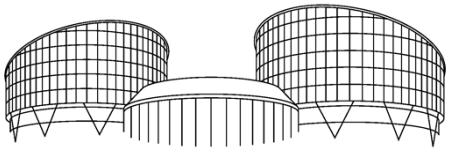

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GABLISHVILI AND OTHERS v. GEORGIA

(Application no. 7088/11)

JUDGMENT

STRASBOURG

21 February 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Gablishvili and Others v. Georgia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Yonko Grozev,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 29 January 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7088/11) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Georgian nationals, Mr Giorgi Gablishvili ("the first applicant"), Mr Romik Kasyanovi ("the second applicant"), Mr Zurab Gachechiladze ("the third applicant") and Mr Giorgi Mtchedlidze ("the fourth applicant"), on 25 January 2011.

2. The applicants were represented by Mr B. Botchorishvili, a lawyer practising in Tbilisi. The Georgian Government ("the Government") were represented by their Agent, Mr L. Meskhoradze of the Ministry of Justice.

3. The applicants complained, in particular, that they had been ill-treated by prison officers and that relevant authorities failed to conduct an effective investigation in that regard.

4. On 12 March 2015 the Government were given notice of the above complaints under Article 3 of the Convention. The remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1988, 1982, 1984 and 1987 respectively. At the material time all four of them were serving their respective prison sentences in Rustavi Prison no. 1.

A. Attempted escape from prison and alleged ill-treatment of the applicants

6. At about 1 p.m. on 30 March 2009 the applicants were arrested in a yard behind the prison during an alleged attempt to flee. The applicants and the Government have submitted different accounts of the circumstances surrounding their arrest.

7. According to the applicants, they left the confinement area through an open door. Then they climbed up a two-metre high wall with the assistance of scaffolding attached to it at the time and jumped down into the back yard. There, they were attacked by prison officers who severely beat them with wooden sticks and iron pipes. The second and third applicants, together with another prisoner, R.G., hid in a truck parked nearby to avoid the beatings, while the first and fourth applicants surrendered immediately. After the arrest the applicants were placed in a punishment cell where their beating continued.

8. The Government admitted that the applicants had been injured on the day of the incident, but submitted that they had sustained all the injuries either as a result of falling from a prison wall that was under construction at the time or as a result of the necessary physical force to which the prison officers had had to have recourse in order to effect their arrest. The Government further submitted that whereas the second and third applicants had resisted the prison officers during their arrest, the first and fourth applicants had immediately surrendered.

B. Criminal proceedings against the applicants

9. On the day of the incident the Investigation Department of the then Ministry of Corrections and Legal Aid ("the Ministry of Prisons") opened a criminal investigation into the circumstances of the applicants' attempted escape. The investigator in charge of the case questioned the applicants, who blamed all their injuries on a fall from a prison wall. On the same date, the investigator commissioned an expert from the National Forensic Bureau who visually examined all those injured and issued reports in respect of the first, second and third applicants as well as the prison officers on 7 April

2009 and in respect of the fourth applicant on 16 April 2009. The examinations of the applicants were conducted in the presence of the investigator.

10. The medical expert concluded, in respect of all the applicants, that the injuries could have been caused by blows with a hard blunt object(s) inflicted at the time of the escape attempt. He further concluded that the injuries concerned were of minor severity and had not caused the third and fourth applicants long-lasting effects on their health. The extent and nature of the injuries sustained by each of the applicants, as recorded by the expert, were as follows:

11. It was observed that the first applicant had multiple abrasions on his chest, nose, forehead, cheeks, right ear, upper left arm, right shoulder and on both knees. His nose was bleeding and swollen. His lower left eyelid was bruised and swollen and he had a cut which was slightly bleeding on his tibia. The forensic expert further noted that during the examination, the applicant had complained of pain in the chest.

12. It was observed that the second applicant had multiple haematomas from his shoulders to his back and on his right cheek; abrasions on the right shoulder and on the back of his right hand; multiple scratches on the right side of his neck; and a deep scratch on the left thigh, covered with scabbing.

13. It was observed that the third applicant had multiple abrasions on the right forearm; an abrasion on the back of the fifth finger of his left hand; and cuts which were slightly bleeding on his head, on the left temple and crown.

14. It was observed that the fourth applicant had multiple haematomas on the chest, right elbow, and below the left eye; abrasions on the forehead and knee; a scratch on the right thigh; and a laceration which was slightly bleeding on the crown of the head.

15. According to the forensic expert reports issued on 7 April 2009 (as cited in the Court of Appeal judgment of 25 March 2010 against the applicants), it was observed that prison officer Z.Ch. had an abrasion on his forehead; V.M. had a haematoma on his face; and O.T. had multiple abrasions on his feet and hands.

16. In October and November 2009 when the applicants were allowed to testify before the court in the criminal proceedings against them, they stated that they had been ill-treated during their arrest. All of them withdrew the statements they had given during the pre-trial investigation. The first and second applicants claimed in that connection that pre-typed texts of statements had been given to them by the investigator and that they had been forced to sign those statements without reading them.

17. On 29 December 2009 the Rustavi City Court convicted all the applicants of attempted escape from prison (an offence under Article 379 of the Criminal Code of Georgia). The second and third applicants were also found guilty of resisting prison officers in the exercise of their duties (an

offence under Article 378 of the Criminal Code of Georgia). Their conviction was upheld by the Tbilisi Court of Appeal on 25 March 2010. Before the courts of first and second instances, the applicants maintained their ill-treatment allegations, which were not, however, addressed by the courts. By a decision of 26 July 2010 the Supreme Court of Georgia rejected as inadmissible an appeal on points of law lodged by the applicants.

C. Investigation into the applicants' alleged ill-treatment

18. On 10 November 2009 all the applicants, except for the fourth one, complained to the Chief Prosecutor of Georgia of ill-treatment on 30 March 2009 and requested the initiation of criminal proceedings in line with the requirements of Article 3 of the Convention. On 11 November 2009, the prosecutor forwarded the applicants' complaint to the judge examining the case against the applicants, considering it relevant for the on-going trial proceedings.

19. On 1 February 2010 the applicants enquired about the progress of the investigation, complaining that none of them had been questioned in connection with their allegations of ill-treatment.

20. On 19 February 2010 a panel of independent forensic experts called by the second and third applicants issued forensic reports concluding that the two applicants suffered from post-traumatic stress disorder which could have been derived from the applicants' ill-treatment. Based on the forensic reports issued by the National Bureau of Forensics on 7 April 2009 (see paragraph 9 above), the panel further concluded that the applicants concerned could have sustained the injuries described in those documents as a result of ill-treatment. The two applicants provided the Office of the Chief Prosecutor with the forensic reports in relation to their complaints.

21. On 3 March 2010 the fourth applicant also lodged a criminal complaint of ill-treatment with the Office of the Chief Prosecutor.

22. On 8 July 2010 the applicants, acting through the Office of the Public Defender of Georgia ("the PDO"), lodged yet another complaint. By a letter of 30 July 2010 they were informed that a preliminary enquiry had been opened on 22 July 2010 under Article 123 of the Criminal Code of Georgia (causing severe or minor injuries by use of excessive force).

23. On 15 December 2010 and 13 January 2011 all four applicants, acting through their lawyer, wrote again to the Office of the Chief Prosecutor enquiring about the progress of their case. In their letter of 13 January 2011, they also denounced the fact that their ill-treatment allegations against the prison authorities were being investigated by the very same authorities – the Investigation Department of the Ministry of Prisons. On 31 March 2011 the applicants' letter was forwarded to the Investigation Department of the Ministry of Prisons, but was left unanswered.

24. In April 2011 the Investigation Department of the Ministry of Prisons conducted the first investigative interviews in connection with the applicants' alleged ill-treatment. Throughout the subsequent months an investigator from the Ministry of Prisons interviewed the prison governor and four prison officers who had been involved in the incident, including those who had arrested the applicants. They all denied having beaten the applicants. Two of them claimed that all of the applicants had sustained their injuries by falling from the wall while they had been fleeing from the prison. One of the officers (O.G.) stated that the first and fourth applicants had surrendered without resistance or complications. The three prison officers who had been injured during the incident (V.M., O.T. and Z.Ch.) admitted that they had had recourse to physical force in order to arrest the second and third applicants, but they denied that the applicants had sustained any injury therefrom. Rather, they attributed all the applicants' injuries to their alleged fall from the wall.

25. As regards the details of the arrest of the second and third applicants, Z.Ch., V.M. and O.T. stated that the two, together with another prisoner, R.G., had attempted to escape in a truck that had been parked in the back yard of the prison. After driving a short distance, the truck had stopped all of a sudden. The prison officers had then approached them and ordered them to surrender. The three prisoners had resisted arrest while they had been in the truck cabin. According to O.T., R.G. had been trying to restart the vehicle. The officers had managed to capture the applicants only after receiving help from additional prison staff.

26. The investigator also interviewed the four applicants, who confirmed the allegations of ill-treatment they had made in their criminal complaints. In particular, they stated that they had been severely beaten with wooden sticks and iron pipes immediately after their arrest and as a result, the first, second and fourth applicants had passed out several times. When they had regained consciousness, the beatings had resumed. The applicants also named those prison officers who had been involved in the beating. They denied that they had sustained their injuries as a result of falling from the wall. Only the fourth applicant admitted that he had slightly injured his leg when he had jumped from the wall, but said that he had received the remaining injuries from the beating.

27. The second and third applicants further claimed that on the day of the incident pre-typed texts of statements had been given to them by the investigator and that they had been forced to sign these statements without reading them. The fourth applicant stated that he had felt sick after the ill-treatment, so he had been unable to adequately judge reality and had signed the interview record without scrutinising it. He further stated that the next day after the incident he had been transferred to Ksani Prison no. 15, where, upon his arrival, he had been beaten by the Governor of the prison. Subsequently, he had been regularly threatened and warned not to lodge a

complaint about his ill-treatment. The second and third applicants also claimed that D.Ch., head of the Prison Service of the Ministry of Prisons and other senior officials of the agency had promised them leniency in respect of their escape attempt in return for remaining silent about their ill-treatment.

28. The investigator also interviewed R.G., who was arrested together with the applicants while fleeing. He essentially confirmed the applicants' account of the events and further claimed that the prison governor, D.S., while physically and verbally abusing the applicants, had called a guard to shoot them, but the latter had not complied with the order.

29. The forensic medical examination reports of April 2009 obtained as part of the investigation conducted against the applicants in the prison escape case were included in the investigation file concerning the applicants' alleged ill-treatment.

30. On 17 September 2011 in response to a complaint lodged by the applicants about the ineffectiveness of the investigation, the prosecutor informed them that they were just witnesses in the matter and had no standing to lodge a complaint.

31. On 13 March 2012, the PDO, acting on behalf of the applicants, requested the Office of the Chief Prosecutor information about the status of the investigation. The PDO was notified that several witnesses had been interviewed and that the investigation was on-going.

32. On 20 August 2012 the prosecutor decided to discontinue the proceedings for lack of evidence of a crime. The prosecutor fully accepted the version of events put forward by the prison officers, concluding that the applicants could have been injured when they had jumped down from a wall whilst fleeing from the prison. The prosecutor also noted that the prison officers had been forced to use physical force against the applicants to effect their arrest, but made no conclusion as to whether the applicants had sustained their injuries therefrom. The applicants were not informed about the decision.

33. On 21 October 2013 the applicants wrote yet another letter to the Office of the Chief Prosecutor enquiring about the status of the investigation, but received no reply. Hence, on 19 June 2014 the applicants' lawyer sent an additional complaint.

34. By a letter of 21 July 2014, the applicants were informed that a decision had been taken on 20 August 2012 to discontinue the relevant proceedings.

II. RELEVANT DOMESTIC LAW

35. The relevant legal provisions concerning the obligation of authorities to investigate allegations of ill-treatment in force at the material time are set out in the following judgments: *Mikiashvili v. Georgia,* (no. 18996/06, § 54,

9 October 2012) and *Dvalishvili v. Georgia,* (no. 19634/07, § 28, 18 December 2012).

III. RELEVANT NATIONAL REPORTS

A. Public Defender of Georgia

36. In his 1st Biannual Report of 2009 the Public Defender gave the following account of Ksani Prison no. 7 (subsequently renumbered no. 15):

> "According to the prisoners, the prison officers had treated them rudely and occasionally humiliated them ... it may also happen that the prison administration subjects them to criminal investigation for reporting their problems to members of the prison monitoring team of the Public Defender's Office ..."

37. The Annual Report of 2010 by the Public Defender observed the following about Rustavi Prison no. 16 (formerly no. 1) and Ksani Prison no. 15 (formerly no. 7):

> "According to the prisoners of [Ksani Prison no. 15] ... it is usual practice that prisoners transferred to prison no.15 from other prisons are ordered to kneel and if they refuse, they are beaten ...
>
> ... The prisoners [further] stated that if they expressed an intention to contact the Public Defender's Office, to report problems, all the telephones in the prison were switched off and they were threatened with harsher sentences. Some were incarcerated in worse conditions of detention and others were beaten ...
>
> ... According to the prisoners [of Rustavi Prison no.16] they had been transferred to a new building of the prison with the use of physical force. However, they had refrained from speaking about this incident openly and requested that their statements be kept confidential. Those prisoners who had sustained visible injuries attributed all of them to different accidents, for instance, they reported that they had sustained injuries when falling from a bed, playing football etc."

B. Open Society Georgia Foundation

38. In 2015 the Open Society Georgia Foundation, in cooperation with various Georgian non-governmental organisations ("NGOs") and human rights experts, published a report entitled "Crime and Excessive Punishment: The Prevalence and Causes of Human Rights Abuse in Georgian Prisons". The document covers the period from 2003 to 2012 and is primarily based on the interviews of hundreds of individuals who served prison sentences during the relevant period, as well as on monitoring reports of the PDO and Georgian NGOs. The relevant parts of the report read:

> "This overview of the findings of the various reports of bodies from the UN, Council of Europe and international NGOs as well as local bodies reveals that human rights abuses in places of detention have remained a significant problem in Georgia and have continually been flagged by observers. The reports agree that there was a

shift from the use of mistreatment and torture in police custody to prisons around 2007-2008...

After this point, NGOs and international observers found fragmentary evidence to suggest that ill-treatment had become worse in Georgia's prisons, though its exact extent and form was not clear in large part because information was simply not available. Prisons by 2010 had become virtually closed systems. Prisoners were heavily disincentivized to report rights' abuses and few observers were able to actually investigate prisons thoroughly ...

From prisoners and former prisoners' testimony torture and inhuman treatment was widespread in the prison system. Moreover, the belief among prisoners that it was widespread was itself pervasive ...

Victims remained remarkably quiet about instances of torture both to impersonal and personal (family) contacts. This is partly due to lack of hope to improve the situation, fear of further punishment, and ineffectiveness of protection mechanisms."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

39. The applicants complained, under Article 3 of the Convention, that they had been ill-treated by prison officers during the arrest following their unsuccessful attempt to escape from prison and immediately thereafter on 30 March 2009. They further alleged that the relevant national authorities had failed to conduct a thorough, adequate, and independent investigation into their allegations of ill-treatment. They relied on Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

1. The parties' submissions

40. The Government submitted that the applicants had failed to lodge their application with the Court with due expedition as required by Article 35 § 1 of the Convention. The applicants had lacked diligence in voicing their grievances before the relevant domestic authorities in a timely fashion. They ought to have realised that no effective investigation would ensue from their criminal complaint of 10 November 2009, as the prosecutor had readily forwarded it to the court examining the case against the applicants instead of initiating a separate enquiry, and no response had been provided to the complaints lodged throughout the subsequent months. The Government also argued that the criminal proceedings against the

applicants had not constituted an effective remedy for their grievances concerning the alleged ill-treatment, as their scope had been limited to the charges brought against the applicants.

41. The applicants disagreed with the Government's contention that the absence of any prospect of conducting an effective investigation into their allegations had been apparent from the very first reaction of the authorities to their complaints and the lack of response to their follow-up complaints, as in the normal course of events a criminal investigation was a remedy that had to be exhausted. They had lodged their criminal complaints in a timely fashion given the circumstances. In any event, the authorities had been alerted by the allegations of ill-treatment and had had sufficient grounds to open an investigation on their own motion. The applicants also argued that the criminal proceedings against them had constituted a proper remedy, given that the allegation of ill-treatment was intrinsically related to the charges against them.

2. The Court's assessment

42. Regarding the general principles concerning the application of the six-month rule within the meaning of Article 35 § 1 of the Convention, the Court refers to its relevant case-law (see, in particular, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 134-36, ECHR 2012; *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, §§ 258-60, ECHR 2014 (extracts); *Mafalani v. Croatia*, no. 32325/13, §§ 75-83, 9 July 2015; and *Akhvlediani and Others v. Georgia* (dec.), no. 22026/10, 9 April 2013).

43. In the instant case, the Court observes that it took seven months for three of the applicants and almost a year for the fourth to lodge a formal criminal complaint with the relevant authorities. In this connection, the Court has held that applicants' delay in lodging a complaint is not decisive where the authorities ought to have been aware that an individual could have been subjected to ill-treatment, especially when the ill-treatment might have been inflicted by State agents (see *Mocanu and Others*, cited above, § 265; *Mafalani*, cited above, § 78; and *Şakir Kaçmaz v. Turkey*, no. 8077/08, § 70, 10 November 2015). Following the applicants' arrest after their unsuccessful attempt to flee from prison, there were clear indications that violence may have been used against them. In particular, the authorities must have been alerted of such a possibility on the basis of the results of the applicants' forensic medical examination, which had been conducted in the presence of the investigator (see paragraphs 9-14 above). Thus, the obligation to investigate had arisen from the very beginning, even without an express complaint on the part of the applicants (see *Mafalani*, cited above, §§ 80-81, with further references therein).

44. Furthermore, the Court has previously acknowledged that the psychological effects of ill-treatment inflicted by State agents may

undermine a victim's capacity to take the necessary steps to bring proceedings against the perpetrator without delay. Such a barrier may become particularly difficult to overcome when the victims continuously remain under the control of those implicated in the ill-treatment following the incident (see *Mocanu and Others,* cited above, § 274, and *Mafalani*, cited above, § 78). With the above consideration in mind and also having regard to the worrying findings of various reports of the PDO and local human rights NGOs about the prisons in which the applicants were detained at all material times, namely, that the prison authorities systematically resorted to violent or otherwise unlawful measures to prevent abuses being reported (see paragraphs 36-38 above) and also the fact that all of the applicants had openly voiced their ill-treatment grievances at the earliest opportunity when they testified before the court in an open session (see paragraph 16 above), the Court cannot but conclude that the applicants would have faced difficult barriers in bringing their grievances before the competent authorities, as some of them indeed claimed (see paragraphs 16 and 27 above).

45. In view of the foregoing and the fact that the delay at issue was not very lengthy (compare *Mafalani,* cited above, in which the delay lasted more than three years), the Court concludes that the applicants cannot be reproached for not voicing their grievances before the domestic authorities earlier.

46. As regards the second aspect of the diligence obligation, the Court notes at the outset that the applicants maintained that both the criminal investigation based on their complaints as well as the trial proceedings against them provided adequate forums for raising their complaints.

47. In this connection, the Court reiterates its findings in the cases of *Manukian v. Georgia* ((dec.) no 49448/08, §§ 33-35, 3 May 2016) and *Parjiani v. Georgia* ((dec.) no 57047/08, §§ 33-34, 15 May 2018), namely that the trial against the applicants was not capable of remedying directly the impugned state of affairs. It could not therefore be regarded as effective for the purposes of the Convention. The Court is of the view that in this context, the instant case is not distinct enough from the above cases for it to hold otherwise.

48. As to the criminal investigation instigated based on the complaints lodged by the applicants, the Court first notes that the Government made somewhat conflicting submissions in this regard. On the one hand, they argued that the authorities had been so reluctant to respond to the applicants' criminal complaints for such a long time that the applicants ought to have realised from the very beginning that an effective investigation into their allegations would never be carried out. On the other hand, they submitted on the merits that by investigating the applicants' allegations of ill-treatment, the authorities had fully discharged their

positive obligations under Article 3 of the Convention (see *Kaykharova and Others v. Russia*, nos. 11554/07 and 3 others, § 120, 1 August 2013).

49. The Court refers in this regard to its well-established case-law under which a separate complaint with the aim of holding State agents in charge of detained applicants criminally liable for alleged acts of ill-treatment is, in the normal course of events, an effective remedy which must be exhausted (see *El-Masri*, cited above, §§ 139-141, and *Gharibashvili v. Georgia*, no. 11830/03, § 46, 29 July 2008, with further references therein). Even if there are some doubts from the very beginning as to the effectiveness of this remedy, an applicant must not be reproached for attempting it before lodging a complaint with the Court in view of the principle of subsidiarity (*El-Masri*, cited above, § 141).

50. The Court further observes from the documents submitted by the applicants after lodging their initial complaints, that the applicants maintained reasonable contact with the authorities, submitted new and detailed evidence, and took steps to inform themselves of the status of their complaints and to speed up their examination, in the hope of a more effective outcome (see paragraphs 18-20, 22, 23, 31 and 33 above; compare *Huseynova v. Azerbaijan*, no. 10653/10, § 85, 13 April 2017; *Malika Yusupova and Others v. Russia*, nos. 14705/09 and 4 others, §§ 164-66, 15 January 2015; and contrast *Açış v. Turkey*, no. 7050/05, §§ 41-42, 1 February 2011). In the light of the circumstances in the present case, the Court does not consider that the applicants failed to respect their diligence obligation.

51. For the foregoing reasons, the Court considers that the application has not been lodged out of time. The Government's objection must therefore be dismissed. The Court further notes that the applicants' complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

52. The Government challenged the applicants' version of events and submitted that they had not been subjected to any form of ill-treatment on 30 March 2009. They admitted that the applicants had been injured on that day but, referring to the findings of the relevant criminal investigation, maintained that the applicants had sustained their injuries either as a result of falling from a two-metre high wall and/or because the prison officers had had recourse to necessary and proportionate physical force in order to effect the applicants' arrest. As regards the State's positive obligation under Article 3 of the Convention, the Government maintained that the applicants' allegations had been properly investigated by the national authorities.

53. The applicants disagreed with the Government. They claimed that the case file contained sufficient evidence that their injuries had been inflicted by the prison officers and that the Government had failed to provide a credible alternative explanation as to how they had sustained them. They further argued that the investigation conducted by the authorities into their allegation of ill-treatment had not been thorough, effective and independent and that the Government had therefore failed to meet their positive obligations under Article 3 of the Convention.

2. The Court's assessment

(a) General principles

54. The relevant general principles were summarised by the Court in the case of *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 81-88 and 114-23, ECHR 2015).

(b) Application of the above principles to the circumstances of the present case

(i) Concerning the alleged ill-treatment

55. The Court observes that the parties advanced different explanations as to the origin of the applicants' injuries. On the one hand, the applicants submitted their statements corroborated by forensic medical evidence (see paragraphs 10-14 above), according to which they had been beaten while being arrested on 30 March 2009 and later that day. On the other hand, the authorities' version, supported by the statements of the prison officers, was that the injuries at issue could have been caused either when the applicants had fallen from a two-metre high wall whilst attempting to escape from prison or when the prison officers had used proportionate physical force to arrest them.

56. Having regard to the nature of the applicants' physical injuries, the Court finds them sufficiently serious to fall within the scope of Article 3 of the Convention. The burden, hence, rests on the Government to provide a satisfactory and plausible explanation as to the cause of those injuries (see *Mikiashvili v. Georgia,* no. 18996/06, § 73, 9 October 2012, with further references, and *Dvalishvili v. Georgia,* no. 19634/07, § 42, 18 December 2012).

57. As regards the Government's submission that the applicants might have sustained their injuries as a result of falling from a two-metre high wall, the Court considers that, in the light of the nature of the applicants' injuries as recorded in the forensic medical reports (see paragraphs 10-14 above), the explanation appears to be highly implausible. In particular, the Court does not find it convincing that all of the applicants could have sustained multiple injuries on different sides of their bodies as a result of a

single voluntary jump from a two-metre high wall (see similar findings in *Nadrosov v. Russia*, no. 9297/02, § 33, 31 July 2008, and *Dvalishvili*, cited above, § 42).

58. The Government further submitted that the applicants might also have sustained some of their injuries as a result of the recourse to necessary physical force by the prison officers in order to effect their arrest. The Court first emphasises that this version is irrelevant in respect of the first and fourth applicants, neither of whom were even charged with the crime of resisting prison officers, unlike the second and third applicants (see paragraph 17 above). Moreover, the prison officers clearly told the domestic investigation that the two had surrendered to them without resistance or complications (see paragraph 24 above).

59. In the light of the foregoing, the Court considers that the Government have failed to provide a plausible explanation as to the cause of the first and fourth applicants' injuries. Taken cumulatively with the forensic medical evidence and the nature of the applicants' injuries, also in view of the applicants' detailed and consistent statements, the Court finds that those injuries were the result of ill-treatment to which the applicants had been subjected during their arrest on 30 March 2009 and/or later that day (see *Mikiashvili*, cited above, §§ 76-77, with further references therein).

60. It remains to be examined whether the second and third applicants could have sustained their injuries from recourse to physical force that was strictly necessary in the circumstances (see *Bouyid,* cited above, § 88).

61. In view of the injuries observed on the bodies of the arresting officers by the forensic expert and the fact that some of the prison officers made an admission in respect of the first and fourth applicants – that the two had not resisted arrest – the Court is ready to give weight to their accounts that the second and third applicants disobeyed the officers' orders to surrender. It notes in this connection that the two applicants concerned were convicted of resisting prison officers (see paragraph 17 above). These circumstances count heavily against the applicants concerned, with the result that the burden placed on the Government to prove that the use of force was not excessive in this case is less stringent (see *Spinov v. Ukraine*, no. 34331/03, § 49, 27 November 2008; *Rehbock v. Slovenia*, no. 29462/95, §§ 65-78, ECHR 2000-XII; and *Barta v. Hungary*, no. 26137/04, § 71, 10 April 2007).

62. The Court is mindful of the difficulties States may encounter in maintaining order and discipline in penal institutions and that a simple case of disobedience by detainees may quickly degenerate into a riot (see *Gömi and Others v. Turkey*, no. 35962/97, § 77, 21 December 2006; *Sapožkovs v. Latvia,* no. 8550/03, § 64, 11 February 2014; and *Tali v. Estonia*, no. 66393/10, § 75, 13 February 2014). It observes that the three arresting officers sustained a variety of injuries during the incident (see *Dilek Aslan v. Turkey*, no. 34364/08, § 48, 20 October 2015, and, *a contrario*, *Dedovskiy*

and Others v. Russia, no. 7178/03, § 82, ECHR 2008 (extracts)). The injuries sustained by the two applicants, on the other hand, were classified cumulatively as minor ones with no long-lasting effects on their health (see *Spinov*, cited above, § 50, and *Tüzün v. Turkey*, no. 24164/07, § 37, 5 November 2013; also compare *Mikiashvili* and *Dvalishvili*, both cited above, in which, in addition to bruising and abrasions, the applicants were diagnosed with head injuries and concussion with a long-term impact on their health). In any event, the degree of bruising on an applicant's body alone cannot rule out the possibility that the injuries originated from the use of necessary force (see *Sapožkovs*, cited above, §§ 65-66, in which the Court found that "many" bruises on the applicant's body and extremities could not alone sufficiently prove that the authorities had used excessive force). It is also worth noting that it appears from the materials in the case file that the events surrounding the escape attempt were unfolding spontaneously. Hence, the prison officers engaged in the arrest operation might have been unable to take measures to minimise any attendant injury (see *Berliński v. Poland*, nos. 27715/95 and 30209/96, § 62, 20 June 2002; and, *a contrario*, *Kurnaz and Others v. Turkey*, no. 36672/97, § 55, 24 July 2007, in which there had been earlier indications that the prisoners were staging a riot).

63. In the light of the foregoing, the Court considers, having regard to the evidence before it, that it is not able to conclude beyond reasonable doubt that the prison officers' recourse to physical force to restrain the second and third applicants was excessive (compare to *Kekelidze v. Georgia* [Committee], no. 2316/09, §§ 23-24, 17 January 2019; see also *Štitić v. Croatia* [Committee], no. 16883/15, § 64, 6 September 2018, with further references therein). The Court does not lose sight of the fact that the applicants also alleged that their beating had continued in a punishment cell of the prison after their surrender (see paragraphs 7 and 26 above). It notes, however, that the scarce medical evidence in the case-file did not differentiate the injuries resulting as a response to the initial force used during the arrest and the injuries that allegedly followed due to the subsequent ill-treatment. In such circumstances and given its findings above, the Court is not in a position to conclude beyond reasonable doubt that the applicants had been beaten in a punishment cell. It particularly emphasises on that point that its inability to reach a conclusion as to whether there had been treatment prohibited by Article 3 of the Convention subsequent to the applicants' arrest derives considerably from the failure of the domestic authorities to effectively investigate the applicants' complaint (see in this connection paragraphs 65-70 below; see also *Thuo v. Cyprus*, no. 3869/07, §§ 148-149, 4 April 2017).

64. Consequently, the Court concludes that there has been a violation of Article 3 of the Convention in its substantive limb in respect of the first and fourth applicants. It further finds that there has been no violation of

Article 3 of the Convention in its substantive aspect in respect of the second and third applicants.

(ii) Concerning the alleged inadequacy of the investigation

65. As regards the procedural obligation of the State under Article 3 of the Convention, the Court observes at the outset that the authorities did carry out an inquiry into the applicants' allegations of ill-treatment and that a number of relevant investigative measures were taken. The Court is not convinced, however, that the enquiry was sufficiently independent, thorough and effective.

66. In the first place, all the investigative measures were conducted by the Investigation Department of the Ministry of Prisons, the very same Ministry which was, at the material time, in charge of the prison system. Its findings were then simply endorsed by the Office of the Chief Prosecutor, without the latter having made any additional enquiries of its own, as the basis for dismissing the case. This institutional connection between the investigator and those implicated by the applicants in the incident, in the Court's view, raises legitimate doubts as to the independence of the investigation conducted (see *Mikiashvili,* cited above, § 87, with further references therein). The fact that the prosecutor made no attempts to scrutinise the investigator's account of the incident further undermines the effectiveness of the investigation (see *Matko v. Slovenia*, no. 43393/98, § 90, 2 November 2006, and *Đurđević v. Croatia*, no. 52442/09, §§ 89-90, ECHR 2011 (extracts)). Nor did the forensic medical examination of the applicants' injuries comply with the requisite standards of independence, as it was conducted in the presence of the investigator who was later implicated by the applicants in the misconduct (see *Dvalishvili*, cited above, § 47; *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X; *Osman Karademir v. Turkey*, no. 30009/03, § 53, 22 July 2008; and *Lopata v. Russia*, no. 72250/01, § 114, 13 July 2010).

67. Furthermore, as the Court has emphasised on many previous occasions, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Bouyid,* cited above, § 133, and *Mocanu and Others*, cited above, § 323). In the instant case, notwithstanding the fact that the authorities promptly arranged a forensic examination of the applicants' injuries, even if it was not unproblematic, the Court cannot overlook the length of time it took before an official investigation got under way and statements from pertinent witnesses were obtained (see paragraphs 18-24 above; see also *Identoba and Others v. Georgia*, no. 73235/12, § 66, 12 May 2015, and *Timurtaş v. Turkey*, no. 23531/94, § 89, ECHR 2000-VI). Thus, the investigation fell short of the relevant standards in this regard as well.

68. It is also apparent from the prosecutor's decision to terminate the criminal investigation that the conclusions were only based on the testimony given by the prison officers involved in the incident. The prosecutor accepted the credibility of the prison officers' statements without giving any convincing reasons for doing so, despite the fact that those statements might have been subjective and aimed at evading criminal liability for the purported ill-treatment of the applicants. The credibility of the prison officers' statements should have been questioned, as the investigation was supposed to establish whether they were liable to face criminal charges (see *Ognyanova and Choban v. Bulgaria*, no. 46317/99, § 99, 23 February 2006, and *Antipenkov v. Russia*, no. 33470/03, § 69, 15 October 2009). Furthermore, the questioning of the arresting officers was superficial. Having examined the substance of their statements, the Court notes that all of them made formulaic statements to the effect that they had not participated in any ill-treatment and the physical force they had used to arrest the applicants had been necessary (see *Dvalishvili,* cited above, § 49, and *Buntov v. Russia*, no. 27026/10, § 131, 5 June 2012). It is also noticeable that notwithstanding the strong probative value that forensic medical evidence normally attracts, the investigation did not even attempt to seek corroboration through it (see *Dvalishvili,* cited above, § 48).

69. Furthermore, it is unclear whether the authorities questioned some potentially important witnesses. Those include, for example, the prison guard who, according to the applicants, was allegedly ordered by the prison governor to shoot the applicants following their arrest, the investigator who allegedly took the applicants' initial statements under duress, D.Ch., the head of the Prison Service, who allegedly visited the applicants soon after the incident and promised them leniency in return for silence. The Government have not submitted a copy of any statements given by them as part of the investigation file (see *Dvalishvili,* cited above, § 49).

70. Having regard to the above considerations, the Court concludes that the authorities failed to conduct an independent, thorough and effective investigation into the circumstances surrounding the incident of 30 March 2009. There has accordingly been a violation of Article 3 of the Convention under its procedural limb with respect to all the applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

72. The first, second and fourth applicants claimed 17,000 euros (EUR) each in respect of non-pecuniary damage, while the third applicant claimed EUR 42,000, additionally referring to his post-traumatic stress disorder.

73. The Government submitted that the applicants' claims were unsubstantiated and excessive.

74. Having regard to the nature of the violations found and ruling on an equitable basis, the Court awards EUR 6,000 each to the first and fourth applicants and EUR 3,000 each to the second and third applicants, plus any tax that may be chargeable on those amounts.

B. Costs and expenses

75. The applicants claimed EUR 11,650 for the costs incurred before the domestic authorities and the Court. The amount was broken down into the number of hours their lawyer had allegedly spent on the case and the lawyer's hourly rate. No copies of the relevant legal service contracts, invoices, vouchers or any other supporting financial documents were submitted.

76. The Government submitted that the amount claimed was neither supported by any evidence nor reasonable. They further argued that some of the services were apparently out of the scope of the instant case.

77. According to the Court's settled case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 130, ECHR 2016 (extracts)). A representative's fees are considered to have been actually incurred if the applicant has paid them or is liable to pay them. The opposite is the case with respect to the fees of a representative who, without waiving them, has simply taken no steps to pursue their payment or has deferred it. The fees payable to a representative under a conditional-fee agreement are actually incurred only if that agreement is enforceable in the respective jurisdiction (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017, with further references).

78. In this case, the applicants did not submit documents showing that they had paid or were under a legal obligation to pay the fees charged by their representative, whether in respect of the domestic proceedings or the proceedings before the Court. In the absence of such documents, the Court is not in a position to assess the points mentioned in the previous paragraph. It therefore finds no basis on which to accept that the costs and expenses claimed by the applicants have actually been incurred by them (compare *Merabishvili,* cited above, §§ 361-72).

79. It follows that the claim must be rejected.

C. Default interest

80. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 3 admissible;

2. *Holds* that there has been a violation of Article 3 of the Convention in its substantive aspect in respect of the first and fourth applicants;

3. *Holds* that there has been no violation of Article 3 of the Convention in its substantive aspect in respect of the second and third applicants;

4. *Holds* that there has been a violation of Article 3 of the Convention in its procedural aspect in respect of all four applicants;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, to the first and fourth applicants each in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, to the second and third applicants each in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 February 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President