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Strengthening the Rule of Law: Challenges and Opportunities for the Georgian Bar

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Report of the International Bar Association's Human Rights Institute (IBAHRI)
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List of Acronyms

ABA CEELI	American Bar Association Central European and Eurasian Law Initiative
AOC	Administrative Offences Code
CJR Council	Criminal Justice Reform Council
CLE	Continuing Legal Education
CoE	Council of Europe
CPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GBA	Georgian Bar Association
GYLA	Georgian Young Lawyers Association
HCJ	High Council of Justice
HRW	Human Rights Watch
IBAHRI	International Bar Association's Human Rights Institute
MCLA	Ministry of Corrections and Legal Assistance
MoJ	Ministry of Justice
NGO	Non-governmental organisation
PDO	Public Defender's Office
UN	United Nations
UNDP	United Nations Development Project

Executive Summary

This report follows a fact-finding mission to Georgia by the International Bar Association's Human Rights Institute (IBAHRI) undertaken from 23–27 April 2012. The mission aimed to examine the independence of the Georgian legal profession following serious complaints received from the Chairman of the Georgian Bar Association (GBA) about the obstruction of advocates and their work. It also considered a number of issues pertaining to the broader administration of justice and directly relevant to the situation of lawyers, including respect for fair trial standards and Georgia's plea-agreement system. The report draws the following main conclusions:

The progress of reform in Georgia

In the relatively short period since Georgia regained its independence in 1991, all of its legal institutions have seen profound and dramatic change. The Rose Revolution in 2003 was followed by a particularly powerful surge of reform. This included a zero tolerance policy on crime that has resulted in very significant reductions in crime and corruption. In recent years, every significant legislative act concerning the administration of justice has been subject to revision. Amendments to various key statutes are pending. On the whole, Georgia's legislative and institutional reforms have been very positive. They have done much to improve compliance with international standards and best practice, most importantly with the European Convention on Human Rights (ECHR).

This process has been accompanied by significant changes in personnel. Under-performing members of the judiciary have been replaced by a new generation of younger judges. The days of 'telephone law', when judges regularly decided cases on instructions from politicians, have been consigned to history. Thousands of police officers have been replaced, as have many of the public prosecutors. There is much to be impressed about by the Georgian Prosecutor's Office, with its gleaming new buildings and its young and dynamic staff. Intensive training and retraining programmes have been carried out for judges and prosecutors. The international community has played a major role in promoting reform and in providing material and other support, particularly in its work with the judiciary and the Prosecutor's Office.

In important ways, the criminal justice system has been made more effective and more humane. Both pay and training of police and prison officers have been improved. This should help to improve morale and raise levels of professionalism. Resources have also been found to rebuild and renovate parts of the prison estate. Facilities for detainees to meet with their advocates have been improved at some prisons. There have been some prosecutions of police and prison officers for abuse of office.

The rule of law in Georgia has benefited greatly from the creation of the Public Defender's Office. The Public Defender takes an active interest in the human rights of all Georgians, including detained prisoners and their advocates, and is provided with full access to places of detention. His reports shed light on continuing human rights violations in Georgia, some of which are clearly significant; but also on the progress that has been made in addressing some of those problems.

The limits of reform in Georgia

Whilst progress towards the rule of law in Georgia has been substantial, it is clear that the process of reform has been uneven.

The judiciary is independent from external interference, but it is not a sufficiently open or assertive institution. More needs to be done to increase transparency in judicial selection and appointment processes. Standards of judicial reasoning are also criticised. Judgments are sometimes written using templates. Even when they are not, judgments often do not contain sufficient reasoning. There is also a widespread perception, by no means limited to members of the criminal Bar that judges are far too willing to agree with prosecution motions in criminal proceedings. The defence do not enjoy equality of arms with the prosecution. There are also fundamental concerns about the judiciary's failure to ensure due process in the prosecution of administrative offences.

The zero tolerance policy and the aggressive reliance on plea agreements have had unfortunate consequences. The conviction rate in Georgian criminal proceedings is breathtakingly high, at over 97 per cent. There is a strong perception, not only among criminal defence advocates, that the judiciary is failing in its duty to ensure fairness when reviewing plea agreements and that defendants are indirectly pressured into accepting plea agreements against their wishes.

It is also apparent that not all the bad habits of Soviet times have died. The heavy handed prosecution of administrative offences under the Administrative Offences Code (AOC), especially against protesters and demonstrators, is a stain on Georgia's commitment to reform and democracy.

The unsteady progress of the Bar in recent years

Like other institutions in Georgia, the Bar has experienced an uneven process of reform. After a long hiatus, it now has the benefit of being regulated and represented by a national professional body, the GBA. The Chairman, Executive Council and Ethics Commission of the GBA are all working hard to improve the standing of the Bar and to improve professional standards and ethical conduct. Some members of the Bar, particularly those in civil practice, are able to perform their professional functions without significant impediments.

At the same time, the GBA and its members are contending with many serious problems. Under Soviet rule, the Bar was not a strong institution and in the years since independence, only limited progress has been made in raising its standing and status. The GBA has been operational and properly functioning for barely three years. The fact that so much has already been achieved is remarkable. There is, however, a great deal of work still to be done. The GBA leadership must continue to work on balancing the need to champion the integrity of the Bar with the need to engage in a constructive dialogue with all parties.

For various reasons, the Bar has not benefited from the same external input with training and other support as have other actors in the administration of justice, in particular judges and prosecutors. The result is that on the whole, advocates have not been retrained or reskilled to the same extent as judges and prosecutors. The consequences of this may be evident in some criminal proceedings. Such imbalance plainly needs to be addressed as a priority.

The prosecution and harassment of advocates

The prosecution and imprisonment in recent years of over 140 advocates is a self-evident cause for concern. Different interlocutors gave different explanations for this problem. Some suggested that these cases reflected a much broader crackdown on genuine crime and that there was nothing inherently suspicious about the prosecution of advocates. Within the Bar itself, however, there was a strong sense that some prosecutions were improperly motivated, that in many cases, conduct that was at worst unethical was being improperly prosecuted as fraud, and that advocates were given manifestly excessive sentences. The delegation was not in a position to reach definitive conclusions as to the reasons for such a large number of prosecutions. A number of points are clear, however.

First, the sheer number of advocates who have been prosecuted in recent years – about four per cent of the Bar – leaves no doubt that something has gone badly wrong in Georgia. It is incumbent on all actors to identify and address the causes of this phenomenon.

Secondly, any decision to prosecute advocates in respect of their work is potentially a very serious threat to the independence of the Bar. Such decisions should therefore be made only in circumstances that clearly justify prosecution.

Thirdly, a significant number of the prosecutions considered by the delegation appear to have been unfounded. Disputes that on the face of it were civil matters about fees or complaints about the advocate's unethical performance have been prosecuted as criminal offences. Legitimate complaints about the prosecution of advocates have not been properly investigated. When wrong decisions have been made, there has been a persistent failure to correct them. The continuing plight of the young advocate Mariana Ivelashvili is a case in point.

Fourthly, the Bar itself has a role to play in ensuring that advocates are not prosecuted in respect of their professional activities. The risk of this happening should decrease as the GBA continues the process of raising professional and ethical standards. Specific training is needed on the drafting of written agreements between advocates and their clients.

Prosecution is not the only risk for members of the Bar. Numerous advocates have made allegations about serious incidents of obstruction of their work in places of detention and of abuse of their clients in detention. Many of these individuals met with the delegation to describe their experiences. There is a common theme in these complaints that prison officials and the Prosecutor's Office do not take such complaints seriously and do not investigate them properly, if at all.

The problems of prosecution and obstruction faced by members of the Bar are not uniform across the profession. Most of these problems have been encountered by criminal practitioners, but not all criminal practitioners reported the same levels of concern. These problems are nonetheless serious and significant and they deserve much more urgent attention than they are presently receiving.

The breakdown of trust and respect between the Bar and other institutions

There is little sense of collegiality or common purpose between the criminal Bar and the Prosecutor's Office. This is probably entrenched by the fact that prosecutors are not members of the GBA. Worse than that, there seems to be an entrenched lack of respect and, to some extent, even a degree of

contempt on the part of some prosecutors and judges towards the criminal Bar. It is difficult to say how this has come about or how extensive the problem is. However, it is clear that the interests of justice are ill-served if the key players are unable or unwilling to work together with at least some degree of mutual trust. In practice, however, they have proved more open to dialogue and collaboration with international partners than with each other.

A deterioration of trust and respect between the Bar and other institutions cannot be repaired overnight. All parties must take responsibility for restoring cordial and professional relations. That work is already underway and a number of working groups with representatives of the GBA and other key institutions are considering important legislative amendments. It is imperative that collaboration of this kind continues to develop.

Professional and ethical standards

There are evidently problems with all stages of training and qualification for the Bar. Academic training is of variable quality. The vocational stage (a year of work experience) lacks structure or assessment. There is no teaching or training on such crucial topics as advocacy and professional ethics. The Bar exam does not provide an adequate assessment of competence for the profession. The Ethics Commission of the GBA is now operating and is doing excellent work, but it lacks resources. Compulsory Continuing Legal Education has been introduced, but only recently. It will take time for these innovations to bear fruit.

The GBA has embraced the need to make progress with raising professional and ethical standards. A review of the Bar exam is already underway. The Law on Advocates may also need to be reconsidered. The size of the challenge facing the GBA in terms of raising professional and ethical standards should not be underestimated. In order to meet it, the GBA may need significant support from the government and from international partners. In any event, making progress with raising professional standards is now an urgent priority. Focused support for this process will provide significant benefits for the rule of law in Georgia.

Recommendations

The IBAHRI's recommendations are set out in full at the end of this report. Key recommendations include:

The Bar and the GBA

Training, admission and ethics

The GBA should continue its work to raise professional standards and to increase public confidence in the competence of advocates. To this end:

- the Bar exam should provide a meaningful test of professional competence for the Bar;
- the GBA should ensure that its Continuing Legal Education (CLE) programme is sufficiently rigorous;
- the GBA Ethics Commission should be provided with sufficient resources to make effective progress with its current programme of work;

- the government and international partners should provide all possible assistance in ensuring that resources are available to the GBA for improving professional and ethical standards within the Bar.

Rebuilding relationships of trust and confidence

All institutions involved in the administration of justice should work together to restore relationships of trust and confidence. To this end:

- the GBA, the judiciary, the Prosecutor's Office and the Ministry of Justice should continue and expand participation in in joint seminars, working groups and other collaborative activities;
- the GBA and the Prosecutor's Office should consider a programme of regular meetings to discuss matters of mutual interest, such as ethical standards, plea agreements or areas of substantive law.

Prosecution of advocates

- In those cases where there is no evidence of fraudulent intent by an advocate, the Prosecutor's Office should refer client complaints to the internal disciplinary procedures of the GBA Ethics Commission rather than seeking a criminal prosecution in every case.
- The authorities should review the case of Mariana Ivelashvili as a matter of urgency.

The judiciary

- The High Council of Justice (HCJ) should take additional steps to increase the transparency and objectivity of the judicial selection and appointment process, including with regard to the entry procedures for the High School of Justice.
- Judges should take immediate steps to ensure that their judgments are individually and cogently reasoned.
- Judges should be proactive in ensuring that defendants in criminal proceedings are afforded a fair trial. Their vigilant compliance with their duty to afford defendants a fair trial should not depend in any way on perceived deficiencies in the conduct of the defence case by the defence advocate.
- Judges in criminal proceedings should afford the same consideration to defence motions as prosecution motions. Any decision to prefer one motion rather than another should be clearly reasoned.
- Recognising their overriding duty to afford defendants a fair trial, judges should take a proactive approach to plea agreements. They should not accept a plea agreement where the prosecution case does not appear to support it.
- Until the proposed new AOC comes into force, measures must be taken to cease violations of fair trial rights when the AOC is invoked.

Prosecutors

- Prosecutors should treat complaints about the obstruction of advocates' work and unlawful conduct in places of detention with the utmost seriousness. They should ensure not only that such complaints are thoroughly and promptly investigated, but that they are seen to be so investigated. Complainants should be kept informed of progress with investigations.

Prison authorities

- Clear instructions should be provided to prison staff that documents and communications between an advocate and his or her client are confidential and cannot be examined or otherwise interfered with.
- Urgent steps should be taken to review search techniques used on female visitors and to ensure that prison staff are appropriately trained to carry out such searches.

Legislation

- Fundamental revision of the AOC should be concluded as soon as possible.
- In the new AOC, the Georgian government must ensure that due process rights are fully respected and the IBAHRI urges the government to remove administrative imprisonment as a potential sentence under the new code.

Chapter One: Terms of Reference and Methodology

This report was produced following a fact-finding mission to Georgia by the International Bar Association's Human Rights Institute (IBAHRI). The mission took place from 23–27 April 2012. It was undertaken after the IBAHRI received serious complaints from the Chairman of the Georgian Bar Association (GBA) about the obstruction of lawyers and their work. The most significant allegation related to the improper and abusive prosecution of lawyers, resulting in their conviction and imprisonment. The mission's terms of reference were:

a) to examine the independence of the legal profession and other guarantees for the proper functioning of lawyers;

b) to investigate any other impediment, either in law or in practice, to the effective administration of justice, with focus on the implementation of international and regional fair trial standards;

c) to write and publish a report containing findings and recommendations.

Methodology

Findings and conclusions are primarily based on 19 individual and group interviews conducted by the IBAHRI delegation in Tbilisi during its mission. Delegates held meetings with representatives from a broad spectrum of national and international organisations, including: the Deputy Minister of Justice; the first Deputy Minister of Internal Affairs; officials from the Ministry of Corrections and Legal Affairs; the Chairman of the GBA, members of its Executive Council and Ethics Commission; Deputy Chairman of the Supreme Court; members of the High Council of Justice; the Deputy Chief Prosecutor; the Public Defender (Ombudsman) of Georgia; over 50 lawyers (advocates), including those in private practice and those involved in litigation for NGOs; representatives of several national human rights NGOs, including the Georgian Young Lawyers Association; the Ambassador of the United Kingdom and other British Embassy staff; members of the delegation of the EU; and representatives of the United Nations Development Project (UNDP), United States Department of Justice and United States Agency for International Development. An analysis of relevant national legislation was also undertaken.

The IBAHRI gratefully acknowledges the assistance and cooperation of all those who gave their time to meet with the members of the delegation.

Delegation members

The IBAHRI would like to express its gratitude to the members of its fact-finding delegation:

Joseph Middleton is a barrister in private practice who works in London. He is a member of Doughty Street Chambers, one of the UK's leading barristers' chambers with a focus on civil liberties and human rights. He specialises in immigration law, criminal law (in particular extradition), and constitutional law, including the constitutionality of the death penalty in various countries outside the

UK. Over 16 years he has also developed an expertise in the election laws of transition democracies, with particular focus on the post-Soviet republics. He speaks Russian, having studied for nearly two years in Moscow, and has visited Georgia on several occasions, taking part in missions for Amnesty International, the International Commission of Jurists and the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR).

Michael Lynn is an Irish barrister based in Dublin. He is a graduate of Trinity College, Dublin. He has represented many applicants in human rights cases before the Irish High and Supreme Courts, the Court of Justice of the European Union and the European Court of Human Rights (ECtHR), and has represented the Irish Human Rights Commission as *amicus curiae* in various proceedings. He is a member of advisory panels for the Irish Council for Civil Liberties, the Immigrant Council of Ireland and the Public Interest Law Alliance, and has directed and taught postgraduate courses on constitutional law, media law and asylum law. He has been a delegation member in human rights fact-finding missions, including the IBAHRI mission to Syria in 2011.

Scott Newton has held the post of Lecturer in the Laws of Central Asia at the School of Oriental and African Studies (SOAS) Law School since 1999, where he has also served as Chair of the SOAS Centre for Contemporary Central Asia and the Caucasus. He lived and worked in Kazakhstan from 1996–2000 as legal project director and as advisor to the Minister of Justice; he has done comparable shorter-term work for international development agencies in Russia, Tajikistan, Uzbekistan, Albania, Sri Lanka and elsewhere. He has spent extensive time in Georgia conducting research, as well as consulting on projects for the Conciliation Resources (Abkhaz–Georgian conflict resolution) and the Open Society Foundations (health and human rights). He has regularly provided expert opinion on matters of post-Soviet law before courts and tribunals in the UK.

Rupert White (Mission Rapporteur) is a human rights practitioner with particular expertise in the protection of human rights in conflict-affected countries. From 2006–2010 he served with the United Nations Assistance Mission in Afghanistan, where he worked on a range of issues including the prevention of arbitrary detention, the promotion of transitional justice, the prevention of violence against women, and the protection of civilians in armed conflict. Rupert qualified as a solicitor in 1994 and practised commercial law for several years before deciding to specialise in human rights. He holds a MLitt in Peace and Conflict Studies (Distinction) from the University of St Andrews, an LLM in International Human Rights Law from the University of Essex, and a BA (Hons) in English Literature from the University of Oxford.

Caroline Howard is a Programme Lawyer at the IBAHRI, where her portfolio includes management of the Georgia fact-finding mission. Prior to joining the IBAHRI, Caroline worked as a Human Rights Officer for the United Nations Department of Peacekeeping Operations in Afghanistan and Darfur and as a Protection Coordinator for the Norwegian Refugee Council. Caroline holds an LLM in International Human Rights Law from Essex University (Distinction), and a BA in History from Queens' College, University of Cambridge.

Chapter Two: Background Information

2.1 Historical context

Georgia is situated in the Southern Caucasus at the strategically significant meeting-point of Europe and Asia. First unified as a kingdom in the 10th century, Georgia enjoyed a brief 'Golden Age' of military and cultural ascendancy before a series of Mongol invasions of Asia Minor and the South Caucasus marked the beginning of the 'long twilight of the Georgian Kingdoms'.[1]

Over the next 500 years, Georgia became the object of rivalry between the Persian, Ottoman and Russian Empires. It was finally annexed to the Russian empire in 1801. Following the Russian Revolution in 1918, Georgia enjoyed a brief period of independence from 1918 to 1921, before it was occupied by the Red Army and incorporated into the Soviet Union in 1922 as part of the Transcaucasian Socialist Federative Soviet Republic. When the Transcaucasian Socialist Federative Soviet Republic was dissolved in 1936, Georgia became a full Republic of the Soviet Union.

In October 1990, as the Soviet Union began to disintegrate, opposition pressure led to the holding of open, multi-party and democratic elections, and, following a referendum in April 1991, Georgia formally declared its independence. Georgia's first post-Soviet president, Zviad Gamsakhurdia, took charge of a country that was already in a state of collapse, and Georgia descended from being one of the Soviet Union's most prosperous republics into dire poverty.[2]

Gamsakhurdia was removed from power in December 1992 following a military coup. His successor, the former Soviet Foreign Minister Eduard Shevardnadze is widely credited with bringing the newly independent state back from the brink of collapse.[3] However, Shevardnadze's government became increasingly tainted by allegations of cronyism and corruption; poverty remained widespread and endemic, and his commitment to democratic principles came to seem increasingly weak. In the course of Shevardnadze's presidency, Georgia lost control of Abkhazia and South Ossetia in the context of violent conflict, generating significant internally displaced persons flows and leaving a legacy of troubled inter-ethnic relations, international involvement and unresolved tensions with the Russian Federation. Hostilities broke again out briefly but dramatically in 2008 in South Ossetia, and the political impasse with regard to both breakaway regions endures.

In 2003, the ruling party's attempts to falsify the results of parliamentary elections galvanised widespread opposition calls for change, and following a peaceful popular uprising which has come to be known as the 'Rose Revolution', Shevardnadze was forced to resign. In January 2004, Mikheil Saakashvili, the most prominent leader of the Rose Revolution, was elected as the new President of Georgia with a 96 per cent majority, becoming the youngest head of state in Europe at the age of just 36.

President Saakashvili's electoral success was rapidly followed by the introduction of significant constitutional reform. The amended Constitution established the post of prime minister as a nominal counter-balance to presidential power, but it also transferred substantial powers to the

1 Thomas de Waal, *The Caucasus: An Introduction* (Oxford University Press, 2010), 36.

2 *Ibid*, 134.

3 Thomas de Waal, 'Georgia's Choices: Charting a Future in Uncertain Times' (Carnegie Endowment for International Peace, June 2011), 5, **www.carnegieendowment.org/files/georgias_choices.pdf**.

presidency, including the right to dissolve parliament.[4] Other constitutional amendments empowered the president to appoint and dismiss judges, thereby increasing the president's influence over a judiciary which was already suffering from a lack of independence. By some accounts these changes were implemented with scant regard for the state's constitutional obligations to provide sufficient opportunity for public consultation, but they were nonetheless pushed through with the justification that a period of 'firm executive power' was required in order to implement the necessary institutional and political reforms.[5] Under President Saakashvili, the new government committed itself to building a strong democratic state with a liberalised economy and reformed institutions. Georgia also embarked on an overtly pro-Western course, declaring its intention to seek North Atlantic Treaty Organization (NATO) and EU membership.

Anti-corruption reforms, combined with an overhauled and simplified tax system, helped put the economy on a sounder footing, and by 2006 the state budget had increased from US$350m to US$3bn. This in turn funded the construction of roads, hospitals, schools and other public infrastructure projects. However, the period from 2005 to 2007 was also marked by human rights violations, of cutting corners in the democratic process, and of the arbitrary exercise of power.[6] These concerns, combined with underlying issues related to the uneven impact of economic reforms, contributed to mass demonstrations in Tbilisi in November 2007. President Saakashvili was elected to a second term of office in January 2008, but with a significantly reduced majority.

The past five years have seen several rounds of large-scale protests and demonstrations against the government. The authorities have responded with varying degrees of force. On some occasions, they have resorted to deploying tear gas, rubber bullets and a water cannon against the participants. Protesters have been punished under Georgia's 1984 AOC, which allows for the imposition of fines and lengthy periods of administrative imprisonment for public order offences. As will be examined below, in its current form, the AOC raises serious concerns as a result of its failure to protect basic due process and fair trial guarantees.

2.2 Zero tolerance and criminal justice reform

Georgia's zero tolerance policy on crime

After coming to power in 2004, one of the new government's key priorities was to tackle deeply entrenched problems of corruption and criminality. The centrepiece of this new approach was a zero tolerance policy on crime. This was intended to denote aggressive enforcement of the criminal law for both minor and major offences. It was an approach consciously borrowed from the experiences of some cities in the United States. The zero tolerance policy was enforced throughout the criminal justice system. At one level, it was clearly a success. Levels of both petty crime and more serious offences, including murder, fell dramatically. As crime fell, public support for law enforcement agencies grew significantly.[7]

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4 Human Rights Watch (HRW), 'Agenda for Reform: Human Rights Priorities after the Georgian Revolution', 24 February 2004, **www.hrw.org/legacy/english/docs/2004/02/24/georgi7650_txt.htm#P91_12141**.

5 Neil MacFarlane, 'Post-Revolutionary Georgia on the Edge', (Chatham House, January 2011), 8, **www.chathamhouse.org/sites/default/files/public/Research/Russia%20and%20Eurasia/bp0311_macfarlane.pdf**.

6 *Ibid*, 9.

7 See n 3 above, 14.

The government also tackled corruption aggressively. During its first year in office, a number of former ministers and businessmen were arrested, often in full view of the media. In the summer of 2004, the entire staff of the notoriously corrupt traffic police was dismissed and a new, reformed organisation was created to replace it. Similar sweeping reforms aimed at eradicating corruption were carried out within the regular police force, the customs service and throughout the public administration as a whole.

The effects of zero tolerance on conviction rates and the prison population

Reduced levels of crime and the virtual elimination of routine corruption in Georgia remain an impressive achievement of the current government, particularly when Georgia is compared to other post-Soviet states. Over time, however, less positive features of the zero tolerance policy have emerged. In particular, conviction rates have reached breathtakingly high levels, standing at around 97 per cent in 2011.[8] Inevitably, this causes fundamental concerns about whether defendants in criminal proceedings are being afforded a fair trial and whether criminal proceedings are heavily weighted against them. This topic is dealt with in more detail below.

A further consequence of the zero tolerance policy has been a very substantial increase in Georgia's prison population. In 2010, Georgia was ranked as having the fifth highest prison population per capita in the world.[9] It seems clear from various sources that the policy has caused, or significantly contributed towards, gross overcrowding, chronic failures to provide adequate healthcare and high rates of mortality within the prison population. In some prisons at least, these problems result in detainees suffering from inhuman and degrading treatment in breach of article 3 of the European Convention on Human Rights (ECHR).[10]

The system of plea agreements

Criminal justice in Georgia has also been strongly affected by the introduction of a system of plea agreements (otherwise referred to as plea bargaining). Like the zero tolerance policy, this is an idea borrowed from experiences in the United States. The use of plea agreements has increased enormously since the system was introduced in 2004. According to the High Council of Justice (HCJ), the national body responsible for judicial administration and appointments, 87.5 per cent of criminal cases were resolved by way of a plea agreement in 2011.[11] Supporters of the plea-agreement system contend that it plays a principled and legitimate role in the criminal justice system and has been a successful tool in combating corruption. It saves time and expense and reduces the already high workload of the courts. Critics of the system, however, argue that the way in which plea agreements have been used in Georgia is fundamentally incompatible with the right to a fair trial. This issue is dealt with in more detail in Chapter Six.

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8 Statistics provided by the HCJ in an email to the IBAHRI dated 31 May 2012. This figure excludes convictions achieved through plea agreements before a case reaches trial.

9 See n 3 above, 47.

10 Public Defender of Georgia, 'Annual Report for 2010: Monitoring of Penitentiary Establishments and Temporary Detention Isolators', 7, **www.ombudsman.ge/files/downloads/en/njxiqrvnresqlesvbinn.pdf** [accessed 26 July 2012].

11 Statistics provided by the HCJ in an email to the IBAHRI dated 31 May 2012.

Institutional and legislative reform

After the imposition of Soviet authority in 1922, Georgia was brought within the Soviet legal system. The judiciary was institutionally weak. Judges deferred to and sometimes received instructions from political authorities. The highest judicial organ at the time, the Supreme Court of Georgia, was subordinated to the Supreme Court of the Soviet Union, while Georgia's lower courts replicated the hierarchy of the Soviet court system. Criminal proceedings were dominated by the prosecution.

Following the restoration of Georgia's independence in 1991, its legal system was transformed to reflect the newly adopted Constitution.[12] Far reaching reforms have continued in recent years, many within the judicial branch. In 2007, the HCJ was restructured. The number of judges has been increased and a new system of in-house judicial training has been introduced.[13] These institutional reforms have been accompanied by new legislation. In 2011, following consultations undertaken by the judiciary and the Criminal Reform Council of the Ministry of Justice, the HCJ initiated a series of additional legislative amendments aimed at further strengthening the independence of the judiciary in Georgia.[14]

In 2008 the Prosecutor's Office, which had earlier been stripped of its supervisory authority, also underwent significant reform subordinating it to the Ministry of Justice (MoJ). The Prosecutor's Office now forms part of the executive branch. It is headed by the Chief Prosecutor, who is appointed by the President upon nomination by the Minister of Justice.[15] The Minister of Justice is responsible and accountable to parliament for criminal justice policy, while the Chief Prosecutor supervises the activities of the Prosecutor's Office.[16] Previously, in common with other post-Soviet jurisdictions, the Prosecutor's Office had been accountable to the President.

Until recently, institutional reform of the Bar had lagged significantly behind that of other justice institutions. Progress in raising the status and standards of the Bar will be considered in detail in Chapter Three.

Criminal procedure

There have been significant recent changes to Georgia's Criminal Procedure Code (CPC), which was revised in 2009 and entered into force in October 2010. One of the most important was the introduction of adversarial as opposed to inquisitorial proceedings in criminal cases. Jury trials have also been introduced, although only in murder cases. At the time of the mission's visit to Georgia, only two such trials had been held.

Other amendments to the CPC have raised minimum evidence requirements and strengthened the protection of due process in criminal cases. However, serious concerns remain about equality of arms in criminal prosecutions. This topic is discussed in more detail in Chapter Five.

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12 *Ibid.*

13 Ministry of Justice, 'High School of Justice: Reform in Judiciary', **www.justice.gov.ge/index.php?lang_id=ENG&sec_id=257** [accessed 26 July 2012]. During 2011, up to 50 seminars/trainings for acting judges, including training in human rights law, were organised by the High School of Justice 'Reform in Judiciary'.

14 *Ibid.* These address a number of statutes, such as the Organic Law of Georgia on Common Courts and the Law of Georgia on Distribution of Cases. Reforms include the exclusion of the members of the HCJ appointed by the President of Georgia from holding any other paid position (except scientific, pedagogical or artistic work).

15 Law on the Prosecution Service in Georgia, **www.legislationline.org/documents/id/15661** [accessed 26 July 2012].

16 *Ibid*, Art 8.

Administrative offences

The punishment of administrative offences, as distinct from criminal offences, was a feature of the Soviet legal system. In the Soviet Union, administrative proceedings were used, inter alia, to suppress and discourage any form of public protest or unsanctioned political activity. Independent Georgia has chosen to retain this feature of the Soviet legal system, with unfortunate but predictable consequences.

Georgia's AOC was adopted in 1984 and has been amended on various occasions since then, most recently in 2011. The AOC continues to impose punishments for a very broad range of administrative offences. It provides for the imposition of fines and/or long periods of administrative detention (imprisonment) in 'temporary detention isolators'. These penalties are used to punish conduct such as 'petty hooliganism', 'maliciously disobeying a police order' and 'violating rules on public gatherings'.

Until recently, the AOC envisaged imprisonment for up to 30 days. Bearing in mind that these are mere administrative offences and given the paucity of fair trial protections in such proceedings, this was already a very significant period. Yet in 2009, following a number of large anti-government protests, the maximum sentence of imprisonment was tripled to 90 days. In subsequent practice, the imposition of lengthy periods of administrative imprisonment has been by no means rare. In 2011 alone, the courts imposed sentences of 90 days' administrative imprisonment on 31 people, 60 days' imprisonment on 132 people and 30 days' imprisonment on 343 people.[17]

Where detained persons are at risk of such long periods of imprisonment, the fair trial guarantees under Article 6 of the ECHR plainly apply.[18] It seems clear, however, that these guarantees are very far from being met in Georgia. The failure to provide fair trial and due process protections in administrative proceedings, both in law and in practice, has been widely criticised by both Georgian and international experts (see Chapter Five of this report).

The AOC is currently being revised, with input from civil society and Council of Europe (CoE) experts. A second draft of the amended Code is expected to be presented to parliament following the parliamentary elections in October 2012. However, a number of interlocutors expressed serious concerns to the delegation that the amendments will be neither far-reaching nor effective.

17 HRW, 'Administrative Error: Georgia's Flawed System for Administrative Detention', 4 January 2012, 11, **www.hrw.org/sites/default/files/reports/georgia0112ForUpload.pdf**. These figures were reportedly provided by the Ministry of the Interior.

18 The ECtHR has issued a number of definitive rulings on this issue in analogous cases brought against Armenia. See, for instance, *Galstyan v Armenia*, App No 26986/03 (ECtHR, 15 November 2007). In that case, the ECtHR held that a maximum administrative sentence of 15 days' detention indicated that the proceedings were criminal in essence and therefore attracted the full fair trial protections set out in Art 6. If similar challenges are brought against Georgia, similar outcomes seem very likely.

2.3 Georgia's human rights obligations

Georgia has been subject to the jurisdiction of the ECtHR since its ratification of the ECHR in May 1999. As of January 2011, a total of 39 judgments had been delivered by the ECtHR against Georgia. There are 2,812 applications from Georgia pending before the court.[19] Georgia actively cooperates with numerous regional human rights organisations, including the European Commission for the Prevention of Torture and the European Commission against Racism and Intolerance and the European Commission for Democracy through Law (the 'Venice Commission').[20]

At the international level, Georgia has also ratified or acceded to six of the nine core international human rights treaties, including the International Covenant on Civil and Political Rights,[21] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[22] the Convention on the Elimination of All Forms of Discrimination against Women[23] and the International Covenant on Economic, Social and Cultural Rights.[24]

In January 2011, Georgia underwent Universal Periodic Review before the UN Human Rights Council. Georgia accepted the vast majority of recommendations provided by other countries, but rejected a recommendation by the Czech Republic to amend the law governing the appointment and dismissal of members of the HCJ, maintaining that reforms in this area have already been successful.[25]

At the domestic level, the protection of human rights is enshrined in Chapter Two of Georgia's Constitution.[26] In addition to a detailed Bill of Rights, the Constitution also provides for the establishment of a Public Defender's Office (PDO).[27] The PDO is clearly a very highly respected institution in Georgia. The Public Defender (or 'Ombudsman') and his colleagues are given full access to all places of detention. Each year the Public Defender submits a detailed report to parliament. These reports provide an invaluable source of information on the state of human rights in Georgia.

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19 ECtHR, 'Country Fact Sheets: 1959-2010', November 2011, 22, **www.echr.CoE.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf**.

20 The Venice Commission is the CoE's advisory body on constitutional matters.

21 Acceded on 3 May 1994.

22 Acceded on 26 October 1994.

23 Acceded on 26 October 1994.

24 Acceded on 3 May 1994.

25 UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review. Georgia', 16 March 2011, UN Doc A/HRC/17/11, recommendation 107.5, 24, **www.upr-info.org/IMG/pdf/a_hrc_17_11_georgia_e.pdf**.

26 Constitution of Georgia, 24 August 1995, available at: **www.parliament.ge/index.php?option=com_content&view=article&id=180&Itemid=85&lang=en** (Georgian).

27 See n 19 above, 21.

Chapter Three: The Bar and the Georgian Bar Association

Broadly speaking, practising lawyers in Georgia fall into two categories: those in independent practice (advocates – members of the Bar) and those employed in government service or elsewhere.

Advocates must be members of their professional body, the GBA. Lawyers in government service, including prosecutors, are generally not members of the GBA. Lawyers working for Georgia's Legal Aid Service as publicly funded defence advocates are a hybrid category: they are employed by the government but are members of the GBA. Lawyers who are not advocates admitted to the Bar are permitted to represent clients in first instance civil proceedings. The right of audience in other civil proceedings and in all criminal proceedings is reserved for members of the Bar.[28]

3.1 Structure and history of the GBA

Under the UN Basic Principles on the Role of Lawyers (the 'Basic Principles'), professional associations of lawyers are entitled to carry out four essential roles on behalf of their members. These are: the provision of education and training; the regulation of professional standards; the delivery of legal services and the promotion of the rule of law; and the independence of the legal profession.[29] The Basic Principles also grant lawyers the right to join self-governing professional associations whose executive body is elected by its members and which exercises its functions without external interference.[30]

In Georgia, the single self-governing association that performs these essential functions on behalf of advocates is the GBA. The GBA has a current membership of approximately 3,700 advocates, the overwhelming majority of whom are sole practitioners. As noted above, membership of the GBA is compulsory for all advocates.

The highest governing body of the GBA is the General Assembly of its members, which must be convened at least once a year. The General Assembly elects the Chairman of the GBA and other office holders and approves the Code of Professional Ethics (the 'Ethics Code'). The general management of the GBA is entrusted to the Executive Council, which is chaired ex officio by the Chairman of the GBA. Other key entities within the GBA include the Ethics Commission, the Audit Commission and the Commission on Continuing Legal Education.[31]

28 Irina Urumova, 'The Legal Profession in Georgia', September 2008, **www.osce.org/odihr/36297**.

29 UN Basic Principles on the Role of Lawyers, Principles 9, 24–26, **www2.ohchr.org/english/law/lawyers.htm** [accessed 26 July 2012].

30 *Ibid*, Principles 24–25.

31 See generally the GBA website, **http://gba.ge/new/?lang=eng** [accessed 26 July 2012].

The Chairman of the GBA, along with members of the Executive Council, the Ethics Commission and the Audit Commission, are elected for a term of four years. The Chairman is the only elected GBA official to be remunerated for his services. He is prohibited from practising as an advocate during his term of office.[32]

The GBA is still a very young organisation. Its creation was first envisaged in the 2001 Law on Advocates, which provides the statutory basis for the GBA's powers, structure and responsibilities. However, the establishment of the GBA was delayed for several years by a series of lawsuits that challenged the constitutionality of a single professional association for advocates.[33] One of the reasons cited for such opposition was a fear that the proposed unified bar association would perpetuate Soviet-style central control over the profession and facilitate corruption.[34]

The lack of consensus about the status of the Bar also disrupted the holding of Bar exams (which until 2004 were administered by the HCJ) and the admission of advocates to the Bar. However, after protracted argument, the legal challenges were eventually resolved in favour of a unified professional bar association, and the GBA was finally formally established in 2006.[35]

Progress continued to be slow. The GBA was unable to convene a meeting of its General Assembly, partly because of the quorum requirements under the 2001 Law on Advocates. It therefore remained an effectively dormant institution until 2009, when the current Chairman and other office holders were finally elected to office. The GBA's inactivity between 2006 and 2009 led to renewed calls in parliament for the establishment of alternative Bar Associations. These calls were resisted at the time, in large part due to concerns raised by the international community about the importance of persisting with efforts to build a strong, independent and unified bar association.[36]

The delegation was informed by the MoJ that official government policy remains supportive of the GBA as the sole national bar association. This is not least because the government does not wish to be perceived as interfering with the affairs of the Bar. However, the delegation was also informed that the desire for the creation of alternative bar associations still persists in some government circles. According to various interlocutors, when the leadership of the GBA makes statements that are perceived to be critical of the government, these tend to be followed by renewed calls for the creation of multiple bar associations.

Several interlocutors suggested that a significant number of the GBA members are drawn from the ranks of former prosecutors and judges who had been previously dismissed for poor performance of their duties. It was further suggested that such members tend to be more conservative and less willing to embrace reform; they are also more likely to be antagonistic towards their former colleagues, both within the courtroom and in interviews with the media. The delegation heard that this confrontational approach on the part of some advocates was exacerbated by the previous inability of the GBA to establish a functioning Ethics Commission (see below). It had also served to undermine the standing of defence advocates as a whole.

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32 Georgia Law on Advocates, Art 27, **http://gba.ge/new/admin/editor/uploads/files/ENG/regulations/The%20Law%20of%20Georgia%20on%20Advocates%20-%20as%20of%20Feb%202011%20-%20eng.pdf** [accessed 26 July 2012].

33 See n 29 above, 2.

34 See report on *Eurasianet.org*, **http://russian.eurasianet.org/departments/insight/articles/eav061302aru.shtml**.

35 See n 29 above, 2.

36 Letter from the President of the Council of Bars and Law Societies of Europe to the Chairman of the Georgian Parliament, 17 April 2009, **www.ccbe.eu/fileadmin/user_upload/NTCdocument/Georgiapdf1_1272355806.pdf**.

3.2 Entry standards, legal education and training

Many interlocutors expressed concerns about standards of training and competence within the Bar. This was in relation to all stages of training and education, from the academic stage through to Continuing Legal Education (CLE). However, the low standard of the Bar exam was by far the most common cause for concern on this issue.

Admission criteria for the Bar

To qualify for admission to the Bar, the applicant must have a higher legal education (a diploma in law), must pass the Bar exam and must complete a minimum of one year of work experience as a lawyer or advocate's intern (see Article 10 of the Law on Advocates). As an alternative to passing the Bar exam, passing the qualifying exam for judges is acceptable. There are no requirements in the Law on Advocates for practitioners to undertake CLE. However, the GBA has introduced its own compulsory CLE requirements (see below).

The academic and vocational stages of training for advocates

At the academic stage, aspiring advocates must obtain a higher legal education. This is offered in 17 higher education institutions. Standards in these institutions were said to vary and in some were said to be poor. With the support of the international community, some work is being done to enhance the curriculum and to standardise textbooks.

Vocational training (the minimum one year of work experience) is not a structured process and is not formally monitored or assessed by the GBA. Crucial elements of vocational training, including practical courses in advocacy and professional ethics, are neither available nor required before applicants take the Bar exam. No training is provided on negotiation, on how to examine and cross examine witnesses, on formulating legal arguments in writing or orally, or on ethical duties to clients, colleagues and the court. **The IBAHRI therefore recommends that consideration be given to making the vocational stage of training a structured and assessed process; and that mandatory courses on core professional skills, including advocacy and professional ethics, be introduced and assessed as part of training for the Bar.**

The Bar exam

The GBA is responsible for setting and organising the Bar exam. At periodic intervals it publishes a list of 5,000 multiple choice questions and the correct answers. Candidates for the Bar exam are required to answer 100 questions taken from this list. Almost without exception, interlocutors expressed the view that the Bar exam is grossly inadequate. The current exam involves no test of the candidate's understanding of the law or legal practice. It imposes no assessment of advocacy or ethics or the other crucial professional skills referred to above. That of course is unsurprising, because candidates for the Bar receive no training in these areas.

The consistent message expressed to the delegation, both by local and international actors, was that the GBA needs to raise significantly both the level and range of skills required of those who enter the profession. The concern is that unless it does so, the GBA will be unable to build public confidence in

the legal profession or overcome many of the obstacles it currently faces**. The IBAHRI recommends that the Bar exam should therefore provide a meaningful test of professional competence for the Bar.**

Work on raising standards within the Bar is underway but progress may be slow. A working group has been tasked to prepare draft amendments to the Law on Advocates with a view to raising entry standards for the Bar. However, it is not expected to complete its deliberations before the end of 2012.

Continuing Legal Education

In comparison with both the prosecution service and the judiciary, both of which are composed of a relatively small number of individuals, the GBA faces enormous practical problems in providing an effective programme of CLE to a national membership of 3,700 advocates. International donor funds have been targeted primarily at improving the capacity of the prosecution and judiciary.

Members of the judiciary and Prosecutor's Office were particularly critical of the general level of courtroom skills and legal knowledge demonstrated by criminal defence Bar. It was suggested that the training courses provided by the GBA in the past had not prepared defence advocates sufficiently well for the introduction of the CPC. In their view, the accusation that the judiciary is institutionally biased against the defence was unfounded, but rather stems from the fact that defence advocates are making more frequent procedural errors due to their inferior training and limited grasp of the CPC.

Beginning in 2012, the GBA Executive Council has made it compulsory for every GBA member to undergo at least 12 hours of CLE per year. Of these, three hours must be devoted to professional ethical standards. For the vast majority of advocates, this will be their first formal exposure to the GBA's Ethics Code. Even during the one year of work experience which they must serve after having passed the Bar exam, they are not yet formally associated with the GBA, and therefore not bound by (or required to be aware of) its ethical standards.

Aside from the compulsory ethics component, the content of the remaining nine hours of mandatory CLE is determined by the GBA in consultation with a range of international partners who have the capacity to offer training assistance. These partners include the American Bar Association Central European and Eurasian Legal Initiative (ABA CEELI), the United Nations Development Project (UNDP), the Norwegian Mission of Rule of Law Advisers to Georgia (NORLAG) and the EU.

As the only external organisation fully accredited by the GBA to design and run its CLE training courses, ABA CEELI is currently providing training on a range of skills identified as being a priority for criminal advocates; these include basic trial skills, forensics, legal writing and the examination of expert witnesses. It is also providing specific training on the CPC. Since the summer of 2010, ABA CEELI has provided training to between 1,800–1,900 advocates on the CPC, to 1,500 in basic trial skills and to a further 850 in examining an expert witness. Classes have been well received and standards and levels of application exhibited by advocates are generally reported to be good.

The delegation learned from the MoJ of efforts being carried out within the framework of the EU-funded and CoE-implemented project 'Enhancing Judicial Reform in the Eastern Partnership Countries', whereby CoE experts are preparing a set of recommendations aimed at raising

the professional standards of lawyers.[37] According to the MoJ, its representatives, as well as representatives of the GBA, have been actively engaged in the project, which is intended to produce recommendations on a range of key areas including the role of the Bar, entry requirements, CLE training and disciplinary standards.

The MoJ also informed the delegation that in 2011 the government's Criminal Justice Reform Council (CJR Council) redirected €120,000 in EU donor funding in order to support institutional capacity building within the GBA. Additionally, as part of a new Criminal Justice Budgetary Support programme signed with the EU in February 2012, the CRJ Council has agreed to allocate technical assistance to the GBA in a similar manner as is currently provided to the MoJ and the Ministry of Corrections and Legal Assistance (MCLA).[38]

The efforts of international donors to work with GBA to provide a more comprehensive programme of CLE are encouraging, but much remains to be done to improve the standards of professional training within the Bar. **The IBAHRI therefore recommends that, with assistance from its international partners, the GBA should increase its efforts to ensure that its programme of CLE is sufficiently rigorous to promote public confidence in the competence of advocates. In this regard, resources should be found to enhance access for advocates to a legal database so that they can remain up-to-date with the latest legal developments in their field of expertise.**

Interaction with other justice sector institutions

The delegation was also made aware of previous efforts to carry out joint trainings for judges, prosecutors and defence advocates on topics of common concern, and specifically in relation to the CPC.

However, when the delegation discussed the prospect of such initiatives taking place, members of both the Prosecutor's Office and the judiciary voiced concerns that these might be misused by advocates to try and discuss individual cases, rather than constructively discussing issues of mutual concern. No doubt such issues can be addressed and the parameters of discussion can be agreed before such joint activities take place.

The delegation also heard from the Deputy Chief Prosecutor that the Prosecutor's Office has previously offered to make its training facilities and resources available to the GBA in order to assist in increasing the level of expertise of the GBA membership. According to the Prosecutor's Office, this offer was refused at the time by the GBA. However, the Deputy Chief Prosecutor confirmed to the delegation that the offer remains open if the GBA does make a request for assistance.

Although the relationship between the GBA and the other justice sector institutions is strained in some areas, the delegation was pleased to learn that representatives of the GBA nonetheless actively participate alongside judges and prosecutors in a range of legislative working groups established by the government's CJR Council, as well as in workshops and conferences organised by the CJR Council.[39] **The GBA, the judiciary, the Prosecutor's Office and the MoJ should continue and expand**

37 MoJ, 'Efforts Undertaken by the Government of Georgia in relation to lawyers', 2. Internal document provided by MoJ in an email to the IBAHRI dated 21 May 2012.

38 *Ibid.*

39 *Ibid.* In recent months, GBA representatives have sat on the Criminal Legislation Working Group, the Penitentiary Working Group and the Legal Aid Working Group.

their participation in joint seminars, working groups and other collaborative activities. Given the rapid pace of change in Georgia's legal system, and the many problems described in this report, there is no shortage of topics to discuss.

3.3 Differences of experience and opinion within the Bar

The problems that some advocates in Georgia have experienced in their practice have not been universal across the profession. Some complaints seem to arise only in criminal cases, which, for these purposes, include proceedings under the AOC. Others, however, are not so limited.

One of the key complaints conveyed to the delegation by advocates and other interlocutors was that there is a systemic failure to ensure equality of arms in criminal proceedings. This complaint is addressed in more detail in Chapter Five. With one exception, however, the delegation did not hear similar concerns in relation to civil proceedings. The exception relates to civil disputes where a private party is in dispute with the state, for instance over land interests. It was suggested that in such cases, judges are more likely to find in favour of the state party, irrespective of the merits of the case. The delegation was unable to investigate the substance of that complaint. However, a tendency to rule in favour of the state in such claims would be consistent with concerns about preferential treatment of prosecution lawyers in criminal proceedings.

Another key complaint made by advocates and other interlocutors was that advocates have not been given adequate access to clients held in places of detention, or have otherwise found that their work has been obstructed in such places. This is dealt with in Chapter Seven. Obviously, this relates only to those engaged in criminal practice.

A third key complaint relates to the prosecution of advocates in relation to matters that were, at most, disputes over allegedly unethical professional conduct. This is dealt with in Chapter Eight. The information provided to the delegation suggests that this problem affects advocates in both criminal and civil practice. But whilst by any standard this is a very serious issue, it has only directly affected a small minority of advocates in Georgia. Most advocates have neither been prosecuted nor threatened with prosecution.

Some of the concerns conveyed to the mission delegates have therefore cut across different areas of professional practice. Most, however, were raised by those in criminal practice. But even among criminal practitioners, the problems described above have not been universal. The issues facing practitioners are serious and widespread, but some criminal practitioners have clearly had much worse experiences than others.

There are also sincere differences of opinion as to the causes of these problems. Some practitioners expressed the view that their bad experiences were the result of a deliberate and systematic attempt by the state to undermine the Bar as an independent profession. Others took the view that some of the problems encountered by their colleagues were problems of their own making, for instance, because they were lacking in competence, insufficiently prepared, unfamiliar with the latest legal developments or behaving unethically. Some advocates also criticised their colleagues for taking their complaints too quickly to the media rather than pursuing them through official channels.

As between these differences of opinion within the Bar, the delegation cannot say that one or another is correct. In reaching its findings and making its recommendations, the delegation has tried to take this range of opinions into account.

However, as will be clear from this report, many advocates in Georgia have encountered very serious problems when trying to perform their professional duties.

To some extent, these differences of experience and opinion are reflected within the leadership of the GBA. Its Executive Council is by no means rigid or monolithic in its outlook. In the relatively short period of its operational existence, the Chairman of the GBA has been an outspoken champion for the Bar as a professional institution. He has also led interventions in a number of urgent cases to protect the basic rights of individual members of the Bar. Both in Georgia and abroad, he has made some trenchant public criticisms of government and state institutions. Whilst recognising the difficulties of asserting a role for the Bar in a time of rapid change, some interlocutors expressed a concern that such criticisms were unduly political in nature. Other members of the Executive Council have adopted a somewhat more conciliatory stance.

The delegation was impressed by the open way in which members of the Executive Council expressed differences of opinion about the extent and causes of the problems facing the Bar in Georgia. A willingness to engage in dialogue, both within the Bar and with other institutions, will be crucial as the GBA continues to consolidate its authority and status in Georgia.

3.4 Professional ethics

The delegation heard widespread concern over the extent to which the principles of professional ethics were understood or observed in practice in the work of the Bar. As noted above, this may be a direct consequence of the fact that this topic is neither taught nor examined as part of training for the Bar.

The Law on Advocates makes the GBA responsible for determining the ethical standards applicable to its members. The standards are set out in the GBA's Ethics Code adopted in 2006.[40] The Ethics Commission of the GBA is empowered under the Law on Advocates to examine and adjudicate on alleged breaches of professional standards by its members.[41] It can consider complaints from a range of sources, including clients, fellow advocates, prosecutors and judges. The Law on Advocates also prescribes a range of disciplinary sanctions, including disbarment, for any breaches that are upheld.[42]

Although the Ethics Code was adopted in 2006, detailed provisions on disciplinary proceedings were only adopted in 2010, in the GBA's Regulation on Disciplinary Proceedings against Advocates. Until then, members of the public and even members of the GBA were largely unaware of the adjudicatory and disciplinary function provided by the Ethics Commission. From 2006 to 2010, the Ethics Commission received only 100 complaints. Since 2010, it has investigated more than 250 complaints. Nearly 50 applications were received in the first four months of 2012 alone.

40 Available at: **http://gba.ge/new/index.php?a=main&pid=308&lang=eng** [accessed 2 August 2012].

41 See n 33 above, Arts 28.7.

42 *Ibid*, Art 34.

Of the 250 complaints that have been investigated by the Ethics Commission since 2010, 25 were deemed to be well founded. In five of those cases the advocate in question appealed but the complaint was upheld in each case. The most common complaints were that the advocate had failed to act in the best interest of the client, there was a conflict of interest or that the advocate had been in contempt of court. In the light of the extensive case law that the Ethics Commission has developed through its adjudication of these 250 cases, the GBA is currently working to prepare an updated and amended version of the Ethics Code, which is expected to be put to the GBA General Assembly for approval later this year. The amendments were anticipated to harmonise the GBA's Ethics Code with relevant European standards.

The Ethics Commission welcomed the introduction of mandatory ethics training as part of the GBA's CLE programme, referred to above, but agreed that more was required. As matters stand, because of the absence of any deep-rooted culture of ethics within the legal profession in Georgia, the Ethics Commission is proceeding gradually and incrementally and does not wish to undermine the acceptance of ethical standards within the profession by enforcing them with undue severity at this stage.

The delegation was very impressed with the commitment and determination of the members of the Ethics Commission (or the 'Commission') and their two support staff to work towards establishing strong ethical standards in the legal profession and to provide a coherent and effective regulatory mechanism which complainants can turn to with confidence. The Commission believes such a mechanism is developing, and, if effective, will prove a practical and far more appropriate alternative than the filing of complaints with the Prosecutor's Office.

In order to build confidence among the public, three members of the Ethics Commission are lay persons, and in cases where the Commission forms the view that there may have been criminal conduct, they refer the matter to the Prosecutor's Office. In the Ethics Commission's view, disputes over fees such as contingency fee arrangements are usually ones that can be determined on the basis of ethical principles and the many cases in which it is alleged that an advocate 'failed to act in his client's interests' are ones that can best be dealt with by the Commission.

The Ethics Commission aims to determine cases speedily, allowing one month for procedural steps to be complied with, and then hearing the case within a further three months. In reaching its decisions, and developing its own case law through the publication of its decisions, the Commission relies on legal principles established by the Constitutional Court of Georgia, the ECtHR and the UN Basic Principles.

As already stated, the delegation was impressed with the Ethics Commission's commitment. However, it is in desperate need of additional resources; its two support staff are poorly remunerated, and the Commission's unpaid members have a heavy and rapidly increasing workload to deal with. The challenge of developing coherent principles in its case law is a time-consuming one, particularly as the Ethics Commission includes a 'Guidance Note' to practitioners as an annex to some of its decisions. Because of the urgent need for the development of strong ethical standards in the Bar, and the importance of the work of the Ethics Commission at this particular time, **the IBAHRI recommends that, with support from its international partners, the GBA should provide additional resources to the Ethics Commission in order that it can make effective progress with its current programme of work.**

3.5 Advocates practising without belonging to the GBA

Membership of the GBA is a statutory requirement for members of the Bar in independent practice. However, there are some individuals who are practising as advocates despite the fact that they have either failed to join the GBA or their membership has been terminated.

Nearly 3,000 advocates had their membership of the GBA terminated between 2008 and 2011, most for failure to pay their membership fees. Although many of these individuals subsequently had their membership reinstated, the fact that advocates are practising without belonging to the GBA is obviously a serious issue. It means that advocates are operating outside the professional and ethical supervision of the GBA. If this phenomenon is not stopped, it will inevitably undermine public confidence in the profession.

An example of the problems that can arise in practice is provided in a recent ruling of the ECtHR. In *Bekauri v Georgia*,[43] the lack of professionalism on the part of the applicant's advocates was condemned in exceptionally strong terms and resulted in the application being dismissed. Of the three Georgian advocates in question, only one was a member of the GBA.[44] **It is recommended that the GBA Ethics Commission take firm action against those who continue to practice as advocates despite not being members of the GBA.**

3.6 Conclusion

The GBA is a young organisation, operating in an environment where there is no tradition of a strong independent Bar, and where the process of reform over the last decade has been slow and uneven. However, the Chairman, Executive Council and Ethics Commission of the GBA are all working to improve the standing of the Bar and to raise professional standards and ethical conduct amongst its members.

Nonetheless, the GBA and its members continue to face considerable challenges. While there are clearly very many exceptional and committed individuals practicing at the Bar, there is a general consensus that the Bar exam does not provide an adequate assessment of competence for the profession and that provision of CLE requires additional attention. The Ethics Commission of the GBA is now operating and is doing excellent work, but it lacks resources. **The IBAHRI recommends that the GBA continue its work to raise professional standards and to increase public confidence in the competence of advocates. To this end, the government and international partners should provide all possible assistance in ensuring that resources are available to the GBA for improving professional and ethical standards.**

The IBAHRI welcomes the fact that members of the GBA, including those within its Executive Council, are able to express a range of opinions on how the GBA should approach the task of upholding its members' rights and developing the profession. However, the GBA leadership must continue to work on balancing the need to champion the integrity of the Bar with the need to engage in a constructive dialogue with all parties. To this end, **the IBAHRI suggests that the GBA and the Prosecutor's Office consider a programme of regular meetings to discuss matters of mutual interest.**

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43 *Bekauri v Georgia*, App No 14102/02 (ECtHR 10 April 2012), para 24.

44 Statement of the GBA Executive Board, **http://gba.ge/new/index.php?a=main&pid=685&lang=eng** [accessed 2 August 2012].

Just as the GBA needs to follow a path of constructive engagement, the judiciary and prosecution must also increase professional interaction and cooperation with the GBA. **The fact that the CJR Council is now actively inviting members of the GBA to participate alongside members of the judiciary and Prosecutor's Office in a range of working groups is a very positive step. It should be continued and expanded.** Joint participation in these working groups will assist in promoting the levels of mutual respect, cooperation and understanding which are necessary for the proper and effective administration of justice.

Chapter Four: Judicial Independence

The existence of independent and impartial tribunals is essential to the proper functioning of both the judicial system and the Bar. Judicial independence requires both institutional independence from interference or undue influence exerted by institutions of public authority, as well as the personal independence of individual judges from interference or undue influence exerted by officials or superior judges.

The independence of the judiciary is formally guaranteed by Article 84 of the Georgian Constitution, and recent years have seen the introduction of an impressive range of legislative and institutional reforms intended to strengthen judicial independence in the area of appointments, discipline and tenure.[45] Nonetheless, the delegation heard from representatives of the international community, civil society and numerous advocates that the judiciary is not yet a sufficiently open institution and remains vulnerable to political interference, particularly in criminal and administrative cases.[46]

Particular concern has been raised in cases where the defendants, whether because of their political or other public activities, are viewed as being opponents of the government. For example, a report published in 2011 by the Georgian Young Lawyers Association (GYLA) concluded that many of the prosecutions that took place following anti-government demonstrations in 2009 may have been politically motivated and that the judiciary had failed in its responsibilities both to control the arbitrary actions of the investigating authorities, and to properly scrutinise the strength and validity of the evidence presented by the prosecution.[47]

4.1 Judicial appointments

In order to protect judicial independence, judges must be appointed through strict selection criteria in a transparent manner by an independent authority. Whilst international standards do not prohibit judicial appointments being carried out by the executive or legislature, it is preferable that selection be entrusted to an independent body so that political considerations do not influence proceedings.[48] The European Charter on the Statute for Judges further stipulates that: 'In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers, within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.'[49]

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45 CoE Commissioner for Human Rights, 'Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Georgia from 18 to 20 April 2011', CommDH(2011)22, para 24, **https://wcd.CoE.int/ViewDoc.jsp?id=1809789&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679**.

46 *Ibid*, para 27.

47 GYLA, 'Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive' (GYLA, Tbilisi 2011), 98, also available at **www.gyla.ge/attachments/964_savaraudod%20politikuri%20motivaciis%20saqmeebi_Full_ENG.pdf**.

48 International Commission of Jurists, 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioner's Guide No.1' (2nd edn, ICJ, Geneva 2007), 4, available at: **www.icj.org/dwn/database/PG-J&L-ENG.pdf**.

49 **http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf European Charter on the Statute for Judges**, 8–10 July 1998, para 1.3.

Composition of the High Council of Justice

As the authority responsible for the administration of the judicial system, the HCJ has exclusive authority to appoint and dismiss judges from district and appellate courts and for the conduct of disciplinary proceedings for members of the judiciary.

The power to appoint and dismiss judges was previously exercised at the sole discretion of the President of Georgia, who acted as Chairman of the HCJ before its reform in 2007. The transfer of this competence to the newly independent HCJ is recognised as being a significant step towards establishing an independent judiciary.[50]

The HCJ is now chaired by the Chairman of the Supreme Court. Eight members of the judiciary, independently elected to the HCJ by the Conference of Judges, constitute a majority on the body.[51] The Chairman of the Supreme Court – himself appointed to that post by the President – decides which judicial candidates are eligible to be put forward for election. In additional to the eight elected members of the HCJ, four members are appointed by Parliament (with the Chair of the Parliamentary Legal Affairs Committee serving ex officio) and two are appointed by the President. At least one of the parliamentary appointees must be a representative of the opposition.[52]

The delegation was informed of a proposed amendment to the legislation governing the composition of the HCJ, which would provide, amongst other reforms, that the Presidential appointees to the HCJ should be barred from holding membership of a political party or of participating in political activities.[53] However, concerns were raised during the delegation's visit that the Head of the Supreme Court retains the sole authority to nominate members of the judiciary for election to the HCJ.

Selection and appointment for judicial office

Under provisions set out in the Law on Common Courts, candidates for judicial office must be at least 28-years-old, have worked in the legal profession for at least five years, and have passed a judicial qualification exam having followed a full course of study at the High School of Justice.[54] They are then eligible to apply to the HCJ for appointment to judicial office. The criteria for selection, as set out in the 2007 HCJ By-Law on Competition for Judges, include the candidate's level of performance in the qualification exam; their professional, analytical and courtroom skills; and their personal traits and moral reputation. The competition process also includes a one-hour interview.

Although the by-law did introduce an element of objectivity into the assessment of candidates, some observers have noted that the selection process, particularly the oral interview, remained subjective and lacking in transparency.[55] These concerns were echoed by the CoE's Commissioner for Human Rights in April 2011.[56]

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50 CoE Commissioner for Human Rights (n 46) para 32.

51 The Conference of Judges is the self-governing organ of common court judges, comprising judges of the Supreme Court, Courts of Appeal and District Courts.

52 See generally HCJ website: **http://hcoj.gov.ge/en/about/organizational-charter/sabchos-shemadgenloba** [accessed 26 July 2012].

53 *Ibid.*

54 Law on the Common Courts, Art 34.

55 American Bar Association, Rule of Law Initiative, 'Judicial Reform Index for Georgia', April 2008, 16, at: **http://apps.americanbar.org/rol/publications/georgia_judicial_reform_index_volume_ii_2009_en.pdf**.

56 See n 46 above, para 32.

Concerns over lack of transparency have also been raised over the selection process by which candidates are admitted to the High School of Justice. Although the eligibility criteria for admission to the School are clearly set out in the Statute on the High School of Justice[57] the CoE found that the statute was 'unclear on how each criteria influences the final decision, and how some of these criteria can be measured.'[58] It therefore recommended that the Statute of the High School of Justice should be re-drafted to allow more transparency in the process.

Some international observers have voiced concerns that both the presidential and parliamentary appointees to the HCJ still retain the ability to block judicial appointments by exercising their right of veto.[59] However, as part of a package of legislative reforms submitted to the parliament for approval in 2011, it is now proposed that this veto power should be removed, and that candidates for the judiciary can instead be appointed by a majority vote.[60]

Such proposals are welcome, and **the IBAHRI recommends that the HCJ take additional steps to increase the transparency and objectivity of the judicial selection and appointment process, including with regard to the entry procedures for the High School of Justice.**

4.2 Discipline, tenure and transfer

To protect judicial independence, international standards provide that all decisions regarding the disciplining, suspension or removal of judges must be the subject of an independent and impartial review, with the relevant grounds and procedures clearly established.[61]

In Georgia, disciplinary proceedings against the judiciary are regulated by the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts (the 'Law on Disciplinary Responsibility'). This law was substantially amended in 2007 in response to concerns raised by the Venice Commission that: the definition of a 'disciplinary violation' contained in the law was so broad as to threaten judicial independence; the provisions requiring dismissal of judges for some lesser violations were disproportionate; and that the procedures governing the removal of judges by the HCJ were vague and unclear.[62]

The 2007 amendments to the Law on Disciplinary Responsibility succeeded in defining more clearly the scope of disciplinary violations covered by the law, and removed the provisions which made the incorrect interpretation of the law by judges a disciplinary offence.[63] Some observers noted at the time that the 2007 amendments did not fully address the concerns raised by the Venice Commission over the lack of transparency in the disciplinary process.

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57 Statute on the High School of Justice, Art 8. Specified criteria include: a) The results of the qualifying examination; b) moral character; c) personal qualities; d) professional skills; e) qualifications; f) ability to prove and express; and g) analytical-logical thinking and decision-making skills.

58 CoE Directorate General of Human Rights and Rule of Law, 'Enhancing Judicial Reform in the Eastern Partnership Countries: Report of the Working Group on Professional Judicial Systems – Project Report: Training of Judges', Strasbourg May 2012, 30, at: **www.CoE.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/Eastern%20Partnership_Report%20on%20Training%20of%20Judges_English_Final%20version_15%2005%202012.pdf**.

59 See n 46 above.

60 MoJ, 'Reforms in Judiciary', 2. Internal document reporting details of proposed legislative changes expressly intended to strengthen the independence of the judiciary provided by MoJ to the IBAHRI in an email dated 21 May 2012.

61 UN Basic Principles on the Independence of the Judiciary, Principles 17–20, **www2.ohchr.org/english/law/indjudiciary.htm** [accessed 26 July 2012].

62 European Commission for Democracy through Law, 'Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia', Venice 16–17 March 2007, para 36, at: **www.venice.coe.int/docs/2007/CDL-AD(2007)009-e.asp**.

63 See n 56 above, 39.

The most recent amendments to the Law on Disciplinary Responsibility, which came into force in March 2012, have abolished the previous requirement for the entire disciplinary process to be confidential. All decisions of the HCJ's Disciplinary Panel should now be published in full on the HCJ website, albeit with all personal identifying data removed.[64]

Tenure

International standards require that judges, whether appointed or elected, shall have guaranteed tenure until either a mandatory retirement age or the expiry of their term of office.[65] Recent amendments to the Georgian Constitution (adopted in 2010 and due to come into force in 2013) now guarantee the principle of life-long appointments for judges.[66]

Transfer

The delegation was informed that the previously existing practice, whereby the HCJ was able arbitrarily to order the transfer of judges from one location to another has now been abolished. A number of interlocutors claimed that the HCJ's abuse of this practice had become problematic, with transfers being imposed on judges without reasons being given, often for an indeterminate period to remote parts of the country, as a means of 'punishing', or forcing the resignation of a judge who had incurred the displeasure of the authorities.

Under the revised procedures governing the relocation of judges, the delegation heard that the HCJ must now produce a written justification for any proposed transfer, and must consult with the judge in question before any decision is reached. The judge is also entitled to appeal any decision ordering his transfer, through a process of judicial review.

4.3 Conclusion

Although independent from external interference, Georgia's judiciary is not yet a sufficiently open or assertive institution. According to one recent survey of public opinion on the legal system, carried out with the support of United States Agency for International Development (USAID), only one third of the Georgian population believe the courts to be fair and independent, and overall opinion of the courts' trustworthiness is 'characterised by uncertainty and division'.[67]

The delegation noted many areas in which the government and the judiciary have put in place positive measures to strengthen judicial independence. Wide-ranging reforms have been undertaken in the areas of judicial appointments, discipline and tenure with considerable international and domestic resources and support dedicated to this task. While welcoming these measures, **the IBAHRI recommends that additional steps be taken by the HCJ to increase transparency and objectivity in judicial selection and appointment procedures, including in relation to entry procedures to the High School of Justice**.

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64 Law of Georgia amending the Law of Georgia on Disciplinary Liability of and Disciplinary Proceedings against judges of Georgian Common Courts (2012) Art 30.

65 See n 62 above, Principle 12.

66 Government of Georgia, 'National report submitted in accordance with paragraph 15a of the annex to Human Rights Council Resolution 5/1', 8 November 2010, UN Doc A/HRC/WG.6/10/GEO/1, 5, **www.upr-info.org/IMG/pdf/A_HRC_WG-6_10_GEO_1_E.pdf**.

67 Caucasus Research Resource Centers, 'Attitudes towards the Judicial System in Georgia', 24 January 2012, 20, **www.ewmi-jilep.org/images/stories/NewsFiles/crrc_report.public%20attitudes%20judicial%20system%20eng.pdf**.

Discarding the legacy of Soviet trial-culture in Georgia will naturally take time. Constant monitoring, and, above all, sustained political will, are now of crucial importance in order to ensure that the legislative and institutional reforms undertaken to date lead to a stronger judiciary.

Chapter Five: Equality of Arms

The delegation noted a widespread perception, by no means limited to members of the criminal Bar, that a marked imbalance exists in the way the prosecution and defence are treated by Georgia's judiciary. This failure to respect the principle of equality of arms was reported to have had a detrimental effect on the ability of advocates to represent their clients effectively in Georgia's adversarial criminal justice system.

Although not a definitive indication of such an imbalance, many observers have noted Georgia's extremely high conviction rates. The IBAHRI was also informed that in 2011, only 2.3 per cent of those defendants whose cases reached trial were acquitted by first instance courts. In 2010, the rate of acquittal in such cases was even lower, at 0.2 per cent.[68] This chapter examines the concerns reported to the delegation in this area, in particular the consideration of defence and prosecution motions by the judiciary. Other related fair trial concerns are also reviewed, including the prosecution of administrative offences.

5.1 The principle of equality of arms: jurisprudence of the ECtHR

As a member of the CoE, Georgia is bound by the provisions of the ECHR, which guarantees, at Article 6, the right to a fair trial in criminal and civil proceedings. In its extensive jurisprudence in this area, the ECtHR has explained that the principle of equality of arms is one of the features of the wider concept of a fair trial. It implies that 'each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[69] In determining whether the principle has been violated, 'importance is also attached to appearances as well as to the increased sensitivity to the fair administration of justice'.[70]

In this context, the ECtHR has also emphasised the overlapping right to adversarial proceedings. This includes 'the opportunity for parties to a criminal or civil trial to have knowledge of, and comment on, all evidence adduced or observations filed […] with a view to influencing the court's decision.'[71] Once again, in determining a violation of the right to adversarial proceedings, the ECtHR attaches particular importance to the appearance of the fair administration of justice.[72]

In its more recent judgments, the ECtHR has reiterated that the concept of a fair trial 'includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial' and that both prosecution and defence 'must be given the opportunity to have knowledge of and to comment on the observations filed and evidence presented by the other party'.[73]

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68 Figures provided by the MoJ in an email to the IBAHRI dated 31 May 2012.

69 *De Haes and Gijsels v Belgium*, App No 19983/92 (ECtHR, 24 February 1997).

70 *Bulut v Austria*, App No 17358/90 (ECtHR, 22 February 1996).

71 *Borgers v Belgium*, App No 12005/86 (ECtHR, 30 October 1991).

72 *Ibid.*

73 *Abbasov v Azerbaijan*, App No 24271/05 (ECtHR, 17 January 2008).

5.2 Consideration of defence and prosecution motions

The delegation heard from several sources that judges were far more likely to approve procedural motions put forward by the prosecution than those of the defence.

According to a 2012 court monitoring project undertaken by the GYLA, in the 66 pre-trial hearings monitored by the organisation from October to December 2011, *all* of the prosecution motions related to the admissibility of evidence were granted by the presiding judge, whereas the only defence motions granted were those agreed to by the prosecution.[74] Although the prosecution appeared to be far more proactive in making procedural applications in these pre-trial hearings (GYLA noted that the defence only challenged six out of the 66 motions filed by the prosecution), this did not detract from GYLA's overall conclusion that the courtroom decision making of judges 'suggested a bias in favour of the prosecution'.[75]

Similarly, in applications for pre-trial detention – where the CPC stipulates that such 'preventive measures' should only be applied in exceptional circumstances[76] – the delegation also heard that around 70 per cent of defendants in criminal cases are made subject to pre-trial detention. Such detentions are frequently justified solely on the basis of an unsupported assertion by the prosecution that detention is necessary to prevent the defendant absconding or committing additional offences.

When the delegation put these reports to members of the judiciary, it was suggested that any difference in the consideration given to the prosecution simply reflected defence advocates lack of familiarity with the requirements of the CPC as compared to the prosecution. Defence advocates were also viewed to be generally less well prepared when presenting their client's case to the court. By rejecting what it considered to be inappropriate or incorrect motions, the judiciary therefore hoped to encourage the defence Bar to raise its standards.

However, the delegation also heard from highly qualified advocates who themselves had not had motions granted by the courts.

As part of its fundamental responsibility to uphold the principle of equality of arms, **the IBAHRI recommends that judges in criminal proceedings should afford the same consideration to defence motions as to prosecution motions. Any decision to prefer one motion over another should be properly reasoned.**

Judicial interpretation of rule of procedure relating to collection and seizure of evidence

Several defence advocates who spoke to the delegation reported that judicial interpretations of the rules of procedure which have the effect of limiting their right to gather evidence and present it to the court. As noted above, CPC asserts the principle of equality of the parties in adversarial proceedings.[77] Article 39.1 of the CPC also guarantees the right of defendants to collect evidence personally or through their counsel.

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74 GYLA, 'Tbilisi City Court Criminal Chamber Monitoring Report', April 2012, 5, **http://gyla.ge/attachments/1336_monit_en_1%20-%20october-december%202011.pdf**.

75 *Ibid*, 9.

76 CPC, Arts 198 and 205.

77 CPC, Art 9.

Where the defence can collect evidence relevant to their case without the court's intervention, no doubt they will do so. But where defendants or their counsel are unable to collect evidence themselves, the defence can file a motion with the judge 'requesting the issuance of the relevant order' (Article 39.2). The most obvious reason why the defence may need the court's intervention is where a third party holds evidence relevant to the defence case but is not willing to disclose it voluntarily.

The nature of the 'relevant order' is not spelled out in the CPC, but it is likely to be either an order to a third party to disclose evidence or, failing voluntary disclosure, an order to law enforcement officials to seize the evidence. In any event, the right to obtain evidence relevant to the defence, if necessary with the help of a court order, is an obvious and important feature of any fair criminal justice system.

Unfortunately, the important procedural safeguards in Article 39 are not being implemented in practice. According to a number of interlocutors, defence motions to secure relevant evidence are being refused under Article 111.2 of the CPC.

Article 111 deals with searching for and seizing evidence, rather than collecting it. Here, the rules are formulated rather differently. The general rule is that the prosecution and defence have equal rights and obligations during the conduct of investigative actions (Article 111.1). This, however, is qualified by an exception in Article 111.2, which states that: 'the defence is not authorised to submit a motion to a court for conduct of the following investigative actions: a) covert investigative actions; b) search; c) seizure.'

It is not surprising that the courts will not authorise defendants and their advocates to conduct covert investigations or to seize evidence themselves from those who are reluctant to provide it. However, Article 111.2 is being interpreted by at least some judges in a way which negates the right to collect evidence under Article 39. Judges are refusing to make orders requiring disclosure of evidence relevant to the defence case on the basis that the defence are, in effect, seeking an order to seize evidence, which breaches Article 111.2.

On the face of it, this is absurd. Yet the delegation was informed that defence applications to compel disclosure of crucial evidence – such as CCTV recordings and telephone records – are routinely refused on this basis. **The IBAHRI therefore recommends that the judiciary adopt commentary or guidance on the interpretation of Articles 39 and 111 of the CPC. These provisions must be interpreted in a way which gives practical effect to the right of the defence to collect evidence relevant to their case, if necessary in accordance with a court order compelling disclosure of such evidence.**

Consideration of evidence presented by expert witnesses

Some interlocutors also expressed concerns over the weight given to expert witnesses in trial proceedings. Although the CPC provides that such experts must be impartial,[78] the majority of experts are employed by the National Forensic Bureau, established in 2008 as part of the MoJ.[79] Several defence advocates therefore questioned the professional independence of these experts, and also expressed the view that the court tends to gives greater credence to the views of these 'official' experts rather than those of external expert witnesses who might be perceived as being more institutionally independent.

5.3 Selection and training of prosecutors

As with other branches of the public administration, the Prosecutor's Office has been drastically streamlined as part of institutional reforms instituted by the current government, with the number of prosecutors having been reduced by almost two thirds; from 1,596 in 2003 to 591 today.[80] By comparison, GBA membership currently stands at approximately 3,700.

The selection procedures implemented by the Prosecutor's Office, combined with the extensive training opportunities made available to its relatively small cadre of prosecutors, has served to ensure that the Prosecutor's Office has established itself as the dominant force within the adversarial system.

Candidates who wish to serve as prosecutors are initially screened through a series of written tests and interview, and if successful at this stage, must then undertake an internship of between six and 12 months in a prosecutor's office, after which a decision is taken on whether they are competent to practice. Of those currently serving as prosecutors, 75 per cent joined the service as newly qualified lawyers.

Prosecutors undergo a mandatory programme of CLE which is the most rigorous and intense of those offered within the various branches of the legal profession in Georgia. Every prosecutor undertakes 70 hours CLE per year. In 2011, prosecutors were trained and assessed on subjects as diverse as case management; communication with victims and witnesses; and the effective use of PowerPoint presentations.

In addition to this process of continuous assessment, the Prosecutor's Office appears committed to enforcing its own code of ethics and, in particular to prosecuting any violation of the law by a member of the service. The delegation was informed that 20 prosecutors had so far been convicted of minor offences in 2012.

The advantages accruing to the Prosecutor's Office – by virtue of its small size, its competitive recruitment procedures and its highly effective training and assessment programme – are significantly enhanced by the fact that the Prosecutor's Office has been a focus of donor attention. It is extremely well-funded and resourced, particularly in comparison to the relatively limited funding so far made available to the GBA in particular, and to defence advocates in general.

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78 CPC, Art 12.

79 International Observatory for Lawyers, 'Report on the Georgian Mission of the International Observatory for Lawyers', June 2011, 12, at: **http://gba.ge/new/admin/editor/uploads/files/ENG/news/Report%20on%20the%20Georgian%20Mission%20of%20the%20International%20Observatory%20for%20Lawyers.June%202011.pdf**.

80 Meeting with the Deputy Chief Prosecutor, 26 April 2012.

Prosecutors' salaries have increased from between US$15–60 per month in 2000, to between US$500–2000 per month in 2012,[81] making jobs within the Prosecutor's Office highly sought after by the most capable law graduates.

The delegation also learnt that all prosecutors' offices are equipped with modern computer and IT equipment, and are now connected to an electronic case-management system. Prosecutors have also been instructed by the Chief Prosecutor to make use of PowerPoint presentations when presenting their cases at trial.

While the Prosecutor's Office can hardly be criticised for pursuing aggressive and effective prosecutions, it was clear to the delegation that the high level of professionalism and preparedness on the part of the prosecution has a marked impact on the way in which their arguments are viewed in the courtroom, and could be said to reinforce the tendency of the trial judge to look more favourably on the prosecution case.

In the light of the resource and training advantages accruing to the prosecution**, the IBAHRI recommends that the judiciary should be more proactive in ensuring that defendants in criminal proceedings are afforded a fair trial.** The judiciary's compliance with its duty to uphold the right of the defendant to a fair trial should not depend in any way on perceived deficiencies in the conduct of the defence case by the defence advocate when compared to that presented by the prosecution.

5.4 Other fair trial concerns

Judicial reasoning

The delegation repeatedly heard how many court decisions contain inadequate reasoning, further fuelling fears about judicial deference towards the prosecution. Numerous individuals confirmed that in both criminal and administrative trials the delivery of poorly reasoned or formulaic judgments, often relying only on police evidence, is still widespread.

Failure to explain the basis on which a decision has been reached has been a consistent subject of attention by the Public Defender, who noted in his 2010 report that inadequate reasoning of interim and final judicial decisions persisted as a 'systemic problem'.[82] In his most recent Annual Report, the Public Defender has continued to highlight problems with respect to inadequate judicial reasoning. Based on an analysis of 169 hearings concerning administrative offences during 2011, he concluded that most rulings in such cases were template-based and that many contained no, or inadequate, reasoning.[83]

The problem of inadequate judicial reasoning has also been highlighted in several recent reports by international experts.[84] It remains an area of focus for those international donor organisations involved in providing ongoing training and capacity-building programmes to the judiciary in Georgia.

81 *Ibid.*

82 See n 10 above, 149.

83 See n 19 above, 14.

84 See n 46 above, para 28.

In this context, the HCJ informed the delegation that the judiciary has been working intensively with expert judges from several Western countries to improve the reasoning skills of Georgian judges, and that they expect to see improvements in this area as individual skills and institutional awareness develop. The Public Defender also informed the delegation that some improvements had been seen during 2011 and that steps were also being taken by the HCJ to implement his recommendations on judicial practice in this area.[85]

However, the inadequacy of judicial reasoning remains an area of concern, **and the IBAHRI recommends that judges should take immediate steps to ensure that their judgments are individually and cogently reasoned.**

Appeals

According to the latest report on Georgia by the UN Working Group on Arbitrary Detention, an estimated 90 per cent of decisions by upper courts confirm the decisions made by the lower courts.[86]

Several advocates interviewed by the delegation expressed their concern with the apparent unwillingness of the judiciary to properly consider an appeal on its merits. Many also saw the process of appealing through the national courts as a mere formality to be followed prior to lodging a case with the ECtHR, rather than as a mechanism that would hold out any realistic prospect of the original decision being overturned.

The delegation was also made aware of concerns that appeals based on procedural violations at first instance are routinely ignored by the Courts of Appeal. For example, one advocate stated that when he lodged an appeal based partly on the fact that the trial judge had denied him the right to cross-examine a witness, the application was dismissed without reference to that element of his appeal.

For those advocates who wish to appeal a court decision on behalf of their clients, the problems caused by the absence of a reasoned judgment are often compounded by their inability to obtain transcripts of court proceedings. The delegation heard that, although audio recording devices have now been installed in all courts, and that transcripts of court proceedings are required to be made available to the parties on request, defence advocates who request copies of those transcripts in criminal or administrative cases have, on numerous occasions, been informed by the court that the recording equipment was 'faulty' and therefore no transcripts were available.

The Administrative Offences Code

As discussed earlier in this report, the AOC currently in force in Georgia allows individuals to be prosecuted for a range of misdemeanours and minor public order offences; if found guilty, individuals are subjected either to fines or to a period of administrative detention (imprisonment).

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85 See n 19 above, 157: 'It is recommended that general courts, when rendering interim or final decisions, provide adequate reasoning in terms of the facts and the law'.

86 UN Human Rights Council, 'Report of the Working Group on Arbitrary Detention, Addendum: Mission to Georgia', 27 January 2012, UN Doc A/HRC/19/57/Add.2, 9, **http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/102/62/PDF/G1210262.pdf?OpenElement**.

Where a person is brought before the courts under the AOC, the fair trial safeguards of Article 6 of the ECHR must be fully respected. These include the right to 'adequate time and facilities for the preparation of [the] defence.' The ECtHR has stated that this requires that an accused must have the opportunity to organise his defence without restriction of the possibility to put all relevant defence arguments before the trial court, and be able to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings.[87]

Article 6 of the ECHR also requires that a reasoned decision be given by the court which addresses all relevant arguments advanced by the defence. In *Fomin v Moldova*, where a person was found guilty under the Moldovan Administrative Code, the ECtHR held that there was a violation of Article 6 due to the lack of reasoning in the domestic court's decision.[88]

Despite the fact that those charged with administrative offences should enjoy the full scope of fair trial guarantees under Article 6 ECHR, the protections the current AOC affords are weaker or vaguer than similar safeguards contained in the CPC and fail to guarantee even basic due process rights for administrative detainees.[89]

The delegation was informed by the MoJ and others that the AOC is currently being revised and that, a second draft of the new AOC is expected to be tabled before parliament following the October 2012 parliamentary elections, but before the end of the year. In view of its deficiencies, **the IBAHRI welcomes this step and recommends that a fundamental revision of the AOC be concluded as soon as possible. Furthermore, in the interim, measures must be taken to cease violations of fair trial rights when the AOC is invoked.** An accused must enjoy full access to his or her advocate. The defence must receive full disclosure of the prosecution case and be given adequate time to prepare and present their client's defence. The courts must provide reasoned decisions when determining cases brought under AOC.

5.5 Conclusion

While the CPC provides a generally sound framework for ensuring equality between the parties, in practice, defence advocates do not enjoy equality of arms with the prosecution. Defence motions are routinely ignored by the courts and rules of procedure are interpreted in favour of the prosecution. Standards of judicial reasoning are also criticised. **To address these concerns, the CPC should be interpreted consistently with Article 6 of the ECHR. Judges in criminal proceedings should afford the same consideration to defence motions as to prosecution motions and any decision to prefer one motion rather than another should be clearly reasoned.**

For various reasons, prosecutors in Georgia are significantly better resourced and trained than the adversary they face. A high level of professionalism and preparedness has enabled the Prosecutor's Office to establish itself as a dominant force within the adversarial system and could be said to reinforce the tendency of the courts to look more favourably on the prosecution's case. Given this, **the IBAHRI recommends that the judiciary be more proactive in ensuring that defendants in criminal proceeding are afforded a fair trial.**

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87 *Moiseyev v Russia*, App No 62936/00, (ECtHR, 9 October 2008), para 220; *Galstyan v Armenia* (see n 18 above), para 84.

88 *Fomin v Moldova*, App No 36755/06, (ECtHR, 11 October 2011), para 31.

89 See n 17 above, 2.

To address concerns about the judiciary's failure to ensure due process in the prosecution of administrative offences, **a fundamental revision of the AOC should be concluded as soon as possible. The IBAHRI also urges the government to remove administrative imprisonment as a potential sentence under the new AOC.** Interim measures which guarantee the fair trial rights of those detained for administrative offences should be adopted before a revised AOC enters into force.

Chapter Six: Plea Agreements

Since its introduction in 2004, the plea-agreement system has come to dominate criminal justice in Georgia. According to the MoJ, in 2011, 87.5 per cent of criminal cases were resolved by the conclusion of plea agreements between the parties before they reach trial. [90] Numerous government officials emphasised the continued benefits of the plea-agreement system to the delegation. These were said to include the swift adjudication of cases, a reduced burden on the courts, and improved cooperation with the authorities in their implementation of the zero tolerance policy.

While it is widely acknowledged that plea agreements have been an extremely effective tool in combatting corruption and organised crime in Georgia, the delegation also learned that the manner in which the plea-agreement system has been implemented and overseen by the courts has failed to ensure the fundamental principle of fairness. As a result, and particularly given that the vast majority convictions are now achieved through plea agreements, the plea-agreement system is undermining public confidence in the administration of justice as a whole. This chapter sets out the key concerns identified by the delegation in relation to the plea-agreement system.

6.1 The role of the prosecutor

The most sustained criticism of Georgia's model of plea agreements relates to the extensive discretionary powers afforded to the prosecutor. When combined with the inability of outside observers to obtain meaningful information on the nature and content of plea-agreements, this is reported to have led to a widespread perception that the plea-agreement system allows excessive scope for subjectivity and undue influence on the part of the prosecutor.[91]

Of particular concern is that the prosecutor has complete discretion as to the length of sentence offered to the defendant as part of a plea agreement. [92] This enables him, for example, to request a sentence below the minimum established for a particular offence, a competence that many believe would rest more appropriately with the judge.[93] Conversely, on reviewing a plea agreement for approval, the judge retains no power to reduce the sentence specified in the agreement, although he may only render final judgment on the basis of the agreement if he considers the requested sentence to be 'legitimate' and based on 'irrefutable evidence […] which proves the defendant's guilt' (discussed further below).[94]

The only restrictions on the exercise of that discretion are that the prosecutor must have regard to the severity of the sentence, the degree of infringement, and considerations of public interest.[95] The delegation noted, however, that 'public interest' is not defined in the CPC, and its application in the context of determining an appropriate sentence for the purposes of a plea agreement remains ambiguous and subjective.[96]

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90 Figures provided by MoJ in an email to the IBAHRI dated 31 May 2012. This compares with 80 per cent in 2010 and 58 per cent in 2009. In the first four months of 2012, 89 per cent of cases were resolved by plea agreement.

91 Transparency International Georgia, 'Plea Bargaining in Georgia: Negotiated Justice', 15 December 2010, 17, **http://transparency.ge/sites/default/files/post_attachments/Plea%20Bargaining%20in%20Georgia%20-%20Negotiated%20Justice.pdf**.

92 CPC, Art 210.3.

93 See n 46 above, para 68.

94 CPC, Art 213.4.

95 CPC, Art 210.3.

96 See n 92 above, 7.

The CPC also allows the prosecutor to recommend the imposition of fines (along with other non-custodial penalties) as an alternative or supplementary punishment under the terms of a plea agreement. This applies even in those cases where the law does not provide that the commission of a particular offence shall be punishable by a fine.[97]

Given the historical association of plea agreements with the high-profile arrests of members of the former regime on corruption charges (and their subsequent release after agreeing to pay substantial fines by way of 'compensation') it is perhaps no surprise that plea agreements are widely viewed as instruments that allow wealthy offenders to buy their freedom, whilst at the same time enabling the state to secure substantial sums by way of direct payments into its national budget.[98]

The delegation discussed these concerns with the Deputy Chief Prosecutor and Deputy Minister of Justice during its mission. While contesting that the plea-agreement system functions either as a means for defendants to 'buy freedom', or for the state to raise revenue, it was nevertheless acknowledged that public perceptions of the system needs to be changed.

To this end, the delegation was informed that international experts are presently being consulted with a view to introducing reforms which will ensure that the system of plea agreement becomes more transparent, and that the imposition of sanctions within that system is more consistent. All plea agreements currently concluded by individual prosecutors were also now reported to be systematically reviewed and overseen by a senior prosecutor to ensure they meet the criteria required under current legislation.

6.2 The role of the judge

In parallel with concerns over the dominant role afforded to the prosecution in settling the terms of plea agreements, the delegation also heard from numerous sources that the judiciary is failing in its basic duty to uphold the fundamental principle of fairness during the plea-agreement process.

Such allegations are particularly troubling given that the defendant waives a number of fundamental rights in consenting to a guilty plea as part of a plea agreement. These include the right to give testimony and the right to trial. In such circumstances the judge has a particular responsibility to ensure that the legislative safeguards which continue to protect the rights of those entering into plea agreements are properly implemented.

On being presented with motion to render a judgment based on a plea agreement, the judge is obliged to ensure that the defendant is aware of all the legal implications of that plea agreement and of the guilty plea associated with it.[99] Amongst other safeguards, the judge must also verify that the plea agreement has been reached on a voluntary basis, and that the defendant was given the opportunity to receive qualified legal advice.[100]

97 *Ibid*, 19.

98 See n 68 above, 12.

99 CPC, Art 212.3.

100 CPC, Art 212.2.

Once he has assured himself that these fundamental safeguards have been adhered to, the judge is then obliged to examine the case materials, decide whether the evidence does in fact substantiate the guilt of the defendant, and, if so, whether the sentence proposed in the plea agreement is 'legitimate'.[101] If the judge finds that the evidence is not, on its face, sufficient to support the charges, then the judge may invite the parties to renegotiate the terms of the plea agreement. If the revised terms still fail to satisfy the court, then the case shall be returned to the prosecution.

In practice, however, international human rights experts have concluded that, when examining the terms of the plea agreement, the judge essentially relies on the evidence presented by the prosecutor. In the vast majority of cases, the demands of the prosecutor – regarding levels of sentences or of fines imposed – are therefore approved without question by the court.[102]

In this context, the delegation was informed that the EU has organised joint workshops on plea agreements for judges and prosecutors. The delegation also heard that this had, for the first time, provided an opportunity for judges to discuss with prosecutors any concerns over the content of plea agreements.

Delegates were also informed by interlocutors that in November 2011 the CPC had been amended in order to reinforce the requirement that judges must properly consider aspects of fairness when reviewing plea agreements.[103] However, the impact of this amendment remains unclear. When questioned by the delegation as to whether the judiciary was obliged to consider whether the sentence recommended as part of a plea agreement was fair to the defendant, one senior member of the judiciary responded that if the terms of the agreement were acceptable to both parties, then the sentence was, by definition, 'fair'.

In the light of the concerns above, and given their overriding duty to afford defendants a fair trial, **the IBAHRI recommends that the judiciary should take a more proactive approach to plea agreements. In particular, judges should not approve a plea agreement where the prosecution case does not appear to support it.**

6.3 The ethical dilemma of the defence advocate

Defendants may choose to plead guilty and seek a plea agreement rather than risk the potential imposition of a more severe sentence if their case was taken to trial. The mere knowledge of widespread pre-trial detention, high conviction rates, and the fact that those who are convicted at trial are likely to be subject to lengthy prison sentences, makes the prospect of concluding a plea-agreement (in the words of one advocate interviewed by the delegation) an 'offer that can't be refused'.

101 CPC, Art 213.3.

102 See n 46 above, para 76.

103 In November 2011, CPC Art 213 was amended to include the statement that 'based on the case materials and the defendant's guilty plea, the court shall examine if the charges are substantiated, and if the sentence requested in a motion on review of a case without substantial consideration is legitimate and fair'. See also MoJ, 'Plea Bargaining Institute in Georgia', **www.justice.gov.ge/index.php?lang_id=ENG&sec_id=867&info_id=4531** [accessed 27 July 2012].

Several advocates expressed exasperation that the realities of the Georgian legal system meant that acting in the 'best interests' of their client often involved advising them to avoid the uncertainties of trial by pleading guilty to reduced charges. Many others though stated that they would not automatically advise a client to enter into a plea agreement. Indeed, members of the GBA seemed generally contemptuous of advocates who saw their primary function as being to 'strike deals' with the prosecution.

In the continued context of high conviction rates and harsh criminal penalties, it seemed clear to the delegation that, in its current form, the plea-agreement system places both the accused and defence advocate in an impossible ethical dilemma when deciding how they should plead.

6.4 Conclusion

As with the introduction of the adversarial system, the use of plea agreements to resolve criminal cases has had momentous consequences for the administration of justice in Georgia. There is a strong perception, not only among criminal defence advocates, that the judiciary is failing in its duty to ensure fairness when reviewing plea agreements and that defendants are indirectly pressured into accepting plea agreements against their wishes. The emergence of the plea-agreement system has arguably also resulted in an advocate's ability to strike a deal being more highly valued than his ability to argue the finer points of a case before a court.

Given the extent to which the system of plea agreements currently dominates the legal landscape, the judiciary must ensure that the presumption of innocence and right to a fair trial remain at the heart of the plea-agreement system, and that such agreements are designed to serve the best interests of justice. **To achieve this, the IBAHRI recommends that the courts are far more pro-active in the oversight of plea agreements and in exercising their powers to review their fairness. Above all, judges should not approve a plea agreement where the prosecution case does not appear to support it.**

Chapter Seven: Access to Clients in Detention

Unhindered communication between lawyer and client is essential for ensuring both equality of arms and an accused's right to an effective defence. To this end, international standards require authorities to respect lawyer-client confidentiality and ensure that advocates are able to visit detained clients without interference.[104]

Many members of the criminal Bar complained to the delegation that they have not been given adequate access to clients held in places of detention. They also reported facing other forms of obstruction by prison authorities, including intimidation, breaches of confidentiality and degrading search techniques. This treatment was generally perceived by the advocates as symptomatic of a wider hostility towards advocates working in the criminal justice system. In some cases, advocates also reported that the interference encountered was particularly intense if their client had made a complaint about alleged abuse by prison staff.

7.1 Delays when entering places of detention

The delegation spoke to advocates who reported that they faced unexplained and lengthy delays when entering detention facilities to meet with their clients.

The delegation was particularly concerned to hear of one incident, which occurred in October 2011. In this case, an NGO advocate was specifically prevented from meeting her client after he had telephoned her from inside Ksani Prison to inform her that he had been severely beaten. On attending the prison to interview her client, and despite there being no other visitors registered as occupying the meeting rooms inside the prison, the advocate was denied access for half a day. She was only admitted when she threatened to report her treatment to the MCLA. The advocate informed the delegation that she assumed that her access to her client had been delayed in order to allow the prison authorities the time to pressurise him into withdrawing the allegations against them. However, in this case the prisoner did decide to press his claim, although there appears to have been little progress since the case was referred for investigation to the Prosecutor's Office in Tbilisi.

Systematic difficulties in entering places of detention have been reported in the past by the Public Defender. However, the delegation heard from the Public Defender that following concerns raised by his office[105] and by international NGOs, efforts have been made to begin to improve prison waiting areas and related infrastructure in order to allow increased space for lawyer–client consultations in places of detention.

104 UN Basic Principles on the Role of Lawyers (n 30), Principles 8, 16 and 22; International Covenant on Civil and Political Rights, Art 14.
105 See n 10 above, 31; see n 80 above, 14.

7.2 Degrading search techniques

Several female defence advocates complained to the delegation that they had been subjected to degrading search techniques employed by prison staff prior to being allowed to meet their clients. These complaints reflect those highlighted in 2011 reports by the International Observatory for Lawyers[106] and the Commissioner for Human Rights of the CoE.[107]

One advocate described to the delegation how, when attending clients in Detention Facility 17 at Rustavi, and at Detention Facility 18 at Ksani, she was obliged to strip down to her underwear prior to being searched by prison staff. Although the searches are conducted by female staff in private examination rooms, these rooms are fitted with CCTV cameras, and the advocate stated to the delegation that she was not sufficiently reassured by statements from prison staff that there were 'only female staff monitoring the CCTV footage'.

When the delegation raised these reports with officials from the MCLA, they were informed that searches are carried out in order to prevent the entry of drugs into prison facilities. The MCLA also refuted any suggestion that advocates are required to undress whilst being searched before entering prison facilities. The delegation was also informed that intimate searches are carried out on all visitors entering prison facilities, including officials from the PDO.

The delegation was also informed of a case in which a female defence advocate was intimidated and assaulted by prison staff after a meeting with her client in Ksani Prison 15 on 21 October 2011. At the meeting the advocate took a statement from her client in which he alleged that he had been severely beaten by members of the prison staff. As she attempted to leave the facility, the prison authorities demanded to see notes of her meeting with her client. When she refused, she was detained, and physically assaulted by three male prison staff. According to the advocate, the notes of her meeting, including her client's statement, were also forcibly removed from her bag and not returned. Prison staff then threatened her with rape if she filed the court application on behalf of her client. In November 2011, the advocate filed a complaint over her treatment with the prosecutor, which included medical evidence of the bruising and other injuries she sustained. To date, although she has been interviewed as a witness by the Prosecutor's Office, there has been no progress in bringing the case to trial.

7.3 Confiscation of case notes and documents

In meetings with NGO and private defence advocates, the delegation was made aware of numerous cases where prison officials have demanded to read case notes made during their meetings with clients. Many advocates stated that the prison authorities prevented them from leaving the detention facilities unless they handed over their confidential files.

Amongst many similar instances reported to the delegation during its visit, one advocate told delegates that officials at Prison Number 17 (formerly Prison Number 2) had repeatedly prevented him from leaving the facility unless he agreed to hand over notes of discussions with clients. In another incident on 29 April 2011, having been prevented from leaving the prison for more than 90 minutes after meeting his client, the same advocate decided to destroy the notes of the meeting

106 See n 80 above, 15.

107 See n 46 above, para 52.

rather than reveal their contents to the prison staff. He informed the delegation that on other occasions he has been able to make duplicate copies of his notes, and had therefore been able to retain one set, whilst handing the other over to the authorities in order to secure his release.

In his 2011 report, the Public Defender refers to the violation of lawyer–client confidentiality in penitentiary establishments as being a matter of particular concern.[108] The report makes particular reference to concerns that prison staff have deliberately confiscated documents in which advocates have recorded allegations that prisoners' rights have been violated.[109]

Although the PDO has reported on these concerns in the past, when questioned by the delegation on the issue, the authorities appeared not to acknowledge that a problem exists. The MCLA strongly disputed any claims that confidentiality was being breached stating to the delegation that whilst it was aware of allegations that confidential documents had been confiscated by prison officials, 'such cases simply never take place'. In relation to the other claims of obstruction by members of the GBA, the MCLA categorically denied that such abuses took place and claimed that such 'false allegations' were being disseminated by 'a small number of politicised advocates'.

Moreover, according to those advocates who spoke to the delegation, when they have raised concerns with the Prosecutor's Office over such interference, the standard response of the Prosecutor's Office has been that an investigation has been carried out and there was no evidence to support their allegations.

The IBAHRI reiterates the finding of the Public Defender in his 2011 report that any continuing interference with lawyer–client confidentiality by prison staff should 'be eradicated', and that individual Prison Directors should take personal responsibility for controlling the entry of advocates to their facilities, and for ensuring that guarantees of confidentiality are upheld.[110] **It is further recommended by the IBAHRI that prosecutors should treat complaints about the obstruction of advocates' work and the unlawful conduct of staff in places of detention with the utmost seriousness. They should not only ensure that such complaints are thoroughly and promptly investigated, but that they are seen to be thoroughly and promptly investigated. Complainants should also be kept informed of the progress of the investigation.**

Restricting prisoners' telephone access to advocates

The delegation was informed of several cases where prisoners have been unable to contact their advocate from inside their place of detention because of a block which specifically prevents them dialling their advocate's number. Some advocates reported that, in order to avoid such interference, they are forced to use multiple mobile numbers, supplying their clients with a 'confidential' number not known to the authorities. One advocate, who provides free legal assistance to prison inmates, told the delegation that when he made a statement to the media claiming that prisoners were being blocked from contacting him on his mobile phone, the Prison Director threatened him with imprisonment.

108 See n 19 above, 54.

109 *Ibid.*

110 *Ibid*, 259.

7.4 Conclusion

While progress has been made to reduce delays when entering places of detention, other obstacles experienced by advocates have not yet been adequately addressed. These include the use of degrading search techniques and violation of lawyer–client confidentiality by prison officials. Not all defence advocates claim to have encountered such kind of obstructions. Nonetheless, these problems are serious and deserve much more attention than they presently receive.

The IBAHRI therefore recommends that prison authorities provide prison staff with clear instructions that documents and communications between an advocate and his or her client are confidential and cannot be examined or otherwise interfered with. Search techniques used on female advocates by prison staff in some prisons are widely viewed as humiliating and degrading and **prison authorities should take urgent steps to review these techniques and ensure that prison staff are appropriately trained to carry out searches of female visitors.**

It is also essential that the prison authorities and, where necessary, the Prosecutor's Office, treat complaints about unlawful conduct in places of detention, including the obstruction of advocates work, with the utmost seriousness. Thorough and prompt investigations of all unlawful conduct in places of detention should be ensured and **consideration should be given to providing the GBA with periodic reports on progress made in relation to pending complaints to the Prosecutor's Office by members of the Bar.**

Chapter Eight: The Prosecution of Advocates

A key complaint received by the delegation during its visit related to the prosecution of advocates. According to the GBA, over 140 advocates have been prosecuted and imprisoned since the present government came to power in 2004. This figure represents roughly four per cent of total membership of the Bar, and is evidently a great cause for concern. The imprisonment and prosecution of members of the Bar has been bitterly criticised by the GBA's leadership in recent years.

As with the other challenges faced by the Bar, the delegation found that the prosecution of advocates could not be understood or addressed in isolation. Rather, this phenomenon should be viewed in the broader context of the Bar as an institution, particularly the Bar's history and misfortunes, its status, role and the recent process of reform (examined earlier in Chapter One of this report).

8.1 Improper prosecution of advocates

While lawyers can be held accountable for breaches of professional standards or ethics, international standards require that states refrain from the prosecution of lawyers for carrying out their professional duties, or punishment as a result of their clients' activities.[111] Georgia's Law on Advocates asserts the principle of non-interference in legal practice,[112] and also provides that advocates shall not be held responsible for written or verbal statements made to the court in the interests of a client.[113]

The delegation learned that, in the vast majority of cases, advocates in Georgia have been prosecuted under provisions of Georgia's Criminal Code, which make it an offence to obtain property through deception or fraud.[114] In general, these prosecutions appear to have been instigated following complaints by dissatisfied clients. However, the delegation was also made aware of a small number of cases in which the advocates in question claimed that the charges against them had been fabricated by the government. They alleged that these prosecutions were motivated, in whole or in part, by the advocate's own political activism, or by the politically sensitive nature of their client's case.

In this regard, the delegation met with Mariana Ivelashvili, whose case has been the focus of particular international attention. In 2008, Ms Ivelashvili, then a newly qualified advocate aged 22, was convicted of obtaining property by deception and sentenced to seven years' imprisonment; she was accused of failing to provide effective legal assistance to her clients in her first case. Ms Ivelashvili served three years and 20 days of her seven-year sentence – one year of which was in a closed cell – before she was granted a Presidential pardon on 23 November 2011 (Saint George's Day and the anniversary of the Rose Revolution), and released.

111 UN Basic Principles on the Role of Lawyers (see n 30 above), Principles 16, 26–29.

112 See n 33 above, Art 3.

113 *Ibid*, Art 38.4.

114 Criminal Code, Art 180.

Human rights NGOs and the GBA claim that Ms Ivelashvili's arrest and prosecution was in fact intended to punish her for her anti-government political activism.[115] In a meeting with the delegation, Ms Ivelashvili confirmed that, prior to her arrest, she had written critical journal articles and had organised rallies to demonstrate against the regional Prosecutor in Gori, Mikheil Abuladze, whom she alleged was responsible for carrying out a series of arbitrary arrests.

Despite her presidential pardon and release, Ms Ivelashvili's conviction was not quashed and she remains unable to practise law. She filed an application to have her conviction overturned in January 2012, but this was refused, and her appeal against the refusal was dismissed. She has now taken her case to the ECtHR, where she is claiming that she was denied a fair trial, contrary to Article 6 of the ECHR.

The delegation is gravely concerned that Ms Ivelashvili is now prohibited from practising law because she has a criminal conviction recorded against her. **The IBAHRI therefore recommends that the authorities review her case as a matter of urgency.**

The delegation also met with Natela Siradze, an advocate who, in 2009, was arrested and sentenced to three months' imprisonment at a time when she was also representing a client who was one of 40 defendants accused of participating in a military coup.

Ms Siradze claims that the government orchestrated her arrest on charges that, in an unrelated case, she had allegedly bribed a witness into providing an alibi for one of her clients who was accused of theft. According to Ms Siradze, her arrest took place at a key moment in the trial relating to the coup attempt, and her conviction was reported on TV as a warning to others. In her meeting with the delegation, Ms Siradze denied that she had committed the alleged offence of bribing a witness, and told the delegation that she had only agreed to admit the charges as part of a plea agreement because she was afraid of the consequences to her and her family if she did not.

The delegation was not in a position to confirm the veracity of the claims made by or on behalf of advocates that the government routinely brings criminal charges against them on political grounds. However, the claims made by the two advocates referred to above (and by several others who spoke to the delegation) reflect more general concerns which have been reported by CoE and others over the selective and procedurally unsound prosecutions of opposition activists.[116]

8.2 The nature of criminal charges brought against advocates

As indicated earlier in this chapter, a significant proportion[117] of the advocates convicted since 2004 were prosecuted on the basis of provisions in the Criminal Code, which make it an offence to obtain property through deception.[118] It seems that many of these charges were brought by disgruntled clients who complained that their advocate, having taken fees on the promise of a case being resolved

115 International Observatory for Lawyers, 'IOL Appeal – Georgian Lawyers continue to be the victims of repeated harassment, threats and acts of intimidation', March 2011, **http://gba.ge/new/admin/editor/uploads/files/ENG/news/IOL-Appeal-Georgian%20Lawyers%20and%20Mariana%20Ivelashvili.pdf**.

116 See n 46 above, paras 78–86; see also n 48 above.

117 According to figures provided to the delegation by HCJ, out of 154 lawyers convicted since 2004, 92 were convicted under Art 180 of the Criminal Code.

118 Criminal Code Art 180.1: 'Taking possession of another's object for the purposes of illegal appropriation or receiving a property through deception shall be punishable by … imprisonment for up to three years'. Art 180.2: 'The same action carried out a) by previous consent of a group b) repeatedly c) causing substantial damage d) by use of an official position; shall be punishable by […] imprisonment ranging from 2 to 6 years.'

in their favour, did not in fact obtain the outcome required. On this basis, they were then accused of obtaining money through misrepresentation.

Once again, the delegation was not in a position to verify the facts of the cases presented to it. However, it did note that the fee agreements that advocates negotiated with clients sometimes involved substantial sums of money and were therefore potentially more likely to be the subject of dispute between the parties. In this regard, the delegation was told of an ongoing case where an advocate has alleged that he is being prosecuted on the basis of fabricated evidence after his clients refused to pay his agreed contingency fee on success in a commercial case. The disputed fees amounted to approximately US$450,000.

The delegation heard from the GBA and several other organisations working with the Bar that, whilst some of its members have been properly convicted of the 'economic' crimes of fraud and deception, the vast majority of cases concerned relatively minor infractions. These infractions would be far more appropriately dealt with by the GBA's Ethics Commission as violations of its Ethics Code, rather than through the Criminal Code, which envisages prison sentences of between two and six years for those convicted of using their official position to obtain money through deception.[119] Improved training on ethics and other skills, such as contract drafting, was also suggested as a means of prevention.

The delegation also observes that those clients who are not satisfied with the quality of service provided by their advocates are far more likely to consider instigating a criminal prosecution than to seek a remedy through the GBA's Ethics Commission. This is particularly the case in a country where, under the all-pervading policy of zero tolerance, advocates accused of fraudulent or corrupt practices are likely to be swiftly and heavily penalised.

Nonetheless, **the IBAHRI is clear in its recommendation that any decision to prosecute advocates in respect of their professional activities should be scrupulously fair and clearly reasoned. Where an allegation amounts in effect to no more than a complaint of unethical conduct, the matter should not be prosecuted but should be referred to the Ethics Commission of the GBA.**

8.3 Conclusion

The high rate of prosecution amongst advocates, predominantly on charges of seeking to obtain property through deception, raises clear concerns. These prosecutions have taken place in the context of a broader zero tolerance policy, which impacts on all those who come into contact with the legal system. Although members of the Bar are clearly not the only ones impacted by the effects of the zero tolerance policy, the GBA nonetheless raises justifiable concerns that many of the prosecutions brought against its members are improper or inappropriate.

Furthermore, legitimate complaints over the prosecution of advocates have not been properly investigated by the authorities. When wrong decisions have been made, there has been a persistent failure to correct them. The continuing plight of the young advocate Mariana Ivelashvili is a disgraceful case in point.

119 Criminal Code, Art 180.2.

It clear that many criminal charges brought against advocates, particularly those alleging fraud or deception, could have been more appropriately dealt with as violations of the GBA's Code of Ethics. Whilst unable to take a view on each individual case, **the IBAHRI recommends that, in those cases where there is no evidence of fraudulent intent by an advocate, the Prosecutor's Office should refer client complaints to the internal disciplinary procedures of the GBA Ethics Commission rather than seeking a criminal prosecution in every case.**

Notable progress has already been made in the area of ethical regulation by the GBA's Ethics Commission, as previously examined in Chapter Three. Whilst continued improvements to the GBA's ethical regulatory framework should reduce the likelihood of inappropriate prosecutions of its members in the future, **advocates who are prosecuted must be afforded every protection of due process. Unresolved complaints in respect of previous prosecutions should also be resolved without further delay.**

Chapter Nine: Recommendations

The Bar and the GBA

Training, admission and ethics

The GBA should continue its work to raise professional standards and to increase public confidence in the competence of advocates; to this end:

- Consideration should be given to making the vocational stage of training for the Bar (the year of work experience), a structured and assessed process.
- The Bar exam should provide a meaningful test of professional competence for the Bar.
- Mandatory courses on core professional skills, such as advocacy and professional ethics, should be introduced and assessed as part of training for the Bar.
- The GBA should ensure that its CLE programme is sufficiently rigorous.
- Resources should be found to enhance access to legal databases for advocates.
- The GBA Ethics Commission should be provided with sufficient resources to make effective progress with its current programme of work.
- The government and international partners should provide all possible assistance in ensuring that resources are available to the GBA for improving professional and ethical standards within the Bar.
- The GBA Ethics Commission should take firm action against those who continue to practice as advocates despite not being members of the GBA.

Rebuilding relationships of trust and confidence

All institutions involved in the administration of justice should work together to restore relationships of trust and confidence; to this end:

- The GBA, the judiciary, the Prosecutor's Office and the MoJ should continue and expand participation in joint seminars, working groups and other collaborative activities.
- The GBA and the Prosecutor's Office should consider a programme of regular meetings to discuss matters of mutual interest, such as ethical standards, plea agreements or areas of substantive law.
- The participation of the GBA in working groups for the discussion of legislative amendments should be extended. Parliament should consult the GBA as a matter of course when amendments to statutes of relevance to the GBA's activities are being discussed.
- The Prosecutor's Office should consider the steps identified below as further measures to enhance mutual trust and confidence.

Prosecution of advocates

- The GBA should offer specific training to qualifying and qualified advocates on how to draft written agreements between advocates and their clients.
- In those cases where there is no evidence of fraudulent intent by an advocate, the Prosecutor's Office should refer client complaints to the internal disciplinary procedures of the GBA Ethics Commission rather than seeking a criminal prosecution in every case.
- Decisions to prosecute advocates in respect of their professional activities should be scrupulously fair and clearly reasoned.
- Advocates who are prosecuted must be afforded every protection of due process.
- Unresolved complaints in respect of previous prosecutions should be resolved without further delay.
- The authorities should review the case of Mariana Ivelashvili as a matter of urgency.

The judiciary

- The HCJ should take additional steps to increase the transparency and objectivity of the judicial selection and appointment process, including with regard to the entry procedures for the High School of Justice.
- Members of the judiciary should be encouraged to participate in joint activities with the GBA.
- Judges should take immediate steps to ensure that their judgments are individually and cogently reasoned.
- Judges should be proactive in ensuring that defendants in criminal proceedings are afforded a fair trial. Their vigilant compliance with their duty to afford defendants a fair trial should not depend in any way on perceived deficiencies in the conduct of the defence case by the defence advocate.
- Judges should be proactive in reporting concerns about the competence of prosecutors or defence advocates to the Prosecutor's Office or the GBA.
- Judges in criminal proceedings should afford the same consideration to defence motions as prosecution motions. Any decision to prefer one motion rather than another should be clearly reasoned.
- The judiciary should adopt commentary or guidance on the interpretation of Articles 39 and 111 of the CPC. These provisions must be interpreted in a way that gives practical effect to the right of the defence to collect evidence relevant to their case, if necessary in accordance with a court order compelling disclosure of such evidence.
- Recognising their overriding duty to afford defendants a fair trial, judges should take a proactive approach to plea agreements. They should not accept a plea agreement where the prosecution case does not appear to support it.

- The CPC should be interpreted consistently with Article 6 ECHR. Judges should not only apply the fair trial standards set out in Article 6, but also be seen to be applying those standards. Their rulings should expressly refer, as appropriate, to the case law of the ECtHR.
- In proceedings under the AOC, judges should recognise that they are likely to be determining a 'criminal charge' for the purposes of Article 6 of the ECHR. Judges should ensure that the accused is afforded due process, equality of arms and a conspicuously fair trial. Sentences should be strictly proportionate to the gravity of the offence.
- Until the proposed new AOC comes into force, measures must be taken to cease violations of fair trial rights when the AOC is invoked.
- The AOC should be interpreted consistently with the high value attached to freedom of association and freedom of assembly under the ECHR.

Prosecutors

- Prosecutors should treat complaints about the obstruction of advocates' work and unlawful conduct in places of detention with the utmost seriousness. They should not only ensure that such complaints are thoroughly and promptly investigated, but that they are seen to be so investigated. Complainants should be kept informed of progress of investigations.
- Consideration should be given to providing the GBA with periodic reports, in writing or with regular meetings, on progress made in relation to pending complaints to the Prosecutor's Office by members of the Bar.

Prison authorities

- Clear instructions should be provided by prison authorities to prison staff that documents and communications between an advocate and his or her client are confidential and cannot be examined or otherwise interfered with.
- Urgent steps should be taken to review search techniques used on female visitors and to ensure that prison staff are appropriately trained to carry out such searches.

Legislation

- Fundamental revision of the AOC should be concluded as soon as possible.
- In the new AOC, the Georgian government must ensure that due process rights are fully respected and the IBAHRI urges the government to remove administrative imprisonment as a potential sentence under the new AOC.

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