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## REPORT

**by Thomas Hammarberg**  
**Commissioner for Human Rights of the Council of Europe**

**Following his visit to Georgia**  
**from 18 to 20 April 2011**

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Administration of justice and protection of human rights  
in the justice system in Georgia

## **Summary**

Commissioner Thomas Hammarberg and his delegation visited Georgia from 18 to 20 April 2011. During the visit, the Commissioner held discussions on the situation with the administration of justice and level of protection of human rights in the justice system in Georgia. The Commissioner paid particular attention to criminal justice policy and practice, the independence of the judiciary, access to justice and the observance of the right to fair trial during judicial proceedings.

The present report focuses on the following major issues:

### **I. Criminal justice policy and reform**

Georgia has undertaken serious efforts to reform its justice system in recent years. An ambitious criminal justice reform process began in 2005, covering the areas of the penitentiary, juvenile justice, probation and access to justice. In the context of this reform, the relevant legislative framework has also been revised.

The stringent policy of "zero tolerance" of petty crime is still in force in Georgia. In practice this leads to imposition of lengthy terms of imprisonment, and concerns have been raised about the proportionality of sentences. The Commissioner encouraged the authorities to adopt a more humane and human rights oriented criminal justice policy centred on the principles of restorative, rather than retributive, justice. One of the positive aspects of the criminal justice reform is that it places an emphasis on alternatives to imprisonment. The Commissioner encouraged the authorities to take further steps to reduce the resort to detention on remand and imprisonment, which are still frequently imposed in Georgia.

The Commissioner welcomed the demonstrated commitment of the Georgian authorities to reform the juvenile justice system. He recalled the principle that in cases involving juveniles, deprivation of liberty should be imposed only as a measure of last resort and for the shortest possible period of time.

### **II. Independence of the Judiciary**

Significant changes have taken place in the organisation of the judiciary in Georgia. Georgia's political leadership has expressed a firm commitment to the fight against corruption. The legislative framework is generally favourable to judicial independence, and pressure on judges is punishable by law. Nevertheless, the Commissioner found that further efforts are needed to safeguard the judiciary from undue interference. He recommended additional measures to prevent political influence on the High Council of Justice and to protect the individual independence of judges.

The Commissioner noted that prosecutors continue to hold a dominant position in the criminal justice system in Georgia. The reports that prosecutors have commenced or proceeded with prosecutions, despite procedural violations in investigations conducted by the police, merit serious reflection. Measures should be taken in order to guarantee effective prosecutorial supervision of police investigations.

### **III. Access to justice**

The Commissioner received some reports that lawyers have encountered difficulties in exercising their profession freely, and that there have been instances of harassment, abusive prosecutions and other forms of pressure on them. Such pressure seriously impairs defence rights and prevents lawyers from effectively serving the cause of justice. In this regard, the Commissioner stressed that defence lawyers must be allowed to operate without impediments and in full confidentiality when providing legal assistance to their clients.

While the new Code of Criminal Procedure provides for increased defence rights, the criminal justice system demonstrates an imbalance in favour of the prosecution. Systemic measures should be envisaged, including comprehensive legal training for lawyers, to address this imbalance and ensure genuine adversarial proceedings. In this context, the Commissioner supports the efforts of the authorities to reform the legal aid service.

Particular attention should be paid to the plea bargaining procedure, which is extensively applied in criminal cases in Georgia. A combination of factors such as very high conviction rates, a stringent sentencing policy and the low public trust in the justice system can influence defendants to plead guilty

even if innocent, leading to a distortion of justice. The Commissioner urges caution in respect to the powerful role that the prosecutor plays in the negotiation of the plea agreement and emphasises the need for an effective and adequate judicial control, so that the safeguards foreseen by the legislation are fully implemented in practice. Additional efforts are needed to increase the transparency of procedures.

#### **IV. Concerns related to administration of justice**

The Commissioner has received numerous communications from various individuals, human rights groups and lawyers, containing allegations of politically motivated prosecutions. In the course of the visit, he discussed several such cases and had the opportunity to meet with some of the detainees who claimed to be unfairly prosecuted and tried on the basis of their political beliefs.

The information obtained was indicative of serious deficiencies marring the criminal investigation and judicial processes in a number of criminal cases against opposition activists, which cast doubts on the charges and the final convictions of individuals concerned. The Commissioner urged the authorities to respond in a clear and transparent manner to the legitimate concerns related to these cases. More generally, vigorous efforts are needed to ensure that the fair trial guarantees as well as the principle of equality of arms are respected, in accordance with Article 6 of the European Convention on Human Rights.

The authorities have taken measures to combat ill treatment and impunity, and considerable progress has been made in reducing the risk of ill-treatment by police officers. However, as shown by the recent European Court of Human Rights judgment on *Enukidze and Girgvliani v. Georgia*, it is crucial for the Georgian authorities to remain vigilant and demonstrate an unequivocal commitment to combating impunity.

The Commissioner was informed that investigations into allegations of acts of violence and disproportionate use of force by the police during the opposition protests in November 2007 and spring 2009 have not been pursued in a prompt or expeditious manner. Every effort should be made to remove existing obstacles to accountability for law enforcement officials, and to ensure that any criminal acts committed by them are effectively investigated by the competent authorities, in full compliance with the criteria established by the European Court of Human Rights.

Finally, the Commissioner believes that addressing the issues highlighted in the present report would contribute to increasing public trust in the judiciary. Measures aiming at increasing transparency of the judicial system and making it more open to public scrutiny are particularly important in this regard.

## Introduction

1. The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, conducted a visit to Georgia from 18 to 20 April 2011.<sup>1</sup> The purpose of the visit was to assess the situation of the administration of justice and level of protection of human rights in the justice system in Georgia. The Commissioner paid particular attention to criminal justice policy and practice, the independence of the judiciary, access to justice and the observance of the right to fair trial during judicial proceedings.
2. In Tbilisi, the Commissioner met the Minister of Corrections and Legal Assistance, Khatuna Kalmakhelidze, the First Deputy Minister of Justice, Tina Burjaliani, the Chairman of the Supreme Court, Konstantine Kublashvili, the Prosecutor General, Murtaz Zodelava, the chairman of the parliamentary committee on legal issues, Pavle Kublashvili and the chairman of the committee on human rights and civic integration, Lasha Tordia.<sup>2</sup> He also held discussions with the Public Defender (Ombudsman), George Tugushi, a number of judges, as well as lawyers and representatives of civil society and the international community. In addition, the Commissioner went to the penitentiary establishments 6, 16, and 17 in Rustavi where he met several prisoners.
3. The Commissioner also met with the Catholicos-Patriarch of All Georgia, His Holiness Ilia II.
4. The Commissioner would like to express his gratitude to the Georgian authorities the valuable information their representatives provided. More generally, he wishes to thank all his interlocutors for their availability and their willingness to share their knowledge and insights.

### I. Criminal Justice Policy and Reform

5. Georgia has undertaken serious efforts to reform its justice system in the recent years. An ambitious criminal justice reform process began in 2005, which – according to the Georgian authorities – has led to tangible results in the areas of the penitentiary, juvenile justice, probation and access to justice. The relevant legislative framework has been revised, having regard to international and European standards. Notable legislative developments in this area include the adoption of new legislation on imprisonment and probation, as well as a new Criminal Procedure Code (hereinafter CPC).<sup>3</sup>
6. The new CPC introduces some significant changes to the criminal justice system in Georgia. One of its stated objectives is to ensure equality of arms and full implementation of the principle of adversarial proceedings in a legal system which was previously largely inquisitorial. The new system foresees a restriction of the role of the prosecutor, who is now obliged to disclose evidence five days before the trial, and envisages better rights for the defence, in particular concerning access to case evidence during the pre-trial investigation. The judge is to assume the more neutral role of supervisor ensuring the fairness of judicial proceedings. In addition, the new CPC introduces jury trials for first-degree murder, although the implementation of this measure will be initially limited to the capital. Clearly, some time will be needed for the system to adjust to the new norms, and a more precise assessment and analysis of the implementation in practice of the new CPC would be advisable at a later stage.
7. A stringent criminal justice policy, dubbed as a “zero tolerance” policy against petty crime, was launched in 2006 and is still in force in Georgia. In practice it has resulted in the imposition of lengthy terms of imprisonment, and concerns have been raised about the proportionality of sentences. By way of example, during the visit the Commissioner’s attention was drawn to the case of a person sentenced in January 2011 to one year of imprisonment for theft resulting in

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<sup>1</sup> The Commissioner was accompanied by Bojana Urumova, Deputy to the Director of the Commissioner’s Office, and two Advisers, Sabrina Buechler and Marsel Capi.

<sup>2</sup> Regrettably, at the time of the Commissioner’s visit, neither the Minister of the Interior nor his Deputy were available to meet with him.

<sup>3</sup> The new CPC entered into force in October 2010.

pecuniary damage of approximately 15 Euros. According to the authorities, the “zero-tolerance” policy has yielded a measurable decrease in the criminality rate.

8. A revision of the Criminal Code tending towards a liberalisation of the above-mentioned policy has been initiated, and a working group has been formed for this purpose. As part of the more liberal policy, it is envisaged to modify the definitions of various offences as well as the penalties to be imposed, and to resort increasingly to alternative sentences. The non-custodial sanctions which have been applied by the courts thus far have consisted mostly of conditional sentences and fines. The Minister of Corrections and Legal Assistance expressed the authorities’ commitment to this reform and told the Commissioner that a new community service work programme of alternative sentencing had been initiated in cooperation with the Ministry of Justice and will apply to minor crimes which currently are punishable by imprisonment.
9. Over the last few years, Georgia has recorded extremely low acquittal rates in criminal cases. Official data indicate that for 2010 the average acquittal rate for all first instance courts was 0.2 %, while the acquittal rate of the first-instance Tbilisi city court was even lower - 0.04 %. During their meetings with the Commissioner, the Georgian authorities maintained that the low rate of acquittals was an indication that the prosecutors were bringing to the court only well-founded and well-prepared cases. The Supreme Court Chairman informed the Commissioner that in 2010 the Chief Prosecutor’s Office suspended around 1390 cases on grounds of insufficient evidence. Lawyers and human rights groups have challenged the authorities’ interpretation, arguing instead that the low acquittal rate is a consequence of the courts’ tendency to support all too readily the prosecution.
10. While the reform places a strong emphasis on alternatives to imprisonment, deprivation of liberty is still frequently applied in Georgia in line with the objectives and spirit of the existing zero-tolerance policy. According to Supreme Court data for 2010, imprisonment was imposed as a sanction in around 45 % of cases, reflecting no change from 2009. The same applies to imposition of pre-trial detention (detention on remand or remand imprisonment) and its extension; at present, resort to pre-trial detention is virtually systematic, and decisions to impose this measure tend to lack individualised reasoning based on each case (cf. the chapter on the judiciary, paragraph 28 below).<sup>4</sup>

#### *Conclusions and Recommendations*

11. The Commissioner welcomes the initial results reported by the Georgian authorities in the context of the reform of the criminal justice system.
12. The stringent policy of “zero tolerance” of crime, which is still in force in Georgia, has led to the imposition of disproportionately lengthy sentences. The Commissioner supports the authorities’ efforts to revise the Criminal Code and encourages them to adopt a more humane and human rights-oriented criminal justice policy centred on the principles of restorative, rather than retributive, justice.
13. The Commissioner would like to recall the established principle that pre-trial detention should be applied as a measure of last resort. He encourages the use of alternative measures to detention on remand wherever possible, in line with Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

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<sup>4</sup> Shortcomings in court decisions imposing detention on remand have been also highlighted by the European Court of Human Rights. Cf. *Giorgi Nikolashvili v Georgia*, judgment of 13 January 2009, §§ 73, 76, 79, *Saghinadze and others v Georgia* judgment of 27 May 2010, § 139.

### ***Juvenile Justice***

14. In 2009, a strategy and action plan on juvenile justice (2009-2013) was adopted in the framework of the broader criminal justice reform. The stated objective of this new policy on juvenile justice is to reduce the use of custodial pre-trial measures and sentences against minors, leading to the creation of a juvenile justice system that focuses on prevention, alternative sanctions, rehabilitation and integration and - in the long term - to a decrease of crimes committed by minors.
15. In the framework of the new policy on juvenile justice, in 2010 the minimum age of criminal responsibility for all crimes was raised from 12 to 14 years. The new Criminal Procedure Code explicitly states that observance of the international guarantees on the rights of the child shall be mandatory.<sup>5</sup> In addition, the CPC provides for mediation and “diversion” (channelling out from the juvenile justice system) of minors who have committed a criminal offence and requires that proceedings on juvenile cases be conducted only by judges, prosecutors and investigators who have received specialised training in psychology and teaching.
16. According to official data, the number of prosecutions against minors fell from 1304 in 2008 to 672 in 2009. Prosecutors have used discretion not to prosecute minors in specific circumstances; in addition, a diversion and mediation programme was launched in November 2010. Since 2009, judges and prosecutors as well as penitentiary staff have been receiving training in juvenile justice. The number of convicted minors in 2010 was 883, which - although slightly higher than in 2009 - nevertheless represents a decreasing trend as compared to previous years.<sup>6</sup>
17. According to the new Code of Imprisonment,<sup>7</sup> minors convicted of a criminal offence serve their sentences separately from adults in special establishments. According to some international observers, conditions in custodial establishments for minors have improved. Education and vocational training is being offered to juvenile offenders placed in such institutions. Probation measures are being increasingly applied, although the general practice is to do so following a period of imprisonment. In 2010 a separate parole board for juveniles was set up, and probation officers are now tasked with planning the rehabilitation and integration process in addition to supervising its implementation. Measures are being taken to recruit social workers both in the penitentiary and probation services.
18. The system of alternative sentences and of diversion and rehabilitation programmes is still in an early phase of functioning. Although official data show an increase in alternative sanctions applied over the last few years, there has also been a significant decrease of the use of conditional sentences - themselves a form of alternative sanction – and no significant decrease in the use of imprisonment.<sup>8</sup> The diversion program, which applies only to less serious offences committed by first-time offenders, is being implemented by the Prosecutor’s Office at a pilot stage in the four largest cities, including the capital. Similarly, the use of community service work as a sanction is just beginning to be developed.

### *Conclusions and recommendations*

19. The Commissioner welcomes the demonstrated commitment of the Georgian authorities to reform the juvenile justice system and finds that considerable progress has been made in this area over the recent period. The most significant results have been observed in the improvement of conditions in correctional facilities for convicted minors and the reduction in the number of prosecutions against minors. Further efforts are needed to overcome the remaining challenges in

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<sup>5</sup> Article 316 of the CPC

<sup>6</sup> 803 for 2009, 1166 for 2008 and 1060 for 2007. In terms of percentage, convicted juveniles equal 4.4% of the total number of convicted individuals, as compared to 5.6% in 2008. Source Supreme Court of Georgia, <http://www.supremecourt.ge/files/upload-file/pdf/sisxlieng2010.pdf>.

<sup>7</sup> The Code of Imprisonment entered into force in October 2010.

<sup>8</sup> Supreme Court data indicate a decrease of the use of conditional sentences from 62.1% in 2008 to 53.2% in 2009 and 47.1% in 2010 accompanied by a steady increase of alternative penalties from 5.2% in 2008 to 13.0% in 2009 and 19.4% in 2010. Application of imprisonment only slightly decreased from 33.9% for 2009 to 33.5% for 2010.

respect of implementation of alternative sentences, as well as effective diversion and rehabilitation and integration programmes, in line with the Guidelines of the Council of Europe Committee of Ministers on child-friendly justice.

20. The Commissioner notes with concern that deprivation of liberty is still widely used in cases of minors accused or convicted of criminal offences. He wishes to recall the principle that in cases involving juveniles, deprivation of liberty and pre-trial detention should be imposed only as a measure of last resort and at the shortest possible period of time. In addition, the Commissioner calls upon the authorities to protect the rights of minors deprived of their liberty and monitor their conditions of detention, in line with the standards laid down in the relevant international instruments.

## II. Independence of the Judiciary

### 1. Organisation of the judiciary system and judges

21. The court system in Georgia is organised into 15 District (City) Courts<sup>9</sup> which specialise in civil, criminal or administrative cases, two Appeal Courts (in Tbilisi and Kutaisi), and the Supreme Court which functions as an appellate court of the highest instance, interprets judicial norms and promotes uniform judicial practice. The institution of magistrate judges was established to ensure wider accessibility to the justice system. In parallel, considerable material investments to improve the working conditions in courts have been successfully carried out and judges' monthly salaries have been significantly increased.<sup>10</sup> Currently, 235 judges are serving in the common courts, and there is a plan to increase their number to 250-260.
22. Georgia's political leadership has repeatedly expressed a firm commitment to the fight against corruption, including in the judiciary. As of 2005, significant reforms have been undertaken with a view to further strengthening the guarantees for the independence of the judiciary.
23. Article 84 of the Georgian Constitution formally guarantees the independence of the judiciary.<sup>11</sup> Another major step forward in this regard is the measure to introduce life tenure for judges, enacted through a constitutional amendment in 2010. However, this apparently does not apply to Supreme Court judges, who are elected for a period of not less than ten years. Pursuant to the Constitution, judges must undergo a three-year probationary period before their appointment becomes definitive. The European Commission on Democracy Through Law (the Venice Commission) has recommended that life tenure be extended to Supreme Court judges and that the provision on the probationary period of judges be removed.<sup>12</sup>
24. In July 2007, the parliament adopted the law on "Rules of Communication with Judges of Common Courts" which regulates the *ex parte* communication between judges and other parties in order to restrict undue influence from public officials, including from other judges, during an ongoing trial. In 2010, interference of political officials with the work of judges was made subject to criminal liability.
25. Since 2007 a permanent commission under the Supreme Court has been analysing existing judicial practice and formulating non-binding guiding principles and recommendations on the application of various legal provisions in the context of criminal, administrative and civil cases. Furthermore, it is now an established practice that court chairs hold internal discussions on

<sup>9</sup> It is planned that 20 district courts will function in Georgia upon completion of the reform.

<sup>10</sup> Cf. in this regard CEPEJ, European judicial systems, Edition 2010 (data 2008): Efficiency and quality of justice, p.293 available at <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2>.

<sup>11</sup> 'A judge shall be independent in his/her activity and shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law'.

<sup>12</sup> Cf. Final Opinion to the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, October 2010, §§ 86, 88-91. [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)028-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)028-e.pdf)

specific cases with judges, with the aim of establishing a uniform court practice. As a result, hearings take place in a far timelier manner contributing to faster resolution of court cases. However, both practices have been criticised by NGOs, which have claimed that they are conducive to excessively strong internal influence on individual judges.<sup>13</sup>

26. Under the Constitution, judges enjoy personal immunity, and any criminal proceedings against a judge or other measures taken in such a context (search, arrest) are subject to consent by the Chairman of the Supreme Court. In 2007, the Parliament repealed the Criminal Code provisions (former Article 336) which held judges criminally liable for passing an unlawful judgement. This is an important step towards the implementation of the recommendation of the Venice Commission that judges should enjoy functional immunity.<sup>14</sup> However, a later ruling of the Supreme Court reasoned that the criminal offence provided for in the repealed Article 336 may fall into the remit of Articles 332 (misuse of official powers) and 333 (exceeding of official powers). According to NGOs, this ruling leaves the judges in a vulnerable and legally ambiguous situation as the broad scope of Art. 332 of the Criminal Code could create grounds for prosecution of judges on the basis of decisions overruled by a superior court.<sup>15</sup>
27. Although the legislative framework generally favours the independence of the judiciary, with pressure on judges being punishable by law, concerns continue to be raised by NGOs and lawyers that the judiciary is not fully shielded from political interference - although the latter no longer takes an obvious or direct form - particularly in criminal and administrative cases. According to the views expressed by such actors, the influence of prosecutors remains comparatively strong, and in the majority of criminal cases verdicts are very close to the request of the prosecutor.
28. Another issue which requires continued attention is the adequacy of the reasoning of court decisions. The Public Defender has stated that he has received a number of complaints of inadequate reasoning and/or rote justifications in court decisions to impose or extend a term of pretrial detention, to dismiss motions during trial and also in the context of final court judgments.<sup>16</sup> Clearly, this contributes to perceptions that judges are prone to influence by prosecutors aimed at ensuring convictions in all cases brought to court. The Chairman of the Supreme Court informed the Commissioner that intensive work is ongoing to address the problem of inadequate reasoning of judgments and that the situation has improved over the last years.

#### *The High Council of Justice*

29. The High Council of Justice (HCJ), established in 1997 as an advisory body to the President, was reorganised in 2007 to become an independent body entrusted with the administration of the judiciary system. The HCJ is chaired by the Chairman of the Supreme Court (*ex officio*).
30. The HCJ is composed of 15 members. The judiciary is represented by the Chairman of the Supreme Court and eight other members elected by the Conference of Judges (at least seven are common court judges). Four members are appointed by the Parliament, and include the chairman of the committee on human rights and civil integration who is an *ex officio* member; one of the parliamentary appointees should be from a faction other than the majority. The President appoints two members. The HCJ members, except those *ex officio*, are elected for a period of 4 years. The HCJ composition appears to be broadly in line with Council of Europe standards, according to

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<sup>13</sup> GYLA, Justice in Georgia, 2010.

<sup>14</sup> Report on the Independence of the Judicial System, Part 1: The Independence of Judges, CDL-AD(2010)004, Venice Commission, 16 March 2010, <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29004-e.asp>

<sup>15</sup> In the case concerning Besik Gvajava, the Supreme Court stated that "Art. 336 of the Criminal Code can be terminated only if the committed conduct (...) does not contain elements of malfeasance envisaged by Article 332 or Article 333 of the Criminal Code" Order of the Criminal Cases Chamber of the Supreme Court of Georgia n. 283/Saz, 10 October 2007, quoted in GYLA, Justice in Georgia, 2010.

<sup>16</sup> Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms in Georgia, Second Half of 2009, pp. 109-112.



which not less than half of the members of a judiciary council should be judges chosen by their peers from all levels of the judiciary.<sup>17</sup>

31. Apart from the parliamentary appointees to the High Council of Justice – who are active members of Parliament - the presidential appointees and the Secretary of the HCJ are also not required to abstain from engaging in political activities in parallel to their HCJ functions. Moreover, as regards judicial appointments, the current legislation enables both the President and the Parliament to veto judicial candidates through their representatives in the HCJ. As a consequence, concerns persist that decision-making in the High Council of Justice is not fully shielded from political influence. However, during his meeting with the Commissioner, the Chairman of the Supreme Court indicated that the increased representation of the judiciary in the present format of the HCJ should obviate such risks.
32. The HCJ has the full and exclusive authority to appoint and dismiss judges from district and appellate courts, a function exercised by the President before the reform. The transfer of this competence to the HCJ represents a significant step forward. After passing the selection procedure, a candidate has to complete a 12-month mandatory training course at the High School of Justice, which was established in 2006. In-service training is also organised at the High School of Justice for sitting judges. The selection of judges is based on results of written and oral examinations, work experience, as well as professional and moral reputation. However, observers report that the process is discretionary. The process of oral examination is often criticised in respect of the criteria used to determine selection.<sup>18</sup>
33. The HCJ also has the authority to start disciplinary proceedings against judges and to impose sanctions. The system provides for the right to appeal against a decision by the HCJ at the higher instance of the Disciplinary Chamber of the Supreme Court. The Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia was amended in July 2007 following an opinion from the Venice Commission. According to some observers, certain provisions of the law remain vague even after the 2007 amendments, and could lend themselves to excessively broad interpretation, thereby diminishing adequate due process guarantees in the context of disciplinary proceedings against judges<sup>19</sup> Concerns have also been expressed with regard to transparency, as disciplinary proceedings and their outcome are confidential.

#### *Conclusions and recommendations*

34. While substantial measures have been taken to reinforce judicial independence in Georgia, further efforts should be made to safeguard the judiciary from undue interference. The adoption of the new Code of Criminal Procedure is an important step forward in this regard, as it seeks to re-balance the powers of judges, prosecutors and the defence during criminal proceedings.
35. The Commissioner has reservations regarding the approach whereby presidential and parliamentary appointees in the High Council of Justice can block judicial appointments by exercising their veto power. More should be done with a view to securing the political independence of the High Council of Justice in practice.

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<sup>17</sup> Cf. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. It should be noted that the CoE Venice Commission has recommended that “a substantial majority of the members of the judicial council should be elected by the judiciary itself” and “other members should be elected by Parliament”. Report on Judicial Appointments, CDL-AD(2007)028, 22 June 2007 [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)028-e.pdf](http://www.venice.coe.int/docs/2007/CDL-AD(2007)028-e.pdf)

<sup>18</sup> Cf. US Department of State 2010 Human Rights Report on Georgia.

<sup>19</sup> Cf. American Bar Association Rule of Law Initiative, Judicial Reform Index for Georgia, April 2008 p. 41, available at [http://apps.americanbar.org/rol/publications/georgia\\_judicial\\_reform\\_index\\_volume\\_ii\\_2009\\_en.pdf](http://apps.americanbar.org/rol/publications/georgia_judicial_reform_index_volume_ii_2009_en.pdf).

36. The Commissioner wishes to stress that the individual independence of judges is an important facet of the independence of the judiciary as a whole, and hierarchical judicial organisation should not undermine individual independence.<sup>20</sup>
37. The introduction of life tenure for judges is an important measure in line with international standards. Adequate procedural safeguards should be in place concerning the probation period and dismissal. The recommendations of the Venice Commission can provide useful guidance in this regard. Transparency of recruitment and selection procedures should be further enhanced.
38. The Commissioner welcomes the establishment of the High School of Justice. The training programmes should contain adequate information regarding the well-established case law of the European Court of Human Rights. Moreover, further efforts are needed in view of the adoption of the new Code of Criminal Procedure, and in light of the persisting concerns as to the reasoning of court decisions (cf. paragraph 10 above).

## **2. The Prosecution Service**

39. The Georgian authorities have implemented a model whereby the prosecution service is part of the executive branch. Following amendments to the Constitution and the adoption of the Law on Prosecution Service in October 2008, the prosecution service underwent significant reforms. The Prosecutor General's Office was renamed Office of the Chief Prosecutor and was made subordinate to the Ministry of Justice. The main functions of the prosecution service are to conduct criminal prosecutions and exercise supervision over pre-trial investigations and in relation to persons who are detained.
40. Under the new institutional arrangement, the departments of the prosecution are under the system of the Ministry of Justice, and the Minister of Justice assumes the role of Attorney General. The Chief Prosecutor is appointed by the President upon nomination by the Minister of Justice. The authorities have maintained that the current arrangement is carefully balanced in order to guarantee independence of the prosecution service from the executive power – the Minister of Justice is responsible and accountable to the Parliament for the criminal justice policy, while the Chief Prosecutor supervises the prosecutorial and administrative activities of the service. In addition, the budget of the Chief Prosecutor's Office is separate from that of the Ministry of Justice.
41. However, the independence of the prosecution service from the executive is no longer expressly stated at constitutional level. In his capacity as Attorney General, the Minister of Justice, upon nomination of the Chief Prosecutor, appoints and dismisses the deputy chief prosecutors, the prosecutors of autonomous republics and district prosecutors.<sup>21</sup> In addition, the Minister of Justice may issue individual orders, instructions and directives and abolish illegal orders, instructions and directives of prosecutors. The Venice Commission has expressed concern that this hierarchical system could technically allow the Minister of Justice, in those cases where he is regarded as a supervising prosecutor, to give instructions on individual cases, which would be at odds with Council of Europe and international standards.<sup>22</sup>
42. Furthermore, the current arrangement confers upon the Minister of Justice an individual prosecution function relating to a number of office holders, including at senior political and judicial level.<sup>23</sup> The Venice Commission has expressed concern that this arrangement allows the Minister

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<sup>20</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

<sup>21</sup> The Chief Prosecutor appoints and dismisses prosecutors of a less senior level than those noted above.

<sup>22</sup> Cf. the Opinion on four Constitutional Laws amending the Constitution of Georgia, CDL-AD(2009)017rev, Venice Commission, 19 March 2009, [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)017rev-e.pdf](http://www.venice.coe.int/docs/2009/CDL-AD(2009)017rev-e.pdf).

<sup>23</sup> According to Article 8 of the Law on Prosecution Service, the Minister of Justice may conduct prosecutions against the President of Georgia, members of the Parliament, Chairman of the Supreme Court and judges of the common courts, members of the Government, the Public Defender, and prosecutors.

of Justice not only to obstruct such prosecutions, but also to prevent them entirely.<sup>24</sup> In addition, the Minister of Justice is a member with full voting rights at the Plenum of the Supreme Court, a body with significant competences on issues pertaining to the judiciary. This combination of functions grants the Minister of Justice a place of considerable power in the criminal justice system.

43. Despite the recent reforms, a number of questions remain as to the operation of the prosecution service. As noted in a subsequent section of this report (cf. paragraph 82 below), prosecutors have at times failed to adequately react to procedural violations in certain investigations conducted by the Ministry of Internal Affairs, such as searches in absence of witnesses, illegally obtained evidence, errors in the protocols of search and arrest, etc. Irrespectively of such violations, prosecutions have continued and the individuals concerned have been sentenced. At the same time, a similar determination to launch investigations and prosecute has seldom been in evidence in cases of ill-treatment or excessive use of force by law-enforcement officials. This has reinforced the perception that prosecutors are acting selectively and on behalf of the government, rather than on behalf of society and public interest.
44. During her meeting with the Commissioner, the Deputy Minister of Justice acknowledged that there had been reports of instances where the defence was not aware of the case evidence. More generally, the Georgian authorities expressed the expectation that the new Code of Criminal Procedure, which lays the foundation for adversarial proceedings, will restore the necessary balance during criminal proceedings. However, in tandem to the necessary adaptation period to the new CPC, further steps are likely to be required to transform lingering attitudes connected to a traditionally dominant prosecution.

#### *Conclusions and recommendations*

45. The Commissioner recommends that the autonomy of the prosecution service, particularly in respect of prosecutorial decision-making, be strengthened and more clearly guaranteed both in law and practice, with a view to ensuring that prosecutors are able to discharge their functions fairly, impartially and objectively. The recommendations of the Council of Europe Committee of Ministers and the opinions of the Venice Commission provide useful guidance and expertise in this regard.
46. The reports that prosecutors have commenced or proceeded with prosecutions, despite procedural violations in investigations conducted by police, e.g. during search and arrest, merit serious reflection. Effective measures should be taken in order to guarantee effective prosecutorial supervision of police investigations.
47. Efforts for further training of prosecutors, both before their appointment as well as on an ongoing basis, should continue. The need for training has become especially relevant following the entry into force of the new CPC which introduces new adversarial principles of criminal justice procedure. However, continuous emphasis should be also placed on the ECHR, in particular Articles 5 and 6. Prosecutors have a duty to respect the human rights of all individuals – including defendants, witnesses or victims - who come in contact with the criminal justice system.

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<sup>24</sup> Cf. the Opinion on four Constitutional Laws amending the Constitution of Georgia, CDL-AD(2009)017rev as well as Recommendation Rec (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system.

### III. Access to Justice

#### 1. The right to defence and access to lawyers

48. The right of access to a lawyer is enshrined in the Constitution. Under the new Criminal Procedure Code, it effectively applies from the moment a person is recognised as a defendant. Indigent defendants are entitled to legal aid and representation at the expense of the State.
49. A free legal aid scheme has been in place since 2005. Initially established under the Ministry of Justice, it was later moved under the Ministry of Corrections and Legal Assistance following the reorganisation of the Prosecution Service and the Ministry of Justice in 2008. Following the adoption of the law on Legal Aid in 2007, the system was reorganised to include contracted lawyers in addition to those employed by the service (around 90 persons). While regional legal aid bureaus are located throughout Georgia, the system faces problems related to resources. In 2010, CEPEJ reported that the number of cases which could benefit from legal aid increased significantly.<sup>25</sup>
50. In 2006, the Georgian Bar Association (GBA) was created. The association, which comprises around 3500 lawyers, acts as an official licensing body for the legal profession and has promulgated a Code of Ethics which foresees a disciplinary mechanism. All practising lawyers, including *pro bono* legal aid lawyers, are members of the bar. Several NGOs in the country also provide free legal aid and consultations.
51. Despite these positive steps, access to a lawyer remains problematic, in particular during the initial stages of deprivation of liberty. While the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (the CPT) has acknowledged some progress in this area, in some instances, detained persons reported that they had only met a lawyer in the court and that it was relatively rare to benefit from access to a lawyer during the first hours of police custody.<sup>26</sup> Moreover, there continues to be scepticism related to the quality of free legal aid and independence of the legal aid scheme lawyers.
52. In November 2010, the International Observatory for Lawyers (IOL) conducted a fact-finding mission to assess the situation with respect to the legal profession in the country. The IOL reported that lawyers encounter impediments in exercising freely their profession, such as difficulties in accessing penitentiary establishments and meeting their detained clients, violation of the lawyer-client confidentiality principle in such cases, difficulties in obtaining access to detainees' medical files, and being themselves subjected to degrading and humiliating searches when entering penitentiary facilities. The IOL also expressed concern about various forms of pressure – including threats of criminal proceedings - against lawyers who have defended sensitive cases.<sup>27</sup>
53. The Georgian Bar Association and several NGOs informed the Commissioner about instances of harassment and intimidation of defence lawyers. In particular, the Commissioner's attention was drawn to the case of Mariam Ivelashvili, a 24 year old lawyer sentenced to 5 years and 9 months of imprisonment for aggravated fraud in 2009. Her lawyers and the Georgian Bar Association have claimed that the case was marred by procedural violations, and that Ms Ivelashvili was being deliberately targeted because of critical statements she had made about the authorities. Lawyers and human rights groups have argued that that the events which gave rise to the case against Ms Ivelashvili do not amount to a criminal offence, but should rather be considered as a violation of the Lawyer's Code of Ethics.

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<sup>25</sup> Cf. CEPEJ, European judicial systems, Edition 2010 (data 2008): Efficiency and quality of justice.

<sup>26</sup> Cf. paragraph 27 of the Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 21 September 2010, <http://www.cpt.coe.int/documents/geo/2010-27-inf-eng.pdf>

<sup>27</sup> Cf. Report on the Georgian Mission of the International Observatory for Lawyers.

54. The Georgian Bar Association and NGOs have claimed that lawyers who defend interests of ill-treatment victims are more prone to pressure from the authorities. In general, human rights observers concur that direct or indirect pressure tends to be exerted on defence lawyers in cases where government interests may be at stake, including in cases before the European Court of Human Rights.<sup>28</sup>
55. On 10 June 2010, the Ministry of Corrections and Legal Assistance adopted a controversial decree requiring that lawyers meet with only one defendant on a single visit to a penitentiary establishment. This measure does not concern lawyers wishing to meet their defendants in pre-trial detention. Lawyers, NGOs providing legal aid and the Public Defender have criticised the decree, which - according to them - both restricts defendants' rights and prevents lawyers from effectively exercising their profession.
56. The Commissioner raised the issue with the Minister of Corrections and Legal Assistance who maintained that the measure was taken in response to complaints by lawyers that they could not reach their clients in prison. According to the Minister, the measure had led to increased order in the prisons, allowing all lawyers to have equal access to their clients. The Minister also noted that the infrastructure of waiting rooms in the penitentiary establishments had been improved in parallel. However, the Public Defender has indicated that lawyers encounter difficulties in accessing their clients due to inadequate infrastructure or organisation in the establishments concerned.<sup>29</sup>
57. As already noted, complaints have been raised that the defence is not at an equal footing with the prosecutor in the criminal justice system. In particular, the defence is reportedly not always given adequate time and facilities for its preparation, and its motions are dismissed by judges who do not always provide adequate reasons for doing so. Moreover, in the context of plea-bargaining - which is applied extensively (cf. in this regard paragraph 67 below) - lawyers play little or no role due to the broad competences of the case prosecutor. In addition, several interlocutors stressed that lawyers lack the necessary legal training and qualifications. Thus far, training efforts by international actors aimed at the judiciary have focused mainly on prosecutors and judges.
58. The Deputy Minister of Justice informed the Commissioner that the new Code of Criminal Procedure provides for enhanced procedural rights for the defence. In particular, the defence is now granted the right to access evidence at any stage during the pre-trial investigation, and the prosecutor is obliged to disclose any evidence five days prior to the start of court proceedings.

#### *Conclusions and recommendations*

59. It is crucial that defence lawyers can operate without impediments and in full confidentiality when providing legal assistance to their clients. They should have free and unimpeded access to their clients in prison in order to ensure that the right to defence is fully implemented in practice. If necessary, efforts should be made to adapt the arrangements and infrastructure in penitentiary institutions.
60. The Commissioner is concerned by the reports of harassment, abusive prosecutions and other forms of pressure on lawyers. Such pressure seriously impairs defence rights and prevents lawyers from effectively serving the cause of justice.
61. The Commissioner supports the efforts of the Georgian authorities to reform the legal aid system. More needs to be done in order to improve the quality of service and to ensure that legal aid is systematically provided to indigent detainees.
62. The Commissioner welcomes the enhanced defence rights under the new CPC and urges the authorities to give full effect to these rights in practice. However, he notes that an imbalance between defence and the prosecution is still a conspicuous feature of the criminal justice system.

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<sup>28</sup> Cf. page No. 7, *ibid.*

<sup>29</sup> <http://ombudsman.ge/index.php?page=1001&lang=1&id=1330>

Systemic measures, including comprehensive legal training for lawyers, are needed to address this imbalance and ensure genuine adversarial proceedings.

## **2. Plea-bargaining agreements**

63. The Commissioner devoted special attention to the issue of plea-bargaining and its application in criminal cases.
64. Plea-bargaining now pervades the operation of criminal justice in Georgia. Its application has witnessed a steep increase since its introduction in 2004. The Chairman of the Supreme Court informed the Commissioner that in 2010 plea agreements were applied in around 80% of all criminal cases.<sup>30</sup>
65. Indisputably, plea-bargaining has been a successful tool in combating corruption and organised crime. It also offers the important benefit of speedy adjudication of criminal cases, alleviating the workload of courts, prosecutors and lawyers. Further, it contributes to the reduction of sentences and as a result to the number of prisoners, which is crucial in the context of the high rate of prison overcrowding in Georgia.
66. The current plea-bargaining model, anchored in the new CPC, implies pleading guilty or agreement with the prosecutor on sentence (*nolo contendere* plea).<sup>31</sup> It can be initiated either by the defendant or by the prosecutor.
67. A defence lawyer is mandatory in the context of plea-bargaining; however, the role of the lawyers in this process is limited. According to the information obtained by the Commissioner, most defendants are virtually certain that they will be sentenced, and lawyers, instead of working towards their clients' acquittal, advise them to plea-bargain with the prosecutor to reduce the sentence to a minimum. This attitude is particularly common for violations that foresee imprisonment as a punishment. However, the Deputy Minister of Justice pointed out that the new Code of Criminal Procedure provisions which provide enhanced rights for the defence will also positively affect the defence's position in the context of the plea agreement.
68. One concern of the Commissioner relates to the discretionary powers of the prosecutor during the negotiation of the plea agreement. For instance, the prosecutor can now ask for sentences even below the minimum sentence provided in the law, a competence many believe should rest with the judge. In addition, the law does not define the required degree of cooperation of a defendant with the prosecution, which leads to subjectivity and inconsistency of practice.<sup>32</sup>
69. A plea agreement is approved by court decision. In the course of the review of the agreement by the court, the judge should make sure that the plea agreement is not concluded upon coercion and intimidation and should examine the evidence supporting the charges.<sup>33</sup> The authorities assert that judicial oversight of the plea agreements is an important safeguard, stressing that the court can refuse to approve an agreement if charges are unsubstantiated or a violation is observed.<sup>34</sup> However, lawyers maintain that in practice, the judge relies essentially on the evidence that the prosecutor presents when examining the terms of the agreement, and in the overwhelming majority of cases the judge agrees with the demands of the prosecutor.
70. One of the peculiarities of the Georgian plea-bargaining system relates to Article 42 of the Criminal Code, which provides that fines can be imposed in the context of plea agreements even for violations of the Criminal Code for which this form of punishment is not foreseen. According to

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<sup>30</sup> As compared to 59% in 2009

<sup>31</sup> Article 209 of the CPC, "Essence of plea agreement".

<sup>32</sup> Transparency International, "Plea Bargaining in Georgia: Negotiated Justice", December 2010.

<sup>33</sup> Cf. Articles 212 and 213 of the Criminal Procedure Code

<sup>34</sup> According to the Ministry of Justice data, in 2010, the Tbilisi City Court refused to approve plea agreements on 697 cases (10%). However, the court accepted these agreements after the parties modified the conditions and only in 21 cases did the court return the case to the prosecutor.

Transparency International Georgia, in practice fines are paid in 99% of the cases, a figure which is disputed by the authorities.<sup>35</sup> The process lacks transparency, due to the absence of clear criteria for determining fines. Human rights defenders in Tbilisi alleged that this is done based on an assessment of the defendant's ability to pay; this has led to a perception that freedom can be bought.

71. Although the implementation of plea-bargaining in practice has given rise to concerns, the authorities maintain that sufficient safeguards exist in the system. The Deputy Minister of Justice did, however, acknowledge the need to increase transparency of the system and improve perceptions.
72. The law also provides for a full release from sentence in exceptional cases where there is effective cooperation with the investigation. While this possibility may certainly help in resolving criminal cases, instances of abuse have been reported in this context. During the visit, the Commissioner's attention was drawn to the dubious criminal case against an opposition activist, Levan Gogichaishvili, sentenced for intentional infliction of bodily harm, and whom the Commissioner met in Rustavi prison. Levan Gogichaishvili was originally arrested on the basis of a statement provided by the victim's sister, who at that time was charged with a serious drug-related offence, but after testifying against Gogichaishvili was released on bail.
73. Concerns have also been raised that the system of plea-bargaining might make defendants more reluctant to complain against ill-treatment or excessive use of force by police, if this has been the case.<sup>36</sup> The authorities have in the past acknowledged the problem and have introduced safeguards.<sup>37</sup> However, the problem may lie not with the existence of system of plea-bargaining *per se* but rather, as already noted, the context in which it is being operated. In view of an almost certain conviction, for many defendants plea-bargaining is the only alternative to get a lighter sentence, and a defendant is less likely to bring a justified complaint of ill-treatment if there is a perceived risk that this could undermine the chance to conclude an agreement with the prosecutor.

#### *Conclusions and recommendations*

74. The functioning of the plea-bargaining system cannot and should not be seen as separate from the operation of the entire criminal justice system. The combination of several factors - very high conviction rates, a stringent sentencing policy and the low public trust in the administration in the justice system – may very well influence defendants to plead guilty even if innocent, leading to a distortion of justice.
75. It is important to bear in mind that when consenting to a guilty plea, a defendant waives a number of rights, including the right to give testimony and the right to trial. The Commissioner notes that while safeguards may be provided in the legislation, their implementation in practice has been subject to criticism. Judges should exercise adequate control over plea-bargaining agreements and see to it that these safeguards are fully implemented in practice. The Commissioner is also concerned with the very limited role that the defence plays in the negotiation of a plea agreement.
76. It is essential that the defendant's plea must always be made voluntarily and free from any improper pressure. To this end, the system further needs the development of objective standards for the negotiations between the defence and the prosecutor, including a clearer definition of the concept "cooperation with the investigation", as well as clear criteria for determining the amount of fines imposed upon the defendant.

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<sup>35</sup> Transparency International, "Plea Bargaining in Georgia: Negotiated Justice", December 2010.

<sup>36</sup> Some instances of ill-treatment - which was a particularly serious concern in the past – are still taking place, despite measures taken by the government, according to observers. See Combating Ill-treatment and Impunity and Effective Investigation of ill-treatment, Country report on Georgia, by Jim Murdoch, 2010.

<sup>37</sup> According to the Code of Criminal Procedure (Art. 210) it is prohibited to conclude a plea agreement which limits the defendant's constitutionally guaranteed right to request prosecution of relevant people in cases of torture and inhuman or degrading treatment.

77. Finally, there is an urgent need for concrete steps to increase the transparency of the system. The Commissioner supports the efforts of the authorities in this regard and encourages them to adopt an inclusive approach by consulting with all relevant groups, including human right defenders and lawyers.

#### **IV. Concerns related to administration of justice**

##### **1. Allegations of selective justice**

78. The Commissioner has received a number of communications from different persons in Georgia who claim that they have been prosecuted due to their (or their relatives') political beliefs and participation in opposition protests and similar activities. In addition, Georgian human rights defenders and lawyers provided the Commissioner with lists of persons allegedly sentenced on political grounds, most of them participants in the opposition protests which took place in November 2007 and in the spring of 2009. This issue has attracted considerable public attention within Georgia and internationally, as indicated by a number of reports referring to the subject.<sup>38</sup>
79. The Commissioner has noted that following discussions between the Ministry of Internal Affairs and various opposition parties, a total of 26 opposition supporters, whom the opposition claimed had been arrested on fabricated charges related to illegal drugs and weapons possession, were released on bail or after serving administrative sentences in August and November 2009.<sup>39</sup> The Commissioner was also informed about the situation of a number of opposition activists in respect of whom the preliminary investigations have been completed, but the trials have not yet started, thereby leaving the individuals concerned in a vulnerable legal situation.
80. There have been claims that the criminal proceedings against the persons concerned have been marred by numerous violations of legal safeguards of the right to fair trial. The Commissioner was also informed by some detained opposition activists that they were offered plea bargaining in exchange for testimony incriminating other opposition activists. On their part, the Georgian authorities have consistently denied allegations of any persecution based on one's political views or beliefs.
81. In the course of this visit, the Commissioner had an opportunity to meet with some of the detainees who claimed to be unfairly prosecuted and tried, including Merab Ratishvili,<sup>40</sup> Vladimer Vakhania<sup>41</sup> and Shalva Goginashvili.<sup>42</sup> He also discussed their cases with lawyers and human rights defenders. While the present report does not purport to undertake a detailed legal analysis of these cases, it is nevertheless possible to make certain observations as to the nature of concerns present. The cases were also raised in the course of the meetings the Commissioner had with the relevant Georgian authorities.

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<sup>38</sup> The National Democratic Institute and a number of local NGOs monitored criminal proceedings of opposition activists during and after the spring 2009 protests. The Georgian Young Lawyers Association has also conducted a legal analysis of a number of cases. For reports, see for example GYLA, Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive, Tbilisi 2011; FIDH, After the rose, the thorns: political prisoners in post-revolutionary Georgia, 2009; and Report of the Public Defender on Human Rights in Georgia, Second Half of 2007, Tbilisi 2008. In addition, the Commissioner has received complaints from some persons who claimed that their relatives had been detained and subject to criminal proceedings on spurious or unsubstantiated charges following their entry into Georgia. According to those allegations, the cases against the persons concerned were marked by procedural shortcomings as well as flawed plea-bargaining procedures.

<sup>39</sup> US State Department Annual Report on Human Rights in Georgia, April 2011.

<sup>40</sup> Mr Ratishvili, an opposition supporter, was arrested on the eve of the November 2007 protests and sentenced to eight years imprisonment for illegal possession of drugs.

<sup>41</sup> Mr Vakhania, founder of an opposition party, was arrested in 2009 and sentenced to three and a half years imprisonment for interference with the activity of a journalist and illegal possession of weapons.

<sup>42</sup> Mr Goginashvili, an opposition activist, was arrested in connection with a violent confrontation between the opposition supporters and police officers during the spring 2009 protests, and sentenced on 15 years on attempted murder of a law enforcement officer and hooliganism. Reportedly, the qualification of the offence did not correspond to the gravity of the act.



82. The shortcomings reported in relation to the above-mentioned cases, as well as some other cases of detained opposition activists and supporters, relate to the right to fair trial, according to which everyone charged with a criminal offence has the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him and which requires equality of arms during court proceedings.<sup>43</sup> The courts have reportedly all too readily ruled in favour of the prosecutor's decision to punish the defendant, even though the incriminating evidentiary basis was allegedly insufficient to prove the defendant guilty. The principle concerns highlighted include the following:
- criminal proceedings were launched without securing the requisite minimum of incriminating evidence;
  - investigative authorities did not take all the reasonable steps available to establish all the relevant circumstances of the alleged crime;
  - in cases related to illegal possession of weapons and drugs, procedural violations were often observed during the search, in particular failure to ensure attendance of witnesses, which call into question the lawfulness of the search and, consequently, the legal admissibility of the seized evidence;
  - during the trial, courts allegedly refused systematically the defence's motions to call witnesses to the court and sometimes based their decision solely on police testimony. In some cases where defence witnesses were heard, their testimony was dismissed by the court as "intended to absolve the defendant of criminal liability";<sup>44</sup>
  - courts have regularly and without adequate reasoning turned down motions of the defence to examine and evaluate the evidence adduced by the prosecution.
83. The authorities have not excluded the possibility that procedural rights could have been violated in certain cases in the past. The Deputy Minister of Justice told the Commissioner that the law permits the revision of a case, should the defence or the prosecutor bring forward new evidence which might have affected the case's outcome at the time.

#### *Conclusions and Recommendations*

84. The Commissioner has received a considerable number of credible allegations and other information indicative of serious deficiencies marring the criminal investigation and judicial processes in a number of criminal cases against opposition activists. This casts doubt on the credibility of the charges retained and on the final convictions.
85. Given the public significance of the matter, authorities should respond in a clear and transparent manner to legitimate concerns related to these cases. In the meantime, the Commissioner urges the authorities to address without delay the cases of individuals where *prima facie* evidence exists in respect of unlawfulness of conviction.
86. Vigorous measures are needed to ensure that legal safeguards are observed and procedural rights of the defendants are protected at all stages of criminal proceedings. In particular, effective court oversight of the search and arrest procedures should be ensured. Fair trial guarantees as well as the respect of the principle of equality of arms should be respected, in accordance with Article 6 of the Convention.

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<sup>43</sup> Article 6 of the ECHR.

<sup>44</sup> Cases have been reported when defence witnesses have been prosecuted for giving before the court. testimony in support of the defendant. See for instance FIDH, *After the rose, the thorns: political prisoners in post-revolutionary Georgia*, 2009; p. 29 and GYLA, *Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive*, Tbilisi 2011, p.25.

## **2. Efforts to combat impunity**

87. According to authoritative reports, the overall situation as regards the treatment of persons detained by the police in Georgia has considerably improved over recent years.<sup>45</sup> Reforms undertaken in this field have included bringing the relevant legislative provisions on torture and inhuman and degrading treatment further in line with European standards, strengthening internal monitoring mechanisms within the Ministry of Internal Affairs and the Office of the Chief Prosecutor, and establishing the National Preventive Mechanism under the Optional Protocol of the UN Convention against Torture within the Public Defender's Office.
88. In this regard, the Commissioner also welcomes the recent adoption of the Action Plan against Torture 2011-2013, which lists a number of steps for combating ill-treatment and its effective investigation, as well as training and awareness-raising activities for relevant staff.
89. In its most recent report on Georgia, the CPT has indicated that while considerable progress has been made in reducing the risk of ill-treatment by police officers, the persistence of some allegations clearly indicates that the authorities must remain vigilant.<sup>46</sup> Decisive measures to combat impunity are particularly important in sending an unequivocal message that ill-treatment and other serious violations by law enforcement officials will not be tolerated.
90. In practice, investigations into claims of ill-treatment or other offences committed by law-enforcement officials are initiated both by the Ministry of Internal Affairs and the Office of the Chief Prosecutor. The Office of the Chief Prosecutor has exclusive jurisdiction over investigations of criminal offences. The Ministry of Interior is empowered to issue disciplinary punishments for disciplinary offences of police officers. Cases where elements of a criminal offence emerge are referred to the Office of Chief Prosecutor for further prosecution. However, there have been reports that the close interaction between the prosecutors and police during investigations can hamper the effective conduct of investigations and shields the offenders from being held accountable. An independent system of investigation of complaints, separate from the existing investigating and prosecutorial authorities, has not yet been established in Georgia.
91. The subject of lengthy and ineffective investigations into instances of ill-treatment and abuse of force by police in Georgia has been reflected in judgements of the European Court of Human Rights and reports of the CPT.<sup>47</sup> The Georgian Public Defender, human rights groups and lawyers have all referred to situations where their complaints to prosecutors on such matters have not received an adequate response.
92. The Commissioner was informed that investigations into allegations of acts of violence and disproportionate use of force by the police during the opposition protests in November 2007 and spring 2009 have not been pursued in a prompt or expeditious manner. Insufficient evidence, including difficulties in identifying masked riot police, as well as the unwillingness of the persons (including officials) concerned to cooperate and give statements are quoted as reasons for the lack of progress in these investigations. In contrast, crimes committed by opposition activists were rapidly investigated and brought before the courts. This apparent difference in treatment has further reinforced existing perceptions of impunity.
93. A recent expert report commissioned by the Council of Europe indicates that the problem of accountability of law enforcement officials is of a systemic nature. The report states that the prosecutor seems to focus upon the question of whether there is sufficient existing evidence upon which to proceed without recognising the enhanced responsibilities of ensuring a rigorous investigation with a view to uncovering the facts and thereby providing (wherever possible) the necessary sufficiency of evidence with which to bring a prosecution.<sup>48</sup>

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<sup>45</sup> Cf. paragraph 14 of the report of the CPT on its February 2010 visit to Georgia, CPT/Inf (2010) 27.

<sup>46</sup> Cf. paragraph 16, *ibid.*

<sup>47</sup> Cf. *Gharibashvili v. Georgia*, judgment of 29 July 2008.

<sup>48</sup> See Country Report on Georgia, Combating ill-treatment and Impunity and Effective Investigation of ill-treatment by Jim Murdoch, 2010.

94. The recent judgment of the European Court of Human Rights on the case of *Enukidze and Girgvliani v. Georgia*, of 26 April 2011, involving the ill-treatment and killing of the 28 year old Sandro Girgvliani by four officials of the Ministry of Internal Affairs illustrates the lack of requisite will to effectively investigate and punish criminal acts perpetrated by law enforcement officials. Although the Court did not conclude that the offenders had acted in their official capacity, it found that the investigation conducted by the authorities (the Ministry of Internal Affairs and the Tbilisi Prosecutor's Office) manifestly lacked independence, thoroughness and integrity. In particular, the Court expressed concerns that the same authority, namely the Ministry of Interior, remained in charge of the investigation for a significant period of time.<sup>49</sup>
95. The findings of the two international experts mandated by the Commissioner to monitor the investigations into certain cases of disappearances that occurred during and after the August 2008 conflict also reflect serious problems of accountability.<sup>50</sup> Recently, the authorities informed the Commissioner that the investigation of the case into the disappearance of Alan Khachirov, Alan Khugaev and Soltan Pliev had been transferred from the regional prosecutorial authorities in Shida Kartli to the Chief Prosecutor's Office. This is a welcome step, and the Commissioner would like to receive further information on the progress of this investigation.
96. The authorities have recognised the need for improvement of the current investigation system and have undertaken a number of measures intended to enhance investigative procedures and prosecutorial practice. The 2009 guidelines for prosecutors are an important and welcome measure in this regard. The guidelines recommend that prosecutors immediately react to any allegation of torture or ill-treatment, irrespective of its plausibility. They also require that the investigation be separated from the service which is the subject of investigation and that the witnesses and victim be interrogated.
97. Even when investigations are initiated, it appears that cases of torture and ill-treatment are more likely to be investigated and prosecuted as exceeding of official powers (Article 333), rather than torture (Article 144/1) or ill-treatment (Article 144/3). The incidence of convictions remains low. The CPT reported that in 2009, 16 investigations had been initiated against police officers under Article 144/1 and one under Article 144/3, out of which five had been terminated and none submitted to the court. By comparison, investigations under Article 333 had been opened in 66 cases, none of which had led to convictions.<sup>51</sup> In the above-mentioned case of *Enukidze and Girgvliani v Georgia*, the European Court of Human Rights held that the punishment imposed on the perpetrators was inadequate.
98. The participation of the victim during investigation and trial is limited. Theoretically, the interest of the victim is represented by the prosecutor of the case. However, doubts have been expressed as to whether the prosecutor can effectively represent the victim's interest in cases of ill-treatment. As the European Court of Human Rights has found, "in particular circumstances, where the prosecutorial authority manifestly lacked integrity and interest in the applicant's case, the prosecution authority's procedural rights could not compensate for the absence of those of the civil party."<sup>52</sup>

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<sup>49</sup> *Enukidze and Girgvliani v. Georgia*, judgment of 26 April 2011, §§ 246-249, 258.

<sup>50</sup> Duly bearing in mind the barriers created by the conflict in 2008, the experts found that an official investigation into the allegations of enforced disappearances was initiated with an unjustifiable delay and a number of reasonable and self-evident steps had not been taken to secure evidence in the context of the investigation. Despite serious allegations of the involvement of Georgian law enforcement officials in the disappearances, the operational conduct of the investigation was not kept separate from the service to which the officials implicated belonged, compromising its impartiality and integrity.

<sup>51</sup> Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 21 September 2010, <http://www.cpt.coe.int/documents/geo/2010-27-inf-eng.pdf>

<sup>52</sup> *Enukidze and Girgvliani v. Georgia*, judgment of 26 April 2011, § 62.

### *Conclusions and Recommendations*

99. The obstacles to ensuring accountability of law enforcement officials who commit serious offences are illustrated by the Girgvliani case.<sup>53</sup> This case shows how imperative it is for the Georgian authorities to demonstrate an unequivocal commitment to combating impunity.
100. The competent authorities should expeditiously and effectively investigate allegations of ill-treatment in full compliance with the criteria established by the European Court of Human Rights, and having regard to the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations adopted on 30 March 2011. The independence of the investigation should be ensured by transferring the investigations away from units of the law-enforcement officials who are subject to the investigations, and from the units investigating and/or prosecuting any criminal case against the victim of the alleged ill-treatment.
101. Allowing violent criminal acts by the police to go unpunished can greatly undermine public trust in the authorities responsible for upholding the law. By prosecuting these crimes and bringing those responsible to justice, the authorities will send a clear message of zero-tolerance of police violence.
102. The Commissioner recommends that steps be taken to ensure greater participation of the victim during investigation and trial. Further, it is essential to ensure transparency and a sufficient degree of public scrutiny during the procedures, including by providing information to the public on the outcome of investigations.

### **3. Public trust in the judiciary**

103. During the meetings with the Commissioner, many interlocutors raised the concern that, despite significant reforms undertaken in the criminal justice system, the level of trust of the Georgian population in the judiciary remains relatively low.
104. The Supreme Court Chairman informed the Commissioner that the rate of public trust in the judiciary had increased to 60%. Nevertheless, a number of recent surveys would tend to indicate that more needs to be done to uphold the credibility of the justice system in Georgia. For instance, the results of the 2009 Caucasus Barometer show that almost 55% of the Georgian population support the statement that “Georgian courts treat part of the population fairly and part unfairly”, whilst only 12.1% of the population believes that “Georgian courts treat everyone fairly and do not grant special treatment to anyone”. Also, only 27.8 % of the population considers Georgian courts politically independent.<sup>54</sup> According to a UNDP survey commissioned in December 2009, only 6% of the population considers the judicial system “absolutely independent” whilst 73% thinks that the government partially controls the judiciary.<sup>55</sup>
105. While laudable progress has been achieved in tackling some of the problems which have previously marred the administration of justice in Georgia, there should be no ground for complacency. If left unaddressed, the issues highlighted in the preceding sections of the report have the potential to seriously undermine the public trust in the judiciary.
106. Urgent measures are needed to increase transparency of the judicial system and make it more open to public scrutiny, which is an important safeguard to the right of fair trial. However, a careful balance should be struck between the need for transparency on the one hand and the need to ensure impartiality and shield the judiciary from undue influence on the other. The same should also apply to matters of public interest which are under review by a court. In particular, politicians should refrain from making tendentious statements that violate presumption of innocence.

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<sup>53</sup> *Ibid.* The Court noted with particular concern how different branches of the state – The Ministry of Interior, the prosecution authority, the domestic courts and the President of Georgia – had “all acted in concert in preventing justice from being done in [that] gruesome homicide case.”

<sup>54</sup> Plea Bargaining in Georgia: Negotiated Justice, December 2010, Transparency International Georgia, p.4.

<sup>55</sup> [http://www.undp.org.ge/index.php?lang\\_id=ENG&sec\\_id=24&info\\_id=861](http://www.undp.org.ge/index.php?lang_id=ENG&sec_id=24&info_id=861)

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107. Finally, the Commissioner wishes to stress that he will continue to follow closely the situation in Georgia, and give his support, in accordance with his mandate as an independent and impartial institution of the Council of Europe, in order to promote the effective implementation of the Council of Europe standards related to human rights protection. The Commissioner stands ready to continue his constructive dialogue with the Georgian authorities to assist them in their efforts to further improve the situation in light of the recommendations made in the present report.

## Appendix

### Comments of the Government of Georgia to the Report by the CoE Commissioner for Human Rights on the Administration of Justice and protection of human rights in Justice System of Georgia

#### A. The report raises concern that a ‘zero tolerance’ policy, launched in Georgia in 2006, still remains in force. The report noted that a ‘zero tolerance’ policy resulted in the imposition of lengthy terms of imprisonment and disproportional sentences

The report omits to note that prior to the reforms, the criminal justice system in Georgia suffered from corrupted institutions, high crime rate and overall perception of insecurity among population; in addition, Georgian state was ruled by local mafia bosses commonly known as “thieves- in- law”. This situation necessitated introduction of strong criminal justice policy, i.e. “zero tolerance policy against crime” in order to eradicate corrupted practices, organised crime networks as well as to improve safety and public order. In the recent years, due to carefully selected criminal justice policy, Georgia managed to make significant progress in all aforementioned areas; namely, the law enforcement authorities have been able to root out the institutions of “thieves-in-law”. Georgia successfully committed itself to fight against corruption, particularly in state institutions that has been praised by various international organisations and institutions (GRECO, TI, etc.); due to strong CJR policy, it has also managed to become one of the safest countries in Europe;

As a result, the Justice institutions were given a momentum to liberalise criminal justice policy and the Report does not mention that relevant decision has been taken in 2010 re-focusing attention on crime prevention and alternatives to prosecution. In this regard, it is worth mentioning that the new Criminal Procedure Code of Georgia has introduced a wider range of non-custodial measures in comparison with previous legal framework. The new Code also introduced discretionary prosecution that allows prosecutors to defer prosecution due to lack of public interest; in parallel, the Ministry of Justice of Georgia identified community service as a priority objective. Since November 2010, the MOJ has piloted diversion among juveniles and drafted similar concept of transaction for adults; in 2010, the Parliament of Georgia upon the initiative of the Criminal Justice Reform Council amended Criminal Code of Georgia and introduced partial cumulation of the sentence in comparison with previous system, whereas the sentences were merely added up.

Statistics below also demonstrates an increase in application of non-custodial measures since the implementation of the liberalisation policy:

2011	Custodial Measure		Non- Custodial Measure	
January	533	51,5%	502	48,5%
February	506	45,8%	600	54,2%
March	529	42,8%	706	57,2%
April	547	48%	593	52%
May	459	50,8%	444	49,2%

**B. The report raises concern that the Minister of Justice is a member with full voting rights at the Plenum of the Supreme Court of Georgia.**

The Ministry of Justice of Georgia took note of this issue and appropriate amendment would be introduced to the Organic Law of Georgia on Common Courts excluding the membership of the Justice Minister from the Plenum of the Supreme Court.

**C. The High Council of Justice**

The Report fails to mention that the Working Group on Judiciary is currently working on following issues mentioned in the recommendations:

- The WG in consultation with international and national organisations has been working on improving interview (oral examination) criteria for candidates for judges at the High Council of Justice;
- In similar manner, the WG plans to address some of the concerns raised in relation to the disciplinary proceedings, i.e. confidentiality of the outcomes of the proceedings in its up-coming sessions;

**D. The Report addressed capacity/mandate of the Minister of Justice as Attorney General, i.e. upon nomination of the Chief Prosecutor appointing and dismissing deputy chief prosecutors, as well as issuing of individual orders**

Notably, the mandate of the Minister of Justice of Georgia is no exception to the common practice existing in other European Countries, such as Denmark, Belgium, Estonia, France, Greece, Luxemburg, Portugal, Slovenia and the Netherlands, where Minister of Justice has the right to initiate prosecution independently from the Chief Prosecutor, or rather to give order to prosecute, to supervise activities of Prosecution Service or to carry out administrative duties.

**E. The Report deals with the individual case of Mariam Ivelashvili, noting that her conduct did not amount to a criminal offense and should rather be considered as a violation of the Lawyer's Code of Ethics**

It is particularly important to stress that Ms Ivelashvili has never been prosecuted or "targeted" for her critical statements about the authorities. She has been prosecuted for *forgery* by expropriating her clients' money repeatedly.<sup>56</sup> Namely, Ivelashvili in her capacity as a lawyer received service and court fees from several clients and not only she did not provide legal assistance and registration of the case in the court, but failed to attend court hearing of the person in criminal case. The criminal investigation was opened based on the complaints filed by Ms Ivelashvili's clients.

In addition, during the investigation, the law enforcement authorities found out that Ms Ivelashvili was not registered as a lawyer and thus did not qualify to provide legal services. This fact did not constitute subject of prosecution, though it is an alarming tendency since it could infringe a person/persons legal rights while being represented in court by unqualified and/or unauthorised lawyer.

As regards the sentence, M. Ivelashvili appealed decision of the Tbilisi City Court. As a result, the Court of Appeals partially reduced her sentence for fraud for 1 year and 3 months.

**F. The Report noted skepticism related to quality of free legal aid and independence of the legal aid schemes lawyers**

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<sup>56</sup> Ivelashvili's conduct falls under the CCG, Art.180, paras 2 and 3, which notes as follows: "Forgery, i.e. taking possession of other's object for the purpose of illegal appropriation or receiving a property right through deception\_ that has caused a substantial damage (180.2.b) repeatedly (180,3(c))."

The Report does not provide any proof, explanation or citing of the source in relation to allegation made regarding the Free Legal Aid. This assessment in the report cannot be substantiated and thus supported, as the Legal Aid System has been considered as a success since its establishment while its lawyers are being considered more qualified and professional than ordinary practicing lawyers both by its customers and international/national organisations working in this field.

**G. The Report noted that the amendments to the MCLA decree of 10 June 2010, hindered lawyers' access to defendants**

The Report fails to note that the new Decree was adopted in response to a distorted practice that used to be exercised by a high number of lawyers in penitentiary facilities. Namely, prior to the amendments a lawyer could subscribe for a meeting with one or two clients a day and meet them one after another. As it is forbidden to limit in time the access to a lawyer by a client, a lawyer could occupy one meeting room for a whole day putting other lawyers in an unfavorable position (other lawyers awaiting in a line could have ended up without being able to meet their client). As a result, existing practice deprived other prisoners of the right to meet their legal representatives. Thus, the new Decree aims to balance the rights and opportunities among all lawyers.

Furthermore, statistical data shows that the number of lawyers entering Penitentiary Institutions increase following adoption of the Decree. For instance in Tbilisi (capital of Georgia), if lawyers entered Penitentiary Institutions in 3383 instances in April 2010, the number reached 3534 in April 2011 (plus 152), *i.e.* after the Decree entered into force. As for May, if in 2010 lawyers had access to their clients in 3504 instances, this number increased up to 3673 (plus 169) in 2011. In total, the number of lawyers entering penitentiary institutions increased by 6-7% after adoption of the Decree.

**H. The Report raises concerns in relation to the infrastructure of waiting rooms in penitentiary establishments, based on the information submitted by the Public Defender of Georgia**

In this regard, the Report does not refer to a number of efforts undertaken by the MCLA. Namely, in order to facilitate lawyer-client meeting procedure and eradicate queuing lines, MCLA examined existing situation in all penitentiary institutions and based on need assessment made infrastructural changes at Tbilisi Prison No 8 in 2010. As a result, 3 rooms were added and 21 tables provided thereof for lawyers; In addition, the MCLA is currently working to further facilitate the process of client-lawyer meetings. It plans to install electronic system of calling detainees in order to organize the queue and assist lawyers in meeting their clients within a reasonable time.

**I. The Report notes that lawyers are in disadvantageous position compared to prosecutors whilst criminal proceedings. Additionally, the report raises concerns about the lack of legal training and qualifications among defense lawyers**

On the general bases, the legislation - particularly, the New Criminal Procedure Code of Georgia introduces fully adversarial trial and provides a fair balance between the prosecutor and a defense side. Under article 33 of the Criminal Procedure Code, prosecutor is the party that bears burden of proof for prosecution. It also provides a mechanism for annulling unlawful and/or unsubstantiated decision of a subordinate prosecutor by a superior one.

Following guarantees are provided in the CPC for strengthening the role of defense lawyers:

- Defense side is equipped with effective investigative authorities and relevant mechanisms. H/she no longer needs to refer to the investigator or prosecutor in order to carry out investigative activities, to obtain documents or any other material. For this, they have to mediate directly with the judge, which places defense and prosecution on equal positions.
- Interrogation can only take place in presence of a judge and with the participation of the defense side. This guarantees full realisation of the adversarial principle.



- Victim no longer represents the prosecution side. It enables defense to oppose prosecutor's strategy more effectively since h/she will not have to deal with two actual representatives on the prosecutorial side (prosecutor and a victim).

While raising concern regarding the lack of training and qualification of the defense lawyers, the Report fails to note that Georgian Bar Association (*hereinafter* "GBA") is an independent, self-regulated body and Government cannot interfere in its work. However, in recent years, Government has supported initiatives of several international organisations aimed at reforming and improving GBA without directly interfering in their professional activities. As a first step, the Government representatives through Criminal Justice Reform Council (*hereinafter* the CJR Council) have encouraged donor and international community to contribute to the institutional capacity of the GBA.

In 2010, the CJR Council agreed to transfer the 120 000 Euros provided by the European Union to the Government for the support of the GBA without any modalities or conditionality. In addition, the CJR Council has openly encouraged other interested partners to contribute to the reforms within the GBA; on several occasions, the CJR Council has stressed the lawyers' independence and the stringent rules limiting any influence or interference from Government's side in their activities.

The CJR Council has also invited GBA members to engage in the discussions regarding ongoing reforms, particularly in area of Free Legal Aid; the dialogue with certain qualified GBA members proved to be mutually useful in relation to the professional development of defense lawyers; In addition, the CJR Council invited GBA members to attend the meeting organized by the Training Centers/Academies in relation to the Criminal Procedure Code of Georgia ("CPC") in order to share experience as well as expertise; Recently, the GBA member also participated in the discussion and drafting of the internal guidelines for Legal Aid Lawyers that further improves ethical standards and communication with the vulnerable clients<sup>57</sup>;

#### **J. The report addressed plea agreement institution**

A plea bargaining, also called as plea agreement or negotiated plea is an alternative and consensual way of criminal case settlement. A plea agreement means settlement of case without main hearing when the defendant agrees to plead guilty in exchange for a lesser charge or for a more lenient sentence and/or for dismissal of certain related charges. (Article 209 of the Criminal Procedure Code of Georgia)

Generally, there exist two basic forms of plea bargain: *charge bargain* and *sentence bargain*.

- In charge bargaining prosecutors agree to drop some of the counts of charge or to reduce the charge to a less serious or less prejudicial offence in exchange of a guilty plea by the defendant.
- While in sentence bargaining, the defendant doesn't plead guilty, but agrees to sentence proposed by the prosecutor. (Article 209 of the Criminal Procedure Code of Georgia)

The main principle of the plea bargaining is that it must be based on the free will of the defendant, equality of the parties and advanced protection of the rights of the defendant:

- a) In order to avoid fraud of the defendant or insufficient consideration of his/her interests, legislation foresees obligatory participation of the defense council; (Article 210 of the Criminal Procedure Code of Georgia)
- b) The defendant has the right to reject the plea agreement on any stage of the criminal proceedings before the court renders the judgment. (Article 213 of the Criminal Procedure Code of Georgia)
- c) In case of refusal, that it is prohibited to use information provided by the defendant under the plea agreement against him in the future. (Article 214 of the Criminal Procedure Code of Georgia)
- d) The defendant has the right appeal the judgment rendered consequent to the plea agreement if the plea agreement was concluded by deception, coercion, violence, threat or violence. (Article 215 of the Criminal Procedure Code of Georgia)

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<sup>57</sup> GBA representatives were: Mr Zviad Kordadze and Mr Imeda Dvalidze, members of the Executive Board of the GBA, as well as Mr Irakli Kordzakhia, Head of GBA Ethic's Commission;

While concluding the plea agreement the prosecutor is obliged to take into consideration public interest, severity of the penalty, personal characteristics of the defendant. (Article 210 of the Criminal Procedure Code of Georgia). To avoid abuse of powers, legislation foresees written consent of the supervisory prosecutor as necessary precondition to conclude plea agreement and to amend its provisions. (Article 210 of the Criminal Procedure Code of Georgia). The plea agreement without the approval of the court doesn't have the legal affect. The court must satisfy itself that the plea agreement is concluded on the basis of the free will of the defendant, that the defendant fully acknowledges the essence of the plea agreement and its consequences. (Article 212 of the Criminal Procedure Code of Georgia)

Guilty plea of the defendant is not enough to render guilty judgment. (Article 212 of the Criminal Procedure Code of Georgia) Consequently, court is obliged to discuss 2 important issues:

- a) Whether irrefutable evidence is presented which proves the defendant's guilt beyond reasonable doubt.
- b) Whether sentence provided for in the plea agreement is legitimate. (Article 212 of the Criminal Procedure Code of Georgia)

After both criteria are satisfied the court additionally checks whether formalities related to the legislative requirements are followed and only then makes decision.

If the court finds that presented evidence is not sufficient to support the charges or that a motion to render a judgment without substantial consideration of a case is submitted in violation of the requirements stipulated by the Criminal Procedure Code of Georgia, it shall return the case to the prosecution. The court before returning the case to the prosecutor offers the parties to change the terms of the agreement. If the changed terms do not satisfy the court, then it shall return the case to the prosecution. (Article 213 of the Criminal Procedure Code of Georgia)

If the court satisfies itself that the defendant fully acknowledges the consequences of the plea agreement, and he/she was represented by the defense council, his/her will is expressed in full compliance with the legislative requirements without deception and coercion, also if there is enough body of doubtless evidence for the conviction and the agreement is reached on legitimate sentence - the court approves the plea agreement and renders guilty judgment. If any of the abovementioned requirements are not satisfied, the court rejects to approve the plea agreement and returns the case to the prosecutor. (Article 213 of the Criminal Procedure Code of Georgia)

The plea agreement is concluded between the parties - the prosecutor and the defendant. Notwithstanding the fact that the victim is not party to the criminal case and prosecutor is not a tool in hands of victim to revenge offender, the attitude of the victim in relation to the plea agreement is still important.

Under Article 217 of the Criminal procedure Code of Georgia, the prosecutor is obliged, to consult with the victim prior concluding the plea agreement and inform him/her about this. In addition, under the Guidelines of the Prosecution Service of Georgia, prosecutor is obliged to take into consideration the interests of the victim and as a rule conclude the plea agreement after the damage is compensated.

According to the statistical data of the Prosecution Service of Georgia, in 2010 prosecution was initiated against 20,450 people, while prosecution was terminated against 1,556 people (7.6%).

According to the Court Statistics, the Court of First Instance heard cases against 20,280 people, while judgments were rendered against 19,956 people, from which plea agreement approved- with 15,867 people (79.5%), and through main hearing against 4,089 people (20.5%).

In 2010 19940 people (98.3%) were convicted, including plea agreements. Court proceedings against 240 persons (1.2%) were terminated.

Court heard cases by the main hearing against 4,089 people, from which 8 persons (0.2%) were acquitted and 54 people (1.3%) were partially acquitted.

Deprivation of liberty was imposed upon 9,134 people (45.8%), conditional sentence - upon 9,485 people (47.6%) and fine - upon 1296 people (6.5%).

The amount transferred to the state budget as the result of the fine imposed as punishment through the main hearing of the court, as well as through the use of plea bargaining agreements equals to GEL 112,795,907.1.

Tbilisi City Court refused to approve plea agreement with proposed terms and conditions on 697 cases (10%), from which on 676 cases parties changed conditions of the agreement in accordance with the court request, which was further considered satisfactory by the court, while on 21 cases the court refused to approve the plea agreement and returned the case to the prosecutor.

#### **K. Information regarding Detainees who claimed to be unfairly prosecuted**

The information provided below gives some overview regarding the criminal cases mentioned in the Report:

##### *1. The Case of Merab Ratishvili*

Merab Ratishvili has been found guilty by the Tbilisi City Court for the crime envisaged in article 260, paragraph 3 of the Criminal Code of Georgia – purchase and retention of especially large amount of drugs (8,438 grams of methadone) – he has been sentenced to 9 years of deprivation of liberty. The decision of the Tbilisi City Court has been based on the following evidence: witness testimony, apartment and the vehicle search reports, examination on drugs and chemical expertise, etc. The decision of the Tbilisi City Court has been appealed to Tbilisi Court of Appeals where the defence requested examination of the additional witness. However, the witness presented before the court of appeals did not provide evidence regarding the innocence of the defendant, as well as denied to hold such kind of information.

##### *2. Case of Vladimer Vakhania*

Mr Vakhania resident of Moscow, Russian Federation, returned to Zugdidi, Georgia in 2008. Soon after his arrival he founded the public movement “United Georgia”. Though not well known by local community his activity got the attention of the local media. On 13 February, 2009, Vladimer Vakhania gave an interview to the journalist of newspaper “Samegrelos Kronika” Lela Khubulava. Journalist recorded interview on the audiotape. In two weeks times, Khubulava was approached by Vakhania’s relative - Ramaz Vakhania who conveyed the message to the journalist that Mr Vakhania wanted the tape back. Khubulava refused to return the tape and visited Vakhania at his home to discuss the issue. The latter continued intimidation and threatened with the explosion of her house. Ms Khubulava got frightened and gave Vladimer Vakhania the record but later published the story in the newspaper. The incident was actively discussed in the media. On 15 March 2009, the law enforcement authorities searched Vakhania’s house. During the search, firearms and explosive materials have been seized.

The evidence presented by the prosecution before the Court included Testimony of the victim Ms Khubulava, testimonies of 4 other journalists of newspaper “Samegrelos Kronikebi” (Loreta Kobalia, Manana Khubulava, Natia Burulava and Paata Lagvilava) and 2 journalists of radio “Imedi” (Lasha and Nato Burulavas) concurring with Ms Khubulavas story and testimony of Mr Makacaria-one of two witnesses attending the search at the defendants’ house, as well as results, protocol of the search – machinegun and two grenades.

##### *3. Case of Shalva Goginashvili*

On 28 May 2011 Shalva Goginashvili along with others physically insulted twelve policemen on duty. The two officers received serious bodily injuries in chest and abdomen area. The witness testimonies, forensic examination as well as video footage of the incident clearly identified Shalva Goginashvili as the person who has attacked one of the policemen - Vakhtang Bochorishvili with a knife resulting into serious bodily injuries endangering Bochorishvili’s life.

Shalva Goginashvili has been prosecuted for the crime envisaged in articles 109 and 353 of the Criminal Code of Georgia - attempted murder and hooliganism; he has been sentenced to 15 years of deprivation of liberty.

#### **L. Report mentions the Problem of accountability of law enforcement officials**

The report mentions that the problem of accountability of law enforcement officials is of systemic nature - this assessment cannot be accepted as inter alia CoE reports do not use the wording "systemic nature", but rather indicate that "there is continuous need for change and improvements investigation of complaints system". "Introduction of more effective system of investigation of complaints will be a logical step to cement these reforms into place more firmly". One of the top priorities of the Minister of Internal Affairs of Georgia is the continuation of strengthening respect for Human Rights, where its efforts undertaken in this direction cover multiple aspects like: Targeted trainings for the MoIA staff; Exchange of best practices with partner countries and organisations; Improvement of legal mechanisms and procedures in criminal justice system; Taking into account the recommendations of relevant international bodies as well as domestic court decisions; Construction and refurbishment of infrastructure as well as efficient investigation of human rights violations.

Moreover, there are internal as well as external/independent structures responsible for monitoring the situation regarding to the violation of human rights within MIA. Internally, these are

*Internally/within the structure:*

- *The Main Unit For Human Rights and Monitoring* (key responsibilities: supervision of implementation of fundamental human rights in the Temporary detention facilities, protection of human rights within the system, conducting internal monitoring in the units of the Ministry and conducting activities in Ministry's pre-trial detention isolators); All the detained persons undergo compulsory medical examination in the Temporary Detention Isolators, where all the bruises, wounds, scar and etc (before apprehension, during apprehension or after apprehension) are registered. In all cases when it is apparent that the person was subject of ill-treatment (despite the person speaks up or makes official complains of ill-treatment) the case will be submitted to the prosecutor for the investigation.
- *General Inspection* (Basic functions: revealing and sanctioning any violation of ethics and discipline in the Ministry, as well as any fact of poor professional performance and misdemeanor by the employee). The authority of the General Inspection is based on the principles of respect and protection of human rights and legitimate interests of natural and legal persons. It is directly accountable only to the Minister of Internal Affairs of Georgia.

*Externally:*

- According to the amendments made in the organic law of Georgia on Public Defender, dated 16 July 2009, the Public Defender of Georgia has assumed the functions of a National Preventive Mechanism (NPM), envisaged by the OPCAT. For the purpose of fulfilling the functions of the NPM, a Special Preventive Group established at the Public Defender's Office shall regularly examine the situation with regard to the detained persons. Prior to the establishment of an NPM, the Public Defender's Office (PDO) was and still is authorized to enter Temporary detention facilities with the objective of revealing the facts of violation of human rights of the detainees without prior notice based on the Memorandum of Understanding between the Ministry of Interior and the Ombudsman of Georgia, signed in 2004.

Furthermore, in order to detect and prevent facts on improper treatment, opportune and effective response system on complaints is functioning within the Ministry of Internal Affairs. If an arrested has any complaints against the person by who he was detained or by the staff of TDI, monitoring group immediately sends his complaint and all enclosed documents to the General Inspection of the Ministry of Internal Affairs. The tasks of the General Inspection are following: to detect, suppress and prevent human rights violations and other unlawful acts committed by the employees of the MIA and considering individual complaints of the citizens. Based on the MIA's disciplinary regulation and the Police Ethics

Code, the General Inspection investigates violations committed by the staff of the Ministry of Internal Affairs of Georgia.

On the other hand, the received complaints from the monitoring group immediately are sent to the Prosecutor's Office (as to the Superior Authority), which also by itself starts investigation of the case. During the period (January –May 2011), in total against 406 employees were subjected to different disciplinary and other measures, among them:

1. Notice- 37
2. Reprimand- 112
3. Severe Reprimand- 103
4. Departing from the Relegation- 2
5. Revocation- 105
6. Reference Card- 21
7. Dismissal- 3
8. Warning- 2.