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Presentation on the execution of *Makaratzis and others group of cases (Applications No. 50385/99 etc.)*

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A. Good news

Greece's communication to the **Committee of Ministers** (CM) dated 4 October 2018 on the *Makaratzis group of cases* includes two fundamentally positive points.

Firstly, the beginning of the functioning of the **National Mechanism for the Investigation of Arbitrary Behavior** (hereafter "**Mechanism**") within the framework of the **Greek Ombudsman**.

Secondly, the reported recommendation of the **Mechanism** to the **Government** that, if no other effective remedy exists for a re-examination of the cases that led to **ECtHR** judgments so that perpetrators are punished proportionately to their actions, *"a written expression of apology by the Chiefs of Staff of the law enforcement agencies involved in each case towards the victims of the incriminating acts so that there is a moral reward for these persons and a commitment of the agencies to disciplinary procedures in accordance with the jurisprudence of the Court in the future."* The **Government** stated that it agrees with the recommendation of the **Mechanism**. In view of that development, **Greek Helsinki Monitor** (GHM), that represents the victims in nine of the thirteen cases of the *Makaratzis group*, hoped that such letters of unequivocal apology will be sent to the victims of all cases before the December 2018 **CM** meeting, so that the latter welcomes such development. In a society and a polity like the ones in **Greece**, an apology is unfortunately so rare that such development will have even greater value than perhaps in other states.

Thirdly, **GHM** would like to note that in some cases the violations of Articles 2 and/or 3 **ECHR** resulted exclusively or mainly from failures not of the disciplinary but of the criminal judicial procedures. The **Supreme Court Prosecutor** has launched a remedy more important than that of an apology: on 30 October 2018, she filed a historic appeal for the cassation of a domestic court judgment for the benefit of the law, to comply with a **European Court of Human Rights** (ECtHR) judgment ruling that this domestic judgment was violating the **ECHR**. The prosecutor stated that, if confirmed by the **Supreme Court**, the cassation will remove that domestic judgment from the case-law so as to prevent the repetition of judgments with similar reasoning and/or invoking that judgment. This seminal decision of the **Supreme Court Prosecutor** concerned the execution of the **ECtHR** judgment (violation of Article 4 **ECHR**) in *Chowdury and others v. Greece*. In previous communications on the *Makaratzis group of cases*, **GHM** had recommended such appeals for cassation by the **Supreme Court Prosecutor**. Now that it was done for the execution of another judgment, **GHM** recommends as a fundamental remedy to execute **ECtHR** judgments the filing of such appeals for cassation by the **Supreme Court Prosecutor**, in cases where the violations ruled by the **ECtHR** resulted from domestic court judgments. Such appeals should be filed for ten of the thirteen cases of the *Makaratzis group*, i.e. for the cassation of the domestic judgments in the cases of *Makaratzis, Sidiropoulos and Papakostas, Zontul, Bekos and Koutropoulos, Alsayed Allaham, Celniku, Karagiannopoulos, Galotskin, Stefanou, and Leonidis*. In the other three cases, of *Zelilof, Petropoulou-Tsakiris, and Andersen*, the complaints were archived and not referred to trials.

B. On the work of the Ombudsman as Mechanism for the Investigation of Arbitrary Behavior

Concerning the work of the **Mechanism**, it is first important to stress that it has the necessary hierarchical, institutional and practical independence from the law enforcement agencies whose alleged arbitrary behavior it is called to investigate, unlike the previous similar investigation mechanism **Greece** had legislated (but was never established). However, **Greece** has to be asked to improve the functioning of this **Mechanism** or of any other independent investigation mechanism it may institute in its place. The latter point is made as the **Mechanism** being part of the **Ombudsman** has no authority to impose penalties on those found responsible for abuse of violence: **Greece** should promptly amend the law so that the **Mechanism** can impose penalties, or –and that will be unfortunate- remove the **Mechanism** from the **Ombudsman** and make it independent so that it can impose penalties.

The first shortcoming of the operation of the **Mechanism** concerns transparency. In the **Ombudsman** website the only reference to the **Mechanism** is one section of the annual report for 2017 that deals with the work of the **Mechanism** where the data provided by **Greece** in its recent communication to the **CM** are included, along with some specific cases followed by the **Mechanism**. Moreover, as indicated in the 25 October 2018 communication to the **CM** by **Redress** on the execution of the *Zontul case,* the **Mechanism** did not effectively involve them at all in his actions on the re-examination of the case, did not answer their queries, nor did he bother to inform them that there could not be a reopening because of prescription, a conclusion established on 13 April 2018 by the **Mechanism**.

The second and more important shortcoming of the operation of the **Mechanism** concerns his decision that almost all new investigations are carried out not by him but, under his supervision, by the same agencies that had carried out the flawed investigations that led to the **ECtHR** judgments against **Greece**. We refer here to the detailed related submission by **Redress** in the *Zontul case* recalling, inter alia, that the **ECtHR** stated in *Kelly and Others v the United Kingdom* that: *"Even though it also appears that, as required by law, this investigation was supervised by the ICPC, an independent police monitoring authority, this cannot provide a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected, albeit indirectly, with the operation under investigation."*

Likewise, in a submission to the **CM**, **GHM** detailed the case of the investigation of a complaint on alleged homophobic harassment and offending behavior by police officers: the victim, a **GHM** LGBTQI activist, was insistently asked by the **Ombudsman** to testify not to him but to a police investigating unit belonging to the same police division as the alleged perpetrators, thus lacking objective impartiality. The victim testified but has never been informed of the outcome of the investigation.

The **CM** is also requested to recall that in two **GHM** submissions, it was mentioned that a dozen ill-treatment allegations (most included in a letter by the **Commissioner for Human Rights** to the **Greek authorities**) were the objects of complaints to the **Ombudsman**, but the plaintiffs never received any information about the investigation of their cases.

In its communication, **Greece** mentions that the **Mechanism** has carried out his own investigations for only 4 out of the 223 cases referred to it since 9 June 2017, while for 136 he simply supervised the disciplinary investigations carried out by what **GHM** considers as objectively partial investigation bodies usually affiliated to the law enforcement agencies whose members are the subjects of those investigations. At the same time, more than one year after the **Mechanism** was launched there is not even one (1) case reported with a conclusion leading to the imposition of sanctions. **GHM** is indeed wondering how this is compatible with the fact that according to article 56 paragraph 10 of Law 4443/2016, the **Mechanism** has 10 full-time persons in his jurisdiction, unless of course these persons were never hired or were hired but contribute to the overall work of the **Ombudsman**: again, the absence of transparency does not allow outsiders to fully evaluate the existence of such resources.

Returning to the issue of transparency, **GHM** that represents the victims in nine out of thirteen *Makartazis group of cases* has never received any communication from the **Mechanism**. In **Greece**'s communication, there is an implicit explanation. *"For the others cases, the **Mechanism** confirmed that the reopening of the disciplinary cases could not lead to the punishment of the culprits, since the facts went back to such long dates that the prescription of the related disciplinary offenses were completed well before the entry into force of the new law. As a result, he decided not to seek the investigation of these cases from the competent services."* **GHM** is stunned by such wrong affirmation that throws doubt on the efficacy of the **Mechanism**. The latter does mention therein that the cases it considers to fall under the short prescription are misdemeanors *"in the absence of an internal criminal decision attributing to the facts in question a longer prescription."* However, **Yannis Papakostas** and **George Sidiropoulos** were tortured with a taser gun in August 2002 and the domestic court considered it a felony case which has a 15-year prescription prolonged by 5 years once the case has been referred to trial. So, on 9 June 2017, the case had not been prescribed; nor was it prescribed in January 2018 when the **ECtHR** judgment was published; nor is it prescribed today; nor will it be prescribed before 2022… The victims expected the **Mechanism** and **Greece** to provide a lawful explanation as to why this case was not reopened or else launch the reopening immediately, especially in view of the fact that the **ECtHR** objected also to *"the leniency of the penalty imposed on police officer C.E. [that] had been manifestly disproportionate in view of the seriousness of the treatment inflicted on Mr Sidiropoulos and Mr Papakostas."* As **Greece** refused to reply to the **GHM** submissions, the **CM** is urged to conclude in December 2018 that she failed to execute that judgment in the framework of the **Mechanism**.

A last invocation of lack of transparency relates to the fact that **Greece** did not provide any replies to the 27 September and 30 October 2018 **GHM** communications to the **CM** that included law enforcement violence allegations in more than 400 cases.[1] The **CM** is also requested to draw the necessary inference from the fact that **Greece** has to date not given **CPT** her approval to publish its report from the April 2018 visit.

C. Greece failed in the follow-up of the UN Human Rights Committee

On 2 November 2018, the **UN Human Rights Committee** (HRCttee) released its assessment of the follow-up to selected concluding observations on **Greece**. One of them concerned the excessive use of force and ill-treatment by law enforcement officers. Based on a **GHM** submission, the **HRCttee** welcomed the designation of the **Ombudsman** as the national mechanism for the investigation of incidents of ill-treatment committed by law enforcement and detention facility agents, but required additional information to assess the effectiveness of its work including whether the **Ombudsman**'s recommendations will be made binding. Moreover, the **HRCttee** regretted the lack of information on concrete measures taken to ensure that all allegations of unauthorized and disproportionate use of force by law enforcement officials are thoroughly and promptly investigated by an independent authority. The **HRCttee** asked for detailed information on the punishment of law enforcement officials for misconduct, ill-treatment or disproportionate use of force, in general and specifically for the cases of tortured Roma **Thanasis Panayotopoulos, Yannis Bekos, Vasilis Loukas** and similar ones. Hence, the **HRCttee** reiterated its recommendation, since its implementation was found not satisfactory and was graded with a **C**.

[1] The LGBTQI case mentioned above; the five well-documented cases that had triggered a letter of concern by the **Commissioner for Human Rights** to the **Minister of Justice, Transparency and Human Rights** and the **Alternate Minister of Interior and Administrative Reconstruction** on 18 April 2017; another dozen ill-treatment allegations which were the objects of complaints to the **Ombudsman** by **GHM** or the **Advocates Abroad**, but the plaintiffs never received any information about their investigation; the death of an Albanian in a police station; and the unprecedented systematic police violence and illegal deportation of asylum seekers in Evros with more than 400 well-documented cases by several NGOs that includes also ill-treatment and push-backs of 15 persons documented by **CPT**.

D. Definition of torture and other legislative changes

In its December 2017 decision, the **CM** *"noted the information about the establishment of a committee tasked with examining whether the definition of torture in Greek law is compatible with the definition in Article 1 of the UN Convention against Torture; also noted the information concerning the examination by the authorities of the matter of conversion of custodial sentences imposed for torture to ensure that that perpetrators of torture or ill-treatment are proportionately and effectively punished; invited the authorities to keep the Committee informed about further relevant developments."* **GHM** notes that an amended definition of torture could have been introduced a long time ago and implemented by the courts. It is however the usual practice of **Greece** to refer to the "Greek calends," i.e. the new criminal code that may in the distant future be tabled before Parliament, changes that the government is not really willing to bring about but wants others, like the **CM**, to believe are imminent. On the contrary, in October 2018, one day after a street musician was arrested for begging, the begging legal provision was summarily dropped from the criminal code, through an amendment tabled by MPs.

E. Recommendations

The Greek government should therefore be asked to:

1. **reopen all disciplinary investigations in the 13 cases of the *Makaratzis group* so that their conclusions are consistent with the ECtHR judgments and lead to issuing of apologies since the punishment of the culprits is impossible because of prescription, with the possible exception for the *Sidiropoulos-Papakostas case* that can still be properly executed;**

2. **request the Supreme Court Prosecutor to file appeals for cassation for the benefit of the law of the ten domestic judgments in the *Makaratzis group of cases* found by the ECtHR to be in violation of ECHR;**

3. **involve victims and/or their representatives to the above investigations or appeals for cassation;**

4. **provide before the June 2019 DH meeting detailed information on the punishment of law enforcement officials for misconduct, ill-treatment or disproportionate use of force, in general and specifically for the 400+ cases reported by CPT and NGOs;**

5. **make sure that the Ombudsman investigates himself the torture and ill-treatment allegations rather than assigning these investigations to law enforcement units that lack independence and objective impartiality;**

6. **empower the Ombudsman to impose sanctions at the end of disciplinary investigations, or else replace him with another Independent Authority that will have the right to impose penalties;**

7. **introduce the necessary amendments so that the definition of torture is compatible with Article 1 of UN CAT and hence is punished accordingly, while penalties imposed for convictions for torture or ill-treatment do not benefit from such attenuating circumstances that may lead to their conversion and/or reduction to lenient sentences.**