms when carrying out investigation into criminal cases. Among the most common violations one has to note inconsistency between various procedural documents, restriction of the right to defence (denial of access to materials of the criminal case), failure to enlighten detainees about their rights, refusing detainees to contact their families (enjoyment of this right is of paramount importance for persons suspected of crime to ensure prompt access to a defence lawyer), failure to carry out one or another investigative action, etc. Each and every case of procedural violations that becomes known to PDO is promptly followed on. The Public Defender sends to the relevant body a suggestion concerning the issue of responsibility of the perpetrator.

1. Z.Chikviladze, defendant, addressed investigator L.Jgarkava, requesting access to the case file, as provided for by Article 76 (3) of the Criminal Procedure Code, and permission to make photocopies of the materials. However, his request was rejected.

The Public Defender addressed the prosecutor of Didube-Chugureti district of Tbilili with a suggestion to raise the issue of responsibility of investigator L.Jgarkava. The Public Defender's suggestion was followed on, and investigator L.Jgarkava was subjected to strict disciplinary sanctions for breaches in the course of criminal investigation.

2. M.Gvalia was accused of murder attempt committed intentionally by two or more persons. The criminal case was investigated by I.Khoshtaria. Defence lawyer Z.Pitskhelauri petitioned with the investigator to have I.Lashkarashvili questioned as a witness, and witnesses Z.Kharatishvili and G.Ivaneishvili questioned additionally. However, the investigator refused to grant the petition. Z.Pitskhelauri made a similar petition with prosecutor T.Gurgenishvili of Tbilisi Department of Procedural Oversight of Investigations in Bodies of the Ministry of Internal Affairs, who partially granted the petition and instructed the investigator to question I.Lashkarashvili. This notwithstanding, I.Khoshtaria completed the investigation without even interviewing I.Lashkarashvili, thus violating Article 55 (4) of the Criminal Procedure Code. On top of that, he withdrew from the case file the petition that defence lawyer Z.Pitskhelauri made with T.Gurgenishvili, as well as the latter's resolution.

The Public Defender addressed Tbilisi Prosecutor's Office with a suggestion to raise the issue of responsibility of investigator I.Khoshtaria. The Public Defender's suggestion was followed on, and investigator I.Khoshtaria was given a reprimand.

3. G.Ekvtimishvili was charged with robbery. From materials of the criminal case it followed that on 9 May 2006, at 7:15 M.Beridese, patrol police inspector filed a report on receiving a verbal notice from T.Mekvevrishvili on committal of an offence, stating that the police arrested D.Tandilashvili and E. Ekvtimishvili suspected of involvement in the offence. The same is stated in the report of inspector R.Dolishvili on receiving a verbal notice from radio station "Rioni" on committal of the offence. This notwithstanding, the report of arrest and personal search of D.Tandilashvili and E. Ekvtimishvili indicates that they were arrested at on 9 May 2006 at 7:45.

Thus, it follows from the case file that arrest of the suspects was effected 30 minutes earlier than reported in the record of arrest and personal search. In connection with this procedural breach, PDO sent a notice to Tbilisi Prosecutor's Office; however the latter did not find any procedural breach in the case.

4. According to G.Gambarshvili, I.Pkhakadze was arrested on 17 December 2006 by officers of Mukhrani unit of police division No.2 of Kutaisi Police Authority. I.Pkhakadze was suspected of committing a robbery. At the police premises he was subjected to physical pressure in order to wring out confession (injuries are documented in the report). I.Pkhakadze was not allowed to communicate with his family. The defence lawyer came to the police station on 18 December at 12:45, and asked investigator K.Babukhadia to give him access to materials of the case and a copy of the record of arrest and personal search. Despite the fact that G.Gambrashvili presented a warrant and gave his identity, investigator K.Babukhadia and head of the investigative unit refused to grant his request.

The Public Defender sent the relevant materials to the Prosecutor General's Office for follow-on. According to the response letter from the Prosecutor General's Office, Kutaisi District Prosecutor's Office opened investigation into the fact of physical assault against I.Pkhakadze by officers of police division No.2 of Kutaisi Police Authority – an offence under Article 144^1 (2) of the Criminal Code.

* * *

It is important to note also such breaches by police as dragging out the investigation, failure to act on the crime. It is the responsibility of police to establish causes and conditions conducive to a crime, take appropriate measures to eliminate them, investigate the crime and bring perpetrators to account. At the same time, investigation into facts and circumstances of am offence needs to be comprehensive, impartial and full. However, investigation is oftentimes only superficial, and information about the offence often goes unattended.

1. Applicant L.Epremidze pointed out that the investigative unit of Mtskheta district police department was investigating the case concerning the theft of 25-ton water tank in his possession, stolen in December 1999. The investigation into the fact of theft started in March 2000. The investigative body was intentionally dragging out the action necessary to establish the truth. On 27 March 2006, the Public Defender addressed Mtskheta-Mtianeti Regional Prosecutor's Office concerning partiality of the investigation and requested the prosecutor's office to look into the circumstances of the case. Mtskheta-Mtianeti Regional Prosecutor's Office informed the Public Defender that it procured and examined the documents present in the materials of the case. It was found that investigators Z.Khuroshvili and L.Gabisonia conducted the investigation superficially and failed to follow on written instructions from the Prosecutor General's Office and Mtskheta-Mtianeti Regional Prosecutor's Office. In this connection, the latter demanded that disciplinary sanctions be imposed on Z.Khuroshvili and L.Gabisonia. Mtskheta-Mtianeti Main Police Authority informed PDO that no administrative penalty was applied to investigators Z.Khuroshvili and L.Gabisonia, as by the time when the Regional

Prosecutor's Office sanctioned the penalty, they were no longer on the staff of Mtskheta Police department.

The Public Defender made a query concerning the investigators' present jobs and found that Z.Khuroshvili works as an investigator at Tbilisi Patrol Police Authority, while L.Gabisonia works as an investigator of the Division of Fight against Murder and Crime against Human Dignity and Health of Tbilisi Criminal Police. The Public Defender sent the materials on their neglect of official duty to the administration of the Ministry of Internal Affairs for follow-up which informed PDO that by the order of the Minister of Internal Affairs Z.Khuroshvili and L.Gabisonia were given a strict reprimand.

2. On 10 July 2006, PDO Regional Office in Kutaisi was addressed by residents of village Mukhiani, Tskaltubo district. According to the applicants, facts of robbery in village Mukhiani became frequent, as did various threats. In order to clarify facts pointed out in the application and collect additional information, PDO representatives met with residents of village Mukhiani and interviewed them. According to the applicants, in summer 2002 several households were violently attacked at one and the same time. The police contented itself only with interviewing the victims and did not even open preliminary investigation. Hence, neither were perpetrators identified and punished. According to one of the victims, perpetrators left behind a bag full of ammunitions, which the village residents gave to police following their insistent demands, without following any procedure stipulated by the law.

Residents of the village were particularly frightened in June 2006 by threats communicated by phone. According to one of the applicants, unidentified persons were trying to extort money from his son, demanding to transfer money. In case of disobedience they were threatening to kill him and destroy his property. Similar messages were received by other residents of the village. The applicants were dissatisfied with complete omission by law enforcement bodies. They said that in June 2006 they approached Tskaltubo police for help; however the staff refused to register their application. Moreover, they refused to listen to the applicants, and told them to leave the police premises immediately.

PDO sent the relevant submissions to Imereti Main Regional Police Authority and the Regional Prosecutor's Office for Western Georgia.

According to the response letter from the Regional Prosecutor's Office for Western Georgia, investigation into the violent assault of residents of village Mukhiani, Tskaltubo district perpetrated on 6 June 2000, was opened on 10 August 2006, i.e. six years after the criminal incident. The reasons for delay are unknown. It is unclear whether any investigation into assaults perpetrated in village Mukhiani in 2002 has started. The Prosecutors' Office paid special attention to the withdrawal of the bag with ammunitions effected in contravention of the relevant provisions of the procedural law. According to the information made available to PDO, investigation into the facts of threats communicated by phone was only opened in respect of one case. Considering the information provided to PDO by Regional Prosecutor's Office for Western Georgia, Kutaisi District Prosecutor was tasked to step in and take relevant measures.

On 1 September 2006, Kutaisi District Prosecutor's Office informed PDO that based on the information provided by PDO Regional Office in Kutaisi and other relevant materials, on 23 August 2006 Kutaisi District Prosecutor's Office opened investigation into the fact of abuse of official authority by officers of Tskaltubo district police – an offence under Article 332 (1) of the Criminal Code.

In the conversation with PDO representatives, residents of village Mukhiani articulated their presumption that inaction by police might have been caused by mercenary motives. The fact that the prosecutor's office opened investigation under Article 332 of the Criminal Case confirms this presumption.

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Deficiencies in the work of police can be eliminated through enhanced transparency and accountability. Facts of infringement of human rights by police should be known to the public, they need to be adequately assessed and evaluated, and followed on by the relevant authorities. This will contribute to increased trust of police by the public.

POLICE MONITORING

Representatives of the Public Defender's Office carry out regular monitoring of police stations and temporary detention facilities both in the capital city and in the regions of Georgia. Monitoring carried out in temporary detention facilities outside the capital city exposed many problems and infringements that call for systemic analysis and follow-up. One of crucial issues is technical condition of temporary detention facilities (that outside the capital are located at police premises). Even though some of the buildings have been repaired and renovated, and presently conditions there are relatively better than previously, hardly any of remand facilities has a shower, medical room, properly functioning water supply or ventilation. Another problem is provision of food for persons in custody, as well as heating. Where detained persons are not provided with food by their families, detention facilities' staff are compelled to provide food for them at their own expense, however in some instances this manifestation of good will by the staff is not possible, for objective or subjective reasons. This problem is particularly relevant for those persons who are kept in custody to serve administrative penalty.

Monitoring carried out in December 2006 resulted in the following findings.

At Tkibuli temporary detention facility, out of nine cells only three are fit for use. Others are in a state of dilapidation. The ceiling and floor are damaged, toilets are in a non-operational condition and require repairs, there are no basic conditions for personal hygiene. Water supply, heating and ventilation systems are not operational. In most cases water for inmates is supplied by the staff. Sanitary condition is highly unsatisfactory.

At Marneuli temporary detention facility there are three cells. The cells do not have toilets or water. They are located at the end of the corridor; however, there is no shower there either. A bulb, installed over the entrance door, is inadequate to ensure normal lighting. Two out of the three cells have no heating, and no glass in window-panes, hence, it is cold in the cells.

At Dusheti temporary detention facility there are four cells. The cells have no heating or ventilation. The only source of light is a bulb installed over the entrance door. The facility has no adequate toilet, and no shower. Besides, the facility has no water supply, as does the police building where it is located. The facility is in need of repair.

At Gardabani temporary detention facility there are five cells. The cells have no heating, and no glass in windows, hence it is cold there. There is no ventilation or showers. A bulb installed over the entrance door is inadequate to ensure normal lighting. The facility is in need of repair.

Monitoring carried out at the temporary detention facility in the premises of Samtredia district police discovered a surprisingly large number of inmates serving administrative detention. Their number varies daily between five to seven persons. There were cases when the number of detainees kept at Samtredia temporary detention isolator reached 17. Almost all of them were serving a twenty-day administrative detention prescribed by Samtredia District Court for offences under Article 45 of the Code of Administrative Offences (illegal purchase or possession of drugs in small quantities, or use of drugs without doctor's prescription). Notably, the facility has only four cells, of which one is in a state of dilapidation and, hence, unfit for use. The problem of overcrowding at Samtredia temporary detention facility is particularly acute due to the fact that apart from administrative detainees, it is also used for placement of persons suspected of criminal acts.

The examination of Samtredia temporary detention facility, and information obtained from its staff as well as inmates show that the facility is in need of repair. There is no shower, or basic

conditions for personal hygiene. Water supply, heating and ventilation systems are in poor condition. Wooden boards on which inmates lie almost all the time are damaged. The administration has no mattresses and beddings. A serious problem is provision of food, and where detained persons are not provided with food by their families, the staff are compelled to provide food for them at their own expense. However, despite good will, it is not always possible for objective or subjective reasons. Therefore, inmates are left to serve their penalties in virtually inhuman conditions.

Samtredia district police is no exception. Similar problems are largely found at police departments in other districts of the country. True, some of police buildings and remand facilities have been repaired, but hygienic conditions there leave much to be desired (as shower facilities are non-existent).

It is important to note that according to the recommendation of the CoE Committee for the Prevention of Torture (CPT) all activities and conditions in the prison will worsen if prison administration is required to accommodate more inmates than its capacity is. Though the Recommendation deals with penitentiary institutions, temporary detention facilities used for persons serving their administrative penalties can largely be seen as such, hence the above recommendation is readily applicable to the situation in temporary detention facilities, too.

Notably, remand facilities of the Ministry of Internal Affairs are used for the placement of persons sentenced by courts to administrative detention for administrative breaches. According to Recommendation R(87)3 of the Committee of Ministers to the member states of the Council of Europe on European Prison Rules: "In countries where the law permits imprisonment by order of a court under any non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall not be less favourable than that of untried prisoners." (para.99).

Concerning light and ventilation, the UN Standard Minimum Rules for the Treatment of Prisoners in Rule 11 says that in all places where prisoners are required to live or work, (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation; (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

The CoE Committee for the Prevention of Torture stresses that lack of air and sufficient light creates degrading conditions of treatment. The relevant authorities must examine the case of each prisoner in order to ascertain whether specific security measures are really justified in his/her case. Further, even when such measures are required, they should never involve depriving the prisoners concerned of natural light and fresh air. The latter are basic elements of life which every prisoner is entitled to enjoy; moreover, the absence of these elements generates conditions favourable to the spread of diseases and in particular tuberculosis.

Also, according the UN Standard Minimum Rules for the Treatment of Prisoners, namely Rules (20) and (26), "Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. Drinking water shall be available to every prisoner whenever he needs it". According to Rule 13, "adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate". Rule 15 further stresses that "prisoners shall be required to keep their persons clean, and to this end they shall be provided with water

and with such toilet articles as are necessary for health and cleanliness". Maintenance of cleanliness and personal hygiene is important for prisoners in order to maintain self-respect and dignity. Therefore, it is necessary to do everything to enable every prisoner to have a shower and maintain cleanliness, which is crucial for their health and dignity.

In what concerns bedding, according to international standards, every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.

Under Rule 17 of the European Prison Rules, "the sanitary installations and arrangements for access shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in clean and decent conditions".

With a view to addressing these problems, the Public Defender addressed the Minister of Internal Affairs about the need to have the premises of pre-trial facilities brought into close alignment with international standards and making the conditions of detention better (after that the temporary detention facility in Tkibuli was closed down).

* * *

When monitoring police offices, PDO representatives found another infringement, namely coercive subpoena of witnesses in contravention of procedural rules. According to Article 93 of the Criminal Procedure Code, "called in evidence can be any persons, who might have the knowledge of information necessary to establish circumstances of the case". Calling in evidence must be in conformity with the procedure prescribed by the law. Under the procedural legislation, a witness shall be summoned to appear before a prosecutor or an investigator with a subpoena. Subpoena shall be sent by land mail or with a courier. A witness can also be called by a telephone message, telegram, radiogram, fax or other means of communications. A subpoena, or other notification shall indicate as to who, for what purpose, to whom and at what address the person is summoned, as well as the date and time of appearing, as well as consequences of not appearing n the absence of valid reasons. Receipt of subpoena (notification) shall be confirmed by a signature of the person who is called in evidence. In the absence of the persons summoned to testify, a subpoena (notification) shall be handed over to an adult family member who confirms the receipt of notification by his/her signature, or a representative of local government or self-government body.

Not infrequently, witnesses are brought in breach of the above norms. Police officers go to a person to be interviewed as a witness (oftentimes, to his residence) and ask him/her to follow them to police without giving any further explanation – as to whom and why they are called. Often they give an overly simple answer – "we don't know, it is the boss, so they will find out and let you go". Oftentimes, people are taken to police forcibly. According to the Criminal Procedure Code, a witness, apart from having the right to know as to why he is summoned, also has the right to formulate his testimony himself; get access to the record of interrogation or other investigative action conducted with his involvement; request making additions or changes to it; make a statement concerning the use of unlawful methods by the investigation; take part in the investigative action, familiarize himself with the record and make statements that shall be included into the record; complain about unlawful action of the investigator with the prosecutor; refuse to give evidence incriminating himself or his close relatives; under Article 94 (1) of the Criminal Procedure Code enjoy the rights provided for in Article 366 (the rights of suspects, defendants and victims in the appointment and conduct of expert appraisal).

There are cases when persons summoned as witnesses are not in a position to enjoy these rights, as the investigator failed to enlighten them accordingly. Instead of summoning a witness and interviewing him, what often happens in reality is coercively bringing him to police. When in the course of monitoring PDO representatives come across such cases, police try to allege that they have appeared voluntarily to testify, which is not true. For understandable reasons, the persons concerned are reluctant to acknowledge that (as they fear retribution by police). Persons brought to police through such means are not allowed to move freely, they do not have access to a lawyer to have his assistance, which leads to impairment of the right guaranteed in Article 18 of the Constitution, namely, that the freedom of a person is inviolable. Under Article 305 of the Criminal Procedure Code, the witness has the right to be interviewed in the presence of a lawyer, but the absence of the latter does not obstruct the conduct of an investigative action. The investigator is under no obligation to provide a lawyer for a person to be interviewed as a witness, differently from interviewing an arrested person. However, since a person is brought to police coercively (or through deception), he has no access to a lawyer, and assistance by a lawyer. When a person is summoned for an interview in compliance with the existing legal provisions, he has adequate time and facilities to find a lawyer, and exercise both his rights and responsibilities.

Coercive subpoena of witnesses is regulated by the Criminal Procedure Code (Articles 175 and 176). In case a person summoned as witness evades appearing before the investigator, the latter has the right to make a motion before the court which issues an order on coercive subpoena. The court's order (ruling) is handed over for enforcement to police. Only then can police coerce the witness to appear. Unless procedural norms are followed in bringing a witness to police, there is a considerable risk that he will be subjected to pressure.

It is interesting to look at some cases where a witness was actually detained, which constitutes violation of the law:

1. In the course of monitoring at Kutaisi temporary detention facility, PDO representatives met with G.J. who reported the following (he refused giving an official statement for fear of retribution from police):

On 14 December 2006, at about 10-11 am, officers of Imereti Regional Division of MIA Special Operational Department came to G.J.'s home in Bagdadi district centre and told him to follow them. When asked where he was supposed to go, police officers answered G.J. that they wanted to find out something. He was put into a car and taken to Zestafoni. On their way, police officers offered him to cooperate with the Special Operational Department, which G.J. rejected. They were also coercing him to testify against one person, which he refused, too. This was followed by verbal insults. G.J. was brought to Imereti Regional Division of the Special Operational Department, where he was subjected to intimidation, psychological pressure and verbal assault. After several hours he was interrogated as a witness by an investigator. On the same day, at about 19:00 G.J. was taken for drug test, which appeared to be positive. Thereafter he was taken to Kutaisi Police Authority where following a telephone conversation between a judge and officers of the Special Operational Unit he was given administrative detention for the duration of 25 days. Then he was taken to Imereti Regional Division again, where he was kept for about three hours, after which he was transferred to the temporary detention facility.

In this case, apart from many other breaches, it is important to note that a person brought to police as a witness was coercively tested for drugs. According to G.J., he had not been arrested under administrative procedure and he was taken to the drugs' clinic as a witness.

2. On 23 March 2006, in the course of monitoring at Zestafoni district police, PDO representatives found in the detention register that the time of arrival in police of one of detainees - M.Kvinikadze, was 20 minutes before the time of arrest, as indicated in the record, which was highly illogical. This gave reasonable grounds to suspect that M.Kvinikadze was arrested earlier than indicated in the arrest report. Investigator K.Gavtadze explained that preliminary investigation into robbery was opened, physical evidence obtained, the victim pointed to the perpetrator, and he, K.Gavtadze sent police officers to bring M.Kvinikadze to appear before the police. (Appearing before the police as a procedural action is no longer valid, it was abrogated in 2003. A person brought to police is considered arrested). Police officers put M.Kvinikadze into custody without making a requisite record.

3. Mamuka Askurava, interrogated as a witness on 10 December 2006 at Ajara Main Police Authority, was subjected to psychological and physical pressure, which resulted in a concussion of the brain.

According to M.Askurava, he was visited at home by police officers who told him that chief of police department wanted to talk to him, and that he would be brought back in half an hour. Already in the police it appeared that M.Askurava was brought for interrogation as a witness in the criminal case opened against his brother. M.Askurava said it was not clear what his status was when he was interrogated, he had not received any subpoena, and no one explained to him what his rights were (as brother of the defendant, he was not obliged to testify).

On 11 December 2006, Ajara Prosecutor's office started investigation into the case concerning infliction of bodily injuries to M.Askurava – an offence provided for in Article 118 (1) of the Criminal Code. However, no criminal proceedings were initiated against any concrete person, despite the fact that M.Askurava clearly pointed to one of the perpetrators.

The examples clearly indicate that summoning of witnesses by law-enforcement bodies in contravention of the relevant procedural norms is common practice.

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Over the recent period PDO representatives have seldom faced obstacles in the course of monitoring. Whenever it happens, it is mostly caused by a low level of legal culture and awareness on the part of the staff of respective institutions. More often then not they are not aware of the scope of powers that the Public Defender enjoys, and are reluctant to make a decision on allowing access to their facilities for PDO representatives without consulting their seniors. For instance:

On 23 October 2006, G.Kurbushadze, chief of temporary detention facility in Kobuleti did not allow PDO representatives to carry out monitoring. He declared that he was subordinate to the chief of Batumi temporary detention facility No.1 and could not decide independently on providing access to the facility for PDO representatives. Chief of Batumi temporary detention facility No.1, S.Beridze allowed access to Kobuleti facility only to G.Charkviani.

Despite presenting the credentials, enlightening on provisions of the Organic Law on the Public Defender of Georgia, and possible consequences of denying access to PDO representatives to the facility, G. Kurbushadze did not allow PDO representative K.Meskhidze to carry out monitoring of the facility. The act by S.Beridze and G.Kurbushadze constitute a violation of the Organic Law on the Public Defender of Georgia, punishable under Article 173^4 of the Code of Administrative Offences.

On 26 October 2006, the Public Defender made a report of administrative infringement by G. Kurbushadze, chief of Kobuleti temporary detention facility that was sent to Kobuleti district police. Judge I. Kadagidze of Kobuleti District Court examined the report of administrative infringement and relevant materials, found that G.Kurbushadze did violate the law and imposed on him a fine of 15 GEL (though the minimum sum of fine for this category of infringements is 30 GEL).

In some districts there is a persistent problem of police registers. More specifically, often the time of arrest and the time of arrival to police are indicated incorrectly. Sometimes this is caused by improper or incorrect compilation of an arrest report, whose data are then entered into the police register. Oftentimes, there are corrections in the registers, mostly concerning the time of arrest and the time of arrival to police. Initially these deficiencies were attributed to non-availability of precise instructions. However, the instructions do exist, but they are often kept on office shelf, and not used by those for whom they are intended. Besides, police officers often note that registers are inspected by supervising prosecutors from whom they receive different instructions on how to complete the. The fact, however, is that there are no uniform regulations on keeping registers, which creates problems in some regions. It is necessary to draw up clear instructions on keeping registers of person in custody, and brief the respective personnel how they should be filled out.

In the course of monitoring carried out on 28 October 2006 at Ozurgeti district police it was found that there had been no record-keeping concerning persons in custody and persons transferred to prisons. Police staff told PDO representatives that registers had been taken away from the police station by representatives of the regional prosecutor's office on 18 August 2006 in relation with the investigation concerning the arrest and torture of B.Poladashvili. Instead, as reported by the police staff, they kept special record for each of detainees, where they entered basic information envisaged in registers. However, in the course of another monitoring carried out on 31 January 2007 in the same police, there was again no register.

The Public Defender's Office addressed a note to the administration of the Ministry of Internal Affairs requesting to provide for Ozurgeti district police a new police register for keeping records on persons kept in custody.

On 21 November 2006, representatives of PDO Office for Western Georgia were carrying out monitoring in Batumi police department No.2. Officer on duty, G.Davitadze, refused access to police registers for PDO representatives, saying that the chief of the department was not informed about the monitoring. He said that it was necessary to notify his chief about the monitoring in advance.

The Public Defender's Office addressed a note to the administration of the Ministry of Internal Affairs requesting to inform the staff of the ministry about the powers given to the Public Defender by the law, so that in future there are no obstacles on the way of monitoring.

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Monitoring carried out by PDO representatives at police facilities in the second half of 2006 exposed infringements by law enforcement officials, resulting in disciplinary sanctions against 8 police officers:

1. Inspector-investigator A.Berdzuli of Gldani-Nadzaladevi Criminal Police was dismissed from the system of the Ministry of Internal affairs for breaching the term of administrative detention of G.Kebadze.

2. Investigator P.Gvilava of Zugdidi Police Department was given a reprimand for breaching the provisions of Article 145 (5) of the Criminal Procedure Code in the course of arresting B.Lemonjava as a suspect; namely, he failed to indicate in the report the grounds for arrest. Besides, he breached the provisions of CPC Article 138 (1), failing to notify B.Lemonjava's family of his arrest as a suspect.
3. Inspector-investigator L.Mamporia of Zugdidi Police Department was given a strict reprimand for breaching the provisions of CPC Article 138 (1) in the course of arresting Z.Kvaratskhelia as a suspect (Z.Kvaratskhelia's family was not notified of his arrest).
4. Arrested V.Alania was not given a copy of his arrest report; he was not informed of his rights. Inspector-investigator G.Gabelaia of Khobi district police department was given a warning for the procedural breaches.
5. Arrested D.Oniani was not given a copy of his arrest report; he was not enlightened about his rights. Patrol-investigator A.Janashia of Samegrelo-Zemo Svaneti patrol police was given a rebuke for the procedural breaches.
6. Examination of the police register at Dedoplistskaro district police showed that the register did not contain records indicating the time of transfer of persons under administrative detention from the police. Based on the conclusions of official inspection carried out by the General Inspectorate of the Ministry of Internal Affairs, inspector I.Gogoladze of Borjomi district police, and inspectors T.Natelashvili and T.Lapiashvili of Dedoplistskaro police were subjected to disciplinary penalties by the order of the Minister of Internal Affairs.

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Over 2006, representatives of the Public Defender's Office made 856 visits to police stations and temporary detention facilities both in the capital city and in the regions of Georgia (307 visits in the first half of 2006, and 549 visits in the second half of 2006), interviewing 1154 persons in custody (321 detainees in the first half of 2006, and 1133 detainees in the second half of 2006).

The monitoring revealed 701 facts of procedural breaches (110 in the first half of 2006, and 591 in the second half of 2006). Sometimes there were several procedural breaches found in respect of one person in custody.

Physical injuries were found in 261 detainees (178 detainees in the first half of 2006, and 83 detainees in the second half of 2006). Of these 261 persons, only 32 (23 detainees in the first half of 2006, and 9 detainees in the second half of 2006) acknowledged the fact of physical violence by police, which accounts for 12% of persons displaying bodily injuries. Notably, in the second half of 2006, the number of detainees complaining of police treatment decreased. Hence, the use of excessive force by police, compared to the statistics from the previous period, shows a tendency to decrease, which is a welcome fact.

In connection with violations in the course of monitoring of temporary detention facilities of the Ministry of Internal Affairs:

1. Preliminary investigation was opened into 28 facts of physical violence by police against detained persons (21 cases in the first half of 2006, and 7cases in the second half of 2006): of these, investigation on 26 cases was dropped for absence of a crime in the act, and 2 cases are in the process of investigation.
2. Preliminary investigation concerning procedural breaches was opened on 2 cases (both in the second half of 2006) that were later dropped for absence of a crime in the act.

In 2006, 31 police officers were subjected to disciplinary penalties for procedural beaches (23 officers in the first half of 2006, and 8 officers in the second half of 2006).

In connection with offences involving violation of human rights by police, the Prosecutor General's Office provided the following statistics:

- 4 officers were subjected to criminal proceedings on charges of torture (Article 144^1 of the Criminal Code).
- 4 officers were subjected to criminal proceedings on charges of threats of torture (Article 144^2 of the Criminal Code).
- 12 officers were subjected to criminal proceedings on charges of inhuman or degrading treatment (Article 144^3 of the Criminal Code).
- 243 persons were subjected to criminal proceedings for abuse of official authority (Article 332 of the Criminal Code); of these 146 received judgement of conviction. (The information did not indicate the number of policeman charged for violation of human rights).
- 62 persons were subjected to criminal proceedings for excess of official authority (Article 333 of the Criminal Code); of these 55 received judgement of conviction. (The information did not indicate the number of policeman charged for violation of human rights).

The number of persons entered temporary detention facilities with bodily injuries in the second half of 2006 was 1605 (the number includes both persons receiving injuries when arrested, and those who had previous injuries): Tbilisi - 657 persons; Shida Kartli - 242 persons; Kvemo Kartli - 184 persons; Imereti - 154 persons; Ajara - 100 persons; Kakheti - 84 persons; Samegrelo –Zemo Svaneti - 70 persons; Samtskhe-Javakheti - 50 persons; Mtskheta-Mtianeti - 33 persons; Guria - 20 persons; Racha-Lechkhumi - 11 persons. In total, the number of persons with injuries in 2006 was 2962.

As far as persons with injuries who complained of physical violence by police, in the second half of 2006 their number was 105 persons, i.e. 6.5% of the total number of persons with injuries at temporary detention isolators (1605); in the first half of 2006 the number of persons with injuries was 1357, of these 86 complained of violence by police, i.e. 6% of the total number. Thus, statistics for the second half of 2006 is almost identical with the first half of 2006, though one should note that compared to previous years, the numbers are significantly lower.

In the second half of 2006, disciplinary sanctions applied to 714 members of police force, among these 117 were rebuked, 263 were reprimanded, 133 were strictly reprimanded, 9 were demoted in position, 174 were discharged from police service, 3 were demoted in title; and 6 officers were dismissed. (The information did not indicate the number of police officers subjected to disciplinary sanctions for violation of human rights).

In 2006, 18 persons (in the process of arrest) died when resisting law-enforcement officers: 14 persons in the first half of 2006, and 4 persons in the second half of 2006.

FISCAL POLICE

The Public Defender's Report for the first half of 2006 covered extensively the facts of human rights violations by fiscal police, such as such as disproportionate use of force when arresting persons suspected of offence, violation of procedural rights of persons in the course of criminal investigation, and others.

In connection with disproportionate use of force and illegal arrests by fiscal police (for details see the Report covering the first half of 2006: the case of N.Posuri, the operation in village Dirbi of Kareli district; the case of D.Naskidashvili), the relevant materials were sent by the Public Defender to the General Prosecutor's Office in order to open preliminary investigation and initiate criminal proceedings against possible perpetrators.

On 18 July 2006, the Shida Kartli Regional Prosecutor's Office opened investigation into a criminal case concerning the excess of official authority by officers of Shida Kartli fiscal police when arresting N.Posuri – an offence under Article 333 (1) of the Criminal Code. Investigation into the case continues.

On 21 February 2006, the Shida Kartli Regional Prosecutor's Office opened investigation into a criminal case concerning infliction of physical injuries to T.Mushkiashvili and N.Guliashvili (special operation conducted in village Dirbi) – an offence under Article 118 (1) of the Criminal Code. Investigation into the case continues.

On 21 June 2006, the Shida Kartli Regional Prosecutor's Office opened investigation into a criminal case concerning illegal arrest of M.Naskidashvili by fiscal police – an offence under Article 147 (1) of the Criminal Code. The preliminary investigation into the case was dropped on 21 October 2006 for absence of a crime in the act.

Notably, the second half of 2006 showed a decrease in the number of complaints on possible violations by fiscal police referred to the Public Defender's Office.

1. The Public Defender was addressed by residents of village Plavismani, Gori district. The applicants pointed out that on 29 June 2006, D.Giunashvili, resident of village Plavismani, was visited by officers of Shida Kartli fiscal police led by head of department, Z.Arsoshvili. D.Giunashvili was absent. The police officers made inquiries with D. Giunashvili's wife, and then they demanded the documents for a vehicle parked in the courtyard near the house, and took them away. On the following day, 30 June 2006, at about 12:00, two Opel type vehicles (wit plate numbers VOV-308 and CAL-117) drove into the courtyard, the fact witnessed by I.Labari, asked by owners of the house to look after it in their absence. A minor child present in the house at the time of the visit, was locked up inside by police. I.Labari made a noise, with neighbours coming to the courtyard gate, but the police did not let them in. According to the applicants they could see the law-enforcers stacking cigarette cases in front of the garage. Finally, the neighbours actively trying to access the scene, managed to enter though it was late, as they could not prevent the illegal act by police that had already stacked 10 cases with cigarettes in D.Giunashvili's residence.

The Public Defender sent a letter concerning this fact to Shida Kartli Regional Prosecutor's Office for follow-on and examination of the case. According to the letter from the prosecutor's office, on 2 August 2006, based on the application of v. Plavismani residents, the Shida Kartli Regional Prosecutor's Office started preliminary investigation into criminal case No.8206864

concerning excess of official authority by fiscal police officers in D.Giunashvili's home in village Plavismani – an offence an offence under Article 333 (1) of the Criminal Code. Investigation into the case continues.

2. The Public Defender was addressed by citizen Gola Chubinidze. According to the applicant. In December 2004, Beriashvili fraudulently got hold of his Mercedes-Benz type minibus. Fiscal Police Department of the Ministry of Finance initiated criminal proceedings on this fact on 31 January 2006. The case is being investigated by M.Tsitsiashvili, investigator of Unit 3 of Tbilisi Fiscal Police Authority.

On 30 April 2006, G,Chubinidze found his minibus and notified investigator M. Tsitsiashvili accordingly. The investigator compiled the official record and parked the car in the courtyard of fiscal police premises. Despite repeated requests of the applicant, the vehicle was not returned to the owner. According to Article 123 (1) of the Criminal Procedure Code, before the investigation is completed, the investigative body handling the case shall return to the owner or possessor: perishable items, essential items for every day use, cattle, poultry, other domestic animals, vehicles, if these objects are not attached or put under seal.

The Public Defender addressed a recommendation to M.Gvaramia, head of the Department of Procedural Oversight of the Ministry of Finance at the Prosecutor General's Office to have the minibus returned to its owner, as prescribed by CPC Article 123 (1). The Public Defender's recommendation was acted on, and R. Nikolaishvili, head of Tbilisi Investigation Department of the Fiscal Police was instructed by the Prosecutor General's Office to return the vehicle to its owner, which was fulfilled.

HUMAN RIGHTS IN ARMED FORCES

Starting from the second half of 2006, the Public Defender's Office has started the monitoring of hauptwahts carried out across the country. The monitoring group of PDO Investigation and Monitoring Department carries out monitoring in accordance with Articles 18 and 19 of the Organic Law on the Public Defender of Georgia. In the course of monitoring the Public Defender (or his representative) has the right of unimpeded access to military units to examine the situation of the protection of human rights, meet with military servicemen kept in custody, check the documents related to their custody, etc.

In the event of disciplinary infringement by military servicemen, followed by imposition by the court of administrative arrest – one of the forms of disciplinary penalties – the military serviceman is placed in hauptwahts – administrative detention facilities within the system of the Ministry of Defence. It is to be noted that the maximum duration of administrative detention shall not exceed 30 days.

Overall, there are six hauptwahts in the system of the Ministry of Defence: the hauptwaht of Tbilisi-Mtskheta-Mtianeti regional department (Tbilisi), the hauptwaht of Kakheti Kvemo Kartli regional department (Vaziani), the hauptwaht located in the premises of Samegrelo-Zemo Svaneti regional police department (Senaki); the hauptwaht of Ajara regional department (Batumi); the hauptwaht of Samtskhe-Javakheti regional department (Akhaltsikhe); and the hauptwaht of Shida Kartli regional department (Gori).

The monitoring of these facilities (with the exception of the hauptwaht in Senaki, to which the monitoring group was not allowed access) carried out by the monitoring group of PDO Investigation and Monitoring Department in December 2006 found fairly similar violations there.

1. The hauptwaht of Tbilisi-Mtskheta-Mtianeti regional department: The building of the facility is in need of overhaul; it has one common cell and 11 solitary cells. The common cell has no heating; there are two windows, both with broken glasses; the walls are wet; the cell has no toilet or water supply points; there are ten large wooden platforms – plank beds; the cell has no internal lighting, the only source of light being a bulb outside the cell, which is not sufficient for providing adequate lighting. Of 14 solitary cells: 13 are in use (one has no door); in seven of them the plank bed is removed and is provided to inmates, according to internal regulations, only in night hours; in six cells the plank bed is lifted to the wall, the cells have no sanitation points or heating.
2. The hauptwaht of Kakheti Kvemo Kartli regional department: The facility has ten cells, of which are two-man cells and two are four-man cells. Overall, the general condition of the facility is satisfactory, with the heating system installed. There is no shower.
3. The hauptwaht of Shida Kartli regional department: The facility has five cells; there is no heating system installed, and heating is provided from the wood stove installed in the corridor. The cells have no windows, the only source of light is bulbs installed outside the cells, one per each of the cells; in the evening hours inmates are given wooden platforms to sleep on sleep, that are kept in the corridor during the day time. The cells are in need of overhaul, as is the entire building of the facility.
4. The hauptwaht of Ajara regional department: The facility has three common and six solitary cells; the cells have no heating, and it is cold inside; in evening hours inmates are given wooden boards that are installed on a concrete platform, and taken away in the morning. The building has no toilets and inmates are taken to the premises of military police. There are no showers, and inmates are taken for shower to the military unit in village Adlia, Khelvachauri district.

5. The hauptwaht of Samtskhe-Javakheti regional department: The facility has four cells, with no toilet or water supply points; there is no shower. Cells are lit from outside with bulbs installed in the corridor; they are heated with a wood stove installed in the corridor. In the evening hours inmates are given wooden platforms to sleep on, that are kept in the corridor during the day time. In the corner of outside exercise area there is a latrine and water tap. The cells are in need of overhaul, as is the entire building of the facility.

According to Recommendation R(87)3 (12 February 1987) of the Committee of Ministers to the member states of the Council of Europe on European Prison Rules: "In countries where the law permits imprisonment by order of a court under any non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall not be less favourable than that of untried prisoners." (Rule 99). According to Rule 24: "Every prisoner shall be provided with a separate bed and separate and appropriate bedding which shall be kept in good order and changed often enough to ensure its cleanliness".

According to the UN Standard Minimum Rules for the Treatment of Prisoners: " Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness".

That inmates of hauptwahts are provided in the evening hours with wooden planks instead of beds for them to sleep on, indicates that hauptwahts can by no means be considered to ensure normal conditions of custody accommodation, which is a direct violation of generally accepted principles of the treatment of prisoners. It follows that a soldier has to spend the whole day on foot, as it is not humanly possible to sit on wet concrete floor, especially in winter season. Such regulations directly cause prisoners' unjustified physical pain and mental suffering, and such conditions in custody facilities constitute inhuman and degrading treatment and can be appraised as torture.

The UN Standard Minimum Rules for the Treatment of Prisoners in Rule 11 says that in all places where prisoners are required to live or work, (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation; (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight. Long stay in a poorly lit room can be harmful eyesight. It is necessary to ensure sufficient lighting. Long stay in a room with only artificial light can also be injurious both to prisoner's eyesight and his mental health. Therefore, all cells shall be provided with sufficient artificial light alongside with the source of natural light.

Given the fact that the conditions in the hauptwahts of military police regional departments are in no way adequate for normal custody accommodation, and keeping persons in such conditions can be considered as inhuman and degrading treatment, the Public Defender addressed a recommendation to the Ministry of Defence of Georgia to carry out measures to address the problems found in the course of monitoring – such as to ensure proper showers, toilets, lighting and heating, as well as to provide proper conditions for sleep in custody facilities of the ministry of Defence.

PDO held a presentation concerning the results of the monitoring and the recommendation sent by the Public Defender to the Minister of Defence, in order to inform the public about the situation in the hauptwahts of the Ministry of Defence of Georgia. Chief of the Military Police informed the Public Defender that his recommendations would be taken into consideration in the

functioning of the hauptwahts. Also, on 19 December 2006, Deputy Minister of Defence, G.Sukhitashvili notified the Public Defender that in future the relevant structures of the Ministry of Defence would be ready to assist his representatives in carrying out the monitoring. The Ministry of Defence has thus expressed its readiness to remedy the existing problems, which is *per se* a positive development demonstrating the willingness of the Ministry to cooperate with PDO, which is very important.

PDO was planning to carry out systematic monitoring of the hauptwahts; however, in January 2007 PDO representatives were precluded from further carrying out the monitoring. Military officials present in the territories of Tbilisi-Mtskheta-Mtianeti, Kakheti-Kvemo Kartli, Ajara and Shida Kartli regional departments of MOD Military Police did not allow PDO representatives access to the hautwahts, despite the credentials and IDs presented, thus grossly violating requirements of the Law on the Public Defender of Georgia, and calling in question the actual willingness of the Ministry of Defence to make the system and the human rights situation there transparent for the public.

Despite the obstacles put on the way of monitoring by the Ministry of Defence, the Public Defender refrained from publicising these facts and instead addressed the Minister of Defence with a letter, expressing the desire for the Public Defender and the ministry to cooperate, and requesting to deliberate on the responsibility of officials who refused to grant PDO representatives access to the hauptwahts, which they are entitled to do by the law. The ministry informed PDO that in future PDO representatives would encounter no problems on the way of carrying out the monitoring of hauptwahts. However, in February 2007, when PDO representatives were visiting Samtskhe-Javakheti and Shida Kartli regional department in order to monitor the hauptwahts, they were again denied access.

It is important to note that institutions under the Ministry of Defence are the only place where PDO representatives, carrying out their functions in conformity with the provisions of the Organic Law, encounter problems in terms of unimpeded access to the hauptwahts. Under the Organic Law on the Public Defender of Georgia, the Public Defender's Office is the only institution authorised to monitor the human rights situation in the system of the Ministry of Defence. That representatives of the Public Defender are precluded from carrying out monitoring in the hautpwahts is a clear intention to prevent them from discharging effectively the functions prescribed to them by the law. This can be interpreted as an attempt on the part of the Ministry of Defence to make the system closed for the public, which in turn means violation of the principle of transparency in the system of the Ministry of Defence.

* * *

The Public Defender's report for the first half of 2006 described facts of physical assault in military units (see the case of G.Sharikadze, the case of V Sarishvili). The military Police Department of the Ministry of Defence started preliminary investigation into those facts (Article 386 of the Criminal Code - abuse of relations between military servicemen). In connection with the case of V.Sarishvili, the Public Defender was informed that private Valeri Sarishvili was physically and verbally assaulted by his fellow servicemen B.Meparishvili, I.Revishvili, R.Silagadze, A.Maisuradze, R,Teteloshvili, U.Verulashvili and B.Cheishvili, and private Kutivadze extorted 50 GEL. The persons concerned were subjected to criminal liability under Article 181 (extortion), article 120 (intentional infliction of harm to health) and Article 186 of the Criminal Code. The case was sent with indictment to Akhaltsikhe district court and adjudicated with the judgement of guilty. Investigation into G.Sharikadze's case continues.

ALTERNATIVE LABOUR SERVICE

Under Article 1 of the Law on the Non-Military Alternative Labour Service adopted by the Parliament in 1997, the law represents a reasonable and humane compromise between the freedom of expression, freedom of conscience, belief and religion, on the one hand, and compulsory military service, on the other.

The right of a person to refuse enrolment in compulsory military service for reasons of his religious belief or convictions (the right to conscientious objection) is guaranteed by the Universal Declaration of Human Rights (Article 18) and the International Covenant of Civil and Political Rights (Article 18).

In 2000 the right to conscientious objection was enunciated in the European Union Charter on Fundamental Rights (Article 10.2). In 1990 at the Second Conference of the Organisation for Security and Cooperation in Europe the participating states agreed on the importance of civilian alternative labour service.

Resolutions 1987/46, 1998/77 and 2002/46 of the UN Human Rights Commission acknowledge and reaffirm the right to conscientious objection, as a legal means for enjoyment of the freedom of thought, conscience and religion.

This right was further expanded and refined in a large number of international or regional legal instruments: way back in 1987, in Recommendation R(87)8 the Committee of Ministers of the Council of Europe called upon the member states to bring national legislation in alignment with the principle providing for the right of a person to conscientious objection. Such persons can be made obliged to enrol in alternative service. The Recommendation also establishes minimum standards, such as the right to be registered at any time as a conscientious objector, the right to a fair trial, procedures of non-discriminatory examination of applications for enrolment in alternative service and, what is particularly important, the existence of non-military (civilian) military service.

This recommendation served as a basis for the adoption, in 2001, of Recommendation No.1518/2001 calling upon the member states to bring their domestic legislation and practice with the requirements of the relevant recommendations.

General Situation

Despite the legal recognition of the right to conscientious objection by most of the European states, the existing legislation and practice in most cases fall short of the minimum standards set forth by Recommendations R(87)8 and 1518/2001.

By 2005, most of EU member states (29 out of 26) recognised the right to conscientious objection. In three countries (Azerbaijan, Belarus and Turkey) there is no legal framework for alternative labour service, despite the fact that the constitutions of Azerbaijan and Belarus adopted in 1990 contain provisions concerning the right to conscientious objection.

Georgia recognised this right in 1997 when the Parliament adopted the Law on the Non-Military Alternative Labour Service; however, the legal provisions on conscientious objection are not duly translated into practice. The Department for Alternative Labour Service was established under the Ministry of Labour, Health and Social Welfare, but abolished after three years, by the Ordinance of 22 January 2007 signed by the Minister of Labour, the functions of the department were transferred to the Department of Veterans' Affairs under the same ministry. Over its

existence, the Department has called up for alternative labour service 368 conscripts, and in 2006 enrolled in alternative labour service were 209 conscripts.

In 2006, the break-down of persons serving in alternative labour service by ethnicity was as follows:

Georgians	176
Armenians	14
Azerbaijanis	11
Assyrians	4
Russians	4

By religion, Orthodox Christians account for 62%, whereas followers of other religious confessions account for 38% of persons serving in alternative labour service.

Of all persons in alternative service, only 8 serve in civilian segments of military units, whereas others are involved in reconstruction and rehabilitation of historic or cultural monuments, work in nature reserves and forest-parks, provide care for persons with disabilities, work in shelters for disabled and old-age persons, utilities, etc.

Currently, the functions of the department are fulfilled by one official – Deputy Chairman of the Department of Veterans' Affairs, without any additional support staff, funding or regional offices.

A serious impediment for the department is lack of financial resources. There is not a single cent included in the budget for handling the functions related to management of non-military alternative service.

As of today, the Deputy Chairman of the Department of Veterans' Affairs has received 8 applications: three have been submitted by members of Jehovah's Witnesses, and petitions for 5 conscripts have been submitted by different eparchies and clergymen.

* * *

The Council of Europe in its Recommendation 1518/2001 calls upon the member states to incorporate into their national legislation a provision enabling conscientious objectors to get registered at any time. The same requirement is contained in the UN Resolution 1998/77. In Georgia, similarly to other countries of Europe, it is stipulated by the law that application concerning conscientious objection can only be filed within 19 days after the conscription is announced (Article 7 of the Georgian law on alternative service).

The Public Defender believes that men due for call-up need to have a choice – to take up military service or alternative labour service. To this end, it is necessary for the department handling alternative service to be an efficient, institutionally sound and adequately financed body.

It is necessary to have a structural unit established by internal regulations of the Department of Veterans' Affairs that would be responsible for handling cases concerning call-up to alternative labour service and dealing with related issues.

On 13 February 2007, after the alternative labour service issues were made part of the functions and responsibilities of the Department of Veterans' Affairs, the department sent out written notices to military offices of local government bodies on the structural changes. Due to lack of funds and other technical problems, it is not possible to disseminate information concerning theses changes beyond Tbilisi.

Currently, the main problem confronting alternative labour service is economic predicament and lack of jobs.

Recommendations:
For the attention of the Department of Veterans' Affairs:

- It is necessary to set up, by the Regulations of the Department, an independent structural entity to deal with matters related to non-military alternative labour service, staffed with several experts.
- It is necessary to include into the departments' budget line additional cost items for the said structural unit to be in a position to properly carry out activities within its competences not only in the capital city, but also in regions of Georgia.
- Potential and actual employers should be made aware of their rights and responsibilities in the context of non-military alternative labour service. At the same time, it is necessary to create an electronic data base both on persons taking up alternative service, and potential employers.
- It is necessary to carry out an information and communication campaign at all levels of the society, to have conscripts and their families informed on their right under the law to take up non-military alternative labour service.
- It is necessary to carry out measures to enhance tolerance in the society, so that persons serving in alternative labour service are not seen by the society as evaders of conscription, and protect their legitimate right to take up alternative labour service.

The Case of Guram Tkemaladze

Guram Tkemaladze was subject to conscription. He is an Orthdox Christian and refused to take up military service, based on his faith and conscience. Based on the law, he requested being enrolled not for military service, but for alternative labour service, and applied to Adigeni district military office. His request was rejected without giving him any grounds for refusal. Besides, G.Tkemeladze was subjected to threats of having criminal proceedings initiated against him for evading conscription.

G.Tkemaladse filed an application with the Department of Non-military Alternative Labour Service that considered his application and made a motion with Adigeni district military office. Despite the motion, the military office again refused to grant G.Tkemaladze's request.

Representatives of the Public Defender's Office interviewed head of Adigeni district military office, T.Tumanishvili. He said that by decision of Conscription Commission, G.Tkemaladze was fit for military service, and that he was called up for service in the Armed Forces on 11 August 2006, and received a notification from the military office on his obligation to appear before the military office on a concrete date. However, G.Tkemaladze failed to appear, giving as a reason acute respiratory infection.

On 31 August G.Tkemeladze came to the military office and submitted his application alongside with a directive on his call-up for non-military alternative labour service, issued by head of the Department of Non-Military Alternative Labour Service.

The matter was brought to the attention of J.Tsomaia, head of the Conscription Division of the Department for Regional Matters of the Government Chancellery, on whose instruction G.Tkemaladze personal file was transferred to Samtskhe-Javakheti Regional Military Police Department that remitted it to Adigeni district military office, as examination of the case was beyond the competence of military police.

According to the letter from Adigeni military office received by PDO on 8 September 2006, G.Tkemaladze has been enrolled for non-military alternative labour service, and his file was sent to the relevant department.

The Public Defender believes that applications by persons who adequately substantiate their refusal to take up military service and request being enrolled for alternative labour service should be handed over without any complicated procedures to the Department of Non-Military Alternative Labour Service that today is structurally subordinate to the Department of Veterans' Affairs.

The Case of Erekle Magradze

On 24 January 2007, the Public Defender was addressed by head of Isani-Samgori district military office, D.Davlashelidze who was asking to look into the case of Erekle Magradze. According to E.Magradze, he is member of Jehovah's Witnesses where he serves as a bishop and requests to postpone his conscription according to the provisions of Article 30 (l) of the Law on the Non-Military Alternative Labour Service.

The Public Defender's response states that the provision of the norm should be interpreted to cover a fairly broad circle of persons. This is suggested, *inter alia*, by the wording of the provision, that speaks of clergymen in general, as well as students of theological schools. The legislature in this case does not point to any specifying circumstances, or any religious denomination, hence it does not narrow down the application of the provision to any specific group of persons. This means that a follower of any religion can have his military service postponed if he is a clergyman, or student of a theological seminary.

Such an interpretation is consonant with constitutional standards of human rights. The Constitution of Georgia in article 14 speaks of equality of every person before the law irrespective of " … religion". This is a generic provision on prohibition of discrimination which protects every person so that he/she is not treated differently from others in identical circumstances. Besides, under article 9 of the European Convention on Human Rights and Fundamental Freedoms: "Everyone has the right to freedom of thought, conscience and religion". From this interpretation of the right to freedom of religion, any discriminatory treatment based on religion is inadmissible, as it would lead to very non-conducive environment for realisation of this right.

The letter further stated that this opinion is not binding and reflects the Public Defender's position.

E.Magradze was asked to present to Isani-Samgori district military office an official letter confirming that he is member of the Jehovah's Witnesses, and his order. E.Magradze's file has been sent to the Conscription Commission for review.

ALTERNATIVE LABOUR SERVICE IN THE RESERVE

Closely linked with the non-military alternative labour service is the issues of reserve service. The Law on Military Reserve Service was adopted by the Parliament on 27 December 2007.

According to the Explanatory Note to the Law on Military Reserve Service, the purpose of the law is to establish an adequately qualified reserve for the Armed Forces to strengthen the defence capacity of the country. According to Article 2 (1) of the Law: "The Armed Forces Reserve is established to support the Armed Forces during mobilisation, warfare and/or the state of emergency, or other extraordinary situation or proceeding from interests of national security". Article 4 (1) states that a person is called up for reserve military service in order to undergo combat training.

Article 8 of the Law defines the list of persons to be exempt from the reserve service, including "persons who served non-military alternative labour service".

It is to be considered that from 31 December 2006, by the order of the Minister of Labour, Health and Social Welfare, the Department for Non-Military Alternative Labour Service has been abolished. The functions of the department have been transferred to the Department of Veterans' Affairs where currently the requisite functions are fulfilled by one official – Deputy Chairman of the Department of Veterans' Affairs.

According to the data of the Department for Non-Military Alternative Labour Service, over the period of three years, as many as 368 conscripts were called up for non-military alternative labour service. This number is much lower than the total number of persons subject to call-up for the reserve military service.

The right of a person to refuse to participate in combat training for reasons of conscience, belief and religion is enshrined in the Georgian law. Therefore, it is the Public Defender's opinion that provisions of the Law on Non-Military Alternative Labour service should be interpreted to apply also to persons due to be called up for the reserve service.

Therefore, Article 8 of the Law on Military Reserve Service should be amended to include in the list of persons subject to exemption from the reserve service also conscientious objectors.

HUMAN RIGHTS IN THE PENITENTIARY SYSTEM

The Public Defender's Parliamentary Report for the first half of 2006 covered extensively both positive developments in the penitentiary system, and its deficiencies.

Over the reporting period the Public Defender's Office carried out regular monitoring of the situation in the penitentiary system. From 1 June to 31 December, 216 visits were made to penitentiary institutions, and visit records for 503 prisoners compiled;

June	53 prisoners
July	44 prisoners
August	153 prisoners
September	26 prisoners
October	67 prisoners
November	73 prisoners
December	87 prisoners

To this one has to add the number of prisoners whose visit records were not made, but who were interviewed by PDO representatives.

It is to be noted that most of the problems described earlier, still persisted over the second half of 2006, therefore it seems inappropriate to repeat what was said earlier. Therefore, we will stress only the most important factors.

Following the changes made to the Law on Imprisonment on 28 April 2006, the status of the standing commission to carry put public control of penitentiary establishments has been defined. In the first half of 2006, such commissions were only operational in three establishments, namely: Kutaisi general regime and strict regime prison No.2, Zugdidi Prison No.4, and Batumi Prison No.3. That public commissions have been established at Rustavi general regime and strict regime prison No.1, Geguti general regime and strict regime establishment No.8, Medical Establishment for Prisoners with Tuberculosis, Ksani general regime and strict regime establishment No.7, General and cell-type regime establishment for women and juveniles No.5, Tbilisi prison No.5, Medical Establishment for Prisoners and Rustavi Prison No.6 is a positive and welcome development.

At the same time, we wish to once again emphasise our position that commission members should be given the right to make visual and audio recordings during the visits if necessary.

Prisoners' Right to Visits and Video cameras in meeting rooms

The current legislation limits the time allowed for short-term visits, and long-term visits are for the time being abrogated. It is highly commendable that the draft penal code makes a provision for such visits.

On 16 June 2006, the Public Defender addressed the Penal Department with a recommendation, requesting to dismantle video surveillance cameras in meetings rooms for defence lawyers and their clients in Kutaisi prison No.2 and Tbilisi prison No.7, as Article 84 of the Criminal Procedure Code of Georgia contains an imperative provision, according to which "the defence lawyer shall have the right to meet with his client without anyone's' presence and without any surveillance".

The recommendation has not been followed on by the Ministry of Justice. In addition to Kutaisi Prison No.2 and Tbilisi Prison No.7, video surveillance cameras have been installed in Rustavi Prison No.6. Video surveillance cameras undermine seriously the right of meeting confidentially with one's defence lawyer.

Recommendation: It is necessary to dismantle surveillance facilities installed in the meetings rooms of penitentiary institutions used for meetings between lawyers and their clients

Video Surveillance Camera in "Thieves-in-Law" Ward

Patients J.Sh. and M.Z. – the so-called "thieves-in-law" were placed in the Medical Establishment for Prisoners of the Penal Department, Ministry of Justice. Institution's director, A.Mukhadze, told PDO representatives that a video surveillance devise has been installed in the ward occupied by the "thieves-in-law".

The Law on Imprisonment, Article 8 (4) stipulates that: "In accordance with established rules, a penitentiary institution administration may employ audio, visual, electronic or other technical control facilities to prevent commission of a crime or other violation of law and to obtain necessary information on the convicts' behaviour. A penitentiary institution administration must warn the convicts in advance of the use of aforementioned protective and control measures".

J.Sh. was placed in the Medical Establishment for Prisoners of the Penal Department with the following diagnosis: hypertension, stage 2; instable stenicardia; ischemic heart disease, post-infarction cardio sclerosis. M.Z. is disabled, with spine lesion and, hence, lost sensitivity below the belt. None of them can move autonomously, they have to comply with the needs of nature in the ward that is being surveyed with a surveillance camera.

The above-mentioned legal act provides for the right for a penitentiary institution administration to employ audio, visual, electronic or other technical control facilities without any limitation as to the place where it is used, which implies that audio-visual control technical facilities can be installed both in a cell or carcer, and wards and toilets of a medical establishment.

The right of a prisoner to be protected from unfounded infringement of his privacy is addressed in the case of the European Court of Human Rights *Melone v UK*. The European Court of Human Rights found violation of Article 8 of the Convention. The Court stressed that "the law must give the individual adequate protection against arbitrary interference" (Malone Judgement, para. 67). "It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power". The law must indicate the scope of any discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity. According to the European Court of Human Rights, the law of England and Wales does not indicate with sufficient clarity the limits and means for the executive to have the discretion for interception (wiretapping) of telephone calls. This means that there is no minimum means of legal protection from infringement of the privacy that the citizens must have proceeding from the principle of the rule of law. The law regulating surveillance of a person deprived of liberty must be clear enough to give an idea to the person of those conditions and circumstances with which competent authorities can use a concrete measure of restriction of the right. The Court also stated that existence of law and practice permitting and establishing the system of surveillance of communications is a violation of human rights within the meaning of Article 8.

"Audio and video surveillance is a particularly serious restriction of privacy and should therefore be based on the law which should be particularly precise. It is important to have precise and detailed rules in relation with this matter" (*Krusine v. France*)

Conditions of imprisonment may sometimes amount to inhuman and degrading treatment. In this connection the European Court of Human Rights established in a number of cases violation of Article 3 of the Convention. In terms of Article 8 (4) of the Law on Imprisonment, the most relevant to it is the judgement of the European Court in the case *Peers v.Greece*.

The case concerns the applicant's arrest and detention in August 1994 on drug-related charges. Five days after his arrest, he was moved to Koridallos Prison as a remand prisoner, where he remained after his conviction in July 1995. He was kept in different prisons in Greece before he was released in 1998. The applicant complained that the conditions of his detention at Koridallos prison, including the psychiatric hospital and the Alpha and Delta wings of the prison, violated Article 3. He invoked Article 8 in complaining that the letters addressed to him by the European Commission of Human Rights were opened by prison authorities.

Although the Court considered that there was no evidence of a positive intention of humiliating or debasing the applicant, the absence of such a purpose could not conclusively rule out a finding of a violation of Article 3. The fact that the authorities had taken no steps to improve the unacceptable conditions of the applicant's detention denoted lack of respect for him. The Court tool particularly into account that the applicant had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate. In the Court's opinion, these conditions diminished the applicant's human dignity and gave rise to feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore concluded that conditions of the applicant's detention in the segregation unit of the Delta wing of Koridallos Prison amounted to degrading treatment within the meaning of Article 3. The Committee for the Prevention of Torture, Inhuman and Degrading Treatment and Punishment, whose report was considered as evidence by the Court, gave negative evaluation of the situation in Greek prisons and in para. 109 of its Report made a recommendation for the state to ensure conditions for the use of toilets by prisoners. The Court relied on the principle established in the case law to the effect that in order for an action to be treated within the scope of Article 3, it should reach a minimum level of inhumanity. When defining such a level, it is necessary to consider the duration of treatment, its physical and mental outcome, in some cases the gender, age and health status of the victim (para.67).

The Court looked at the conditions in which the convict had to comply with the needs of nature, and concluded this to be inadequate treatment. The Court noted that for Article 3 to be violated, of decisive importance is not only the character of treatment, but also that such treatment has an intention of humiliating and debasing of a victim. If the treatment is by its character inappropriate and inadequate, however its intention is not debasing the object of treatment, than there is no violation of Article 3.

When appraising the intention of humiliating and debasing, the court considered the fact that the authorities had taken no steps to improve the unacceptable conditions of the applicant's detention, which denoted lack of respect for him.

Article 8 (4) of the Law on Imprisonment gives a penitentiary institution administration a discretion to install visual, electronic or other technical control facilities, including in places where convicts and prisoners satisfy their basic physiological needs. The said provision does not contain any reservation concerning the limitations and the scope of its use. The only conditionality is that the administration must warn the convicts in advance of the use of

surveillance system. However, this limitation is no impediment for carrying out surveillance and control of those persons who can be no threat to the order in a penitentiary institution, or the safety of other prisoners. What is implied here is persons placed in the Medical Establishment for Prisoners who, given their condition, are often unable to represent any threat whatsoever, whereas surveillance is conducted in respect of everyone. In the case in question the only criterion is that under surveillance are the so-called "thieves-in-law". At the same time, intrusion in privacy is performed by particularly harsh methods, namely visual surveillance at the time when a convict complies with the needs of nature.

The source of this evil practice is Article 8 (4) of the Law on Imprisonment that does not restrict the use of surveillance system in terms of place, or special circumstances or conditions. Such surveillance amounts to inhuman and degrading treatment, as is conducted through gross intrusion into privacy. The intention of such treatment is to humiliate and debase a person, expressly manifesting lack of respect for prisoners, as no one bothered to reason if the persons concerned, despite their grave illness, are capable of violating the law and jeopardising the safety of other prisoners. It is difficult to believe that a person with grave illness, that under the existing provisions is subject to various checks and inspections, could pose a serious threat at the moment of using the toilet, to the extent that it is necessary to conduct his visual surveillance in the process.

Food

Nutrition of inmates at penal institutions represents a particularly problematic issue. The penal Department tries to address it, including through the opening of shops inside establishments. Shops have been opened at penitentiary institutions No.6 and No.2 in Rustavi, and No.7 in Tbilisi. The prisoners have personal accounts in the bank, and can buy food and various items themselves.

Hygiene, Clothing and Bedding

Maintaining good personal hygiene is critical to protecting one's health and that of others, but it is essential also to other aspects of life. However, the situation in most of penitentiary establishments in this regards is still very grave. In most cases, the essential hygiene products are provided by families, but there are those who are deprived even of that.

Most establishments have a serious problem in terms of bedding. As reported by prisoners, their bedding is not changed for months.

During the time of the visit of the Human Rights Commissioner, Mr. Thomas Hummarberg, prisoners at Rustavi establishment No.2 had no bedding at all.

Work and Education

Provision of work during sentence is of major importance for prisoners' rehabilitation. However, this issue does not represent the matter of any priority for the Penal Department, and prisoners are deprived of any possibility to enjoy the right given to them by the law.

Besides being of major importance of prisoners' rehabilitation, work programmes offer prisoners the possibility of engaging in purposeful activity. The basic importance of the work provided lies also in its relevance to re-socialisation and increasing prisoners' ability to earn a living after release. In addition, prisoners whose families do not have sufficient financial capacity to transfer money to their accounts for them to use shops, can earn money themselves.

The launch of educational programmes at some of penitentiary institutions is a positive development. Thus, for instance, Kutaisi Prison No.2 offers an educational programme, in which prisoners can acquire computer literacy, learn using PC. The program is implemented by the monitoring commission established with Kutaisi Prison No.2.

Overcrowding

Regrettably, overcrowding has been a chronic problem afflicting Georgia's penitentiary system, despite building new facilities. Overcrowding in cells in summer months led to acute shortage of oxygen, and prisoners had no air to breath, which was one of the factors causing death.

The situation as of July 1 and October 16, 2006 was as follows:

- Zugdidi common and strict regime establishment No.1: capacity – 950, number of inmates held as of 1 July – 1528, and as of 16 October - 1885
- Common and cell-type establishment No.5 for women and juveniles:
  Juveniles' section: capacity – 108, number of inmates held as of 1 July – 124;
  Women's prison: capacity – 118, number of inmates held as of 1 July– 167 and as of 16 October - 170;
  Women's penal establishment: capacity – 220, number of inmates held as of 1 July- 269, and as of 16 October – 357;
- Ksani strict regime establishment No.7: capacity – 1010, number of inmates held as as of 16 October – 1298;
- Geguti common and strict regime establishment - capacity – 900, number of inmates held as of 1 July – 968, and as of 16 October – 1283;
- Tbilisi Prison No.1: capacity - 620, number of inmates held as of 1 July – 841, and as of 16 October – 993
- Batumi Prison No.3: capacity - 250, number of inmates held as of 1 July – 563, and as of 16 October - 591
- Zugdidi Prison No.4: capacity - 305, number of inmates held as of 1 July – 382, and as of 16 October - 348
- Tbilisi Prison No. 5: capacity - 2020, number of inmates held as of 1 July – 3774 and as of 16 October – 3971.

That in Tbilisi Prison No 5, in the most overcrowded cells 1 bed accounts for an average 4 prisoners who must take turns to sleep, has to be viewedd within Article 3 of the European Convention (prohibition of torture) and can safely be interpreted as torture and inhuman treatment.

Prisoners' Beating and Torture, and Degrading Treatment

It is necessary to look into the facts of beating and torturing prisoners, their inhuman and degrading treatment, and disproportionate use of force against them.

Undressed Prisoners in Disciplinary Cell of Establishment No.6

It is particularly important to note the incident at Prison No.6, where prisoners were placed in a disciplinary cell undressed. The situation clearly was the one to be viewed as torture, inhuman and degrading treatment.

On 13 and 15 September 2006, PDO representatives were carrying out monitoring at Rustavi Prison No.6 and strict regime establishment. They met with convicts Genadi Tsurtsumia, Imeda Butkhuzi and Badri Ketsbaia, who were placed in a cell without any clothes, but underwear. Their clothes could be found outside the cell, in the corridor, near the desk of the duty officer

According to G.Tsurtsumia, he had been kept in a disciplinary cell for 16 days, without clothes, as his clothes were taken away by the administration. Despite his request, he was not given items for personal hygiene, such as a towel, soap, tooth brush and toothpaste, not even a pen and a paper. PDO representatives looked at the register of inmates placed in disciplinary cells, and found that G.Tsurtsumia was not recorded there at all. Members of the administration failed to present any order concerning G.Tsurtsumia's disciplinary punishment.

According to I. Butkhuzi, he had been kept in a disciplinary cell from 14 September. Members of the administration took away his clothes. He was not given a pen and a paper either.

According to Badri Katsbaia, he had been kept in a disciplinary cell from 11 September. Members of the administration took away his clothes, leaving him only in underwear.

The monitoring of disciplinary cells showed that none of them had any mattress and bedding, and prisoners had to sleep on wooden plank beds. The prisoners said that being without any clothes, they felt cold at night.

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On 28 October 2006, PDO representatives visited Rustavi Prison No.6 and met with inmates Vazha Gegenava and Rudik Ovakian, who had been also kept in disciplinary cells in September 2006.

V.Gegenava reported that he was fully deprived of his clothes and placed in a disciplinary cell naked. His underwear was given back to him in about 2 hours, whereas the clothes – only after ten days, when his disciplinary punishment expired.

R. Ovakian reported being kept in a disciplinary cell for several hours, completely naked.

Both prisoners said they felt cold, but this notwithstanding, the administration did not give them their clothes.

Article 26 (1) of the Law on Imprisonment prescribes the right for a prisoner to "a) be provided with garments"; Article 34 says that "A convict shall have adequate facilities to . . . observe personal hygiene without any prejudice to human dignity and honour". Under the Regulations for strict regime establishments (article 25, 1 and 5), "a convict shall be provided with adequate facilities for maintenance of personal hygiene, as well as with pen, notebook, newspapers and magazines".

The administration of the establishment alleged that the prisoners themselves refused wearing clothes, which is emphatically denied by the convicts. On 15 September, during another monitoring at the same establishment they were already wearing clothes; however, they said that clothes were given to them 15 minutes before the arrival of the PDO group.

Depriving prisoners of clothes, creating unbearable conditions, barring them from the use of facilities for maintenance of personal hygiene, as well as paper and pen for correspondence is contrary to the Georgian legislation and provisions of the international treaties ratified by Georgia (International Covenant on Civil and Political Rights – Article 7 and 10; Convention

against Torture and Other Forms of Cruel, Inhuman and degrading Treatment and Punishment; European Convention for the Protection of Human Rights and Fundamental Freedoms – Article 3). The actions described above clearly amount to torture, inhuman and degrading treatment.

On 26 October 2006, the Public Defender sent relevant materials to the Prosecutor General's Office for it to start preliminary investigation. On 27 October, the investigation department of the Prosecutor General's Office opened preliminary investigation into possible excess of official authority my some members of administration of Rustavi Prison No.6 – an offence under Article 333 (1) of the Criminal Code.

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Facts of beating prisoners still persist in the penitentiary institutions.

The Case of M.Kereselidze, O.Baboev, T.Shaveshov and G.Vashakidze

On 7 September 2006, representatives of the Public Defender's Office met with prisoners of Prison No.1 of the Penal Department: M.Kereselidze, O.Baboev, T.Shaveshov and G.Vashakidze. Accoridng to the prisoners, On 6 September 2006, Levan Maruashvili, director of Prison No 1 of the Penal Department of the Ministry of Justice of Georgia, entered one of the prison's cells together with several other persons. He introduced himself to the cell's inmates – M.Kereselidze, O.Baboev, T.Shavedov and G.Vashakidze – as the new director and threatened them that unless they give him their mobile phones, they would end up with forbidden objects "planted" with them, and hence, with increased penalties. The search of the cell did not demonstrate the presence of any illegal objects, however, the inmates were taken separately out of the cell and physically abused. Examination of the detainees displayed injuries on their backs and feet. PDO representatives received explanations from the detainees and filed the reports that were sent for follow-up to George Latsabidze, Deputy Prosecutor General; Pavle Kovziridze, Chief of Investigative Department of the Ministry of Justice, and Tamar Tomashvili, head of the Human Rights Department of the Prosecutor General's Office.

On 20 September 2006, G.Gvarjaladze, a.i. head of the investigative department informed he Public Defender that preliminary investigation into the case started and the criminal case was sent for follow-on to the Prosecutor General's Office.

The Case of David Asatiani

Representatives of the Public Defender's Office met with defendant D.Asatiani who said that on 3 January 2007 he was physically assaulted by convoy officers.

B.Akhalaia, head of the Penal Department convened a briefing on the following day and said that the incident would be investigated very shortly.

Despite the fact that D.Asatiani was physically assaulted by six officers of the quick response special unit under the Penal Department, only two of them received charges, and were subjected to a disproportionately light penalty. Namely, M.Giorgadze and K.Gulbani, officers of the quick response special unit of the Penal Department, received charges under Article 333, Para 1 of the Criminal Code of Georgia (exceeding official powers resulting in substantial impairment of the rights of a physical or legal person or legitimate interests of the state – punishable with deprivation of liberty for a period of up to three years, and withdrawal of the right to hold an office for up to three years).

On 18 January 2007, the Chamber of Criminal Cases of Tbilisi City Court ordered imposing on M.Giorgadze and K.Gulbani a bail of 3 thousand GEL each as a measure of restraint.

The Case of B.Maruashvili

On 13 February 2006, the Public Defender was addressed by G.Khachidze, defence lawyer of convict B.Maruahsvili. According to the applicant, on 9 February his client, placed in Ksani strict regime establishment No.7 was physically assaulted by members of the administration, who also "Planted" a mobile phone. According to the lawyer, B.Maruashvili was unlawfully recognised as a suspect for alleged commission of a crime under Article 378 of the Criminal Code.

On 14 February 2006, PDO representatives met with B.Maruahsvili's cellmates: T.Chulukhadze, M.Bazadze and V.Akhaladze. They said that on 9 February, members of prison administration entered their cell – one of them was G. Kvaratskhelia – who told the inmates to get up and ordered B.Maruashvili to follow them, which he did. The convicts did not know where he was taken, as they never saw him back. They also said that no illegal object was withdrawn from B. Maruahsvili during the search in the cell.

On 15 February 2006, PDO representatives met with B.Maruahsvili placed in Tbilisi Prison No.5, who said he was transferred there from Ksani establishment No.7 on 10 February. He said that on 9 February, when he was held at Ksani, several persons came into the cell, among them Gocha Kvaratskhelia, some Alik and seven other members of prison staff. They searched B.Maruashvili, and having found nothing prohibited, took him out of the cell. He was verbally abused and physically assaulted by Alik. Then he was taken to some premises in the building of the establishment, where he was again beaten by Alik, who said he would tell the administration that he, B. Maruashvili, has a mobile phone. Then A.Arakelov, director of the establishment, entered and said they would increase his punishment, and recalled B.Maruashvili's escape from Rustavi Prison No.2, when one of staff members of the prison was killed. At that time A.Arakelov was director of Rustavi prison, and he lost his post due to the incident. Then they gave him a framed-up report and told him to certify with his signature that he had a mobile phone, which the prisoner refused to do.

The Public Defender sent relevant materials to G.Latsabidze, Deputy Prosecutor General for examination and follow-on.

The Case of M.Somkhishvili

The Public Defender was addressed by L.Jakobia, mother of prisoner M.Somkhishvili, defendant, held at the Medical Establishment for Prisoners, and M.Jishkariani, president of the Centre for rehabilitation of Victims of Torture "Empathy". The applicants stated that in the course of monitoring, M.Somkhishvili was found to have physical injuries that, according to him, were caused by multiple repeated beatings. PDO representatives met with M.Somkhishvili who confirmed the fact of beating.

The Public Defender addressed the Deputy Prosecutor General, the Investigative Department of the Ministry of Justice, and Human Rights Department of the Prosecutor General's Office requesting to follow on the case. According to information provided by the Prosecutor General's Office, on 20 October 2006, the investigative department of the Prosecutor General's Office opened preliminary investigation into case No.74068391 on the fact of beating defendant M. Somkhishvili – an offence under Article 333 (3) of the Criminal Code. On 25 October, 2006,

forensic examination was conducted to look at and appraise the degree of severity of injuries, inflicted on M.Somkhishvili. Preliminary investigation was in process.

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With a view to prevention of crime in the penitentiary system, the Ministry of Justice and the Prosecutor General's Office must ensure that no case remains outside investigation, and no perpetrator goes unpunished.

Complaints Concerning the 'Planting" of Prohibited Items with Prisoners

Notably, several "thieves-in-law' were close to the termination of their sentence at Tbilisi prison No.7, when prohibited objects happened to be found in their cell. This lead to an increase of their penalty. It is difficult to assume that such an offence could happen shortly before the time o release.

The case of Akaki Landia, Malkhaz Mgaloblishvili and Giorgi Endzeladze

Lawyers of the Public Defender's Office presented copies of criminal case No 073060364 in processed by the investigative department of the Ministry of Justice. According to the documents, on 8 August 2006, in the course of examination at cell No.23 of Prison No. 7, officers of the security service found inmates of the cell: A.Landia, M.Mgaloblishvili and G.Endzeladze to have prohibited items, namely, knives that they were alleged to keep under mattresses. All the three persons are the so-called "thieves-in-the law". Their term in prison was expected to terminate for A.Landia – on 15 August 2006, M.Mgaloblishvili – on 29 October 2006, and G.Endzeladze – on 22 December 2006.

A.Landia, M.Mgaloblishvili and G.Endzeladze were subjected to criminal liability on account of signs of a crime provided for in Article 378 (1) of the Criminal Code (possession of prohibited items). The persons refused to admit the crime and used their right to silence. By decision of Tbilisi City Court of 12 December 2006, they were subjected to imprisonment. Preliminary investigation into the case ended on 22 August 2006. Indictment on the case was compiled on 24 August 2006 in accordance with Articles 48 and 416 of the Criminal Procedure Code. The case was transferred for consideration to the Chamber of Criminal Cases of Tbilisi City Court.

Several circumstances give grounds for doubt. Prison No.7 conducts regular check-ups, and it is next to impossible to have any prohibited items brought into the prison without "assistance" of the prison administration. Also, the objects happened to be found very shortly before the time of release.

* * *

The facts of discovering prohibited objects with inmates of Prison No. 1 also look highly doubtful.

The Case of T.Kortua

On 12 December 2006, PDO representatives interviewed T.Kortua, serving his sentence in Tbilisi Prison No 1 of the Penal Department. According to T.Kortua, on 5 December 2006 members of the said penal institution planted a prohibited item (mobile phone SIM card) with T.Kortua and two other prisoners. The Public Defender sent the relevant materials for investigation to the Prosecutor General's Office and the investigative department of the Ministry of Justice.

From the information provided by the Prosecutor General's Office, the investigative unit started preliminary investigation on criminal case No. 74068471 on excess of official authority by staff members of Tbilisi Prison No.1 - an offence under Article 333 (1) of the Criminal Code of Georgia.

The Case of A.Gamkrelidze

On 8 December 2006, PDO representatives interviewed A.Gamkrelidze, serving his sentence in Tbilisi Prison No.1 of the Penal Department. According to A.Gamkrelidze and his lawyer G. Amashukeli, the prisoner was repeatedly threatened with the "planting" of a mobile phone or other prohibited item. A.Gamkrelidze said that on 6 December 2006, in late hours, members of the said penal institution conducted a search in his cell. They took out all the inmates out of the cell, and stayed there for some tie. Then they took A.Gamkrelidze to the administrative building, put a cell phone on the table and told him it was his phone. A.Gamkrelidze denied his having a phone at the prison. He was charged with commission of an offence provided for by Article 378 of the Criminal Code.

PDO representatives interviews A.Gamkrelidze's cellmates, T.Kortua and E.Melikyan, who gave a similar account of events.

On 12 December 2006, Public Defender sent the relevant materials for investigation to the Prosecutor General's Office. From the response letter from the Prosecutor General's Office it followed that the investigative unit started preliminary investigation under Article 333 (1) of the Criminal Code of Georgia.

Provision of Medical Services in the Penitentiary System

The Public Defender's Report for the first half of 2006 provided detailed description of the problems in the provision of medical services in penitentiary institutions. The situation has not changed way since 1 July 2006. The death rate among prisoners has almost doubled. Over 2006, 92 prisoners died, one their of them in the first half and two thirds in the second half of 2006.

Prisoners mostly suffer from viral hepatitis, tuberculosis, cardio-vascular and neurological diseases, to which the conditions existing in penitentiary institutions are highly conducive, such as sanitary and epidemiological situation, inadequate accommodation, overcrowding, as well as acute shortage of medical personnel and deficiency of the material and technical basis.

Representatives of the Public Defender's Office and the Centre for Rehabilitation of Victims of Torture "Empathy" carried out joint monitoring to examine the condition of medial service in the penitentiary institutions of Western Georgia and found a host of problems, such as:

1. Kutaisi Prison No.2 (cell-type and strict regime establishment) – 1) shortage of personnel; 2) inadequate or deficient provision of medications; 3) non-availability of a separate room for psychiatric patients in the medical ward; 4) inadequate dental service; 5) non-availability of a clinical laboratory, making it impossible to carry out timely and cost-effective diagnosis; 6) medical professionals and clinical and laboratory tests are in most cases provided at the expense of prisoners; 7) inadequate record-keeping in medical cards; 8) no documented informed consent to a medical manipulation; 9) several patients required forensic psychiatric examination. It is not clear why such

patients end up in prisons or why they are not diagnosed and sent for forensic examination.

2. Zugdidi Prison No.4 – 1) shortage of personnel; 2) inadequate or deficient provision of medications; 3) non-availability of a separate room for psychiatric patients in the medical ward; 4) grossly insanitary conditions; 5) non-availability of basic surgical instruments; 6) non-availability of a clinical laboratory, making it impossible to carry out diagnosis.
3. Batumi Prison No.3 - 1) shortage of personnel; 2) inadequate or deficient provision of medications; 3) non-availability of a separate room for psychiatric patients in the medical ward; 4) inadequate dental service; 5) flawed transfer of medical information, which undermines continuity of medical services; 6) most of the forms for medical documentation (medical registers) were available, but they were virtually no record made in them; 7) the available medical equipment made it impossible to provide any meaningful medical assistance (intubation tubes, tracheotomy kits, laryngoscope, defibrillator, etc. were not available); 8) this prison accounted for a largest number of HIV positive patients compared to other institutions. According to the staff of the medical ward, 16 cases of HIV were recorded, and of these 3 patients died.

Proper medical examination of prisoners and their referral for treatment constitutes a persistent problem. Not infrequently, such examination is only provided after intervention by the Public Defender. Eighteen prisoners were given examination at the recommendation of the Public Defender and referred transferred or treatment to the Medical Establishment for Prisoners.

The Case of G.A.

The Public Defender was addressed by parents of prisoner G.A. concerned about the health condition of their son.

During the riot of 27 March 2006 at Tbilisi Prison No. 5, defendant G.A. was transferred to Tbilisi prison No.7, where he was visited several times by representatives of the Public Defender's Office and M. Jishkariani, president of Empathy Centre.

PDO sent a notice to the Penitentiary System Reform, Monitoring and Medical Service Department of the Ministry of Justice requesting to examine health status of the prisoner. From the answer of the Department it followed that on 3 May a commission of medical experts examined G.A's health status at Prison No. 7 and diagnosed him with calculous cholecystitis.

On 28 June G.A. was transferred for surgery from the Medical Establishment for Prisoners to Tbilisi Hospital No.1 with the diagnosis of calculous cholecystitis, post-surgical hernia, and chronic appendicitis. On 30 June he was given a surgery – lapatomy, cholecystomy and appendectomy, as well as post-surgical hernia plasty. He also underwent a tomography and was found to have a formation in the right maxillary sinus.

According to G.A.'s attending physician and the surgeon, for a certain period of time (2 weeks) the patient required hospital treatment and observation, as sutures were not yet removed. This notwithstanding, on 11 July G.A. was transferred by convoy from Hospital No.1 to Prison no.7, where he was not admitted and was sent to the Prison Hospital. The attending doctor T.Chartolani spoke to chief physical of the Prison Hospital, D.Asatiani, who said that control of such situation in a prison hospital would be extremely difficult from the medical perspective. So, on 11 July in the evening he was brought back to Hospital No.1.

Notably, no adequate treatment was provided to G.A. at the republican Prison Hospital, and it was only after the intervention by the Public Defender that he was taken for surgery to Tbilisi Clinical Hospital No.1. The Public Defender addressed for assistance M. Jishkariani, president of the Empathy Centre that covered the costs of surgery.

The Case of M.Ts.

The Public Defender was addressed by M.K. concerned about the health condition of his son, M.Ts.

On 4 August 2006, PDO representatives met with D.Asatiani, chief physician of the Medical Establishment for Prisoners, under the Penal Department. M.Ts. received a surgery on the right thigh and was in need of another surgery to remove metal pieces. M.Ts.'s family invited a specialist from the Anti-Sepsis Centre who concluded that the patient required a surgery. However, given the conditions at the institution, the invited doctor said it was necessary to have the patient transferred to a civilian hospital. According to D.Asatiani, since the transfer of M.Ts. to a city hospital was delayed for various reasons, and it was no longer expedient to continue his treatment at the Medical Establishment for Prisoners, he was transferred to Tbilisi Prison No. 5.

PDO representatives visited Tbilisi Prison No. 5 where they met with A.Esvanjia, chief physician of the prison's medical ward. He said that on 8 June he addressed G.Mikanadze, deputy Minister of Justice and requested to authorise him to have the patient transferred to a civilian hospital, but no answer followed.

Representatives of the Public Defender's Office met with M.Ts., and examined him. The medial surface of the right thing was damaged, with a metal rod visible that was introduced in the course of a surgery. According to M.Ts., in 2004 he received a gunshot injury in the same area, which led to a comminuted bone fracture, after which he was operated on at Gudushauri medical Centre. M.Ts. said he also had a spine lesion. Motility in the extremity was preserved (in the foot area). He had pain and temperature sensation in the same area. M.Ts. was asking to have him transferred to a specialised hospital for surgery.

The Public Defender addressed on this matter the chairman of the joint medical expert commission, established under the Ministry of Labour, Health and Social Welfare who informed PDO that M.Ts. underwent a surgery at the Anti-Sepsis National Centre, and on 8 September was transferred to the Medical Establishment for Prisoners.

The Case of A.K.

On 30 October 2006, the Public Defender was addressed by E.K. with an application concerning the health status of convicted prisoner A.K., placed at the Medical Establishment for Prisoners where he underwent X ray, clinical and laboratory tests. However, he needed additional tests that the Medical Establishment for Prisoners could not provide. A.K. required additional tests in order to present to the joint medical expert commission of the Ministry of Justicem, and Ministry of Labour, Health and Social Welfare that would examine the issue of his remission from penalty.

On 1 November 2006, the Public Defender made a recommendation to B.Akhalaia, head of the Penal Department to ensure the transfer of A.K. to a specialised medical institution. The Public Defender was notified that convict A.K. was transferred to Tbilisi Hospital No.4 for examination and further treatment.

The Case of A.V.

On 26 September 2006, representatives of the Public Defender's Office visited the Medical Establishment for Prisoners of the Penal Department of the Ministry of Justice and met with prisoner A.V., who was in a very severe condition of health. There was a risk of his losing his right leg. According to physician M.Mchedlidze, A.V. required consultation by a neurosurgeon.

On 27 September PDO addressed M.Jishkariani, president of the Empathy Centre for Psychological Rehabilitation of Victims of Torture and Violence, and asked her to assist in providing a consultation for A.V. and his further treatment. Medical specialists examined A.V. and made the following diagnosis: complication following osteorrhaphy performed for gunshot fracture of the left thighbone, traumatic amputation of toes on the left foot, traumatic lesion of right minor femoral nerve.

According to M.Jishkariani's recommendation, in order to ascertain the diagnosis, define treatment tactics and determine the pertinence of a surgery, it was necessary to perform myography of the right thighbone, and microbiological investigation of the left foot.

On 18 October 2006, the Public Defender made a recommendation to B.Akhalaia, head of the Penal Department to ensure a convoyed transfer of A.V. to a specialised medical institution for myography. The Public Defender was notified that on 8 November A.V. was transferred to the neurological ward of the Academy for Post-Diploma Medical Education for myographic examination.

The Case of G.J.

On 3 October 2006, representatives of the Public Defender's Office visited the Tbilisi prison No.7 and met with prisoner G.J. who has undergone a surgery on the right thighbone, with a metal device attached. His thigh suppurated and he suffered from severe pain. G.J. required specific treatment, not available at the establishment.

PDO sent a notice to Prison No.7 for the prison doctor to carry out examination of G.J. and if necessary, to have him transferred treatment to the Medical Establishment for Prisoners. On 6 October G.J. was transferred to the said facility.

The Case of D.L.

The Public Defender was addressed by the brother of D.L., convicted prisoner, kept at Tbilisi Prison No.7. According to the applicant, his brother was in severe condition of health (with a tumor, for which reason he required urgent surgery) and required transfer to the Republican Prison Hospital for treatment.

On 26 October 2006, the Public Defender made a recommendation to B.Akhalaia, head of the Penal Department to ensure the transfer of D.L. to the Medical Establishment for Prisoners. The Public Defender's recommendation was followed on and on 11 November D.L. was transferred to the Medical Establishment for Prisoners.

The Case of J.Sh.

The Public Defender was addressed by defence counsel Sh. Shavgulidze, defending the interests of J.Sh., defendant. According to the applicant, his client was in a severe condition of health and placed at the Medical Establishment for Prisoners. At the request of defence, to examine his

status an alternative forensic examination was appointed, and it was to be carried out by Forensic Centre "Vector"; however the experts were not allowed to enter the institution to carry out the appraisal.

The criminal procedure law guarantees for a party to perform alternative forensic appraisal and administration of the establishment where the prisoner is placed is under an obligation to ensure the prisoner's meeting with an expert, namely: Article 96 (6) of the Criminal Procedure Code says that "the right to procure the expert's report shall be granted also to a party", Article364 (1) says that "a party shall have the right, at its own initiative and with its own means to carry out an expert appraisal to establish the facts that, in his opinion, can be helpful in protecting his own interests. The expert institution is under an obligation to carry out an appraisal appointed and paid for by the party". According to Article 137 (1), administration of custodial institutions is under an obligation to ensure "a face-to-face meeting between an arrested or detained person, and a doctor or forensic expert". Under Para. 2 of the same article: "failure by administration of a custodial institution to perform its procedural function shall entail his liability, as prescribed by the law".

On 6 September 2006, the Public Defender made a recommendation to B.Akhalaia, head of the Penal Department to ensure access of forensic experts to the Medical Establishment for Prisoners. The Public Defender's recommendation was followed on, and experts were given access to the institution.

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There was a case when the Public Defender's recommendation was not acted on, and the right of a convicted prisoner to get additional medical assistance at his own expense was restricted.

The case of A.I.

The Public Defender was addressed by defence counsel Eka Surguladze, defending the interests A.I. kept in Prison No.7. According to the applicant, her client was in a severe condition of health, suffering from weakness, dyspnea, and systematically elevated temperature of 37.5-37.6^0 etc. Prison doctor told E.Surguladze that A.I. required roentgenography and thorough examination.

On 27 September 2006, the defence counsel addressed G.Kiknavelidze, director of Prison No.7 and requested to permit access to the establishment for physicians of Tbilisi Central Republican Clinic: phthisiotherapist, ultra-sonographist, roentgenologist and lab assistant in order to carry out examination of A.I.'s health status and prescribe treatment, as provided for in Article 137 of the Criminal Procedure Code.

On 10 October, when meeting PDO representatives, A.I. said that on 30 September 2006, he had undergone roentgenography and blood testing at the Medical Establishment for Prisoners. On 9 October 2006, the doctor of Prison No. 7 told him his illness was not confirmed. However, according to A.I., he was persistently suffering from weakness, dyspnea, and systematically elevated temperature of 37.5-37.6^0. He requested to provide medical assistance. Under Article 26 of the Law on Imprisonment: "The accused/convict shall have the right to enjoy health care service as needed".

According to Prison regime regulations (approved by the Minister of Justice by order No. 367), Article 27 (20) "The convict shall have the right, to enjoy any health care service of his choice, payable at his own expense, that is provided by healthcare professionals in a hospital type or treatment station type establishment". According to Article 27 (21): "In deciding on this issue, it

is necessary to consider the opinion of prison medical service staff. The application shall be considered within three days, and the time is appointed for inviting a required specialist into the prison. When inviting a specialist, it is necessary to satisfy oneself that he is a holder of a license for medical activity".

Given the above, on 9 October 2006, the Public Defender made a recommendation to director of prison No.7 requesting to provide for access of medical specialists for the purpose of carrying out medical examination of convict A.I.

On 9 January 2007, I.Tsintsabidze, deputy head of the Penal Department , and later, on 12 January G.Kiknavelidze, director of Prison No.7, informed the Public Defender that A.I received a consultation from medical specialists of the Medical Establishment for Prisoners, and was transferred to the latter for specialist examination (ultra-sonography, roentgenology, blood and urine tests, etc.). Based on the results of examination, A.I. displayed no pathological changes, he was observed by a doctor, and in case of need would be given symptomatic treatment.

Hence, the Public Defender's recommendation was not acted on, and A.I. was restricted in his legitimate right to medical assistance and service.

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The Public Defender took an interest in the health condition of prisoners kept in the psychiatric ward of the Medical Establishment for Prisoners. The psychiatric ward of the said institution was found to accommodate prisoners whose psycho-physical condition was extremely grave, however they were not offered any forensic psychiatric examination either at preliminary investigation or court trial phase, and the issue of their mental sanity was not finally ascertained.

1. I.B.
2. Z.M.
3. V.Ch.
4. T.G.
5. G.B.
6. K.N.
7. S.B.
8. T.M.
9. Z.J.
10. O.M.

On 17 October 2006, the Public Defender addressed M.Jishkariani, president of the Empathy Centre for Rehabilitation of Victims of Torture for assistance in examining mental health of the above prisoners.

M.Jishkariani stated in her response letter that within the framework of the programme on "Implementation of International Standards for the Prevention of Torture" that deals in one part with identifying and advocacy of prisoners with grave psychic pathologies, the Centre "Empathy" would examine mental health of the patients in case the administration of the Medical Establishment for Prisoners provides access to prisoners.

On 17 November 2006, the Public Defender's Office sent a notice to the head of the Penal Department with a request to assist in the earliest possible access of mental health specialists to the Medical Establishment for Prisoners in order to examine their health status.

Since no reply followed, on 26 December 2006 PDO sent a reminder to head of the Penal Department, with no reply again.

These facts are illustrative of the existence of inhuman conditions in the penitentiary system and inhumane attitude toward prisoners on the part of the staff.

The report of US State Department published in 2006 in relation to Georgia states that over the year the death toll in the penitentiary system increased. The Minister of Justice announced that 92 persons died in penitentiary institution in Georgia (of these four committed a suicide), whereas the number of deaths in 2005 was 46. Suicidal attempts and self-inflicted injuries can be viewed as protesting against existing conditions and violation of the rights of prisoners.

According to NGOs, including the Human Rights Watch, prisoners with mental problems were found to be in absolutely deplorable condition. Despite instructions from the court, such prisoners are not transferred to medical wards. Sometimes they are placed in isolation wards.

Notably, isolation wards at the Medical Establishment for Prisoners look more like a dungeon:

During the monitoring of isolation wards the Medical Establishment for Prisoners by PDO representatives on 15 August 2006 and 13 February 2007, they were found to be in appalling state. Conditions there appear to be similar to conditions at disciplinary cells of Tbilisi prisons No.1 and No.5. There are six such wards. As reported by the administration of the establishment, only one of these is not functional. The wards are damp, smelling, with litter on the floor, no glass in the windows, non-operational central heating, cold, with no partitioning of toilets from the rest of the room. The impression is that they have not been cleaned for a very long time. Conditions are grossly insanitary.

Given the fact that these wards are used for placement of persons with mental health problems during exacerbation of the disease, one has to note that they are running serious risks to life and health. Metal bars installed on the windows can easily been used to self-inflict injuries. Interestingly, the administration reasoned that if an inmate wishes to inflict damage to himself, he can hit his head against the wall, therefore it is not necessary to fix the bars. Isolation wards are the place where it is necessary to have walls with soft lining. In such conditions it is impossible to provide any treatment. However, long accommodation in such wards leads to further deterioration of their physical and psychological condition.

These ward were seen by Mr.Thomas Hammarberger, High Commissioner for Human Rights, though one has no note that for his visit, similarly to PDO recent visit, the wards were relatively cleaned.

* * *

It is important to look at a case where the Penal department and the administration of the Medical Establishment for prisoners showed negligence towards a prisoner in a serious psychic state. The prisoner required urgent psychiatric assistance in hospital conditions, which is not available in the Medical Establishment for Prisoners. It is impossible to provide specialised assistance even in the “psychiatric ward” of the establishment, as it is grossly against any international or national norms and standards. Because of the failure to have the patient transferred to a psychiatric care institution, his stay at the Medical Institution for Prisoners constituted an example of torture and inhuman and degrading treatment.

The Case of Giorgi Mikiashvili

On 29 October 2005, patrol police arrested in Tbilisi Giorgi Mikiashvili, charged under article 353 of the Criminal Code (resistance, threat or violence against persons guarding public order, or other state agents). The arrested person displayed physical injuries in the head area that, according to G.Mikiashvili were inflicted by police when beating him in the course of arrest. On 20 December, after the Public Defender took interest in the case of Giorgi Mikiashvili in connection with his mental incompetence, preliminary investigation was opened into the fact of excess of official authority by police – an offence under Article 333 of the Criminal Code. The investigation was later dropped for absence of a crime in the act. Mikiashvili was subjected to custody as a measure of restraint and placed in Tbilisi prison No.5. On 11 November, 2005 he was transferred from the prison to the Republican Prison Hospital and placed in the psychiatric ward. G.Mikiashvili's health condition was examined by psychiatrists of the Psychological Rehabilitation Centre "Empathy" (M.Jishkariani, G.Berulava, K.Chkoidze) who gave their expert report. Based on the report, G.Mikiashvili was diagnosed with grave delirium, closed cranial injury and concussion of the brain". Despite repeated warning by the experts of "empathy" concerning the need for patient to undergo comprehensive examination and further treatment, he was discharged from hospital. After three days, because his condition exacerbated again, he was brought back to the Medical Institution fro Prisoners.

On 15 August 2006, as reported by G. Mikiashvili, he was beaten by members of the administration of the medical establishment, including deputy director G.Butliashvili. According to Levan Labauri, medical doctor, assistant of PDO Centre for Protection of Patients; Rights who examined G.Mikiashvili, he displayed multiple bruises and excoriations, as well as a formation on the head. For safety reasons, G.Mikiashvili was transferred to the isolation ward. Notably, isolation wards are very similar to the so-called carcers, or disciplinary lock-up cells, with unbearable conditions, and their stay per se means torture and degrading treatment.

On 15 August 2006, the Public Defender held a press conference, where he said that G.Mikiashvili's treatment and his being kept in inhuman conditions tantamount to torture. On the same day the Public Defender addressed the Minister of Justice, Head of the Penal Department and the General Inspectorate of the Ministry of Internal Affairs. He also requested that experts of the independent forensic centre "Vector" be granted access to G.Mikiashvili, kept in the Medical Establishment in order to perform forensic examination of physical injuries.

The Ministry of Justice notified the Public Defender that the Investigative Department of the ministry opened investigation into the fact of inflicting injuries to G.Mikiashvili – an offence under Article 118 (1) of the Criminal Code, and that experts were granted access to the establishment.

On 16 August 2006, G.Mikiashvili was transferred, for safety reasons, to Rustavi Prison No.6 and placed in the medical ward. The establishment has no psychiatrist. In September G.Mikiashvili's condition deteriorated significantly (he damaged 8 beds, wall tilings, toilet, refused to take food, rejecting visitor from the family. According to opinion of M.Jishkariani, psychiatrist, it was necessary to refer G.Mikiashvili to a specialised psychiatric clinic.

Since G.Mikishvili was in a grave psychic condition and failure to provide adequate treatment was equal to torture, on 31 October 2006 the Public Defender made a recommendation to Head of Penal Department, B. Akhalaia that G.Mikiashvili be referred for qualified psychiatric care to a general profile psychiatric hospital. The Public Defender made a recommendation to the Prosecutor General, Z.Adeishvili, for the prosecutor's office to make a motion before the court concerning a forensic psychiatric examination for G.Mikiashvili – so that its results could be used to decide whether it was possible to further keep G.Mikiashvili in a penal institution. On

13 March, the penal department informed the Public Defender that G.Mikiashvili was transferred to psychiatric hospital in Kvitiri.

On 28 November 2006, Judge M.Chokheli of Tbilisi Appellate Court, relying on the motion of defence, appointed forensic psychiatric examination for G.Mikiashvili. (Before that, Tbilisi City Court sentenced G.Mikiashvili to 18 months of deprivation of liberty, decision that was challenged by both parties – the prosecution requested 6 years of deprivation of liberty, while the defence requested his acquittal). On 23 January 2007, the report of forensic psychiatric examination was presented to the court. G.Mikiashvili was diagnosed with reactive psychosis. The court decided G.Mikiashvili would stay at psychiatric hospital in Kvitiri.

Presently, the patient's condition is satisfactory and found to improve, which shows once again that if he had been provided with qualified medical assistance earlier, his condition would not have exacerbated to the extent he was found to have.

* * *

It is important to address more seriously the issue of adequate medical services for persons in custody, as guaranteed by the Georgian law and international norms.

DEATH RATE WITHIN THE PENITENTIARY SYSTEM, AND CAUSATIVE FACTORS

In 2006, the PDO conducted a survey and monitoring of mortality among prisoners in various institutions of the penitentiary system. According to the official data, the total number of prisoners who died during the reporting period was 92 as reported by the Ministry of Justice, though when verifying the data, it was only possible to get the names of 89 prisoners. Of these, 37% of death cases (33) fall on the first half of the year, whereas in the second half of 2006 the figure almost doubled and was found to constitute 56 cases, or 63% .

January	February	March	April	May	June	July	August	September	October	November	December
6	**3**	**10**	**6**	**3**	**5**	**8**	**12**	**14**	**6**	**10**	**6**
Total in the first half - 33 37%						**Total in the second half - 56 63%**					

The highest rate of mortality is found to fall on August, September and November. Considering the fact that of 10 prisoners who died in Marc, 7 cases of death have to do with the so-called riot in the prison, it becomes clear that death rate was higher in the second half of the year. The peak of mortality falls on August and September, which might be due to seasonal factors, at least to a certain extent.

It is important to note that of 56 death cases in the second half of 2006, 30 cases occurred at the Medical Establishment for Prisoners, of the Penal Department; 5 cases – at the Medical Establishment for Prisoners with Tuberculosis, of the Penal Department; 9 cases – at different penal institutions; and 12 cases – at medical institutions in Tbilisi and other cities of Georgia. The breakdown by months (second half of 2006) looks as follows:

Month	**Place of death**			
	Medical Establishment for Prisoners	**Medical Establishment for Prisoners with Tuberculosis**	**Penitentiary institutions of the Penal Department**	**Various medical institutions**
July	5	-	2	1
August	4	-	2	6
September	4	3	3	4
October	4	1	1	-
November	9	-	1	-
December	4	1	-	1
Total:	**30**	**5**	**9**	**12**

Of penitentiary institutions of the Penal Department, most death cases were found to occur at Prison No.1 (4 cases), followed by Prison No.5 (2 cases); Batumi Prison No.3, Kutaisi Prison No.2 and Ksani establishment No.7 had one case of death each.

Place	**Number**
Prison No.1 of the Penal Department	**4**

Prison No.5 of the Penal Department	**2**
Batumi Prison No.3 of the Penal Department	**1**
Kutaisi Prison No.2 of the Penal Department	**1**
Ksani establishment No.7 of the Penal Department	**1**

It is interesting to look into causes of death among prisoners. According to official data, of 56 cases of death in the second half of 2006, 40 were caused by cardiovascular insufficiency (27 cases) and cardio-pulmonary insufficiency (9 cases). Fewer cases are attributed to heart failure (2 cases) and respiratory insufficiency (1 case). Relying on this statistics would mean that most of deceased prisoners suffered from various diseases of the cardiovascular system, which of course is not true. In this case cardiovascular insufficiency and cardio-pulmonary insufficiency are invoked as an easy way out to explain a high level of mortality in Georgia's penitentiary system, and needless to say, such interpretation is misleading as to actual causes of death. Speaking at the press briefing held on 10 August 2006, G. Mikanadze, Deputy Minister of Justice said that most of prisoners suffered from cardiovascular diseases. As pointed out above, in medical terms this wording is not indicative of any real causes of mortality in the penitentiary system. The information presented at the web page of the Ministry of Justice gives at least some idea of the disease that ended up in prisoners' death:

	Nosological Groups	**Number**
1	Intoxication of unclear etiology	**8**
2	Old-age senility	**2**
3	Tuberculosis (including other forms, not only lung)	**10**
4	Heart diseases (mostly various forms of ischemic heart disease)	**8**
5	Trauma and accident (including suicide)	**6**
6	Malignant diseases	**3**
7	Infectious diseases (including neurological infections)	**4**
8	Anemia (acute, chronic), including resultant from gastro-duodenal bleeding	**4**
9	Neurological diseases (including those with disturbance of brain circulation)	**7**
10	HIV/AIDS	**3**
11	Lung and pleura diseases (other than TB)	**3**
12	Vascular diseases and vascular complications	**3**
13	Diseases of digestive system	**3**

These data are illustrative enough to presume that mortality in establishments of the penal system is mostly caused not by acute cardiovascular or cardiopulmonary insufficiency, but by tuberculosis, intoxication of unclear etiology and comas, neurological diseases, traumas and accidents, etc. As far as cardiac diseases are concerned, ischemic heart disease was diagnosed only in 8 cases, however, given the accompanying nosologies it is not possible to safely assume as to what in reality caused the death.

Analysis of prisoners' morbidity, and in particular, the causes of death in penitentiary establishments is essential for mapping out effective preventive interventions, which would contribute to better health of prisoners and reduce morbidity among them. At the same time, a certain proportion of cases examined by PDO could have not ended fatally. Detailed examination of causative factors of death will help law-enforcement bodies to conduct effective investigation in relation to specific cases.

PDO carried out detailed monitoring of prisoner's post-mortem reports. To this, end, PDO addressed the National Forensic Expert Bureau with a request to provide access to expert conclusions on the cause of death of prisoners. Detailed analysis was carried out in respect of 29 reports (Annex 1).

General Analysis of Expert Reports

The following remarks are in order with respect to the introductory part of expert reports:

- In 18 cases there is no indication of the identification number of the order – 613, 603, 630, 632, 646, 645, 657, 658, 671, 677, 678, 679, 682, 720, 742, 749, 760, 795;
- In 15 cases there is no indication of the age of the deceased person - 603, 630, 1299/1-ბ, 677, 678, 679, 682, 742, 744, 745, 749, 750, 760, 771, 784;
- In 15 cases there is no indication of the time when medico-legal autopsy started - 603, 630, 658, 1299/1-ბ, 677, 678, 679, 682, 742, 744, 745, 749, 750, 760, 31;
- In 11 cases the autopsy was performed outside the 30-day term established by the law, and no indication was made of the cause of delay:

646 – 23.07 – 13.09,
97 – 31.07 – 6.09,
658 – 4.08 – 15.09,
1299/1-G – 7.08 – 19.09,
677 – 9.08 – 6.10,
678 – 9.08 – 6.10,
679 – 9.08 – 6.10,
682 – 12.08 – 10.10,
742 – 2.09 – 12.10,
744 – 2.09 – 11.10,
745 – 2.09 – 10.10.

The following remarks are in order with respect to the descriptive part of expert reports:

- No indication of the length of the body – 677, 679, 682, 742;
- No indication of cadaver-related effects – 679, 682, 742;
- No indication of the groups of muscles with rigor mortis– 671, 677, 678, 795;
- In some reports size of the organs is not indicated, whereas the size indicated in twin organs is identical, which is not true;
- Generally, there is no indication of the weight of organs;
- In 8 cases no description is provided in respect of some internal organs - 657, 677, 678, 679, 682, 720, 742, 771;
- Not infrequently, the organ colour is not reflective of its pathology. Indication of the colour makes sense only if the introductory part of the report points as to whether the source of loght in the course autopsy was natural or artificial none of the reports makes any indication on this matter;

- 613 – the expert indicates that the body is cold. The descriptive part says that the time span between the death and commencement of post-mortem examination is not less that 4 and not more than 6 hours. However, it appears that the dead body was found at 7:30m whereas the examination started after 22:30, and it was impossible for the expert to see livores mortis as they are described.

In some reports there are gross errors in describing internal organs, for instance in 655, 1299/1, 682, 749, 750, 31.

Frequently, endocrine glands are not described properly. The reports almost invariably state that endocrine glands showed no pathological changes, and some reports do not mention them at all (657). In some of the reports pancreas is described among endocrine glands (744, 745, 760, 31, 784), instead of describing them in digestive system, as do classical manuals; in some cases it is not mentioned at all (677, 678,679, 720, 742, 771).

Not infrequently, medicolegal diagnosis is formulated unprofessionally. The diagnosis should start with a description of the immediate cause of death, main disease, followed by accompanying diseases and background diseases. This sequence is often ignored, and in some cases the formulation of diagnosis is beyond any criticism:

- 1299/1-g - Acute vascular insufficiency, acute myocardial ischemia, uneven blood distribution in the myocardium, bran oedema, grave inflammatory process in lungs, thickening of epithelium on brain skin (!). etc.
- 679 – Acute cardiovascular and respiratory insufficiency. Adenocarcinoma of lungs and liver. Coronary atherosclerosis. Cardiosclerosis. Post-infarction cicatrices in the myocardium, multiple cancer metastases in thoracic cavity and abdominal cavity. Necrotic areas in lungs.

In some cases, no additional examinations were carried out, with no indication as to the reasons:

- 657 – it was necessary to carry out histological investigation to confirm cancer diagnosis with a microscopic investigation;
- 1299/1-g - in his report the expert ignores investigation findings provided by a histomorphologist. Histomorphological investigation found diffusive haematomas in the lungs and haematomas in the brain, then the expert goes on to describe dark-colour discharge from the ear and concludes by saying that left ear tympanic membrane was injured (the injury itself is not described). He points to acute ischemia as a cause of death, failing to fulfil the assignment of the order and examine the presence of alcohol and narcotic drugs;
- 682 - No histological investigation performed, which according to the data, was crucial. The expert fails to fulfil the assignment of the order and examine the presence of alcohol and narcotic drugs;
- 742 – the question posed in the order as to whether the person had use alcohol or narcotic drugs before his death remained unanswered;
- 745 – the expert describes haematomas in neck area soft tissues, however, characteristic morphological changes are not pointed out;
- 750 - in the descriptive part the expert mentions splenomegaly, which is not corroborated by microscopic description;
- 760 - the question posed in the order as to whether the person had use alcohol or narcotic drugs before his death remained unanswered, neither was any material taken for chemical test to answer this question;

- 795 – histological investigation found croupous pneumonia, whereas in the conclusion the expert indicates bronchia pneumonia, which is an entirely different diagnosis. The expert fails to reason why he ignored the results of microscopic investigation.

In the period between 17 July to 19 September, 29 prisoners died in the Medical Establishment for Prisoners: of these 6 persons died with violent (non-natural) death, and 23 with endogenic (natural death).

Table: Number of Death Cases with Causes of Death

No	**Cause of death**	**Report No**	**Number of cases**
	Violent (non-natural)		***6***
1.	Mechanical asphyxia	613, 749	2
2.	Mechanical lesion	658, 784	2
3.	Electrical trauma	630	1
4.	Chemical intoxication	646	1
	Endogenic (natural)		***23***
5.	Tuberculosis	603, 645, 670, 742, 745, 771	6
6.	Pneumonia	671, 677, 682, 720, 750, 795	6
7.	Heart pathologies	632, 97, 655, 1299/1-g, 678	5
8.	Cancer	657, 679, 760	3
9.	Cirrhosis	31	1
10.	Complications after medical intervention	708, 744	2
	Total	-	***29***

Endogenic death (due to disease) was caused by: TB in six cases (603, 645, 670, 742, 745, 771), pneumonia in six cases (671, 677, 682, 720, 750, 795), heart pathologies in five cases (632, 97, 655, 1299/1-g, 678), cancer in three cases (657, 679, 760), liver cirrhosis in one case (31) and complication after medical interventions in two cases (708, 744). It is important

One has to note particularly, that in summer month, with no epidemy spreading, in the 21st century six persons die of pneumonia! Patiens die of complicated forms of tuberculosis, chronic heart pathologies and what is particlularly alarming – of cancer, i.e incurable disease. Keeping such persons in penal istitutions is absolutely senseless, and we believe inhumane!

Enforcement of Court Judgments

Situation with enforcement of court judgments in a country is the best measure to assess the efficiency of its judiciary system. This is why the *Constitution of Georgia*, together with

other laws of the country, contain provisions that are aimed at cultivating special reverence and abidance to the judiciary system and court acts.

According to the official statistics, during 2006, Enforcement Bureaus of the Enforcement Department executed the total of 25166 cases. As many as 10631 cases were terminated due to a variety of reasons, while 302 of the enforced cases involved claims against the state budget.

In total, the share of enforced cases against all cases on which court rulings were issued accounts to approximately 44 %. Apart from recovery of arrears, these latter also included cases belonging to other categories (such as eviction, housing, reinstatement into a job, payment of alimonies, etc.) The share of enforced cases that involved claims against the state budget or state budget-funded organizations accounted for 12%. In monetary terms, this corresponds to 3 513 658. 92 GEL and 80443 USD.

The above demonstrates that the share of enforced cases involving claims against the state budget and budget-funded organizations is only a small fraction of the total number of enforced cases, accounting only to 12%. It is not surprising therefore, the largest number of complaints are concerned with enforcement. For instance, non-payment of arrears in wages appears to be one of the most frequent claims featuring in citizens' applications to the Public Defender .

The case of Zaur Amilkhvari

In 28 July 2006, citizen Zaur Amilakhvari addressed the Public Defender with a request to look into his claim involving a non-enforcement of a court judgment.

According to the application and the attached documents, on 12 January 2006, the Chamber for Administrative and Other Cases of the Supreme Court of Georgia ruled on partial annulment of the decision of the Chamber of Appeals of the Regional Court for Administrative and Tax Cases of 10 May 2005, and passed a new judgement. On 15 March 2005, the respective enforcement writ (#bs-991-577(2k-05) was issued, which partially satisfied Z. Amilakhvari's claim, and quashed Order #5-1407 of the Ministry of Finances of Georgia of 2 August 2004 "On the dismissal of Zaur Amilkhvari". The new court ruling ordered the Ministry of Finances to reimburse to Mr. Amilakhavari the amount of aggregate lost wages from the day of his dismissal to the time of issuance of the individual administrative act.

The enforcement writ was presented to the Enforcement Bureau in due course. Nonetheless, the applicant claims, the said court decision has not been enforced to this day.

The Georgian Constitution and other legal acts prescribe that "acts of courts shall be obligatory for all state bodies and persons throughout the whole territory of the country"

The Law of Georgia on Enforcement Proceedings entrusts the responsibility of enforcing of court judgements on the officer of court. An undue delay in enforcing a court judgement will initiate the process of coercive execution.

In view of the above, the Public Defender addressed a recommendation to the Enforcement Department pointing to the need to secure the enforcement of the relevant court ruling. The Department replied that on 28.03.06,, based on enforcement writ #bs-991-577(2k-05), their court officer O. Chalatashvili sent off a notice to the Ministry of Finance which set a three-month period for voluntary enforcement of the court decision. The amount in question was to be deposited onto the account of the special group of Enforcement Department of the Ministry of Justice of Georgia.

On 27 July 2006, the Department sent off a second notice to the Ministry of Justice, requesting to indicate the total amount of M. Amlikhvari's lost wages that accrued from the date of his dismissal until issuance of the individual act. The Enforcement Department received no reply to this.

Given the above, the Special Group of the Department was instructed to send off another notice to the Ministry of Finances containing a requirement to secure timely enforcement of the court decision at issue.

The case of Omer Meladze

Citizen Omer Meladze addressed an application to the Public Defender in relation to the non-enforcement of a court decision.

The application, together with the attached documents, indicates that on 11 September 2003, the Khelvachauri district court ruled in favour of Omer Meladze, satisfying his claim to be recognized as an individual household in the Kelvachauri district and, hence, be allocated a homestead land plot in the lowland area of Khelvachauri. The Sharabidze Sakrebulo (Village Council) of the Khelvachauri district was required to register the claimant as an individual household and allocate the established minimum size of the homestead land plot from the reform land fund.

The respective enforcement writ, #2-479, was issued on 9 July 2004 and was presented to the Ajara Enforcement Bureau, in full compliance of the established procedures. Nonetheless, according to the claimant, there followed no execution of the decision.

Having looked into this case, the Public Defender found no credible reason for the procrastination of enforcement of the above decision and sent off a recommendation to the Ajara Enforcement Bureau containing a requirement to secure execution of enforcement writ #2-479.

In reply to this recommendation, and with a view to securing enforcement of the above court decision, The Ajara Enforcement Bureau served the respective notice on the Sharabidze Local Council of the Khelvachauri district and held a special meeting at the Governor's Office. Both the Sharabidze Sakrebulo and the Governor's Office account for the non-enforcement of the said decision by the fact that the process of entry of lands into the reform land fund register has been terminated. Both of them state they will fully satisfy requirements of the enforcement writ of execution once the process of land entry into reform fund resumes.

The case of Natela Menteshashvili

The Public Defender of Georgia received an application from Natela Menteshashvili stating that the Tbilisi Regional court judgment passed in respect to her claim had not been enforced.

The Regional court had satisfied N. Menteshashvili's claim, quashing the 20 July 2004 decision of the Tbilisi Vake-Sabirtalo district court and ruled that respondent Shota Martiashvii should pay the claimant the equivalent of 20,000 USD in Georgian laris. The court decision was entered into effect, and the respective enforcement writ, #2ბ/143-05, was duly presented to the Enforcement Bureau. In her application, N. Menteshashvili claims the enforcement of the court judgement is being delayed intentionally: to this day no attachment has been laid on the respondent's property (house in Tskhneti, suburb of Tbilisi, 41 Aghmashenebeli street) and no coercive enforcement of the court judgement has been initiated.

Chapter 17 of the Law of Georgia on Enforcement Proceedings spells out the rights and responsibilities of the bailiff, according to which the bailiff is entitled to secure the recovery in favour of the creditor:

a.a. From the property of a debtor by means of laying an attachment on it or the sale of property. In the case the State property is concerned, a bailff shall duly notify the alocal agencies o the State property management;
a.b. From the wages, pension, scholarship and other incomes of a debtor;
a.c. From funds and property of a debtor that are maintained by other persons, as well as from the bank accounts of a debtor on the grounds of a collection order.

When the matter concerns money or property recovery, the bailiff shall commence the process of inventory of the property and lay attachment on the debtor's property (both movables and immovables) immediately upon serving the notice of voluntary enforcement on the debtor, in full compliance with of the rules prescribed by the law.

The Public Defender finds a grave violation of Natela Menteshashvili's rights, in view of the fact that the court judgement remains unenforced and the creditor's legitimate claim has not been satisfied to this day. Hence, he presented a recommendation to the Enforcement Department pointing to the need to secure enforcement of the court decision at issue in an expeditious manner.

According to the reply received for the Enforcement Department, at the present stage of proceedings, the movable property at the debtor's apartment has been inventoried and attached. All other respective measures will be taken upon receipt of the conclusion from an independent audit, and when the citizen's representative turns up.

The case of Tsenteradze-Kavtaradze

On 26 July 2006 Margalita Tsenteradze-Kavataradze addressed the Public Defender of Georgia in relation with the non-enforcement of a judiciary decision.

According to her application and the attached documents, on 15 October 2004, the Vake-Saburtalo district court issued an enforcement writ #2/791-04, which satisfied Margalita Tsenteradze-Kavtaradze's counter-claim. The court ordered Giorgi Kavtaradze to pay an alimony in the amount of 50 laris per month in favour of his under-aged daughter, Keti Kavtaradze, and his ex-wife.

The enforcement writ was duly presented to the respective Enforcement Bureau, nonetheless enforcement has not taken place to this day.

In regard of the above, the Public Defender requested an explanation from the Enforcement Department. According to the Chairman of the Enforcement Department, the case had been in charge of bailiff Kakhaber Peikrishvili. The bailiff, with a view to securing enforcement of the court judgment, had served a proposal of voluntary enforcement on Giorgi Kavataradze. Following this, in order to assess the debtor's movable and immovable property, the bailiff made an enquiry at the Tbilisi Registration Office of the National Agency of Public Registry and the Information Centre of the Interior Ministry. As a result of the enquiry he found that the debtor owned no apartment at Building 14 of the Vashlijvari Settlement of Tbilisi. Apart from this, he determined that the debtor had made a transfer of the alimony amount of 200 laris to the respective bank account. In view of the Public Defender's letter, the Chairman of the Enforcement Department undertook a commitment to personally oversee the enforcement procedure of the case concerned.

The case of Goderidze, Javakhishvili and Bekauri

The Public Defender's Office was addressed collectively by Natela Goderidze, Manana Javakhishvili and Eleonora Bekauri regarding the non-enforcement of a court judgement.

From the application and the attached documents it follows that on 15 January 2004, the Chamber of Appeal for Entrepreneurial and Bankruptcy Cases of the Tbilisi Regional Court satisfied the claim of Mr. N. Goderadze, an authorized representative of a group of shareholders of company *Color*. The court ordered defendants P. Tokhishvili, T. Burduli, N. Papiashvili, G. Khutsishvili and A. Murjkneli to transfer the property in question to its

legitimate owners, together with paying the associated state duty, in accordance with Chapters 53 and 49 of the Civil Procedural Code of Georgia.

The respective enforcement writ, #2/29, was issued on 20 May 2004 and duly presented to the Enforcement Bureau. Nonetheless, according to the applicants, the enforcement never took place over the years that followed.

In view of the above, the Public Defender sent off a recommendation to the Kakheti Enforcement Bureau pointing to the need to secure enforcement of court judgment #2/29. Despite the numerous reminder notices that followed after the initial recommendation, the Public Defender never received a reply. Meanwhile, the applicants still insist that the case remains unenforced.

The case of Zurab Khakhviashvili

On 10 October 2006, the Public Defender was addressed by Zurab Khakhviashvili regarding the non-enforcement of a court judgement

The application, along with the attached documents, indicate that on 13 February 2006, the Camber for Administrative Cases allowed the claim of Luba Khakhviashvili, Fedosia Verigina and Nargiza Verigina and ordered the Defense Ministry of Georgia to pay fixed amounts of compensation in favour of the plaintiffs. In particular: 1277.40 Gel – to L. Kakhviashvili, 1361.64 – to F. Verigina and 1363.74 to N.Verigina. The respective enforcement writ, #3/1898-06, was issued on 10 April May 2006 and duly presented to the Enforcement Bureau. Nonetheless, as the applicants point out, the enforcement never took place over the months that followed.

In view of the above, the Public Defender addressed a recommendation to the Enforcement Department pointing to the need to secure enforcement of the above case. According to the Chairman of the Enforcement Department, the case in question was given for processing to the Special Enforcement Group for Particularly Important Cases. The Defense and Finance Ministries had been served proposals of voluntary enforcement. The debtors appear to have ignored the proposal, due to which the case proceeded to the stage of coercive enforcement. In view of the Public Defender's recommendation, the Special Enforcement Group of the Enforcement Department has been instructed to secure timely enforcement of the above court judgement.

The case of Marina Nadareishvili

The Public Defender of Georgia was addressed by attorney M. Tsikvadze of the *Tsikvadze & Kupatadze* law firm in relation to non-enforcement of the court judgement on the case of Marina Nadareishvilil.

From the application and the supplied documents it follows that the Tbilisi Vake-Saburtalo district court, by its decision #2/937-02 of 15 March 2002, satisfied M. Nadareishvili's claim ordering the Interior Ministry to disburse the claimant a one-off compensation due to her son's death in a car accident during the time of his service in the army. The amount in question is 13,388.40 Gel.

The respective enforcement writ, #3/1898-06, was issued on 12 July April 2004 and was duly presented to the Enforcement Bureau. Nonetheless, the applicant claims, the enforcement never took place over the period that followed.

Having looked into the case, the Public Defender found a violation of the citizen's rights. In this connection, he presented a recommendation to the Enforcement Department pointing to the need of securing enforcement of the case in question.

A reply letter from the Enforcement Department of 1 August 2006 indicates that the enforcement writ - where Marina Nadareishvili is a creditor and the Interior Ministry the debtor - was passed for processing to the Special Enforcement Group for Particularly Important Cases. In view of the Public Defender's recommendation, the Special Group was instructed to secure enforcement of the case in question and launch the respective enforcement proceedings in a timely manner.

The case of Khochiashvii and Nateladze

On 18 August 2006, The Public Defender was addressed by J. Khochiashvili and G. Nateladze.

According to the documentation supplied in connection of this case, the applicants had formerly worked at the Dedoplistskaro Division of Agriculture and were dismissed from their position by resolution #52 of the Minister of Agriculture of 15 April 2005.

The applicants filed a claim with the Dedoplistksaro district court requesting reinstatement into their jobs, together with the compensation of all lost wages.

The Dedoplistskaro district court satisfied their claim by passing the respective judgement on 2 September 2005 and declared the Minister's resolution of 15 April 205 null and void. Hence, the court reinstated J. Khochiashvili and G, Nateladze into their positions and ordered the Dedoplistskaro Division of Agriculture to reimburse them their lost wages. The respondent did not appeal the court decision within the established timeframes. Accordingly, the decision was enacted and the respective enforcement writ, #07/123, was issued.

Pursuant to Government Resolution #145 on amendments and additions to the Articles of Organization of the Ministry of Agriculture and according to the order of Georgia's Agriculture Minister of 2 September 2005, #2-2000, all territorial bodies (i.e., district divisions) of the Ministry of Agriculture were to be closed down, and the deputy-minister of Agriculture was authorized to oversee the execution of this decision.

Based on the above, the applicants abandoned the job reinstatement claim, requesting just the compensation for the lost wages. Respectively, the court officer applied to the Dedoplistskaro Division of Agriculture with a request to include the above disbursement sum into the liquidation balance sheet. The liquidation commission ignored this request.

Following completion of the liquidation process, the enforcement instrument was returned to the applicants unenforced, on the grounds of Article 35, Section G of the Law of Georgia on Enforcement Proceedings. The basis for such an action appears to be official letter #2-1-16/1830 of the Ministry of Agriculture, in which the deputy minister, Begiashvili, states the Ministry has no knowledge as to who will be the legal successor of the abolished divisions.

In the reply to the Public Defender's letter, Mirian Dekannosidze, the first deputy minister of Agriculture, points out that the liquidation commission had drawn up no inventory act, because the said organization (which, in fact, had the status of an enterprise) had no property registered to its name as of the moment of liquidation. As far as the issue of legal successor is concerned, again, the Ministry explains that no legal successor of the Dedoplitskaro District Division (abolishment of the enterprise) had been appointed, because the Division had no property by the time of liquidation.

First of all, according to the Law of Georgia on Entrepreneurs, an enterprise is a legal person of private law with an established organizational and legal form determined by Chapter 2 of the said law, which carries out profit-oriented activities, independently and in an organized manner. In contrast, the Ministry's territorial bodies (divisions) were operating under the Ministry and had been established in accordance with the Law of Georgia on Legal Person of Public Law.

As regards the legal successor, Resolution #38 of the Georgian Government dated 21 May 2004 determines the structure of the Ministry of Agriculture incorporating the territorial bodies of the Ministry, which, indeed, - until issuance of resolution #145 by the Georgian Government - were district divisions.

The Georgian Government Resolution #19 of 28 January 2005 determines the financing mode of the territorial bodies of the Ministry of Agriculture which, in fact, were district divisions at that time. The divisions were financed from the state budget. Besides, Resolution #2-108 of the Minister of Agriculture contains a template of *Articles of Organization* of these territorial bodies, i.e., district divisions. The said Resolution provides that the territorial body of the Ministry of Agriculture is a district division, with heads of the divisions, their deputies and the personnel appointed and dismissed by the Minister of Agriculture. Pursuant to the same Resolution, the division reports to the Ministry, and in its activities is fully guided by the Constitution of Georgia, other laws of Georgia, decrees of the President of Georgia, orders of the President of Georgia, resolutions of the Government of Georgia, orders of the Minister of Agriculture, and other statutory acts.

In the light of the above, the issue of legal successor becomes quite evident. As the abolished divisions were, indeed, structural units of the Ministry, the responsibility for disbursement of

the lost wages in question fully rests with their administrative body, i.e., the Ministry of Agriculture,.

Returning of the enforcement instrument is, in effect, a breach of the applicants' labour rights provided by the Constitution of Georgia and other legal acts of the country. In addition, pursuant to Article 82.2 of the Constitution of Georgia, "Acts of courts are mandatory on the whole territory of the country for all state bodies and persons". The court judgement remains unenforced, which constitutes a breach of the human rights provided by the acting legislation.

Proceeding from the above and in accordance with Article 21.b of Georgia's organic law on Public Defender, the Public Defender addressed a recommendation to the Enforcement Department suggesting that the Chairman should instruct the relevant officers to resume the enforcement procedure with regard to the above case and oversee the enforcement proceedings until the enacted court judgement is executed.

This recommendation has been fulfilled. The enforcement was resumed and the proceedings were started.

A collective application against Mayor's Office

Public Defender was addressed by a group of Tbilisi residents who suffered as a result of events of 1992-1993.

From the application and the supplied documents it follows that the said individuals had filed a suit at the Tbilisi regional court claiming that Georgia's Finance Ministtry and Tbilisi Mayor's Office should take a joint responsibility for the compensation of material losses in the amount equivalent to 4,606,845 USD in Georgian laris .

The applicants' claim was based on Presidential Decree #180 relating to the Program for restoration of dwelling houses and payment of compensation to individuals affected by the events of December-January 1991-2.

The Tbilisi regional court allowed the claim and ordered the Finance Ministry and Tbilisi Mayor's Office to pay the compensation in the amount equivalent to 4 606 845 USD in Georgian laris.

Tbilisi Mayor's Office and Finance Ministry appealed the said judgement at the Supreme Court of Georgia, which, upon consideration, dismissed their cassation claim and confirmed the judgment of the regional court.

In connection of this case, the total of 157 enforcement writs were issued and duly presented to the Enforcement Department of the Justice Ministry.

Applicants claim that while the Finance Ministry is clearly unwilling to enforce the judgement on a voluntary basis, the Enforcement Department is holding back the initiation of coercive enforcement.

In connection with the above, the Public Defender requested an official explanation from the Enforcement Department of the Justice Ministry, and asked for an exhaustive information as to why the coercive enforcement of the court judgement had been delayed. He also pointed to the fact of violation of human rights and to the need of initiating the relevant measures.

In its reply letter, the Enforcement Department noted that the case had been passed for processing to the Special Group of Particularly Important Cases. This latter, in accordance with Article 92 of the Law on Enforcement Procedures, had served a proposal of voluntary enforcement of the judgement on the said Ministries, which was not fulfilled by the debtors. The letter also points out that the case has now proceeded to the stage of coercive enforcement.

An ensuing letter received from the Department notes that the 2007 State budget envisages allocation of ten million laris specifically for the purpose of securing execution of court decisions and repayment of arrears. However, this will hardly suffice to ensure enforcement of all judgements. The State should take respective measures to meet its all obligations related to repayment of all arrears that accrued over years.

Enforcement of Judgements of the European Human Rights Court

The need to introduce an adequate mechanism for re-examination of certain cases following judgements of the European court.

A certain number of European Court judgements relate to the non-enforcement of judgements passed by national courts, which is qualified as violation of the right to fair trial stipulated in Article 6 of the European Convention.[1]

One of the major obstacles in enforcing judgements of the European Human Rights Court is that Georgia has no mechanism of repeal or re-examination of enacted court judgements.

Due to the fact that legislation of many members states of the Council of Europe did not have a similar provision in their legislation, on 19 January 2000, CoE Committee of Ministers issued "Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights"

The major principle of the recommendation is that the court judgement should ensure full restitution of damages incurred by the injured party *(restitutio in integrum)* as a result of violation of the Convention. From the experience of Committee of Ministers, in certrain cases, re-examination of cases appears to be the only efficient means, to achieve *restitutio in integrum*.

The Recommendation applies "re-examination" as the generic term, also covering the mechanism for re-reconsideration of enacted court judgements. According to the same Explanatory Memorandum, although the text of the recommendation contains no indication as to who ought to be empowered to ask for reopening or re-examination, it would be logical to assume that this right should be given to the interested parties, i.e. those directly affected by the European Court decision.

In connection with the above, the first deputy Minister of Justice, Mr. Constantine Korkelia informed us that the intended amendments to Georgia's domestic legislation will serve the general basis for improving the situation with enforcement of European Court judgements. These changes will allow to reopen and re-examine cases based on the decisions of the European Court and also enable the creditor to receive a compensation for the delay in enforcement. In our view, this initiative of the Justice Ministry must be welcomed. We would only hope that the draft amendments will be prepared shortly so that their consideration is started as soon as possible.

[1] Judgement of 8 April 2004 "Asanidze against Georgia", judgements of 27September 2005 "Ltd Iza & Mkrakhadze against Georgia" and Ltd AMat-G & Mebaghishvili against Georgia"; Judgement of 28 November 2006 Apostol against Georgia.

As to the financial aspects of the matter, Mr. Korkelia notes the re-allocation of budget assignations among state creditors is beyond the competence of his ministry. Sadly, despite the many notices addressed to the Ministry of Finance, this latter has not as yet developed the required action plan for allocation of funds for the enforcement of court decisions for cases where the state and budget-funded organizations are respondents.

The 2007 budget envisages 10 million laris to cover the state indebtedness related to the non-enforcement of court decisions, which definitely, must be viewed as a positive development. However, this amount should not be seen as the upper limit of enforcement finds: earmarking a fixed compensation amount in the budget should not become an impediment to the enforcement of judgements if the aggregate indebtedness of state organizations exceeds the allocated sum.

Apparently, a clear plan of actions is absolutely essential, in order to set out the principles of repayment of state arrears, together with the respective time-frames and deadlines.

We recommend to the Finance Ministry to elaborate and present the said action plan within the shortest possible time, in order to secure repayment of all arrears associated with the enforcement of court judgements. This is an urgent requirement, particularly, if one recalls the fact that on 7 August 2006 the respective Georgian authorities already notified the Committee of Ministers that the said plan was already in the process of development.

Improvement of the system for enforcement of court judgements.

In addition to the above problem, the European Court judgment against Georgia of 29 November, "Apostol v. Georgia", points to another shortcoming of Georgia's enforcement mechanism, running counter to the principle of a fair trial.

The above judgement questions the Law of Georgia on Enforcement Proceedings, particularly, compliance of its Articles 26 and 113 [1] with the fair trial principle. According to Article 26 of the said law, a bailiff shall be entitled to refuse to enforce a judgement in case of non-payment by the creditor of the preliminary expenses provided by the law". According to Article 113[1] "the fee shall be charged from the debtor at the time of serving the enforcement instrument".

In the opinion of the European Court, the imposition upon applicant of the obligation to pay expenses in order to have that judgement enforced is a purely financial restriction and therefore should be subject to a particularly rigorous scrutiny from the point of view of the interests of justice.[2] The Court held that by imposing the enforcement-related fees upon the claimant the state failed to meet its positive obligation related to organization of a system for enforcement of judgements that is effective both in law and practice.[3]

[2] §60
[3] §64

Proceeding from the above, and based on recommendation (2004)5 of the Committee of Ministers of 12 May 2004 related to the verification of compatibility of draft laws, existing laws and the administrative proceedings of member states with the standards laid down in the European Convention on Human Rights, it appears expedient to make certain amendments to the Law of Georgia on Enforcement Proceedings so that, on the one hand, the advance fees imposed upon the creditor are determined based on the financial solvency of the creditor, and on the other hand, the State should set forth reliable guarantees to eradicate the practice recognizing a non-payment of the fee as sufficient grounds for non-enforcement of a judgement.

Violation of procedural guarantees of the Convention

The issue of violation of procedural guarantees is not concerned solely with the non-enforcement of European Court judgements, although it is directly related to the observance of provisions of the European Human Rights.

The European Court may pass a judgement on the violation of the Convention, without having an actual proof corroborating that the violation in question has indeed taken place. The refusal of the country's competent bodies to investigate into suspected facts of violation or a dismissal of the respective claim will serve sufficient grounds for the Court to judge on the violation of the Convention. In the case of Georgia, a clear proof to this are judgements of 17 October 2006.

In its judgement *Danelia v. Georgia* the European Court found a violation of the procedural part of Article 3 of the Convention. Mr. Danelia contends he was subjected to torture and inhuman treatment while in police custody. Although, the supplied materials did not provide substantial evidence to prove that this violation had indeed taken place, the verdict was still against Georgia. This was due to the fact that Mr. Danelia's numerous applications requesting to study the facts in order to establish the alleged violations were ignored and no effective investigation was initiated which, in itself, is a breach of Article 3 of the Convention.[4]

Judgement *Gurgenidze v. Georgia* relates to the breach of Article 8 of the Convention. The European Court found a violation of the right secured by Article 8 of the Convention, due to the refusal of domestic courts to consider the case of an alleged violation of his right to respect for his private life. This, in effect, constitutes violation of the guarantees accorded by Article 8, even though the alleged violation was committed by private individuals, not the state authorities.

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[4] §§64-65

Proceeding from the above, we recommend that the State and administrative bodies should give careful consideration to the claims involving alleged violations of the human rights guaranteed by the Convention and investigate into such claims rigorously.

Recommendation:

- Ministry of Finance shall elaborate the action plan within the shortest possible time in order to secure execution of enacted courts judgements that remain unenforced over years;

- In the light of recommendation (2004) 5 of 12 May 2004 of the Committee of Ministers, the judgement of the European Court of Human Rights of 28 November 2006, the Ministry of Justice shall elaborate draft amendments in the Law of Georgia on Enforcement Proceedings in order to bring the procedures for determination of the size of enforcement fee and rules of its payment in compliance with requirements of Article 6 of the European Convention of Human Rights;

- All applications and claims, relating to alleged violations of the principles of European Convention, should be considered and investigated with due care.

Private property infringement facts

The right to private property is one the most secured and guaranteed rights in Georgia. According to Article 21 of the Georgian Constitution "The right to inheritance and property is recognised and guaranteed. The abrogation of the universal right of property, its acquisition, transfer and inheritance is prohibited; Restriction of these rights is possible for the necessary social need in cases determined by law and by established right; Sequestration of property for necessary social need is permissible in cases directly determined by law, by a decision of the court or through urgent necessity by organic law but only if full compensation is made."

The right to property is interpreted as an absolute right. This means that any individual shall refrain from infringing on the property right of another individual. Protection of private property is the prerequisite and the guarantee for the country's economic development.

Despite the provisions set out by the law, The Public Defender's Office received a great number of applications related to the violation of private property rights.

The case of Marina Bochorishvili

The Public Defender was addressed by Z. Popxadze on behalf of his confiders M. Bochorishvili and N. Tsereteli regarding violation of their property right.

The supplied documents indicate that Marina Bochorishvili , Vazha Zakarashvili and Nodar Tsereteli jointly own a plot of land and a building at 81 Gorgasali Street, Tbilisi. This is confirmed by an excerpt from the Public Registry. The supplied documents also include an approved architectural design and construction permit for the building concerned.

The applicant contends that a representative of the Municipal Supervision Service first gave an oral warning regarding a possible dismantling of the building. After that, on 9 October, M. Bochorishvili received a notice from the Municipal Supervision Service asking either to supply required documents or otherwise, the notice said, the building would be demolished.

The Georgian legislation sets out clear rules for dismantling buildings. In particular, these rules are described in Article 7, paragraph 1 of the *Law of Georgia on State Supervision over the Architectural and Construction Activity* which spells out that the state architectural and construction supervision bodies are entitled to take decision on terminating the construction, as well as full or partial dismantling of a building constructed in violation of the law. Paragraph 3 of the same Article notes that the said decision must be adequately documented and should contain the reference number of the administrative/legal through which such decision was taken, together with an indication of the body with which this decision could

be appealed, including its address and the deadlines for lodging the appeal, as well as a reference to the particular norm of a statutory act which was violated in the course of construction. According to Para 4 of the above Article, the party concerned should be informed of the resolution regarding full or partial dismantling of the building constructed in violation of the law within 24 hours following adoption of the resolution. 'Informing' means posting the text of the resolution in a conspicuous place. The Georgian legislation entitles parties to a dispute to appeal the resolution of the Architectural and Construction Supervision Service within 15 days. At the same time, filing such an appeal would automatically suspend implementation of the resolution of the Supervision Service until the said appellate body passes a decision. Hence, if the party lodges a claim regarding the resolution of the Supervision Service, the final decision on dismantling can only be taken by the court.

As noted above, the City Supervision Service sent a notice to one of the owners, which is not what's provided by the law.

Property right is guaranteed by the Constitution of Georgia.

The Civil Code of Georgia provides that "an owner is entitled at his discretion to freely possess and use his property (thing) which is not contrary to a law and other legal acts, do not allow the use of the property by other persons…".

Proceeding from the above, the Public Defender finds that the dismantling of the building at 81 Gorgasali Street was carried out in breach of the provisions of the law and violated the legitimate rights of the owner. Therefore, based on Article 21.b of the Organic Law of Georgia on Public Defender, the Public Defender addressed a recommendation to the Tbilisi Mayor's Office requesting to take respective measures with regard to the said developments.

Nevertheless, on 29 October 2006 at about 2:00 am, the building was dismantled. The dismantling was attended by a representative from the Public Defender's Office. The respective protocol was drawn up, in which the deputy head of Supervision Service states that the owners will be offered an alternative plot of land as a replacement.

On 8 January 2007, we received a rather ungrounded and incompetent reply from the City Supervision Service explaining the dismantling by the argument that buildings like the demolished one spoil the appearance of the city and do not fit into the master plan for urban development. The Supervision Service also noted that in the cleared land or an alternative plot provided as a replacement, the owners will have every right to construct a building suitable to the capital city, provided that the Urban Development Service of the Tbilisi Mayor's Office approves the design and a respective building permit is issued.

First of all, it should be noted that the inconsistency of any existing building with the general appearance of the city can by no means be used as an argument to restrict the owner's property right. Besides, it was the Mayor of Tbilisi to whom the Public Defender had addressed the recommendation. The law requires that the Mayor's Office itself should have considered the recommendation duly and sent the reply to the Public Defender within the

period of one month. However, as noted above, the reply came from the Supervision Service, not from the Mayor. Hence, it would be fair to assume that the Mayor's Office gave little thought either to the drafting of the reply or to the documents attached to the recommendation, including papers directly proving the ownership of the building, an approved architectural design and the building permit. These documents attest to the fact that in the course of construction at 81 Gorgasali Street all requirements of the law had been strictly observed. In addition, Marina Bochorishvili submitted an application to the Mayor's Office asking for a permit for the construction of a Coca-Cola kiosk in her plot of land, which was rejected. In this light, City Supervision's argument that the owner will be entitled to construct another building in the land at issue sounds rather unsubstantiated.

The case of David Asatiani

The Public Defender was addressed by D. Asatiani with an application pointing to the encroachment of his property right.

The supplied documents point to the fact that in 1997 Davia Asatiani purchased a pavilion in the Pushkin garden of the Freedom Square, Tbilisi at an auction. Following this, he carried out a reconstruction of the pavilion, which had been approved by the respective architectural service. According to excerpts from the Public Registry, David Asatiani is, indeed, the owner of the building (café-bar "Ia"), while the land on which the pavilion stands belongs to the State.

According to the applicant, he received a verbal notice from a representative of the City Architectural Supervision Service about the impending dismantling of the pavilion. Notably, registration of owners in the Public Registry was incorrect, as according to part 2 of Article 150 of the Civil Code of Georgia, "buildings, structures and things that are solidly connected with the land and are not designated for temporary use, which may be stipulated under a contract, may belong to the essential constituent part of a land plot".

Hence, from the very start, it was wrong to split the ownership of the building and the 16 sq. meters of the land on which the pavilion stood by registering the state as the owner of the land and giving the ownership of the building standing on this land to a private person. Although, according to Part 1 of Article 312 of the Civil Code, "The presumption of reliability and completeness is applicable to data of the public register, i.e. the register records are deemed to be accurate unless their inaccuracy is proved". The court did not deliberate on the accuracy of the Registry records, hence David Asatiani was considered the legitimate owner of the said building.

As stated above, The Georgian legislation sets out precise procedures for dismantling, fully ignored in this particular case.

The Supervision Service gave only an oral notice to the owner, which is not what the acting law stipulates. Proceeding from the above, the dismantling of the building in the Pushkin Garden of the Freedom Square in Tbilisi was carried out in violation of the provisions of the law, infringing upon the property rights of the owner. Hence, pursuant to Article 21, section

b of the *Organic Law on Public Defender*, the Public Defender addressed a recommendation to the Mayor of Tbilisi to secure adoption of a judicial decision in regard of the said matter.

Public Defender's recommendation was largely ignored, and the property registered to Mr. Asatiani was demolished.

The reply was delayed and did not fit within the established deadlines and, again, it came from the Supervision Service, not from the Mayor's Office. The letter stated that Café-Bar "Ia" was made of the so-called light constructions, and hence cannot be regulated by Article 150 of the *Civil Code of Georgia* or by the *Law on State Supervision over the Architectural and Construction Activity*. It was also pointed out that Mr. Asatiani did not own the plot of land on which the building stood. He had rented this land and the renal agreement expired on 10 April 2005. Hence, the building could be and was dismantled.

In this connection, it should be noted that the case includes a copy of D. Asatiani's letter to the Mayor's Office, in which he requests an extension of the rental period. He never received a reply to this letter and the City Supervision Service provided no counter-evidence to disprove the above. Accordingly, pursuant to Article 559 of the Civil Code of Georgia, David Asatiani legitimately assumed that the rental agreement period was extended for an unlimited period.

Hence, there is every indication that D. Asatiani's right were indeed violated, as he was registered in the Public register as the owner of the building demolished by the Supervision Service authorities, and the court did not deliberate on the legitimacy of the ownership. The demolishing of the building was carried out against his will and without any legal grounds.

The case of company 'Nia Ltd'

The Public Defender was address by partners of company 'Nia Ltd' regarding an encroachment on their property rights.

The supplied documents indicate to the fact the 'Nia Ltd', a legal person. owns a plot of land at 2 Dadiani Srt, Tbilisi, in the vicinity of the railway bridge, and a shop built on this land. This is substantiated by an excerpt from the Public Registry. The supplied documents also include an officially approved architectural design and the respective building permit.

Initially, an order was issued on approving the design of a temporary light-type pavilion to be built on the said land, which – based a special application from the Nadzaladevi district governor's office - eventually was changed to standard construction blocks, Consequently, the owners were granted a permit to continue the building process and use standard construction blocks for the building.

The applicants claim that a City Supervision Service representative gave them a verbal notice of the intended demolition of the building. Accordingly, they filed an application with the said service requesting to quote the legal provisions based on which the decision was taken on dismantling the building they owned.

In reply, the City Supervision Service notified the applicants (letter #20-5/02-3430) that no administrative proceedings had been started in connection with dismantling the building at 2 Dadiani Street. Following this, the applicants claim, they were given a second notice stating that the dismantling of the building would be carried out on 5 January 2007, the basis for this act being the verbal order of the Mayor of Tbilisi.

The Supervision Service again ignored the requirements concerning dismantling of a building as set out in the *Law of Georgia on the Supervision over the Architectural and Construction*. The said Service gave only oral notices to the owners, depriving them of any evidence to motivate their application to the court.

Proceeding from the above, on 26 December 2006, the Public Defender sent off another recommendation to the Tbilisi Mayor's Office, insisting that this issue should be dealt with in full compliance with the acting legislation. It was also recommended to consider the imposition of disciplinary measures upon those individuals who acted in violation of the requirements of the law.

On 16 January 2006, the owners of 'Nia Ltd' addressed the Public Defender once again contending that the City Supervision Service would proceed with the demolition of their property on the same day, at 20:00, despite the above recommendation,

Representatives of the Public Defender's Office went to the site to attend the dismantling of the property. It turned out that dismantling works had already started, as the energy company had already cut off the electric supply, while the actual demolition of the structure took place on 17 January.

Following this, Tbilisi Mayor's administration sent off a reply dated 22 January, noting that the Mayor's Office had not issued a single legal act concerning demolition of the shop "Nia Ltd" at 22 Dadiani Street, neither had been any administrative proceedings started in this relation. The owners of the trading pavilion were given an oral notice about the intended demolition of the pavilion in the nearest future, in full accordance with the norms established by the law. Finally the letter said, " if, proceeding from the interests of the city, the City Service decides the said property should be demolished, the dismantling procedure will be carried out in full compliance with the law, so that no encroachment of the lawful rights of the owners will take place".

Interestingly, the said letter was dated 22 January 2007, whereas the building at issue had already been dismantled, back on 17 January, i.e. 5 days earlier.

The Public Defender submitted all relevant documents connected with the demolition of the privately owned building at issue to the General Prosecutor's Office for due consideration.

On 2 February 2007, the General Prosecutor informed the Public Defender that all materials and documents concerning encroachment on the property rights in connection with "Nia Ltd" had been passed to the Tbilisi Prosecutor's Office, together with an instruction to notify the Public Defender and the General Prosecutor of the ensuing judgement.

The case of a trading centre near the Tsererteli Metro Station

On 18 November 2006, the Tbilisi Supervision Service demolished the building of a trading centre located at 12 Poti Street, across from the Tsereteli metro station, owned by company 'Votum Ltd'.

Prior to this, representatives of the Supervision Service had given an oral notice to the owners of 'Votum Ltd' about the intended demolition of the building. This is corroborated by the protocol drawn up by the Didube-Chughureti inspector of the Head Division of the Tbilisi Patrol Police on 14 November 2006.

On 29 February 2000, the Tbilisi Mayor's Office and 'Votum Ltd' signed a 20-year lease agreement concerning the lease of a state-owned plot of non-agricultural land to 'Votum Ltd'. The legal basis for this agreement was Resolution of the Government of the City of Tbilisi #04.18.94 of 10 June 1999. Section One of the said resolution speaks about leasing out a plot of land with an approximate area of 150 sq. meters in the territory adjacent to the Tseretli Metro Station for temporary use for building and operating a trading centre (shop).

The above agreement provides for the right of the lessee to build a trading centre/shop, together with all auxiliary buildings and structures necessary for its operation. Although, the agreement did not specify the construction methods and terms to be applied in the building of the shop, Article 7, Section 3 of the Agreement provides for the right of the lessee to sub-lease the buildings and structures erected in the leased plot and owned by the lessee. Besides, according to Order #63 of 7 March 2000 of the Chief Architect of Tbilisi, 'Votume Ltd' and the City Mayor's Office have agreed on the construction design for the building to be built in the leased plot of land. On 9 March 2000, the Tbilisi Architectural and Construction Inspection issued the respective building permit, hence, officially approving the building as fit for operation.

According to Chapter 9 of the *Civil Code of Georgia*, "the private legal relations of legal persons of state bodies and public law with other persons are also governed under civil legislation, unless these relations, proceeding from the state or public interests, are governed by public law".

The Tbilisi Mayor's Office and 'Votum Ltd' made an agreement in compliance with the civil legislation norms. Following this, services operating under Mayor's Office studied the

architectural and engineering design of the structure to be erected, and issued the respective building permit. Hence, these acts are indicative of the Mayor's Office intent to enter into legal relations, where 'Votum Lts' featured as a bona-fide holder of the building erected in the said plot, pursuant to Article 159 of the *Civil Code of Georgia*.

The plot of land at issue was leased out temporarily for building and operating of the trading establishment on 10 January 1999. The issued permit does not specify the period over which the lessee could make use of the said building. Accordingly, it would be fair to assume that the lessee could exercise the ownership of the property for the period equal to the term of agreement.

The *Civil Code of Georgia* specifies legal grounds for the abrogation of a lease agreement. According to the general rules, a lease agreement can be abrogated only in exceptional conditions, in particular, if one of the parties violates the terms of the concluded agreement, making an adequate management of the lease agreement impossible.

Article 12 of the Agreement made by the parties is concerned with dispute settlement. According to Section 1 of the said article "parties shall endeavor to settle any disputes arising from the present agreement by seeking a mutually acceptable settlement". According to Section 2 of the same article, in case the parties fail to achieve a mutual agreement, the dispute will be brought before a court for consideration."

The above provision was neglected by the Tbilisi Mayor's Office. The Tbilisi Supervision Service operating under the Mayor's Office demolished the immovable property without reaching any prior agreement on this subject. Consequently, this administrative body violated the principle of a proper exercise of a right, provided for by the acting legislation. Article 115 of the *Civil Code of Georgia* states: "A civil right shall be exercised properly. The exercise of a right with the purpose of inflicting damage to others is inadmissible". The legal norm points to the expediency of a dispute resolution through court proceedings. According to Article 8 of the *Civil Code of Georgia*, "participants in legal relations are required to exercise the rights and duties thereof in good faith" .

Accordingly, in case of a disagreement, the Tbilisi Mayor's Office was to file a claim with the court. In such a case, the issue of legitimacy of the said construction would have been considered and assessed by the court, through a careful and comprehensive study of all relevant circumstances, with all fairness and impartiality.

Given the above, the officials of the Supervision Service under the Mayor of Tbilisi, through their illegitimate actions, have violated the human rights protected by the acting legislation, in particular: the rights of the applicant as a *bona fide* holder and an entrepreneur.

Pursuant to Article 160 of the *Civil Code of Georgia* " a *bone fide* holder is entitled to claim the return of his holding from an illegal holder. This means that if a bona fide holder is dispossessed of the holding, he/she is entitled to claim the return (and putting the holding in its initial condition) of the holding from the new holder over the period of three years. This rule does not apply where the new holder has better right of holding. The demand for the

return of holding may also be applied to the holder with a better right provided that he has acquired the holding with force or by fraud".

Article 6.1 of the Agreement states the lessor 's obligation to provide help to the lessee with disposing the leased plot of land. The Tbilisi Mayor's Office failed to fulfill its obligations under the said agreement, which entitles the applicant to the compensation of incurred losses.

The Public Defender found a violation of the aforementioned rights by the administrative body. Proceeding from this, and based on Article 21, subsection b of *the Organic Law of Georgia on Public Defender*, he addressed a recommendation to the Tbilisi Mayor's Office, demanding to reinstate the holding in its initial condition, or otherwise, if this is impossible, to pay a fair compensation for the destroyed property.

It is to be noted, that the Public Defender's reports for previous years contain a number accounts on cases related to dismantling of property where demolition was carried out in violation of the law, e.g., the cases of Nergadze and Zurab Talaxadze, the case of the Dighomi and Batumi parking lots, the case of Nodar Maisuradze, etc. Nonetheless, the relevant authorities made no effort to follow up the indicated facts and take the respective legal actions, nor there has been a single instance where an individual who committed the offences and omissions associated with illegal demolition of private property was brought to justice.

UTG Case

On June 13, Suliko Mashia addressed the Public Defender with an application on behalf of the JSC "United Telecom of Georgia" (UGT) shareholders.

The claimant pointed out inconsistency of Article 53 of the Georgian Law on Entrepreneurs (Article 1) with the Constitution, and the resultant violation of human rights and freedoms. The said article defines mandatory share sale rule. Under the Law " if, as a result of share acquisition, shareholder owns more that 95% of voting shares of the joint stock company, this shareholder (for the purpose of this article "Buyer":) exercises right to buy out shares from other shareholders at a fair price, with the remaining shareholders entitled to fair price in exchange of shares.

As a result of case examination, the mentioned article of the Law on Entrepreneurs was deemed by the Public Defender as an abusive legislation in terms of human right protection. Namely the Right of Ownership, adopted and supported by Article 21 of the Constitution, is abused by Article 53 of the law, general right of acquisition, alienation or inheritance cannot be subject to abrogation.

Consequent to aforementioned, on September 19 of current year, under the "Organic Law on Public Defender", the Public Defender filed a suit to the Constitutional Court requesting to deem the Article 53 of the "Law on Entrepreneurs" unconstitutional.

The Constitutional Court admitted the case, the "Act Under Dispute" became ineffective and presently the case remains under consideration.

The Case of Lasha Morchiladze

On October 17, 2006 Lasha Morchiladze addressed the Public Defender with an application.

Claimant's explanatory notes and presented material revealed that claimant is the owner of 2475 sq.m site in Ozurgeti. In agreement with the regional and local managing bodies construction of two 5 tn water reservoirs is underway on the mentioned site. Undertaken action is deprived of all legal bases, since it commenced without preliminary agreement with the owner and offered no adequate remuneration.

L. Morchiladze referred the statement to Ozurgeti Regional Management on terminating illegal construction or ensuring adequate remuneration.

According to follow up from Ozurgeti Regional Management, (dated September 8, 2006) the act is justified by Makharadze (currently Ozurgeti) Public Deputies' Regional Board Resolution, adopted in 1983. Under the resolution, the site was allocated for water reservoir and water pipe route construction. Arguments of the Regional Management, pursuant to resolution, imply that the site should not be listed under the privatization fund list and its transfer to public ownership by the Land Committee constitutes the breach of law, therefore Morchiladze,s claim is unfounded.

Ozurgeti Regional Management follow up is deprived of all legal bases. Actions conducted on L. Morchiladze's site grossly violate the ownership rights supported by the domestic legislation of Georgia and international insturments.

Ownership and inheritance rights are adopted and supported Under Article 21 of the Georgian Constitution. General rights of ownership, acquisition, alienation or inheritance cannot be subject of abrogation.

Property stripping for urgent public requirements is authorized in direct law defined cases, under the Court ruling, or under the Organic Law defined urgent cases followed by adequate remuneration.

Management's position against the site inclusion in the privatization list and consequent transfer to private ownership is unfounded.

The legacy of site transfer was not subject of deliberation by adequate bodies. Nobody applied the court with the motion of verifying the legacy of Court Act, therefore no court judgement is rendered concerning the limitation of human rights in any form. Moreover, the Presumption of Certainty and Completeness of public registry records is effective for site. Under Article 313 Para 1, of the Civil Code of Georgia, data from public registry is deemed accurate unless contrary stated.

The present case evidences no public needs, neither remuneration term, offered by claimant is considered. The claimant's generally accepted lawful right to possess and use owned property and prevent its appliance by a third party is harshly violated by the local bodies.

Consequent to aforementioned, the Public Defender of Georgia, under Article 21 Para B of the Organic Law addressed a suggestion to governors of Guria and Ozurgeti concerning the examination of the case and restoration of claimant's violated rights.

Follow up from Procurator's Office of Guria corroborates the fact of reservoir construction. Moreover, letter revealed that construction is funded by the State Budget and Municipal Development Fund, with the project estimated at GEL 4,500,000, bearing vital importance in terms of social development.

Consequent to aforementioned, the President's State Governor's Office agrees with the statement given in the letter dated Sept 8, 2006 concerning the interpretation of site status as being urgent for the public. The purposeful meaning of site defined in 1983 is being realized by the aforementioned project.

The letter left many issues unanswered, namely the Public Defender focused on such fundamental issues as violation of ownership rights (all stated). Respond provided from Governor's Office disregards this issue by not mentioning a word in this respect. The Public Defender addressed the suggestion to the Governor's Office for adequate follow up concerning the remedy of human rights breach. According to claimant's explanation, he was interrogated in the court under ambiguous status, followed by house search.

LLC Adat Case

On August 17, M Otarashvili, chairman of association "Shareholders Rights and Corporate Management" addressed the Public Defender with an application

The materials attached to the case revealed that K Nikabadze, Prosecutor of Krtzanisi-Mtatzminda Regional Prosecutor's Office addressed N. Bakhtadze, the head of National Agency of Public Registry of the Justice Ministry with the letter No.01/18-1/6-1154 dated may 5, 2006, stating that due to criminal case No.0605924 effective in the company, consequential investigation interests shall be preserved by preventing the alienation of property owned by LLC "Adat" located on 103 Agmashenebeli AV.

Following the aforementioned letter, General Director of LLC Adati addressed the National Agency of Public Registry for the record on property, with his claim left disregarded. Such action was justified under the letter provided by Mtatzminda-Krtzanisi Regional Prosecutor's Office, dated may 5, 2006.

Chapter 24 of the Criminal Procedure Code of Georgia defines property seizure rule, prohibiting owners from disposing the property and if so required , from using the property.

Seizure is legalised in support of action, criminal procedural force, presumable asset stripping, upon the prosecutor order or, in urgent cases, upon the prosecutor's ordinance.

Letter No.01/18-1/6-1154, dated May 5, 2006 provides no legal basis for restricting property alienation, therefore it contradicts the law. Moreover, content of the letter and action of public registry representatives resulted in breach of law-envisaged human rights.

Under Article 170 of the "Civil Code of Georgia", Owner exercises full authority to legally or otherwise possess, within the limited terms of agreement and use the property, prevent the use of property by others and dispose it, unless such action prompts the violation of neighbors' or the third persons' rights, or can be interpreted as an abuse of rights.

Under Article 37 of the Administrative Code of Georgia, all are entitled to claiming public information regardless of its physical form and maintenance terms and select the suitable way of getting it, if existent in different forms.

Claimant defined that restrictions of ownership rights and limited access to public information is common practice among prosecutors and representatives of public registry, with similar cases observed before.

Under Article 21, Para D of the Organic Law of Georgia on Public Defender and Article 38 of the "Organic Law on Prosecutors' Office" the Public Defender addressed a suggestion to the General Prosecutor of Georgia to consider the issue of disciplinary responsibility of N Nikabadze , prosecutor of Tbilisi Mtatzminda-Krtzanisi Regional Prosecutor's Office.

Suggestion was left unresponded within the law defined one month. Reminding letter is referred to General Prosecutor's Office concerning the aforementioned fact, although no reaction is made so far known to the Public Defender of Georgia.

Partnership " Amirejibi-89 case.

On August 9, 2006, the Public Defender was addresses by Koba Davitashvili, MP, with an application and provided statement of partnership "Amirejibi-89" members, concerning the violation of human rights.

Case files reveal that Partnership Amirejibi-89" owns area in Tbilisi on 26-32 Agmashenebeli Av, proved by record from public registry. Claimant pointed out on the construction of sport arena on the mentioned territory without owners' permission.

With the purpose of obtaining complete information, we addressed Isani-Samgori Regional Administration, which revealed that, for many years the area was turned into dump. In 2005 the area was cleaned and the City Service of Sport commenced construction of sport arena. It is to be noted hereby, that the ownership of the site was unknown at that time, until the official registration date in public registry as of April 24, 2006. Nowadays population of that region firmly opposes the demolishment of Sport Arena

The Ownership Right is one of the strongly supported and guaranteed rights. Article 21 of the Constitution of Georgia defines the Ownership and Inheritance rights as adopted and supported, therefore general rights of acquisition, alienation or inheritance of property cannot be subject of abrogation.

Rights mentioned in the first point can be subject to restriction for the purpose of urgent public needs under the law-defined cases and stated rules.

Property stripping for urgent public needs is justified in direct law defined cases, upon the court judgement or for the purpose of urgent needs stated by the Organic Law and only upon adequate remuneration.

Under the Civil Code of Georgia, owner exercises full authority to freely possess, use and dispose owned object and prevent its abuse by a third party. Freedom of use implies the owner's right to utilize the object at his discretion.

Prior to commencement of construction, City Service of Sport should have learned who was the owner of the populated area. Since partnership "Amirejibi 89" was established under Resolution No.25119303 of the district board of 26 Commissar District of Tbilisi, dated December 20, 1989, and the related data were kept in technical archive, therefore Isani-Samgori Regional Administration statement concerning the registration of site in 2006 does not seem to be appropriate. Access to archive data was free for adequate bodies, clearly underlying that area on 26-32 Agmashenebeli Av does not represent the state ownership and partnership "Amirejibi 89" is considered as possessor. Therefore, claim from population concerning the demolishment of arena shall be disregarded, since it results in abuse of owners lawful interests.

Consequent to aforementioned, the case deals with the violation of ownership right of whose owning 26-32 Amirajibi street, for that reason, under Article 21, Para B of the "Organic law on Public Defender of Georgia", the Public Defender addressed recommendation to the Municipal Authorities to assign the Supervisory City Service of Municipal Authority to demolish sport arena in full observance of law requirements, in addition, to consider the issue of disciplinary responsibility of those, who acted in violation of human rights of the partnership members under Para D of the same Article.

The response from the Supervisory City Service implies the inability of the latter to legally follow up, by launching administrative action concerting the demolishment of sport arena. Since the case deals with the abuse of ownership right and property use, dispute generated between the parties is a subject of private law, which under Article 172 of the Civil Code shall be resolved by parties in court.

Afterwards, as became known from her own reasoning, Maia Kandelaki Chairman of partnership was summoned to the Supervisory City Service and offered interchange, in exchange of relegating the owned area to the State. Since no concrete offer was made, with

the exception of unofficial, verbal promise, Maia Kandelaki disregarded the offer and therefore the said issue remains pending.

Neron Mamaladze's case

The Public Defender was addressed by citizen Mzia Patarashvili acting as representative of Neron Mmaladze, concerning the destruction of property owned by her assigner.

Case files revealed that on March 1, 1992 citizen Neron Mamaladze and partnership "Khurotmodzgvari-89" entered into agreement, with the latter undertaking the liability of erecting multistoried building on site, owned by N. Mamaladze, located on 9 Anagi St and in exchange the citizen would be granted a five-room flat. Construction was to be finished at the end of 1998, failure to meet the obligation in due time, resulted into violation of agreement terms. Hence, on January 16 N. Mamaladze addressed the court with the claim to repeal the agreement between the parties and to record the site in public registry on his name.

During case proceedings defendant filed a counter claim with the appeal to repeal the same agreement on the basis that Neron Mamaladze had never been the owner of the disputed site and was not authorized to enter into agreement concerning the land transfer. Moreover, he claimed freeing out the territory from other facilities at Mamaladze's expenses.

Judgement, rendered by Tbilisi Vake-Saburtalo Regional Court on March 24, 2005, partially satisfied Neron Mamaladze's claim, although partnership's, claim was fully met. The agreement made between the parties on March 1, 1992 was deemed repealed: N Mamladze was rejected from adopting and recording the 1400 sq.m property, located on 29 Shartava street, as his own property, since he failed to present the ownership proving documents. Therefore, "Partnership" was deemed a fair owner of disputed property, in view of the fact that, the site was transferred to the latter by Tbilisi Public Deputies' Board resolution.

N. Mamaladze submitted a cassation appeal against the court judgement with the claim to deem the part of court resolution abrogated, concerning the rejection of his ownership right on the site and putting him in charge of freeing out the area from facilities. Moreover, he claimed the court to satisfy his motion by rendering a new judgement and disregarding the partnership's appeal.

Appellate Court partly satisfied Mamaladze's appeal: Tbisili Vake Saburtalo Regional Court judgement point D, dated march 24, 2005, obligating N. Mamaladze to free out the site from facilities at his expens in connection with the commencement of construction activities by "Khurotmodzgvari-89", without compensation was deemed arrogated.

Applicant's aforementioned claim on returning disputed site and recording it in public registry on his name, was disregarded, due to absence of legal basis, since the mentioned site has never been recorded as the applicant's property.

Partnership "Khurotmodzgvari-89" counter claim against N Mamaladze concerning demolishment of facilities on the disputed area at his expenses was disregarded, for not being recognized as a fair owner and consequently claim on freeing the site was unfounded.

Cassational appeal was submitted by Union of Georgian Architectures, Partnership "Khurotmodzgvari-89" against the judgement rendered by the Chamber of Tbilisi Regional Court of Civil, Industrial and Bankruptcy Case of Court of Appeal, dated September 28, 2005,

The Cassation Chamber examined the case-files and viewed the court judgment, concerning the actual environment inaccurate, consequently resulting into wrong legal assessment. The Chamber considers the reasoning of judgement incomplete, therefore the judgement rendered by the Chamber of Tbilisi Regional Court of Civil, Industrial and Bankruptcy Case of the Court of Appeal, dated September 28, 2005, was disregarded and referred to the Chamber of Civil Cases of the Tbilisi Court of Appeal for reconsideration. Currently the Appellate Court considers N.Mamaladze's case over the demolishment of commercial building.

On July 25, 2005, Partnership "Khurptmodzgvari-89" registered the land, beneath N Mamaladze's commercial facility, on its name in public registry. N. Mamaladze filed a suit to the Chamber of Administrative Cases of Tbilisi City Court. Aforementioned case is under consideration.

Documents provided by Supervisory City Service of Tbilisi Municipal Authority evidences that the mentioned body send a note to partnership "Khurotmodzgvreba-89" on Nov 28, 2005 concerning the eradication of terms and reasons contributing to violation of law. Under Article 6, Para 1, of the Law on Supervision of Architectural-Construction Activities" the mentioned note serves as a warning for the owner to demolish the facility within 5 calendar days. The note also implies that under Article 170 of "Administrative Violation Code" partnership "Khurotmodzgvari-89" bears responsibility for notifying the Supervisory Civil Service of Municipal Authorities on undertaken actions within one month.

The form of administrative violation remains ambiguous, due to absence of concrete requirements in the act, apart from the aforementioned. In case of administrative violation, respective body draws up a minute and not note. Similar document shall be deemed valid under the "Law of Georgia on State Supervision of Architectural-construction activities" if considered for act made by administrative-construction supervising bodies, issued for the purpose to remedy the violations concerning the architectural-construction activities, failure to meet requirements results into multiple sanctions, imposed by the law.

Under Article 6,Para 1 of note drafted by Supervisory City Service of Municipal Authorities, if violations are revealed in architectural-construcion activities, the State Architectural Construction Supervisory Bodies suggest the responsible party to voluntarily address the issee within the time required for remedy. If left disregarded, a special penalty shall be issued by the State Architectural Construction Supervisory Bodies.

Supervisory Civil Service provided no documents to the PDO, neither the act revels any concrete violation, as well as Article of Law on Architectural- Construction activities, evidencing the expediency of Note.

Following the expiry date defined in note, Supervisory Civil Service conducted demolishment, without objection from the owner of the site "Khurotmodzgvari -89" and indeed such action was carried out in agreement with the owner, although the fact remains apparent, that facility located on site did not belong to Khurotmodzgvari-89. Referring note to "Partnership Khurtmodzgvari" by the Supervisory Service is justified under Article 150 of the Civil Code of Georgia, interpreting the capital building, closely related to land, as an entire part of the land.

Presumably, Supervisory Service claimed demolishment of the facility from the owner, solely on the bases of record from public registry, without familiarizing who was the possessor of the facility.

Minute, drafted by PDO representatives Salome Vardiashvili and Giorgi Mshvenieradze states the contrary. The accuracy of the minute is proved by Supervisory Civil Service employee V Gvatua.

Under the minute, Supervisory Service employee defies the following: Commercial unit, possessed by N.Mamaladze hindered the use of land owned by partnership "Khurotmodzvnari -89", consequently partnership addressed the municipal authority with the claim to demolish the facility.

The said minute obviously revealed that Supervisory Civil Service of Municipal Authorities was aware on the real possessor of the facility

In case of claims towards possessor, Article 172, Para 2 grants the owner (Khuromodzgvari) right to address the Court with the claim to eradicate the impeding environment, although no such action was undertaken by the owner. In case of impediment, Partnership Khuritmodzgvari was entitled to legally exercise its rights by addressing law enforcers. Under Article 172, part 3, of the Civil Code of Georgia, "abuse or otherwise impediment of property ownership right, authorizes owner to claim eradication of such actions, if motion is not followed up, owner exercises full authority to undertake such action without court judgement, by presenting ownership proving documents issued by adequate body, unless presumable abuser is a legal owner or/and has documented right of using the property. As revealed, the authority to cease impediment, without court judgement, is granted to law enforcers and not to Municipal Supervisory Civil Service.

Despite many unanswered questions and contradictory official information received by the Public Defender from the Supervisory Civil Service of Municipal Authorities, it is to be noted, that demolishment of object owned by N. Mamaladze was conducted in full disregard of Law.

Unlike Maia Kandelaki's case, whereby Supervisory Service underlines its inability to intervene in dispute arisen between private persons, property owned by N. Mamaladze was demolished on the basis of Khurotmodzvgari statement, regardless of being aware on dispute between the parties. Nowadays, the Appellate Court shall deliberate of who shall be granted the ownership right and whether demolishment can be undertaken or not, at the background that this act has already taken place.

Hussein Ali's Case

The Public Defender of Georgia examined Hussein Ali's case and views that illegal action undertaken by law enforcers, wrong proceedings and prolonged investigation contributed to violation of Hussein Ali's ownership rights. Moreover, relation between the foreign investor and the State was significantly marred, in view of the fact that, development of sound relations with foreign investors bears utmost importance as one of the key priorities of the country.

* * *

On April 6, 2006 and on September 1, 2006, the Public Defender of Georgia was addressed by Aleskandre Baramidze, representing interests of Husein Ali, concerning the violation of rights.

On September 6, 2006, David Lanchava, representative of Akhmed Iynise filed a suit against Husein Ali in Tbilisi Isani- Samgori Regional Court claiming payment of debt In amount of GEL 8 Mln. Baramidze noted, that the said file had never reached Hussein Ali.

The foremost court cession concerning the aforementioned was held on September 16, 2004, whereby Husein Ali was not summoned as defendant and received no notification (უწყება)

Tamaz Melkadze, summoned by the Court instead of Husein Ali, submitted a faked Power of Attorney issued on August 16, 2001, notarized by Ketevan Chkhikvadze, giving full authority to Tamaz Melkadze to represent Hussein Ali in conducting civil issues in all instances of court, including right to close the case by reconciliation, disregard or partially or completely comply with the requirements.

False representative of Hussein Ali, Tamaz Melkadze admitted at the Court that Hussein Ali had a debt of USD 8 Mln to Akhmed Uinies.

Under judge Bakradze,s suggestion the Act of Reconciliation was drafted by the parties at the court cession, whereby Tamaz Melkadze, as a legal representative if Husein Ali transferred 90% share of Georgian Tobacco owned by Hussein Ali to Akhmed Iuness. The said "Act of Reconciliation" was approved by judge Bakradze at the same cession.

On September 17, 2004, the aforementioned changes, introduced by Iisani-Samgori Regional Court, were officially recorded at the public registry, whereby Akhmed Iunes turned a 90% charter capital holder of LLC "Georgian Tobacco Industry"

On September 18, 2004, Akhmed Iunes, 90% charter capital holder of LLC "Georgian Tobacco Industry" transferred his share to Avtandil Tzereteli. Samgori-Isani Regional Court judgement dated Sept 20, 2004 and adequate record in public registry made Avtandil Tzereteil a 100% charter capital holder of LLC "Georgian Ttobacco Industry".

Apparently, this is a case of fraud and consequently a crime is committed, since Iunes would not have presented his share to Avtandil Tzereteli. Another detail deserves attention, whereby the civil case examination and closure took 10 days, which usually requires month and even years.

On November 26, 2004, after becoming familiar with the fraud committed against him in September 2004, Hussein Ali addressed investigative bodies.

On the following day, after Hussein Ali submitted the application on Nov 27, 2004, a criminal case was initiated by the Fiscal Police Operative Departmet of the Ministry of Finance concerning the missappropriation of 90% share in LLC "Georgian Tobacco Industry" held by Hussein Ali. The criminal case was granted number No.9204822.

The aforementioned case-examination was slow and ineffective, although two undertaken expertise revealed the falsification of Hussein Ali,s signature on the Power of Attorney issued to Tamaz Melikadze and Notarized by Ketevan Chkhikvadze.

On July 1, 2005 Tamaz Melkadze and Ketevan Chkikvadze were indicted. Although, later on September 14, 2005 N. Salia, prosecutor of Procedural Management Agency of Investigation in Tbilisi Territorial Units of the Ministry of Finance at General Prosecutor's Office, made an ordinance on criminal case No.9204822 over termination of criminal proceedings and preliminary investigation.

On March 20, 2006 Chamber of Criminal Matters of Tbilisi City Court presiding judge Giorgi Goginashvili with his decree abrogated N. Salias's ordinance on criminal case No.9204822 dated Sept 14, 2005 concerning the termination of criminal proceedings and preliminary investigation and referred the case to General Prosecutor's Office of Georgia for reconsideration.

Ordinance, dated March 20, 2006 rendered by Chamber of Criminal Matters of Tbilisi City Court was sued by N. Salia the Prosecutor of General Prosecutor's Office of Georgia

On March 23, 2006, Investigative Chamber of Tbilisi Court of Appeal presiding judge Omar Jorbenadze disregarded the claim filed by General Prosecotor's Office of Georgia and left the ordinance, deivered by the Colleqium of Criminal Matters of Tbilisi Civil Court presiding judge Giorgi Goginashvili effective.

Both the first instance court and Appelate Court prosecutors deemed the judgement, concerning the termination of criminal proceedings and preliminary investigation taken hastily, without fully exhausting the potential of undertaking all investigative actions and thus contradicting the obligation provided under Article 18 of the Criminal Procedural Court for the provision of objective and comprehensive examination of circumstances.

On March 24, 2006 repetitive graphical expertise was initiated, No.20/01/13-2568 resulting in the following conclusion:

1 Signatures on behalf of Hussein Ali, in English (in form of a text), appearing on the following documents: on the Power of Attorney, dated August 16, 2001 and registration record for notarial actions, number and date of notarial actions No.1-2510 20.08.2001 and signature of a person in charge of accepting notarized documents was performed by the same individual.

2 Signatures on behalf of Hussein Ali, appearing in the first point of conclusion is made not by Hussein Ali himself but by another person, keeping resemblance with the Husein Ali's original signature.

3. Signature on behalf of Hussein Ali, (short signature) appearing on the Power of Attorney, dated August 16, 2001 is made not by Hussein Ali himself but by another person, keeping resemblance with the Husein Ali's original signature.

On March 24, 2006 senior inspector of Unit 3 of Tbilisi Central Administration of Fiscal Police Investigative Department of the MOF, Aleksandre Jibladze rendered the judgement for indictment of accused Tamaz Mekladze and Ketevan Chkikvadze.

On April 13, 2006, defendant Tamaz Melkadze gave evidence by admitting guilt.

At the end of summer 2001, while being Head of Legal Department of LLC Georgian Tobacco Industry, an urgent need was prompted for protecting the interests of Canadian citizen Hussein Ali, 90% shareholder of LLC Georgian Tobacco Industry, at various court instances. Due to his absence in Georgia, I applied my friend, notary Ketevan Chkhikvadze with the request to forge the Power of Attorney on behalf of Hussein Ali, dated August 16, 2001. This document enabled me to protect Hussein Ali's interests and represent him at various court instances for many years. Lately, due to my personal viewpoint, I changed my attitude towards this person and together with others, whom I prefer to leave unidentified, decided to remove him from management of the industry if given a chance to do so. At the beginning of September 2004, I learned that David Lanchava, Akhmed Iune's representative, filed a suit against Husein Ali at Tbilisi Isani-Samgori Regional Court. On the basis of the aforementioned Power of Attorney: "I acted as Hussein Ali's representative at the court and without prior agreement with him, transferred 90% share held by the latter in exchange of USD 8 Mln. I express no desire to add more on my evidence".

- On April 13, 2006 from 13:00 PM to 14:40 PM Ketevan Chkhikvadze was additionally interrogated, whereby accused admitted guilt of forging the Power of Attorney and notarizing it at Tamaz Melkadze,s request.
- On the same day from 15:40 PM to 16:15 PM accused Tamaz Melkadze was additionally interrogated, whereby defendant admitted quilt.
- On the same day, at 16:15 PM Plea Agreement was made with both accused, signed by M .Chikvaidze, prosecutor of Procedural Management Agency of Investigation in Tbilisi Territorial Units of the Ministry of Finance at General Prosecutor's Office of Georgia, by the Head of Administration G.Kakulia, by the accused and their attorneys.
- Afterwards, on the same day, prosecutor of Procedural Management Agency of Investigation in Tbilisi Territorial Units of the Ministry of Finance at General Prosecutor's Office M .Chikvaidze made ordinance on the separation of the criminal cases against the accused T. Melkadze and k. Chikvaidze
- Later, on the same day, M .Chikvaidze, prosecutor of Procedural Management Agency of Investigation in Tbilisi Territorial Units of the Ministry of Finance at General Prosecutor's Office of Georgia addressed Giorgi Shavliashvili, Chairman of Chamber of Criminal Matters of Tbilisi City Court for solicitation and claimed the approval of Plea Agreement made with accused T. Melkadze and K. Chkhikvadze.

- Later, on the same day Chamber of Criminal Matters of Tbilisi City Court Prosecutor's Assistant Ia Shengelia, referred letter to the director of Tbilisi jail No.5 on summoning prisoners K. Chkhikvadze and T Mlkadze to court.
- Later, on the same day at 19:30 PM Chamber of Criminal Matters of Tbilisi City Court presiding judge L Murusidze opened the court cession for the purposed of K. Chkhikvadze's and T. Melkadze's criminal case examination. Shortly after declaring the cession opened, judge rendered a verdict and at 20:00 PM, the court cession was announced closed.
- The Court approved Plea Agreement and the accused T. Melkadze and K.Chkikvadze were found guilty and sentenced to 5 years of imprisonment with penalty in amount of GEL 10,000.

The following deserves attention:

The Procedural agreement was completed within a remarkably short span of time. In less than 4 hours, from 16:15 PM to 20:00 PM prosecutor and judge managed to do the following:

1. appealing minutes of Interrogation from prosecutors
2. familiarizing with the Minutes of Interrogation
3. making Judgement on Plea Agreement
4. agreeing with high instance prosecutor
5. drafting Plea Agreement minutes
6. delivering minutes to accused and their attorneys for familiarization and signature.
7. delivering minutes to high instance prosecutors for familiarization and signature.
8. rendering judgement on separation of the criminal cases against the accused.
9. drafting 2 solicitations, over rendering verdict on criminal case without adequate deliberations.

10. delivering solicitation, over rendering verdict on criminal case without deliberations to accused and their attorneys for familiarization and signature.
11. delivering solicitation to the court
12. familiarizing with the prosecutor's solicitation and case-files
13. assigning assistants, including summoning accused to the Court: bringing prosecutor to the court, opening and conducting the court cession
14. defying identity of the accused
15. hearing on prosecutor's solicitation and defendants' evidence: inspecting other procedural environment concerning the approval of Plea Agreement.
16. rendering final judgement
17. publishing the final verdict

The Public Defender voiced suspicion over the Plea Agreement made with accused T Melkadze and K. Chkhikvadze in compliance with the aforementioned rules and over the consequential court judgement, which he shared at the press conference, held in September 21, 2006

Namely, execution of the whole procedure concerning the Plea Agreement and its approval by the court in less then 4 hours seems unfeasible for the Public Defender of Georgia. The way of drafting Plea Agreement without clarifying who ordered such action of accused triggers doubt. On the same day, the Public Defender addressed Deputy General Prosecutor Giorgi Latzabadze for further follow up. Despite repetitive applications on December 7, 2006 and on January 17, 2007, the question remains unanswered.

On May 24, 2005, R. Nikoleishvili the Head of Administration of Tbilisi Fiscal Police Investigative Department, was addressed by the Public Defender, under the Organic Law of Georgia on Public Defender", with the request to reclaim Hussein Ali,s Power of Attorney, dated Sep 16, 2004, which provided basis for Melkadze to represent him at the Courts, for the purpose of complete and objective investigation of the case.

On September 21, 2006 the Public Defender addressed Nino Burjanadze, Chairman of Parliament to exercise authority, granted by the Parliamentary Regulations and put the question of establishing temporary investigative committee for the purpose of revealing the facts of violation committed by the State Bodies and officials in connection with Husein Ali's case and for adequate follow up.

Response, provided by Elene Tevdoradze, Chairman of Human Rights and Civil Integration Committee of the Parliament of Georgia underlined the following:

Under Article 54 of the Regulations for the Georgian Parliament, the basis for establishment of temporary investigative committee is the existence of information on: a) illegal action of the state bodies and officials, posing threat to the Georgian State security, sovereignty, territorial integrity, to political, economic and other interests, b) excessive expenditure of the state and local budget, c) investigation which acquires vital importance for the state and the society.

Despite the high importance of the present case, none of the aforementioned basis are presented herein. Provided material more likely implies abuse of dominant position by individual law enforcers. Under Georgian legislation, breach of law by the prosecutor concerning the case proceedings, shall be subject to highest examination by the Georgian Justice.

Under the ordinance, dated December 20, 2006, the Chamber of Criminal Case of Tbilisi Court of Appeal, presiding judge T.Alania abrogated the verdict, dated April 13, 2006, filed by the Chamber of Criminal Case of Tbilisi Civil Court presiding judge L.Musuridze, approving the Plea Agreements with accused T.Melkadze and K. Chkhikvadze and the case was relegated to Fiscal Police for reconsideration.

Abrogation of the verdict, dated April 13, 2006 passed by Chamber of Criminal Matters of Tbilisi City Court was based on the statement made by K.Chikhvaidze and T. Melkadze, whereby both admitted providing willfully wrong testimony while being in custody, due to life-execution threatening menace realized on their family members by strangers.

Tbilisi Appellate Court verified no objective evidence concerning the fact of threat; moreover, life-threatening menace towards the accused also remains ambiguous. If such threat was real, why it does not exist now, at the background when investigation not only failed to reveal and defuse the source of such menace but also failed to find those doing so.

In this regard, ordinance rendered by the Chamber of Criminal Case of the Tbilisi Court of Appeal, dated December 20, 2006, reveals the following: " In view of judge, they can try to prove their innocence without the outside pressure, since nowadays such actions are not left without adequate follow up" – in other words, the court deems such issues fully addressed, although 8 months ago, in April 2006 such actions were fully unresponded. One fact remains apparent; the period between April 2006 to present saw no major changes in this regard.

On December 28, 2006 N. Salia, prosecutor of Procedural Management Agency of investigation in Tbilisi Territorial Units of the Ministry of Finance at General Prosecutor's Office rendered the ordinance concerning termination of criminal prosecution and preliminary investigation, due to absence of criminal activity.

On December 28, 2006, prosecutor N. Salia based his resolution concerning the termination of criminal prosecution and preliminary investigation on the same circumstances, which triggered him to render the similar ordinance on September 14, 2005. In doing so, he completely disregarded ordinance made on March 20, 2006 by the Chamber of Criminal Case of the Tbilisi Civil court, presiding judge Goginashvili and ordinance made on March 23, 2006, by the Investigative Chamber of the Court of Appeal judge Jorbenadze, providing basis for abrogation of prosecutor Salia's judgement dated September 14, 2000.

Prosecutor disregarded concrete assignments indicated in Goginashvili,s ordinance, dated March 20, 2006: Akhmed Iunis and other members, who could have provided valuable testimony, were not interrogated. Moreover, alternative graphical expertise, presented by

Hussein Ali, was left without adequate assessment. In contrast, huge attention and consideration was granted to alternative graphical expertise presented by the accused.

Under the attorney's statement, prosecutor disregarded Hussein Ali's claim revealed in multiple statements and solicitation in connection with granting him or his representative the honored permission of attending the interrogation of accused and witnesses', the Right fully granted by the Procedural Code of Georgia. Interestingly, none of these documents concerning solicitation and suit are attached to the case-material.

Consideration shall be granted to other circumstances, whereby prosecutor Salia rendered judgement in 8 days, after Tbilisi Appellate Court abrogated the verdict, dated April 13, 2006. Apparently, such short time is grossly insufficient for objective and complete inspection of circumstances. Consequently, prosecutor Salia,s ordinance on termination of criminal proceedings and preliminary investigation was accepted hastily, deprived of all reasoning and legal basis, as was the judgement, rendered on September 14, 2005. The same can be attributed to Plea Agreement made with T. Melkadze and K.Chkhikvadze on April 13, 2006 and verdict, passed on the same date.

Illegal action of law enforcers and investigative bodies enabled Avtandil Tzereteli to wholly alienate his 100% share in LLC "Georgian Tobacco Industry", including 90% of share illegally deprived from Hussein Ali. Nowadays "Coppola Venture Limited", a company registered in British Virginia Isles represents the 100% legal owner of the Company, such circumstances not only complicate but maybe wholly deprive Hussein Ali from the opportunity of returning his property.

Hussein Ali,s case acquires vital importance, whereby illegal action and presumably criminal act and inactivity of Georgian Justice and investigative bodies significantly abused the foreign investor's interests.

Badagoni Case

On November 14, 2006, mass media aired the fact that wine plant of the wine producing company LLC "Badagoni" was subject to the State control with the participation of Judges of Kakheti Regional Administration of Fiscal Police Investigative Department, the Ministry of Agriculture and " Samtrest" officials , which resulted into locking of reservoirs No.19 and No. 23, with the partial destruction of wine material from Reservoir No.23.

As is known, Inspection process was conducted in violation of Entrepreneur's Rights. Under Article 12 of the "Law of Georgia on Public Defender" the Public Defender, on his own initiative, launched the investigation concerning the aforementioned fact.

The Public Defender filed a written petition to Fiscal Police of Georgia, to the Ministry of Agriculture and Samtrest requesting information.

According to the letter, received on November 21, 2006 from the Investigative Department of Fiscal Police, Vine and Wine Department addressed the Kakheti Regional Administration of Fiscal Police Investigative Department on November 14, 2006 with the statement. The mentioned statement implies that, under the special order from Georgian Government, (no concrete persons are indicated) "Samtresti and General Inspectorate of the Ministry of Agriculture launched the state control on LLC Badagoni wine material and brand production, 40 samples were sent for assessment to Multitrest laboratory. The lab inspection results revealed the existence of counterfeited wine material. The letter is accompanied with the appeal, signed by Deputy Chairman Ms Ketevan Zhgenti.

Based on stated material, under Articles 261 and 263 of the Criminal Procedure Code, Kakheti Administration of Fiscal Police Investigative Department launched preliminary investigation concerning the counterfeited wine material, used by LLC Badagoni.

The case was subject of examination. Urgent circumstances revealed wine material, confirmed by Akhmeta Regional Court

Letter, provided by Vine and Wine department implies that "Samtresti" conducts the state control on local wine and wine brand production on the legal basis, for the purpose of determining grape production, processing, technological procedure of wine and vine brand production, as well as the quality compliance with regulations and technical instructions applied in winery. Inspection results provide bases for making adequate resolution in terms of issuing or non-issuing of certificate.

The aforementioned letter also implies, that on November 13, 2006, Samtresti employees were repeatedly sent to LLC Badagoni wine plant for additional examination of analytical results received from Multitrust, although their attempt turned unsuccessful due to objections from the unit representatives.

In contrast, LLC Badagoni representatives underline the fact of wine destruction, kept in reservoirs, on November 14, by "Samtresti" representatives in presence of Fiscal Police. The mentioned fact is seized by TV cameras.

The "Law of Georgia of Food Safety & Quality" defines rules for the state control, the same Law Article R defines the concept of state control as " the action undertaken by – the state subdivision of the Georgian Ministry of Agriculture - the "National Service for Food Safety, Veterinary and Plant Protection" for the purpose of detecting the compliance of foodstuff and animal food with the adequate law requirements or for the purpose of eliminating the revealed inconsistency. Hence, the National Service for food Safety, Veterinary and Plant Protection represents the food safety controlling body

As known from material, Vine and Wine Department is associated with Badagoni case, the direct address of which enabled the Fiscal Police to commence preliminary investigation. Since "Samtrest" is in charge of executing control over entrepreneurs activity and on food safety only in separate cases (like issuance of the certificate of consistency, export–invoice),

we deem the action conducted by the representatives of the mentioned department as an abuse of dominant position, resulting into the harm insulted to the company Badagoni.

Under Article 24 of the same Law:

The state control on the foodstuff encompasses one of the below given items or their entirety

a) sampling within the stated rules and inspecting in the mentioned laboratory
b) revision of documentary material

However, Article 34 defines officials' rights in terms of conducting control

a) within the rules defied by the "Law of Georgia on the Control of Industrial Activities" enter and take samples for laboratory investigation from concrete units permissible for laboratory inspection
b) claim record book, document or other data, encountering information concerning the realization of the law on foodstuff or animal food. Make copies of these documents and ensure adequate records.
c) in case of reveled inconsistency prevent market offer of poor quality food and animal food.

Article 32 provides on urgent measures for the provision of foodstuff and animal food quality:

If evidenced, that foodstuff or animal food encompasses serious threat to human of animal health, and the existing means and resources are invalid in terms of its prevention, with the consideration of circumstances, within the legislation determined rules, the service is in charge of undertaking the following:

a) in connection with the local foodstuff or animal food:

a. a) suspend foodstuff or animal food market offer within defined timeframe
a.b) timely inform the population on temporary refraining from foodstuff or animal food appliance
a.c) determine special rules concerning the high risk containing foodstuff and animal food.
a.d) apply other applicable and urgent measures envisaged by the legislation of Georgia

b) in connection with imported foodstuff or animal food:

b.a) suspend food staff or animal food import from export country or from any part of this country or if required from transit country for definite time.
b.b) defy special requirements with export country, in connection with any region of this country or transit country concerning the high risk containing foodstuff or animal food.
b.c) apply other adequate, extraordinary temporary measures envisaged by the legislation of Georgia.

Article 3, Para 1 of Order No. 2-146 rendered by the Minister of Agriculture, defines methods for realizing the urgent measures concerning the "Rules of Unsafe Food destruction":
a) combustion on specially allocated area
b) burying on specially allocated area
c) placement in bio-thermal hope
d) placement in sewerage
e) denaturation

Part 5 and 4 of the same Article 4 defines the ways of destroying unsafe foodstuff or animal food, subject to adequate service resolution, within the Law determined rules. Decision on destroying unsafe foodstuff or animal food shall clearly state methods and terms of destruction, quantity of the destroyable material (weight/ volume, volume and number of bunch), as well as data on wrapping and branding (the unit volume of wrapping), with the distributor/manufacturer being accountable for the accuracy of date. Distributor/ manufacturer shall be immediately notified in writing over the decision concerning the destruction of unsafe foodstuff or animal food.

Under Para 7 of the same Article, destruction of unsafe foodstuff and animal food shall be conducted in presence of distributor/manufacturer's authorized representative. The Act of Destruction is executed into two copies by distributor/manufacturer, per annex 1, with one copy transferred to the authorized representative of the service and the other copy left to manufacturer/ distributor, which shall be kept within two years. Copies of the Act of Distribution, singed by manufacturer/distributor or their representative shall be provided to other interested parties".
Badagoni wine destruction process was performed in violation of the above mentioned rules.

The Minister's Decree warranties and grants the possibility of suing this judgement, although Badagoni was deprived of this opportunity.

In present case, adequate supervisory Body was entitled to temporary suspension of Badagoni production, before the end of investigation process and before proving the authenticity, however, the act of wine destruction was illegal. Moreover, as mentioned above, control was executed by unauthorized unit-Vine and Wine Department "Samtresti", whereas the only authorized unit is the National Service for Food Safety, Veterinary & Plant Protection. Wine material was destructed on November 14, 2006, while Samtresti chairman Vasil Managadze was on business leave and his Deputy Ketevan Zhgenti was in charge of duties. In the meantime, Petre Tsiskarishvili was newly appointed Minister of Agriculture, conducting control over the Legal Entity of Public Law "Samtresti". Petre Tzskarishvili commented on TV concerning the case, without familiarization with the circumstances surrounding the case. Apart from the evident facts of exceeding authority by certain people, unfounded announcements made on TV significantly damaged the reputation of the Company.

Derived from the aforementioned, under Article 21, Para G of the Law of Georgia on Public Defender", the Public Defender relegated available material to the General Prosecutor's Office for adequate follow up.

Schirnhoffer Case

Austrian businessman Schirnhoffer visited Tbilisi with the purpose of initiating industrial activities. "Schirnhoffer" is well-known European sausage producing firm, planning to expand the business net in Georgia.

In January-February, 2006 Austrian "Schirnhoffer" sent various sausages for realization to LLC "Schirnhoffer" in Georgia, delivery was executed by three car-refrigerators. The first batch entered on February 22, 2006, (33E7007/FP432), the second batch-on March 3, 2006 (33HZ930), and the third batch – on March 16, 2006(33HZ973). Cars, loaded with goods entered the customs "Natakhtari, assumed as the destination for unloading. Notwithstanding, that each car provided all required material immediately upon entrance, customs clearance had not taken place until April 10, 2006. Written appeals, addressed to the head of customs department, requesting elimination of impediment for timely meeting of the customs formalities was left unresponded. Failure to realize customs clearance of good imposed significant material loss to LLC "Schirnhoffer"

This was preceded by appeal (letter No.26-1/3642) of the head of Fiscal Police Department, dated December 27, 2005 addressed to the chairman of customs department requesting inspection of goods prior to customs clearance. Customs Head Merab Tavartkiladze, acting under the written order of the Head of the Fiscal Police, letter No.26-1/3642 , dated December 27, 2005, LLC did not provide internal customs form 1 to "Schirnhoffer" , required for filling the customs declaration. This was confirmed by Merab Tavartkiladze himself, during the counter claim inspection.

In the meantime, on February 23, 2006 customs and veterinary department representatives opened the car–refrigeration No.33E 7007/FP432 (the first batch) and took samples from ten types of sausages, which were directed to the lab of the National Centre of Veterinary Diagnostics and Expertise of the Georgian Veterinary Department for Examination. The mentioned is approved by the letter of the Ministry of Agriculture. My official appeal was followed up by the aforementioned ministry, implying that Veterinary Service Department of the Ministry of Agriculture checked the sausages produced by Austrian firm "Schirnhoffer" on the basis of letter provided by the Ministry of Finance of Georgia.

LLC Schirnhoffer representative defined that notwithstanding their written appeals to the Veterinary Department and Ministry of Agriculture dated February 16, 2006 and March 6, 2006, requesting prevention of imported good inspection, having the International Quality Certificate and facilitating customs clearance, were left unresponded. The same faith was shared with another apply of LLC Shirnphori" addressed to Veterinary Department. The letter implied LLC Schirnhoffer's request for conducting referential (relative) examination of imported good and participation of Microbiology from Austria.

After exhausting all possible attempts to timely execute customs clearance, LLC Schirnhoffer was forced to refer the Court, by filing a sue on March 31, 2006 against the Customs department with the claim of customs clearance.

As stated by LLC Schirnhoffer representative, intervention of the President of Georgia contributed to final resolution of the problem. On April 10, 2006, at approximately 10 AM, Givi Aminranashvili, representative of LLC Schirnhoffer appeared at Natakhtari customs, per customs department head, Zurab Antadze's personal request and the problem was solved by immediate performance of customs clearance.

As made known by the Ministry of Agriculture of Georgia, the laboratory examination revealed the existence of more than acceptable amount of microbes in sausages. Therefore, the resultant conclusion banned LLC Schirnhoffer from marketing its products.

Notwithstanding this, product is still successfully traded in Georgia, with this being the case even in the past time.

The said fact underlines the willful act of concrete persons to hamper legal activity of LLL Schirnhoffer, evidencing the attempt to constrain competition. In addition, three hundred jobs were lost, and the image of Georgia was harshly undermined, since Shirnophor production is world wide known.

Although material revealed illegal hampering of entrepreneur's activities, resulting in both material damage and blemished reputation, no one was made criminally responsible for the actions committed.

Protection of the Elderly, and Pensions

According to the United Nations' data, there are 606 million of individuals worldwide over the age of 60, which accounts for 10% of the global population. By 2050, their number will increase to 1.6 billion and will account for 19% of the total world population. Presently, 62% of such population resides in developing countries, however by 2050, this figure will amount to 80%. Doubtless, social protection of the elderly in developing countries is a challenging task. However, it should be remembered that the lack of adequate action to address this problem may result in a situation where increasing numbers of elderly people will face the risk of being left below the poverty line.

Presently, provision of pensions in **Georgia** is regulated by a statutory act - the *Law of Georgia on State Pension,* which determines grounds for the origination of entitlement to the state pension, together with the size of the pension, and its administration body. The law also sets out the terms and conditions for assignment, allocation, suspension, resumption and termination of pension payments, and regulates other pension-related relations.

Pursuant to this law, the grounds for granting the pension are as follows:

a) reaching a pension age of 65
b) proven disability status condition
c) death of the breadwinner

The minimum monthly amount of the state pension is 28 laris.

The persons with a proven disability status are granted the pension in the amount of 35 laris. Similar amount is allocated to children with disability that require permanent attendance.

Every dependant that has lost the breadwinner is entitled to a pension.

a) in case of death of one of the parents – every dependant is assigned a state pension in the amount of 28 paris, regardless of the number of dependants left in the family after the death of the breadwinner.
b) orphans – are allocated a pension of 35 laris, regardless of the number of dependants left after the death of the breadwinner.

The Public Defender's Office has considered numerous applications in connection with violations related to the provision of pensions and the arrears of the administrative bodies to individual citizens. A number of applicants contend they have been waiting for years for the compensation of arrears in wages. Quite frequently, the applicants claim that despite their extreme indigence, they fail to be enrolled into the poverty reduction social program. All of the above constitutes violations of the social protection rights of private citizens.

The case of Tiko Askilashvili

The public Defender was addressed by Zviad Vaniev from the town of Gori, in relation with the allocation of pension and provision of social help to Tika Aslanikashvili. According to the applicant, T. Aslanikashvili, age 82, resides in v. Tsedisi of the Gori region and is a widow of a WWII veteran. T. Aslanikashvili has not been allocated her due pension. Neither is she receiving any social help from the state. The local self-government bodies appear to ignore the situation, which prompted Z. Zaniev to address the President's administration with the aforementioned concern. This latter re-sent his application, together with the attached documents, to the Gori governor's office. However, to this day, the applicant has received no reply.

Based on the Z. Vaniev's application, the Public Defender sent an enquiry to the Gori Governor's Office. In addition, representatives the Public Defender's Office arrived in Gori to get a firsthand look at the situation.

In its reply letter #901 of 6 September 2006, the Gori Governor's Office states that T. Aslanikashvii will be assigned her due pension and social assistance, immediately after she submits her ID card to the respective body. However, the letter notes that T. Aslanikashvili

appears to have no ID card. Hence, the Gori Governor's office undertook to help with the issuing of the ID.

As for the allocation of the state pension, the applicant received a written explanation stating that upon receipt of the ID card, T. Aslanikashvili should file an application at the Gori branch of Georgia's State United Social Insurance Fund of Georgia, which will secure the assignment of the pension to her.

The case of employees of the Dzevri nursing home

The public Defender's Office studied a collective application of the employees of the Dzevri nursing home regarding payment of their accrued arrears in wages. The applicants claim they have not received wages for 1998, 1999 and 2000. Neither have their received their 2003 December wages.

In view of the application, the Public Defender's Office addressed the Ministry of Labour, Health & Social Protection and the Finance Ministry. The latter sent a reply letter #04-02/8728 of 24 August 2006, noting that because the submission from the Ministry of Labour, Health & Social Protection contained no indication of arrears to be paid to the staff of the Dzegvi Nursing Home, the Finance Ministry has had no opportunity to take any respective decision in regard to the repayment of the said arrears in wages to the staff of the aforementioned organization.

In its reply letter #01-05/08/8393 of 13 September 2006, the Ministry of Labour, Health & Social Protection states that due to the long-drawn reorganization of the Department for Disabled Persons' Affairs of the Social Protection Ministry, in 2001, by orders #364 and #228 of the Ministry of Labour, Health & Social Protection and the Ministry of Finance, a joint commission was established with a view to assessing the financial liabilities of the Disabled Person's Department and inspecting the financial and accounting documents of the special reorganization commission of the said department. However, due to a number of reasons, including the personnel turnover caused by the restructuring of the Ministry, and the permanent time deficit of the commission members (holding top positions), the matter remained unresolved, which means that the size of debtor and creditor indebtedness of the Department for Disabled Persons' Department remains still unspecified. With a view to resolving this matter, the Department suggested to the Finance Ministry that and inter-ministerial commission should be established to comprise the representatives of the two ministries. The commission will be tasked to inspect the financial accounts and balance sheets drawn by the reorganization commission of the disbanded department, together with drafting the conclusion about its legal successor and presenting the conclusion to the said Ministries. However, according to the same document, the Dzevri nursing home 1998-2000 creditor indebtedness is not on the balance sheet of the Ministry of Labour, Health & Social Protection. Hence, there is no repayment obligation in respect to these arrears.

The same reply letter sets out the reasons accounting for the non-repayment of the 2003 December arrears in wages.

Having received the reply, The Public Defender's Office sent an enquiry to the Ministry of Labour, Health & Social Protection about the intended timeframes of the establishment and operation of the said commission. The Ministry's letter #01-05/08/10667 of 21 November 2006 provided an additional information, according to which the draft joint resolution by the Labour and Finance Ministries regarding reorganization of the Department for Disabled Persons' Affairs, has already been prepared, and consultations are underway to finalize the draft. The commission will function for the period of three months following its formation.

The Public Defender will keep a close watch over the case until the rights of all claimants are fully restored.

The case of Mzia Bregvadze

The Public Defender's Office considered the issue relating to the compensation of losses by the Tbilisi State University due to Mzia Bregvadze's death in a car accident during performance of her job duties.

The documents supplied both by the University and Mzia Bregvadze's spouse, N. Chanturia, indicate that the court passed a guilty verdict on M. Chachanidze, the driver of the other car involved in the accident, but dismissed N. Chanturia's claim based on his own decision to drop the charges. In view of this fact, the University refuses to pay compensation to the family of the deceased, pointing to the fact that the injured party should have proceeded with the charges, rather than withdrawing the claim, which is incorrect.

Pursuant to Article 86 of the *Criminal Procedure Code* relating to the rights of a civil claimant, withdrawal of a civil claim shall not deprive the spouse of the deceased person of the right to claim compensation of losses from the University.

The case materials include Protocol #1 (form T-1) regarding the accident drawn up by the University on 8 June 2005, as well as conclusion by the Chief Labour inspector and a letter of his senior, A. Morchiladze, dated 27 June 2005 (# 24). According to this letter, the accident, indeed, can be classified as an employment injury and is subject to registration. Hence, the matter should be regulated by Decree of the President of Georgia #48 of 9 February 1999 on "*The rules for compensation of damages incurred to an employee in the course of performance of job responsibilities*". Section 2 of the Decree points out that the employer is materially responsible for causing a damage to the health of an employee and for the employment/industrial injury which occurred within the confines of the organization, as well as beyond it, during a trip, if the transport vehicle was provided by the employer. As to the size of compensation, this is regulated by Article 39 of the Decree, according to which in the case of death of an employee during performance of his/her duties, the size compensation to be disbursed to the deceased person's family should be equal to an aggregate amount of the

wages of the deceased person for the period of ten years, to be paid as a one-off disbursement, as well as all funeral expenses. In the case of death of a public official, the burial expenses are fully born by the state or the local self-government body.

Proceeding from the above, and pursuant to Article 21, section b of *the Organic Law on Public Defender*, the Public Defender addressed a recommendation to the rector of the University pointing to the need to secure payment of compensation to the spouse of the deceased person, in compliance with Article 4 of Presidential Decree #48 of 9 February 1999 on "*The rules for compensation of damages incurred to an employee in the course of performance of job responsibilities*", and determine the compensation amount in accordance with Articles 39 and 51 of the same Decree.

Nonetheless, this recommendation was ignored.

The case of Badri Chubinidze

On 20 September 2006, the Public Defender was adddressed by Badri Chubinidxze with an application regarding arrears in wages. The applicant had worked at the Airport Division of the Transport Police Department of the Interior Ministry from 1995 until 2004. On 1 August 2004, he was transferred to the human resources department on account of a reorganization started at that time. On 15 February 2005, he retired due to a disability. The applicant contends he never received wages for 1998-2001, November 2004, plus wages for the several months he was with the HR department, although the arrears were to be repaid in 2005.

In view of the aforementioned, the Public Defender's Office sent a respective enquiry to the Ministry of Interior. Mr. Pruidze, the Head of Finance-and-Administrative Division of the Ministry's Personnel and Logistics Department, replied that the amount due to Mr. Chubinidze in wages was 965.72 Lari, the reimbursement for unused leave and dismissal compensation is 444.73, amounting to the total of 1410.45. This amount has been credited. However, the aforementioned arrears can only be repaid if the Finance Ministry additionally allocates the respective sum to the Ministry of Interior specifically for this purpose, as the Interior Ministry's budget envisages no such disbursement, and using moneys designated for other purposes for the repayment of Mr. Pruidze's arrears will result in the accumulation of new arrears.

Notably, this is a standard reply invariably sent by the Interior Ministry to any queries relayed to arrears in wages.

The case of Nodar Rezesidze

The Public Defender was addressed by Nodar Rezesidze with an application stating that from 1973 to 2004 he had worked at various structural units of the Interior Ministry. From June 2004, he was with the State Border Protection Department. While in this position, he was asked to retire due to the age. The applicant claims that since dismissal he received no

social assistance or bonuses (additional pays and compensations) due to him, pursuant to the acting legislation. Neither has he received wages for September-October 2005 and his leave pay, despite the many applications he had addressed to the said Ministry.

Having studied the above issue, the Public Defender's Offices found the following: pursuant to Article 96 of the *Labour Code of Georgia* in effect at that time, in case of a dismissal, the organization should pay the dismissed employee the full amount of all indebtedness and payments owed to him up to the date of his dismissal. If the employee was not at work on the day of dismissal, the said amount should be paid no later than the following day after he/she submits the respective request for payment of the moneys owed to him.

Another fact to be taken into account is that N. Rezesidze had served in Azhari, a high mountainous village in Georgia. At that time, pursuant to Article 7 of Presidential Decree # 192 of 2 March 2005, military servicemen and civilians serving in high-mountainous areas were entitled to a special bonus equal to an established percentage of the basic wage rate which according to section (d) of the aforementioned Decree was equal to 40% of the basic wage for 2500 m or higher above the sea level.

The abovementioned statutory acts provide adequate grounds for the applicant to request repayment of an additional bonus owed to him, given the fact he had served in a high-mountainous area.

Hence, Nodar Rezesidze's legitimate rights have been violated. In this connection, and pursuant to section 21.b of the *Organic law on the Public Defender*, the Public Defender addressed a recommendation to the Border Police Department requesting to secure the repayment of all arrears to Nodar Rezesidze without any further delay, including those in wages and bonuses due to him under the respective Presidential Decree.

The Border Police department reacted to the recommendation by stating that "Nodar Rezesidze served at the Ministry of Interior, which is not a structural part of the Armed Forces. Therefore, the additional payments and long-service bonuses will only apply to him for the length of the period over which he had served in the Armed Forces, not at the Interior Ministry. In effect, this reply questions the fact that the Ministry of Interior belongs to the category of law enforcement agencies and, hence, its employees shall enjoy all the rights and entitlements stipulated in *the Law of Georgia on the Status of Military Servicemen.*

In the light of the above, it would be extremely difficult to assure Nodar Rezesidze, as well as other individuals facing similar problems, that their fate is in safe and competent hands. A competent reply - even if undesirable - contributes to the feelings of lawfulness, fairness and security amidst the society. As it is, practically every state official in Georgia, if dismissed from his/her job, finds himself/herself on the other side of the fence, becoming a part of the socially unprotected population. Needless to say that every such individual should at least have an assurance that the State will take care of his/her social rights.

Time and again, the State has declared its commitment to repay fully arrears to all individuals formerly employed at state organizations. However, facts indicate that this arrears have not been paid to this day. Presently, there remain quite a number of individuals that had lost their jobs with state agencies and never received any compensation of arrears in wages. As a result, they keep being shrugged off from one state agency to another, and all they hear in reply is just obscure replies and hollow promises.

The case of Tamar Parchukashvili

The Public Defender was addressed by Tamar Parchukashvili in connection with the disbursement of lost wages.

The supplied documents indicate that T. Parchukashvili had been dismissed from her post of the head of the on-job training department of the Tbilisi Light Industry College, together with three other employees, by the director of the College, Abram Basel. This decision was declared null and void by Order #166 of 16 September 2004 of the Ministry of Education. Following this, Abram Basel lodged a claim at the Didube –Chughureti district court. On 1 October 2004, the court suspended enforcement of the said Order until passing a judgement on the case. On the basis of T. Parchukashvili's individual claim, the Tbilisi regional court judgement of 04 March 2005 quashed the earlier court decision. This resulted in the re-enactment of Order #166 of the Ministry of Education which was subject to immediate implementation. Despite this, reinstatement of the three dismissed employees into their jobs did not take place until 8 August 2005.

From that time on, the college employees have been requesting disbursement of their lost wages, but to no avail. Deputy Minister of Education T. Samadashvili's letter of 24 October 2005, #01-17-12/12454, notes that since the court had not deliberated either on the subject of the dispute or on the disbursement period, the Ministry should make the respective decision proceeding from the acting legislation. Article 208 of the *Labour Code of Georgia* acting at that time provided that enforcement of the decision on reimbursement should be effected immediately. In case of a delay, the disbursement amount should cover the entire period until the date of enforcement, including the period over which the delay occurred.

Accordingly, pursuant to Article 214 of the *Labour Code* acting at time, the disbursement should have covered the period from 14 September 2003 to 14 September 2004, and pursuant to Article 208 – the ensuing period from 14 September 2004 until 3 August 2005. The creditor's indebtedness should have been reflected in the 9 month balance sheet of the college for 2005.

Proceeding from the above, the Public Defender addressed a recommendation to the Ministry of Education, which responded with a reply letter #01-16-07-1/21071 of 20 December 2006. According to this reply, on 13 September 2006, the Ministry of Education, already allocated an additional amount of 1500 laris to the budget of the Light Industry College, specifically for the purpose of disbursing the arrears in wages owed to T. Parchukashvili.

At the end of 2006, Tamar Parchukashvili was paid all arrears due to her, through the Treasury Service of the Finance Ministry.

The case of Tsiuri Zotova

The Public Defender was addressed by Tsiuri Zotova. The applicant points to the fact that she has a 2nd category disability, suffers from diabetes mellitus and lives in an abject poverty.

Zotova reported that the Poverty Reduction Program administrators visited her at home, although, despite her extreme indigence and difficult social conditions, she was not enrolled into the program while, the applicant reckons, she belongs to the neediest group of the population.

Based on Ts. Zotova's application, the Public Defender addressed the Ministry of Labour, Health & Social Protection. According to the received reply, this matter was re-sent for consideration to the Kvemo-Kartli regional Coordination Centre of the State Social Assistance and Employment Agency.

Reply #2/02-461/1 of 7 November notes that the social agent filled out a new application for Ts. Zotova'a, which will be followed by all the necessary actions, as envisioned by the law.

The case of Nvart Martirosyan

On 10 November 2006, The Public Defender was addressed by Nvart Martirosyan, a widow with three children. The applicant contends that she has a 1st category disability, and her family is having to lives in an extreme poverty. Hence, she had addressed the State Agency for Social Assistance and Employment. Consequently, the social agent came to visit her at home and filled out a declaration for her. Following this, she did not hear form the Agency despite the many enquiries she made at its Isani-Samgori district branch. Later on, with the help of the Public Defender, N. Martirosyan was issued a registration certificate, but it only included the applicant herself and the older child. The applicant claims that while the social agent was filling out the declaration she made sure that the names of the other two children, too, were entered into the declaration and produced their birth certificates to the Agent.

Based on this application, the Public Defender of Georgia addressed the Ministry of Labour, Health and Social Protection requesting a repeated study of N. Martirosyan's family social conditions to ensure that all four members of her family were entered into the unified database of socially vulnerable families, so that they all receive social assistance.

In its reply letter #2/02-550 of 13 December 2006, the Agency pointed out that although the applicant had filed an application for assistance for all four members of her family, the assistance was only approved for 2 persons, as out of her three children, two live in an

orphanage, not with their mother. Hence, the social agent acted in full compliance with the Agency guidelines and entered only two family members into the declaration.

Consequently, the family received a medical assistance card and an allowance for its two members, Nvart and Andranik Martirosyan - 42 laris each.

Housing problems

The Public Defender's Office has considered a number of cases associated with housing and living conditions. Quite often, applicants point to the extremely difficult, virtually intolerable conditions in which they are having to live.

Notably, one of the most important social rights of a person is an adequate standard of living, which implies that every person is entitled to at least a subsistence minimum: adequate food, clothing, living and care conditions, and assistance when required, together with necessary funds to afford basic consumption goods.

Adequate standard of living implies living above the poverty line in a given society.

All of the above is supported by Chapter 11 of the *International Covenant on Economic, Social and Cultural Rights* and *The Universal Declaring of Human Rights*. By joining these international instruments, Georgia undertook a commitment to secure implementation of the above rights.

In order to review the housing situation in Georgia, the Public Defender addressed the Tbilisi, Rustavi, Batumi and Kutaisi local self-government bodies and requested the 2006 information as to how many individuals applied to them with housing problems, how many claims were satisfied, and how much funds were allocated from the budget to address these problems.

In its reply letter, the Financial Service of the Mayor's Office notes that the 2006 city budget included 21,000,660 laris for the improvement of housing conditions, which was used for the capital repair of shabby dwelling houses, fixing damaged roofs, water piping and sewage systems, lifts, as well as payment of housing compensation to those dwellers whose houses were beyond restoration and were recognized uninhabitable, and other incidentals.

The Batumi City Management Service replied that in the 2006 local budget, 1,260,000 laris were allocated for the promotion of cooperative building societies programme. The Mayor's Office received 155 applications with a request to provide funds to overcome various housing problems, out of which 103 were satisfied. In 2004-2006, 20 families were moved to municipal apartments, while 60 families received housing compensation. Five families were provided with a temporary housing in a municipal building.

The Kutaisi city government body replied that in 2006, they had received 94 requests for housing, while 184 applications requested funds for the repair of damaged dwelling houses/apartments. The city budget envisioned only 1,131,500 laris to address such needs. Accordingly, only a handful of people received temporary accommodation, 29 apartment buildings were repaired, while repair works of another 39 apartment buildings are still in progress.

The city of Rustavi is in a particularly dire state from this point of view. The reply from Rustavi indicates that in 2004-2006 the local budget contained no allocations at all for housing, as 'there was no such need'. According to the same source, in 2006, they received 98 applications from families in need of permanent housing. Given this fact, it seems rather puzzling why the said service deems there is no need for such budget expenditures.

According to the letter from the Akhmashenebeli Territorial Management Service, in 2006 the number of residents who requested housing amounted to 185. The number of residents that filed similar applications at the Shartava Territorial Management Centre was 141. None of these requests were satisfied, as the budget envisioned no funds for this purpose. The Rustaveli Territorial Management Centre received 67 applications. And, again, none of them were satisfied. The Gorgasali Territorial Management Service appears to be in a slightly better situation as it managed to scrape up some funds for this purpose. In 2005-2006, the said service satisfied 151 requests for a roof repair out of the total of 210 of similar requests; it also satisfied 68 applications requesting a repair of the water piping and sewage systems out of the total number of 75 of such applications. Broken glass was replaced in the entrance hall windows in 36 apartment buildings, and 17 families were given a temporary accommodation in dormitories.

While Housing is a ubiquitous problem in Georgia, improvement of living conditions is yet another challenging issue. Nonetheless, local self governments allocate very too little funds to address this problem. Sadly, in the case of Rustavi, the local self-government appears to see no need in allocating any money for this purpose.

The case of Lili Beroshvili

On 2 November 2006, the Public Defender was addressed by Lili Beroshvili in relation to the housing problem. According to the applicant, she is a pensioner, and has no place to live. Several years ago she submitted an application to the ex-Mayor, V. Zodelava, regarding this matter. The Mayor pledged to help and allocated an amount of 6000 laris for her to buy a flat. However, this amount turned out insufficient, due to the fact that prices for flats had gone up by the time. After that, she addressed his successor, Z. Chiaberashvili, who tasked the Tbilisi Dwelling Fund Rehabilitation and Management Service to look into this matter. Regardless of this, the problem was never resolved.

According L. Beroshvili, she is having to live at a rented flat, although she can hardly afford this. The applicant has to pay the rent from her miniscule pension, which hardly leaves any money to cover even very bare needs.

In view of L. Beroshvili's application, we addressed the Mayor of Tbilisi. It would seem, the Mayor's Office, has re-addressed our letter to the Mtatsminda Krtsanisi Governor's Office, which replied that the Governor's Office had no means to assist in this matter due to the fact at the present time they had no vacant municipal flats. The letter also notes that this matter falls directly within the competence of the Local Property Management Service under the Mayor of Tbilisi.

Given the above, we sent yet another letter to the Mayor of Tbilisi containing a request to task the respective local service to resolve the problem and inform the Public Defender's Office of the adopted decision.

The case of the Iashvili Street.

On 19 April 2006, the Public Defender was addressed with a collective application from dwellers of an apartment house at 16 Iahsvili, Tbilisi.

The apartment house was damaged as a result of the 2002 earthquake, following which the Tbilisi Mayor's Office allocated a respective amount for the rehabilitation works. The reconstruction work was carried out. The ground floor of the house was fortified, while the first and second floors were left intact due to insufficient financing.

On 7 May 2006, the Public Defender requested detailed information from the Mayor's Office as to how much funds had been allocated for the rehabilitation work and what particular works had been conducted.

The Municipal Improvements Service provided a financial account, according to which the allocated funds had been expended basically for the rebuilding of the outhouse demolished during the earthquake and restoration of the damaged sewage system. Besides, the ground floor was fortified, while no repair work was done on the first and second floors.

The Public Defender's Office representatives studied the situation with the said dwelling house. The study revealed that on the first and second floors, residents are having to live in unbearable conditions. Among them are children and elderly people. The second floor is in a particularly dire state: one of the walls is completely destroyed, the floor is sagging down, and the remaining walls have developed bad cracks. The house may collapse any moment. Some of the dwellers have left the house and moved elsewhere, while those that have no choice are having to stay in the house. Apparently, the cannot afford any repair works. Photos taken at the site provide a shocking account of the situation.

According to Section 1 of Article 11, of *the International Covenant on Economic, Social, and Cultural Rights* „The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.". Article 25 of the *Universal Declaration of Human Rights* is also supporting these rights.

The international law features an adequate standard of living as the core of social rights. Term 'adequate standard' of living of a person is "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services", while according to Article 11 of *The Covenant on Economic, Social and Cultural Rights*, it implies "adequate food, clothing and housing". Despite the fact that the adequate standard of living will cover a wider array of factors, its basic indicators will still remain food, clothing and housing.

In this particular case, the applicants, have no financial means of their own to improve the situation and achieve adequate housing conditions. Moreover, the house which is on the brink of collapse poses danger to the life and health of these people.

The Public Defender finds that the applicants' right to adequate housing has been violated. In view of this, and pursuant to Section 21.b of the *Organic Law on Public Defender*, the Public Defender addressed a recommendation to the Tbilisi Mayor's Office pointing to the need to review the situation and act on it accordingly by conducting a complete and adequate rehabilitation work on the dwelling house at 16 Iahsvili Street.

In reply, the Service for Management of the Historical Part of Tbilisi of the Mayor's Office replied that they have studied the case at issue and found that the building had been, indeed, badly damaged. The rehabilitation work will be forthcoming shortly.

The case of Nargiz Guliashvili

On December 2006, the Public Defender's Office was addressed by Nargiz Guliashvili. According to the applicant, she had lived at 35 Sakanela street, together with her orphaned grandchildren in a basement flat which was flooded during heavy rains and became uninhabitable. Following a TV coverage featuring her living conditions the family was moved to an alternative dwelling space.

Now, the applicant contends, the representatives from the Special Fund for the Liquidation of Earthquake Consequences pay her regular visits only to threaten that she will be evicted from the premises.

In view of this application, the Public Defender addressed the Chairman of the Special Fund for the Liquidation of Earthquake Consequences with a request to refrain from evicting the Guliashvili family until an alternative shelter is found for the family. Given the fact that the Fund will be closing down soon, the Public Defender also appealed to the Governor's Office of the Isani-Samgori district.

The Governor's Office replied that they are unable to resolve this issue, even by allocating a temporary shelter, due to the fact the Office has no vacant dwelling space available at present. At the same time, the letter notes that the Office is aware of N. Guliashvili's housing problem and pledged to provide a shelter to the said family at the earliest possible opportunity.

The case of Nino Tsiklauri

On 2 November 2006, the Public Defender was addressed by Nino Tsiklauri with an application, claiming that her house had been badly damaged during an earthquake. The ceiling and walls have developed bad cracks, the water piping and electric wiring are completely out of order. The applicant lives alone. She has a 1st category disability, is confined to bed and is need of constant medical treatment. She can neither invite workers to do repair works, not can she afford paying for it. Hence, the applicant requested an intercession from the Public Defender with the Mayor's Office to help her resolve this problem.

In this connection, the Public Defender's Office contacted the Tbilisi Mayor's Office which notified back that the Vake-Saburtalo Governor's Office has no funds in its budget assigned specifically for the repair works required in this particular case. Nonetheless, they have re-installed the water piping and electricity wiring and intend to complete the remaining works next year.

The case of Natalia Postilova

On 21 December 2006, the Public Defender was addressed by Natalia Postilova, age 92. The applicant states that she has a 1st category disability and requires constant medical attendance.

Given her extreme poverty, the applicant points out, she had applied for help to the State Agency for Social Assistance and Employment. The Agency representative visited her once and filled out a declaration. Since then the applicant never heard from the Agency.

In this connection, the Public Defender's Office contacted the Ministry of Labour, Health & Social Protection which replied that upon receiving the Public Defender's recommendation, they studied the issue in question. As a result, N. Postilova has been assigned a monthly allowance.

The least protected population

The case of Abo Bakhareishvili

On 19 July 2006,the Public Defender was addressed by Abo Bakhareishvili.

The application and the supplied documents indicate that on 6 April 2006, representatives of the gas supply company, "Tbilgazi", drew up a protocol (#002662) against the applicant obliging him to pay a fine, pursuant to Article 91[1] of the *Code of Administrative Offences,* based on the respective court judgement

According to the applicant he, indeed, had his gas meter installed without involving "Tbilgazi". However, he contends, this does not automatically incriminate him of a theft of natural gas. The applicant notes that when the case was considered by the first instance court the only reason he did not appear before the court was that he had been served the summon with a delay, this being a gross violation of the *Procedure Law* on the part of the court. He contends that the Court of Appeal heard the case without due attention to the merits and particular circumstances of the case, and without full and impartial investigation.

Consequently, the court judgement was enacted and the respective enforcement writ was issued. The court officer set a deadline for voluntary enforcement of the court decision at 10 November 2006. Otherwise, the debtor was informed, his movable and immovable property would be sold from an auction.

The applicant belongs to the least protected social group. He is 82 and lives alone. His only immovable property is a one-room flat in Mgaloblishvili street in which he lives. The applicant has no worthwhile movable property subject to laying an attachment, pursuant to *the Law on Enforcement Proceedings*, - just personal belongings. Accordingly, the only valuable asset in possession of the applicant is the flat. Selling the flat from an auction would result in that the elderly person will be left homeless and in a helpless state.

Pursuant to Article 34 of the *Law on Enforcement Proceedings*, the enforcement can be terminated if the creditor abandons the recovery, or if the creditor and the debtor come to an agreement.

Due to the debtor's indigent social condition, the Public Defender addressed the Enforcement Department with a request to suspend the enforcement. Simultaneously, he addressed a request to the Mayor's Office to look into this matter and endeavor to find an alternative solution to the problem.

The recommendation was fulfilled. The Mayor's office allocated the necessary money to pay the fine imposed on A. Bakhareishvili.

Education

The case of Irakli Gurgenidze

The Public Defender was addressed by Madona Kirkitadze, stating that her son passed the unified national entrance exams at the Zestafoni National Assessment and Examination Centre without having attended the graduating class of the secondary school. In view of this fact, the Centre refused to issue him the respective certificate, motivating the decision by the fact that by the time her son sat for the exams he had not yet reached the age of 16, which age is required by Article 4, subsection 4 of Order #452 of the Minister of Education & Science of Georgia of 22 May 2006 *On the Statute of Certification of Long-Distance Learning*. This order provides that long-distance learners willing to obtain a secondary school leaving certificate shall be 16 or older at the moment of submission of the respective application.

Following this, Madona Kirkitadze applied to the Ministry of Education & Science, which, too, substantiated its refusal by referring to the same subsection of the said Order in its reply letter (#2/12755 07.08.2006).

Article 9, subsection 4 of the *Law of Georgia on General Education* states that long-distance students are entitled to receive general education. Rules and terms for long-distance education are established by the Ministry of Education & Science. By the time of passing this law, long-distance education issues were regulated by Order #207 of the Education Ministry dated 15 October 2003, which set no age restrictions for the enrollment of long-distance students into the 11th grade.

Therefore, Irakli Gurgenidze's enrollment into the long-distance program of the 11th grade was effected in full compliance with the legislation acting at the moment of enrollment. Given this circumstance, the above Centre's refusal to issue a certificate to Irakli Gurgenidze is devoid of any legal grounds. According to Article 47, part 1 of the *Law of Georgia on Normative Acts* "a normative act is retroactive only if literally so prescribed by this normative act". Order #452 of 22 May 2006 of the Minister of Education & Science contains no indication to such retroactive action.

In view of the above, and pursuant to Article 21, section b of the *Organic Law on Public Defender*, the Public Defender addressed a recommendation to the Ministry of Education & Science requesting to instruct the National Assessment & Examination Centre to issue Irakli Gurgenidze a certificate of secondary education.

In its reply letter of 31 October 2006, the Ministry of Education states that the Ministry will secure the issuance of the said certificate to Irakli Gurgenidze.