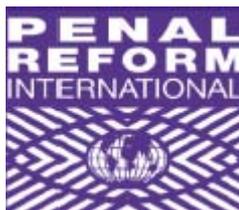




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ASSESSMENT OF PENAL LEGISLATION IN GEORGIA

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FOREWORD

In 2008 the EC Delegation in Georgia approached Penal Reform International with a request to elaborate a summary assessment of the legislative base relating to criminal justice and the penal system in Georgia.

Legislation is the foundation of any well functioning democracy, and many new laws and amendments have been drafted or adopted in Georgia since 2004. Following the Rose Revolution, the new government energetically approached reform of the criminal justice system and drafted – assisted *inter alia* by the European Union – a strategy paper to guide these reforms.¹

The 2008 assessment was conceived as an opportunity to take stock of subsequent developments and to review compliance of legislation - both in force and existing in draft - with the human rights commitments of Georgia under relevant Council of Europe and other international instruments. The study was carried out by a team of consultants acting in their personal capacity. The team comprised Mr. Erik Svanidze² and Ms. Mary Murphy,³ supported by Professor Dirk Van Zyl Smit⁴. All experts have a solid background and experience in the international criminal justice field.

The analysis was completed before a first roundtable discussion with government officials at the Delegation of the European Commission in November 2008. A second roundtable discussion of the findings was held with civil society representatives in early December 2008. Where appropriate, the analysis was then amended according to the comments and opinions which emerged from a lively exchange of opinion. In 2009 the Ministry of Justice provided final, written feedback on the findings in two separate sections. This feedback is here attached to the initial study in order to ensure that the position of the government on the issues discussed is fully represented. The framework of the study does not provide for further comments, but it is expected that even the contended points⁵ will remain within the focus of future developments.

It should be mentioned that since the study was completed, developments in the Georgian legislative framework have continued, and important improvements have already been agreed or initiated. In particular we welcome and appreciate the active discussions which have taken place

¹ For more information to the policy making refer also the Webpage of the Ministry of Justice of Georgia: http://www.justice.gov.ge/Strategy_eng.html

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⁵ It seems that some of them resulted from misapprehension of observations on the combined effect of deficiencies of the avenues for automatic review of legality of continued detention and challenging it; specific legislative tools needed for correction of deviations and other significant components the expert analysis.

regarding the new draft Criminal Procedure Code and Code of Imprisonment, both of which were a key focus of our analysis and the subject of great public interest.

This present study identifies key areas for attention in respect of Georgia's compliance with relevant international standards. Despite ongoing and planned developments, it remains a solid and still necessary contribution to, and reference document for discussions aimed at further improving Georgian criminal justice legislation and practice. In particular it facilitates transparency and the wide discussion among stakeholders that is of crucial importance in a democratic society.

We hope that the analysis and the discussions which it prompts will continue to enrich debate in Georgia and contribute to the initiation of yet more improvements. We hope also that the results of the work will lead to a better understanding among the wider public of the challenges inherent in creating a criminal justice sector that fully meets Georgia's aspirations as a member of the European and international community.

I. Executive Summary

The study organized by the PRI on request of the EC Delegation to Georgia suggests that, in spite of numerous actions undertaken by the government changes and indications of the readiness of Georgian authorities to enhance penal legislation and policies, the sphere has retained significant problems and systemic shortcomings. Below key areas of concern are listed which relate to three main areas: law making in general, criminal law and procedure, execution of imprisonment and probation.

Law Making

The report addresses the deficiencies of the law-making in the area concerned. It has too often been carried out without a sufficiently fundamental scientific and methodological justification, and in the absence of other necessary basic preparatory work. The urgent need to combat organized crime and corruption, to dismantle obsolete state structures, and to meet the many other challenges faced by Georgia since the end of 2003 makes the often too prompt action and the resulting weaknesses of the current system understandable, but does not justify them. It is regrettable that final stages of the adoption of the new Criminal Procedural Code are still affected by the last minute introduction of significant and controversial modifications.

Despite the fact that consistency of norms within the entire legal system is an indispensable component of any legislative process, the main draft Codes (on Criminal Procedure and Imprisonment) have remained disassociated from and inconsistent with each other. The draft CI remains highly problematic in terms of its structure, thoroughness, internal consistency and clarity. There is a need to base the development and establishment of relevant law and practice on a coherent, clearly elaborated and specific penal strategy and well thought-out policies.

Criminal law and procedure

- the overwhelmingly custodial mentality that resulted in the radical increase of persons remanded in custody and those sentenced to imprisonment;
- the draft Code of Criminal Procedure still maintains provisions disregarding European standards on deprivation of liberty being a measure of last resort, namely: the introduction of an additional ground for deprivation of liberty (in form of a ‘need to ensure execution of sentence’) that is incompatible with the exhaustive list approved on the European level; excessive limitations on challenging legality of detention (complaints should be lodged within the time-limit of 48 hours, cannot be signed by lawyers, will be considered predominantly without a public hearing etc.), omission of the requirement of addressing by judges of the arguments in favour of release; the defects have not been properly addressed by guidelines issued to magistrates either;
- the narrow range of alternatives to remand in custody (it will be actually limited to undertakings of appropriate behaviour and residing at a specified place, bail, personal surety and submission of juveniles for supervision) combined with the restrictive and financially driven implementation of alternatives (current laws provide for several alternatives, including personal surety, but the practice limits them to excessive bails, i.e. whether someone is released routinely depends on whether they can ‘buy their freedom’);
- the passive role of the state with regards to ensuring fair trial guarantees - neither legal provisions nor practice ensure a real equality of arms of the defence with the state backed prosecution and law-enforcement machinery (the critical character of financial,

organisational, technical and other aspects of inequality between the state and capabilities of defence should be balanced by explicit regular duties of investigation and prosecution in respect of integrity and care, i.e. serving the legitimate interests of defendants, which are omitted in the drafts in issue);

- limitations of several crucial rights of defendants are formulated without appropriate safeguards and in a wording leaving a room for arbitrariness, including unbalanced exceptions to the right of the defence to participate in person in the questioning of witnesses and non-disclosure of results of covert investigations at the early stages of the procedure, a number of covert investigative (direct or technical surveillance, controlled purchase and delivery) are left outside a judicial control and so on;
- the disproportionately restrictive regime of access of media is especially objectionable in the light of lack public trust in the independence of the judiciary (the general rule should be that it is allowed, unless a motivated and challengeable decision is issued in circumstances provided by the law);
- unlimited discretionary powers for the prosecution (while not excluding discretionary prosecutorial powers, international standards unconditionally prioritise the principles of equality of all citizens before the law, and individualisation of criminal justice), its actual dominance in the application of coercive measures, a monopoly in respect of minimisation of punishments that cannot be applied unless concluding a plea-bargaining deal with the prosecution; the prosecution should be guided by clear and transparent directives and not classified guidelines as envisaged by the draft legislation (the requirement has become more topical in view of the merger of the Ministry of Justice and the prosecution system);
- the flawed character of the plea bargaining system, when a defendant is compelled to waive fair trial guarantees in view of the mentioned unbalanced framework governing deprivation of liberty (there are negligible perspectives for remaining free without striking a procedural deal/confessing), stringent sentencing schemes and restriction of possibilities for minimization of punishment to plea-bargains, practices which actually rule out any realistic prospect of an acquittal (their proportion has not exceeded 0,2 %), by forcing the defence to 'go blind' without disclosure of evidence; the overall state of affairs leads to a waiver 'tainted by constraint' as identified by the European Court of Human Rights in much less restrictive circumstances;
- jury trials is something that is innovative for the country, but so far alien to it and its fully-fledged introduction is premature due to the level of preparation that has been done; in light of the problems relating to public confidence in the criminal justice system, and its fairness in particular, the novelty could be seen as a development to welcome;
- the overwhelmingly custodial mentality, and related policies have resulted in correspondingly punitive amendments to the Criminal Code as well as to changes in practice (the schemes can lead up to 30 or even 40 years' imprisonment for several, but comparatively minor crimes; the margin of sanctions that often are limited to a couple of years of imprisonment, i.e. 3-5, 4-6 etc., create difficulties with individualisation of punishment).

Execution of imprisonment and probation

- the radical increase in the prison population (more than 300% in comparison to 2004) and the resultant problem of overcrowding have not led to an introduction of national strategies or mechanisms to address these urgent problems; neither existing nor the draft norms meet the international standard of 4 m² for multi-occupancy accommodation of prisoners;

- the legislative framework disregards the guiding principle which stems from European standards, according to which restrictions on prisoners' rights 'shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed';
- the outdated concept whereby the regime to which remand prisoners are subject is considered as an element of the prosecuting machinery (this assertion should attract particular attention in view of the institution of a separate ministry dealing with execution of sanctions); as well as the considerable reduction in the scope of rights applicable to remand prisoners including the absence of any entitlement to work and education;
- the significant practical obstruction of avenues for gradual reintegration and release on parole that are not implemented due to the inaction of respective commissions;
- provisions on preventing re-offending and reintegration into the community require further elaboration in respect of the explicit introduction of individual sentence planning, in particular with regard to the rehabilitation of juveniles;
- provisions for the disciplinary responsibility of prisoners are open for arbitrary application due to the lack of clear definitions of ordinary disciplinary violations and inadequate provisions on material conditions to be ensured in isolation cells; the procedure providing for actual prolongation of imprisonment for disciplinary violations (introduced in June 2007) evades major safeguards and fair trial principles;
- the legislation needs to be adjusted to international standards on absolute necessity and proportionality of use of firearms, including its planning and control, quality of regulations and training of staff;
- powers and responsibilities of the public monitoring boards need to be upgraded in accordance with relevant international standards in respect of appropriate access to information, meeting prisoners in private, publication of monitoring results, additional, also financial, guarantees of independence and the inclusion of human rights issues in the scope of the activities of the national monitoring board;
- there is a clear need for further enhancement of the institutional status of the military component (perimeter guards) of the penitentiary department in line with the requirement of its separation from respective services or, provisionally, non-involvement in prison matters;
- stipulations on healthcare in prisons should provide more detailed criteria for its integration into and compatibility with national health policy, as well as for its interaction with general health administration (it is worrying that in spite of current problems the most recent modification of the draft Code on Imprisonment offers considerably less guidance than previous versions);
- the adopted law on probation has failed to remedy the deficiencies inherent in the previous law on community sanctions and probation, among other deficiencies it contains a weak reference to the human rights applicable in this context, it does not provide for an appropriately developed outline of the range of re-socialisation strategies, lacks stipulations on coordination and interaction of the service with the penitentiary establishments; it has failed to contribute to resolving concerns regarding controversial developments in respect of implementation of community sanctions and alternatives to deprivation of liberty.

II. Assessment of Penal Legislation in Georgia

INTRODUCTION

The following report contains an outline assessment of penal legislation in Georgia undertaken in 2008 by Penal Reform International at the request of the European Commission Delegation to Georgia. The study was carried out by a team of consultants acting in their personal capacity. This comprised Mr. Erik Svanidze⁶ and Ms. Mary Murphy⁷ supported by Professor Dirk Van Zyl Smit⁸.

The report identifies key areas for attention in respect of Georgia's compliance with relevant international standards, in particular those developed by or under the auspices of the Council of Europe as the leading standard-setting organisation on the continent. The paper reviews recent changes introduced in the respective draft laws in the light of recommendations and opinions of international experts involved in previous assessment activities, as well as relevant trends in policies and practices in the penal sphere⁹. In particular it focuses on the Draft Criminal Procedure Code¹⁰ and Draft Code on Imprisonment¹¹.

The survey comprises two main substantial sections. The first deals with relevant fundamental issues of criminal law and procedure. The second section focuses on execution of imprisonment, penitentiary matters and probation. The third section comments on conceptual and methodological shortcomings of the law-making process. Within the sections points are grouped according to key sets of international standards. The observations and comments incorporated in the report are proposed as recommendations to be taken into account during further developments in the penal sphere.

1. CRIMINAL LAW AND PROCEDURE

1.1 Liberty and Security of Person

The draft CPC incorporates some of the recommendations made by international experts and bodies. Thus, it includes an explicit general rule implying the 'presumption in favour of liberty'¹². Encouraging indications of a commitment to fundamental values can be found in the, admittedly

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⁹ The range of the study has been defined by the Terms of Reference set up by the EC Delegation to Georgia. The scope included: current penitentiary legislation, Draft Penitentiary Code, Law on Probation and relevant provisions of the Criminal Code and Draft Criminal Procedural Code.

The report has been prepared after a consideration of preliminary findings with and receiving written feedback from relevant stakeholders in the country. They were presented at meetings with competent Georgian authorities on 17.11.2008, as well as domestic and international civil society representatives on 04.12.2008.

¹⁰ Hereinafter 'the draft CPC'. The official version of the draft (formally dated 3 July 2006) was provided by the Parliament of Georgia on 11 November 2008. The variable and inconsistent character of modifications made in more recent working versions of the draft CPC complicated the study. Nevertheless the report touches upon several intentions expressed in these versions.

¹¹ Hereinafter the CI. The report deals with the version that has been submitted to the Parliament and processed in its committees since late 2006.

¹² Paragraph 4 of Article 7 of the draft CPC.

partially inconsistent¹³, incorporation of grounds of deprivation of liberty contained in Article 5 of the European Convention on Human Rights¹⁴. The recent amnesties and increased number of pardons can be regarded as additional signs of moving away from an overwhelmingly custodial mentality. At the same, it should be taken into account that the latter measures can have only temporary and limited effects.

Nevertheless, deprivation of liberty and pre-trial detention, in particular, remain controversial and problematic components of penal legislation and of practices resulting from it. The consequences of an overwhelmingly custodial mentality can be to some extent illustrated by statistics, according to which the number of those newly remanded in custody in 2007 reached 8929, almost doubled in comparison with 2002.¹⁵ Although the statistics for the first eight months of 2008 hint at a declining tendency regarding the absolute number of those subjected to pre-trial detention (4899 against 6274 for the corresponding period in 2007), the percentage of cases in which it is applied has remained the same (around 45%).¹⁶

This mentality has also increased the number of those sentenced to imprisonment. In 2007 they numbered 9788, an increase of more than 300% in comparison to 2004 figures (3172). At the same time, the number of non-custodial sanctions had increased by only 192 %. Consequently, imprisonment constituted 46,1 % of all sentences¹⁷.

A further weakness is the pecuniary aspect of the policy pursued. Routinely, whether someone is released depends on whether they can pay bail. Although there are no explicit statistics available in this regard, existing data and information suggest that the absolute majority of those subjected to alternative measures and sanctions actually could only 'buy their freedom' by means of paying considerable sums of 'bail'. Such bail is often subsequently converted into a fine,¹⁸ predominantly through summary procedures under constrained plea-bargaining schemes¹⁹. Such policies have led to an excessive application of detention, which, in addition, is fundamentally unfair to poorer persons who cannot afford to pay. This situation will not be brought in line with international standards of non-discrimination unless more comprehensive and systemic changes are introduced both in legislation and practice.

In a longer perspective such policies create more problems than those supposedly solved. It should, of course, also be taken into account that, although statistical indicators are important for assessing trends and the general state of affairs, the essence of international standards and the obligations that result from them is that the state must adhere to fundamental human rights principles and values and establish a system capable of securing their observation vis-à-vis

¹³ See footnote 17 below.

¹⁴ Hereinafter 'the Convention'. See the case law of the European Court of Human Rights (hereinafter 'the ECtHR') reflected in the Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to Member States on the Use of Remand in Custody, the Conditions in Which it Takes Place and the Provision of Safeguards against Abuse and the Explanatory Memorandum to the same Recommendation.

¹⁵ The number in issue had reached its peak in 2006 and has declined somewhat since, but it is still very high.

¹⁶ < www.supremecourt.ge/default.aspx?sec_id=129&lang=1 > Consulted on 30.09.2008.

¹⁷ *Ibid.*

¹⁸ *Ibid.* The proportion of bails among other non-custodial measures exceeded 97% within the same recent period. Besides that, there is a correlation between the number of fines applied as a supplementary measure of punishment and conditional sentences rendered. In the first half of 2008 the absolute figures were 5978 and 5049 respectively. The report on the second half of 2006 by the Public Defender of Georgia provides an analysis and illustrative materials of disproportionate application of pecuniary criteria in terms of excessive amounts of bails that do not correspond either to the gravity of the crime or other circumstances (e.g. 170000 GEL for purchase of a criminally acquired mobile phone in the case of a defendant with no criminal record, etc.). See p.p. 12-17 at < <http://www.ombudsman.ge/uploads/reports/annualreport2006part2.pdf> >, consulted on 01.10.2008.

See also *Chakvetadze v. Georgia*, application 29869/07, ECtHR Decision of 21 October 2008.

¹⁹ On the fundamentally flawed character of the plea-bargaining procedures introduced see below.

everyone within its jurisdiction²⁰. This includes those affected by ‘zero tolerance’ policies or other responses to events, including ‘anti-terrorism’.²¹

It is to be regretted in this regard that the draft CPC has retained significant deficiencies, omissions and stipulations which echo policies that contradict the binding provisions of international treaties and standards that set up the presumption in favour of liberty. Thus, CPC stipulations regarding grounds for initial detention, and the prerequisites for remanding persons in custody, are inconsistent and more extensive than the exhaustive list provided for by European standards²². It also does not envisage an appropriate scheme of periodic automatic review of the legality of continued remand in custody.²³ In combination with excessive formal restrictions on challenging the validity of pre-trial detention²⁴, as well as the legal possibility²⁵ and practice of excluding any form of hearing in resultant appeal procedures, this undermines the system’s ability to meet the criteria set by the Convention for judging whether the remand custody of a particular individual is or remains necessary²⁶. The legislative framework in question has not spelled out the requirement of addressing particular circumstances and facts supporting remand or specific substantial arguments put forward in favour of release.²⁷ It is regrettable that the practical guidelines on the main issues of criminal procedure issued to magistrates have also not addressed the defects in question adequately²⁸. In these circumstances one should not underestimate the accent implied in the wording that instead of providing for an entitlement, maintains the obligation for judges to apply security measures, including a remand in custody, whenever the formal prerequisites are met²⁹.

²⁰ Article 1 of the Convention.

²¹ The comment applies to the whole set of standards covered in the report. It is important that Georgia has managed to deal with respective problems without derogations under Article 15 of the Convention.

²² See paragraph 12 of Article 41 of the draft CPC. In particular this remark concerns the reference to the ‘need to ensure execution of sentence’, which is not envisaged by the standards under Article 5 of the Convention. See Rule 7 b of the cited Recommendation Rec(2006)13. This notion is open to a broad interpretation, especially in the light of provisions on compensation of procedural expenses. To be compared with paragraph 1 of Article 199 of the draft CPC.

²³ *Keus v. the Netherlands*, application no. no. 12228/86, ECtHR Judgment, 28 September 1990, at paragraph 24. See also para. 17 of the Rec (2006)13 cited above. In particular it provides for a monthly review in this regard. More recent working modifications of the draft CPC suggest an introduction of two months time-limit for a remand during an investigation with a possibility for its prolongation. Due to the overall length of remand period envisaged (9 months), even with the obligation to review the matter at the stage of committing to trial, it would not fully comply with the recommendation concerned.

²⁴ Paragraph 1 of Article 201 of the draft CPC. To be compared with *Assenov and Others v. Bulgaria*, application no. 24760/94, ECtHR Judgment of 28 October 1998, at para. 162.

²⁵ Paragraph 4 of Article 201 of the draft CPC. See *Jablonski v. Poland*, application no. 33492/96, ECtHR Judgment, 21 December 2000, at paras. 91 – 94. The same applies to the appeal procedures against substantial judgments rendered. See paragraphs 1 and 3 of Article 279 of the draft CPC.

²⁶ More recent versions of the draft CPC introduce an additional formal limitation that deprives the defense lawyer from lodging respective challenges. In light of strict time-limits (48 hours) it will make extremely difficult for the defense to obtain even a formal signature from the defendant concerned.

²⁷ See paragraphs 7 of Article 200 and 8-10 of Article 201 of the draft CPC. To be compared to *Sarban v. Moldova*, application no. 3456/05, ECtHR Judgment, 4 October 2005, at paragraphs 100-101; *Patsuria v. Georgia*, application no. 30779/04, ECtHR Judgment, 6 November 2007, paras. 63-77.

²⁸ The recommendations have been issued by the special Commission established at the Supreme Court of Georgia on 5 February 2007. Although the element has been incorporated in the practical guidelines issued to the magistrates, it is done in a cursory manner. The sample court order provided in the guidelines suggests that it would be enough to list some of the arguments without an appropriate analysis of their relevance. It is indicative in this regard that the guidelines suggest that the term of deprivation of liberty can be prolonged on the same grounds that existed at the time of arrest ‘and/or’ complexity of the case. Actually the judges are instructed that it can be done regardless of substantial grounds present and on the basis of ‘complexity’ only.

²⁹ Paragraph 6 of Article 200 of the draft CPC.

It is noteworthy that some of the deficiencies have already led to the ECtHR cases concluded against Georgia in respect of violations of relevant provisions of Article 5 of the Convention³⁰. The policies pursued and ‘the fact that Georgia locks up so many of its citizens’ was addressed by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment³¹ in its most recent report on a 2007 visit to the country. Among other recommendations, the CPT insisted that steps should be taken to ensure that imprisonment is really the remedy of last resort. It also emphasised the importance of non-custodial measures³².

The legislation in force³³ and the draft CPC have not introduced wording that would incorporate criteria that would clarify, in the manner required by the ECtHR, the moment when deprivation of liberty commences. The wording referring to the ‘restriction of liberty guaranteed by Article 18 of the Constitution of Georgia’ does not specify the key element of the criterion in question³⁴. The normative uncertainty that this entails can contribute significantly both to the actual length of police custody and to uncertainties about the legal framework of detention in general³⁵.

1.2 Alternatives to Detention

Notwithstanding the intention of reintroducing an undertaking of appropriate behaviour and a requirement of residing at a specified place³⁶, the range of alternatives to remand in custody remains narrow. According to the draft CPC it will be actually limited to the undertakings mentioned, bail, personal surety and submission of juveniles for supervision³⁷. The list of other ‘possible’ measures³⁸ has not been furnished with a detailed framework in respect of particular grounds, specific conditions and other crucial aspects of their application. It is also worrying that implementation of the limited range of non-custodial alternatives to remand in custody provided for by the draft CPC can actually be postponed under the pretext of unavailability of the necessary resources³⁹, in spite of the fact that they do not require significant financial or administrative effort.

A limited range of choices in this regard results in increased use of deprivation of liberty. The range should be expanded in line with relevant European standards and best practice. New types of supervision in the community and technical opportunities for electronic surveillance are of particular importance in this regard.⁴⁰

³⁰ *Patsuria v. Georgia, Chakvetadze v. Georgia*, cited above.

³¹ Hereinafter ‘the CPT’.

³² The CPT report on the 2007 visit to Georgia, CPT/Inf (2007) 42, para. 32.

³³ Articles 72-73, paragraph 1 of Article 141 of the CPC in force.

³⁴ Para. 2 of Article 181 of the draft CPC.

³⁵ More recent working modifications of the Draft CPC incorporate an ambiguous concept of ‘stopping’ as distinct from apprehension. It requires more detailed consideration due to the same reasons, as well as considerations related to footnote 51 below.

³⁶ The undertaking in issue as well as police supervision were excluded from the list of alternatives on 16.12.2005 (former Articles 166 and 167 of the current CPC).

³⁷ Paragraph 1 of Article 195 of the draft CPC.

³⁸ Paragraph 2 of Article 195 of the draft CPC.

³⁹ Paragraph 3 of Article 195 of the draft CPC. See also Recommendation Rec(2000)22 of the Committee of Ministers of the Council of Europe to member states on Improving the Implementation of the European Rules on Community Sanctions and Measures. The concerns have gained particular relevance in light of the modification in more recent working versions of the draft CPC that intends to downgrade the measures listed in paragraph 2 of the article to ‘additional’ ones. Therefore it has been suggested that they can be applied in combination with the limited choice of main measures only.

⁴⁰ See Rule 2 of Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

Furthermore, the implementation of alternatives to detention raises serious concern. Laws can provide for the widest ranges of alternatives, but the practice may limit them to just a couple of options. Thus, the existing range of preliminary measures includes a personal surety, which is of general character and is potentially applicable in many procedural situations. Nevertheless it is used on an extremely negligible scale. In the first half of 2008 it was applied only in 53 (or 0,67 %) of 7833 cases where a preliminary measure was applied. The absolute majority of such measures used within the same and preceding periods were remand in custody (44 %) and bail (55 %)⁴¹.

It is important in this regard to take notice of the excessively financially driven practice of using bail,⁴² which contradicts the standards set up by the Convention under Article 5. Although the draft CPC has reduced the minimum amount of bail from 2000 to 1000 GEL⁴³, excluded a reference to ‘gravity of the crime committed’⁴⁴ and retained just one of the criteria for assessment of the amount, and although it also mentions the defendant’s assets in this regard, the draft has not remedied all the inconsistencies with the international standards mentioned. The provisions lack an indication to the guarantee provided for in Article 5 of the Convention. Accordingly, amounts of bail should be assessed principally by reference to the accused and any other factors that would relate to any desire he may have to abscond.⁴⁵ Neither the draft CPC nor the existing legislation stipulates explicit powers of the courts to decide on or change the amount of bail requested by prosecutors. In addition to legislative amendments it would be necessary to issue clear and detailed public guidelines, because of the level of malformation of the current practice that not only disregards relevant aspects of the right to liberty and security of person, but also undermines principles of justice and non-discrimination. There are instances that cast doubt on the equitability and legality of applying bails vis-à-vis individuals accused of grave crimes, who subsequently escape relevant responsibility due to dubious procedural deals or considerable financial contributions to state funds.⁴⁶

Accordingly, it is not just the range of measures available that is significant in this regard. There should be a clear policy commitment to meet the legitimate aims of criminal procedure and criminal law in general while using alternatives in practice in terms of the variety of cases and persons involved.

1.3 Fair Trial Guarantees

In spite of some improvements that have been introduced in line with international standards, the most important being in relation to a general rule on disclosure of evidence⁴⁷, the draft CPC has still failed to address many considerable deviations from fair trial principles and guarantees.

⁴¹ Two remaining measures of supervision over juveniles and militaries are of specific nature. They were used 6 times each within the same period. <www.supremecourt.ge/default.aspx?sec_id=129&lang=1>, consulted on 15.9.2008.

⁴² See above, including the comments and further references at footnote 13 above.

⁴³ Paragraph 2 of article 196 of the draft CPC. It is a considerable sum for the majority of the country’s population still.

⁴⁴ It is noteworthy that the norm includes the wording quoted, which clearly undermines presumption of innocence.

⁴⁵ *Neumeiser v. Austria*, application no. 1936/63, ECtHR Judgment, 27 June November 1968.

⁴⁶ The wealthy appear to be at an unfair advantage in comparison to the have-nots. See comments at footnote 13 above.

⁴⁷ Paragraph 1 of Article 89 of the draft CPC. To be compared to *Rowe and Davis v. the United Kingdom*, application no. 28901/95, ECtHR Judgment, 16 February 2000, para. 60. Although the provision in question has to be expanded over not only evidences that can lead to an acquittal, but include more general reference to information favourable for the defence, i.e. mitigating circumstances and so on.

The existing and draft legislation clearly suggests that the state has opted for a simplified concept of fair trial guarantees and has assumed a relatively passive role in this regard. This approach does not take into account that a state has to enact the required laws, and secure in practice the necessary support for the defence in order to ensure a real equality of arms with the state backed prosecution and law-enforcement machinery. It is not enough to establish a formal rule of equality between them by an entitlement to carry out one's own investigation, involve independent experts etc⁴⁸. Such an approach leads to a distancing of the state from the positive obligations in respect of the right to fair trial that derive from Articles 1 and 6 of the Convention. The critical character of financial, organisational, technical and other aspects of inequality between the state and defence capability in Georgia should also be balanced by explicit regular duties of investigation and prosecution in respect of integrity and care, i.e. serving the legitimate interests of those implicated, suspected, and accused. In particular the obligation should extend not only to disclosing, but also seeking evidence favourable to the defence⁴⁹. For the same reasons it is worrying that the state does not consider allocation of any additional funds in order to mitigate in practice the financial connotations of putting the entire burden of balancing the accusatory stance on the defence⁵⁰.

Furthermore, several core norms that are asserted in introductory and general clauses of the draft CPC are diluted in subsequent specific provisions. It is noteworthy that many limitations of rights are formulated very widely, leaving room for arbitrariness.⁵¹ They are not compensated for by clear wording, and appropriate safeguards⁵². In their entirety they are capable of undercutting the whole system of fair trial postulates. The most significant of these are the unbalanced exceptions to the right of the defence to participate in person in the questioning of witnesses⁵³. In spite of the above-mentioned general rule on disclosure of evidence, the draft CPC has retained unbalanced exceptions in respect of non-disclosure of results of covert investigations at the early stages of the procedure⁵⁴. The draft CPC failed to adequately define the crucial moment from which criminal charges are considered as being brought against a person, i.e. the point from which the person concerned is entitled to basic fair trial guarantees. While Convention law uses a broad concept of any form of measures which carry the implication of an allegation of committing a criminal offence⁵⁵, the draft CPC limits them to the moment of detention or presenting of formal charges only. As a result, on certain occasions it can lead to an unacceptable postponement of the application of the said guarantees, especially in view of the powers of the investigating authorities and their scope during the pre-trial stage⁵⁶.

⁴⁸ However, even a formal equality is not preserved fully. Thus, more recent versions of the draft CPC omit from the entitlements available for the defense such investigative activities as searches and covert investigative actions.

⁴⁹ It is indicative that more recent working versions of the draft CPC, and in particular modifications of paragraph 3 of Article 18 limit the ban on using unacceptable evidences to court decisions only and, therefore, exclude its applicability to an indictment and prosecution.

⁵⁰ Although paragraph 6 of Article 167 of the draft CPC envisages possibilities for expanding the legal aid scheme over expertise costs, it should be taken into account that the relevant draft explanatory memorandum does not ask for any additional expenses neither in this regard nor other needs. There are other provisions requiring additional expenses, including the rule obliging the defense to submit all the materials to the court and prosecution on 'own expenses' (paragraph 7 of Article 89 of the draft CPC). The same applies to the introduction of jury trials.

⁵¹ See *Gusinskiy v. Russia*, application no. 70276/01, ECtHR Judgment, 19 May 2004, para. 62.

⁵² See *Doorson v. the Netherlands*, application no. 20524/92, ECtHR Judgment, 26 March 1996, para. 70; *Rowe and Davis v. the United Kingdom*, cited above, paras. 61-62.

⁵³ Articles 43, 114 of the draft CPC. To be compared to *Van Mechelen and Others v. the Netherlands*, applications nos. 21363/93, 21364/93, 21427/93 and 22056/93, ECtHR Judgment, 23 April 1997, para 60.

⁵⁴ Paragraph 5 of Article 89, paragraph 13 of Article 41 of the draft CPC.

⁵⁵ Paragraph 6 of Article 4 and Article 40 of the draft CPC. To be compared to *Corigliano v. Italy*, applications no. 8304/78, ECtHR Judgment, 23 November 1982, para. 34 (with further references).

⁵⁶ Parts XVII and XVIII of the draft CPC. In a context the implication of an allegation of committing a criminal offence can be linked to many investigative activities performed against a person, including seizure of documents, search and so on. The same applies to intended introduction of 'stopping' (see footnote 29 above).

The list of other problematical elements includes: debatable openings for the retrial of those acquitted by courts⁵⁷, the indefinite extension of procedural seizure of property to a wide range of persons⁵⁸, and an unspecified procedural framework and related inapplicability of basic safeguards, in relation to punishments for certain procedural violations and trial-related offences⁵⁹.

The incorporation of provisions regulating covert investigative actions into the draft CPC should be considered as a positive development. However, due to their cursory and inconsistent character the relevant set of norms does not fully meet the requirements of articles 6 and 8 of the Convention. Thus, while envisaging detailed procedural rules for just two types of covert investigative actions that necessitate a court order, the draft CPC does not contain any regulatory framework for the remaining five. The latter have been left within the prosecutors' competence without any procedural safeguards whatsoever⁶⁰. In addition, the provisions in question do not ensure clarity and foreseeability in respect of protection against infringements of the right to respect of home and private life⁶¹, and against incitement and entrapment⁶².

Recent amendments to the legislation⁶³ have restricted access by the media to criminal proceedings. They have established an approach amounting to a *de facto* media-free regime that contradicts the publicity rules enshrined in paragraph 1 of Article 6 of the Convention. Although Article 107 of the draft CPC provides for a compromise, it does not comply fully with the essence of the Convention law which establishes a presumption in favour of public hearings, which includes access by the media⁶⁴. In Convention law it can be overruled in particular circumstances⁶⁵ and under the 'necessary in a democratic society' standard only. In this regard it should be highlighted also that Convention law questions the proportionality of an automatic blanket ban, even if it is designed to achieve very serious and noticeable legitimate aims⁶⁶. The importance attached by the ECtHR to the public character of proceedings as a safeguard 'against the administration of justice in secret with no public scrutiny', 'the means whereby confidence in the courts can be maintained' and the affirmation that 'rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1'⁶⁷, make the above-mentioned restrictive regime especially objectionable in the light of certain other factors that could be seen as undermining public trust in the independence of the judiciary. In the current circumstances it is particularly important that the draft CPC and other relevant legislation affirm the publicity and media standards mentioned⁶⁸.

⁵⁷ Articles 24 (still operates with the notion of 'termination of case' and not of a 'prosecution'), 130, 293 of the CPC.

⁵⁸ Article 176 of the draft CPC.

⁵⁹ Paragraph 5 of Article 197, paragraph 6 of Article 198, paragraph 1 of Article 91, paragraph 10 of Article 93 and so on.

⁶⁰ Articles 158-160 of the draft CPC. See *Khan v. the United Kingdom*, application no. 35394/97, ECtHR Judgment paras. 26-28; *Allan v. the United Kingdom*, application no. 48539/99, ECtHR Judgment para. 52.

⁶¹ In particular that applies to surveillance. S/paragraph 1.a of Article 158 of the draft CPC.

⁶² Apply to the majority of s/ paragraphs of Article 158 of the draft CPC. *Teixeira de Castro v. Portugal*, application no. 25829/94, ECtHR Judgment, 9 June 1998, paras. 36-39.

⁶³ Paragraph 2 of Article 16 of the CPC in force and Paragraph 4 of Article 12 of the Law on Court of General Jurisdiction.

⁶⁴ Paragraph 1 of Article 107 of the draft CPC contains partially contradictory provisions in this regard. Furthermore, more recent working versions of the draft CPC incorporate rules that maintain a 'media free' regime.

⁶⁵ *B. and P. v. the United Kingdom*, applications nos. 36337/97 and 35974/97, ECtHR Judgment, 24 April 2001, paras. 36-37.

⁶⁶ See *Hirst v. the United Kingdom (No.2)*, application no. 74025/01, ECtHR (GC) Judgment, 6 October 2005, para. 74.

⁶⁷ *B. and P. v. the United Kingdom*, para. 36.

⁶⁸ Article 107 of the draft CPC omits clear reference to media. Its provisions should be reinforced accordingly.

1.4 Prosecution

The discretion exercised by the prosecution is another aspect of criminal procedure that requires a more balanced approach, because of its potential to weaken public confidence in the criminal justice system. Unfortunately, the draft CPC can be seen to be introducing unlimited discretionary powers for the prosecution⁶⁹. While not excluding discretionary prosecutorial powers, international standards unconditionally prioritise the principles of equality of all citizens before the law, and individualisation of criminal justice⁷⁰.

The above-mentioned pecuniary elements of the system have been put under the almost exclusive competence of prosecution. The prosecution also has actual dominance in the application of coercive measures⁷¹, a monopoly in respect of minimisation of punishments, and the opportunity to restrict certain fair trial guarantees. These could all be regarded as indicators that call into question the fairness of the system⁷². Such an approach is even more objectionable because of the ambiguous demarcation between the competences of prosecution and investigation, and the resultant expansion of prosecutorial powers over a large group of law-enforcement officers. While the investigating body is logically furnished with the power to detain suspects, the latter component (detention) is equated with the initiation of criminal prosecution. This contradicts the assertion that this function is an exceptional power of the prosecution⁷³.

The elements of the role of prosecution that override powers of court judges⁷⁴ should be brought in line with the relevant standards.⁷⁵ Moreover, the general immaturity of the criminal justice system makes it advisable to incorporate guiding principles and safeguards in the legislation and not only to contain them in departmental documents. The prosecution should be guided by clear and transparent directives⁷⁶. These requirements have become more topical in view of the merger of the Ministry of Justice and the prosecution system.

1.5 Plea-bargaining

Considerations relating to the factors that undermine public confidence in the fairness of criminal procedures are extremely relevant for assessing the appropriateness of the recently introduced scheme of plea-bargaining. There are a range of factors that militate against a fair system of plea bargaining in Georgia. These include: the above-mentioned framework for detention on remand,⁷⁷ sentencing that does not provide an appropriate range of opportunities for individualisation of punishment, stringent sentencing schemes introduced under the Criminal Code⁷⁸; and legal limitations on the minimization of punishments or conditional sentences which restrict these to plea-bargaining/procedural deals or cases of co-operation with the investigation,⁷⁹ practices which

⁶⁹ Articles 22, 127 of the draft CPC.

⁷⁰ Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe to Member States concerning the Simplification Of Criminal Justice, chapter I.

⁷¹ Thus, the ratio of prosecution's motions on remanding in custody granted is constantly increasing: while in 2005 it was 81,6 % and in 2007 - 93,6%, in the first half of 2008 it reached 95,1 %.

<www.supremecourt.ge/default.aspx?sec_id=129&lang=1> Consulted on 30.09.2008.

⁷² See comments and related footnotes 14, 41, 43-45, 56, 74.

⁷³ Articles 22, 177 paragraph 2, 178 paragraph 1, 183 paragraph 1.

⁷⁴ See comments and related footnotes 41 (omission of the power to decrease bail) and 74.

⁷⁵ Recommendation Rec(2000) 19 of the Committee of Ministers of the Council of Europe to Member States on the Role of Public Prosecution in the Criminal Justice System, paragraphs 17,19.

⁷⁶ *Ibid*, paragraphs 13 and 36.

⁷⁷ See sections 1.1 and 1.2 above.

⁷⁸ See section 1.7 below.

⁷⁹ Paragraphs 2¹ of Article 50, Article 55, Article 63, paragraph 5 of Article 67 of the Criminal Code.

actually rule out any realistic prospect of an acquittal⁸⁰. All these factors taken together significantly undermine the fairness of procedures leading to conviction under the existing plea-bargaining scheme⁸¹. Such a state of affairs amounts to a waiver ‘tainted by constraint’, as has been identified by the ECtHR in much less restrictive circumstances.⁸²

The plea-bargaining framework suggested in the draft CPC also reduces the minimal paper guarantees by skipping the requirement of disclosure of evidence to the defence,⁸³ and compelling it to ‘go blind’. Accordingly, the creation of a fair system of plea-bargaining, or other simplified procedures, would require, in addition to detailed elaboration of the legal procedures, measures to remedy the whole set of fundamental drawbacks in the current criminal procedure mentioned above.

1.6 Jury Trials

Introduction of jury trials is something that is innovative for the country concerned, but so far alien to it. In light of the problems relating to public confidence in the criminal justice system, and its fairness in particular, the novelty could be seen as a development to welcome.

At the same time, it requires sufficiently detailed assessment, preparation and adjustment. That is why the issue of applicability of jury trials that had been left unresolved in the draft CPC⁸⁴ has gained specific topicality independently of the fact that respective provisions were not sufficiently elaborated. In particular, the provisions do not regulate in detail several specific components of jury trials, especially procedures on admissibility of evidence⁸⁵. These are matters which should have been resolved on the basis of detailed and substantial research. It is therefore doubtful that they can be adequately finalised during procedures at the legislative level.

There are several other features that require additional reflection. Thus, both versions of the jury system provide for appeals only on a limited number of points of law. Jury trials are very complex and subject to an increased number of factors that can lead to mistakes and faults. In order to remedy this feature many jurisdictions have started to move away from strict limitations on appeals. Thus, the UK has introduced the more flexible concept of ‘unsafe’ conviction.⁸⁶ In view of the provisions of Article 2 of Protocol 7 to the Convention, to which Georgia is also a party, France has instituted re-hearings under the appeals procedure against guilty verdicts rendered by juries at the first instance courts⁸⁷.

⁸⁰ According to official statistics of the Supreme Court of Georgia, even the proportion of acquittals, unprecedented for fair trial based criminal justice systems, has been demonstrating a further tendency to fade: in 2006 their ratio was 0,8 % against all sentences rendered, in 2007 – 0,2%, in 8 months of 2008 – 0,2%.
<www.supremecourt.ge/default.aspx?sec_id=129&lang=1> Consulted on 30.09.2008.

⁸¹ Inappropriately harsh regime and conditions of detention, stringent policies of execution of punishments, including actual unavailability of early conditional release could be added to the list of factors to be taken into account in this regard.

⁸² *Deweere v. Belgium*, application no. 6903/75, ECtHR Judgment, 5 February 1980, para. 54.

⁸³ Articles 89, 202-207 of the draft CPC.

⁸⁴ See paragraph 2 of Article 27.

⁸⁵ Paragraph 2 of Article 242 of the basic and Article 248 of the alternative version of the draft CPC. Paragraph 3 of Article 217 contains just an indication in respect of additional evidences. In countries with well-established legal tradition of jury trials respective general rules are supplemented by practice and corresponding experiences.

⁸⁶ UK *Criminal Appeal Act* 1995 s2(1).

⁸⁷ Articles 496-520, 546-549 of the CCP of France.

Taking into account the specificity of jury systems, it should not be overlooked that the society in general is ill-equipped with necessary experience and understanding for its adoption. Relevant consideration should also be given to financial and administrative implications of the system⁸⁸.

For these reasons and given the level of preparation that has been done, it is premature to consider a fully-fledged introduction of jury trials⁸⁹. Accordingly, any practical steps in this regard should be preceded by more fundamental scientific and empirical studies, assessment of feasibility of such a system in the context of the country concerned and its entire legal system, more detailed elaboration of specific legal provisions and preparation of well-thought through amendments to related legislation. In addition, there should be a fundamental assessment of the administrative and financial aspects of the system that may be introduced. The preparations should include relevant training for the judiciary, prosecutors and lawyers, as well as awareness-raising activities for the public in general.

1.7 Criminal Code and Sentencing

An overwhelmingly custodial mentality, and related policies have resulted in correspondingly punitive amendments to the Criminal Code as well as to changes in practice. Remarks made above regarding tendencies to be observed in respect of excessive and financially driven application of pre-trial detention, and a distorted plea-bargaining framework⁹⁰ are equally relevant to current sentencing policies.

It should be emphasised that the strict requirement that punishments be added together mechanically can lead to sentences of up to 30 years' imprisonment for several, comparatively minor crimes, or 40 years in case of appended judgments⁹¹. The same difficulties with individualisation of punishment arise owing to the maintenance of an extremely narrow scope of sanctions envisaged by the Criminal Code for many categories of crime, and very rigid rules concerning the possibility to award sanctions below the minimum envisaged⁹². That scope is often limited to the range of two years' imprisonment only⁹³. These shortcomings were not, and could not be, remedied by the guidelines issued by the Supreme Court of Georgia, since they were obliged to follow the legislative framework in force⁹⁴.

Data on the type of punishment and their application in the first eight months of 2008 suggest that only three types are actually used: imprisonment (43,6 %), fines (3,9%) and conditional sentences (51,4 %).⁹⁵ It is worth reiterating that conditional sentences are applied in combination with fines, as a rule, in cases of cooperation with the investigation or under the plea-bargaining scheme (procedural deals) only. This state of affairs can be illustrated by the fact that in the first six months of 2008 there was only a single instance of sentencing to correctional labour, but 581

⁸⁸ See comments regarding financial implications in footnote 45 above.

⁸⁹ More recent versions of the draft CPC rightly opted for a limited use of the jury system at the initial stages of its introduction. It is envisaged to apply it to intentional homicide cases only. At the same time these versions demonstrate that the system undergoes significant alterations, raising concern as to whether the necessary levels of thoroughness and vigilance in law-making have been present in respect of such a complex and fundamental matter.

⁹⁰ See sections 1.1, 1.2 and 1.5 above.

⁹¹ Articles 50, 59 of the Criminal Code.

⁹² In addition to provisions referred to in footnote 74 see Article 54 of the same code.

⁹³ Parts 1-6 of Article 117, parts 2, 3 of Article 118, part 2 of Article 177, part 2 of Article 178 and so on.

⁹⁴ See the Guidelines on Problematic Issues in the Practice of Criminal Justice. <www.supremecourt.ge/default.aspx?sec_id=179&lang=1> Consulted on 01.10.2008. Although the guidelines aim at ensuring uniform sentencing practice and they are designed as a detailed template, they have the potential to further limit opportunities for individualization of punishment. The schemes provided for in the guidelines remain harsh. None of rigid, even detailed schemes is able to meet all the particularities of concrete cases and persons.

⁹⁵ <www.supremecourt.ge/default.aspx?sec_id=129&lang=1> Consulted on 30.09.2008.

sentences of imprisonment for up to two years. The latter constituted 13% of all imprisonment sentences rendered⁹⁶.

These features of the sentencing framework do not correspond to international standards, nor to contemporary rationales developed in respect of the issues concerned⁹⁷.

One more change of note is the lowering of the age of criminal responsibility from 14 to 12 years for the gravest crimes⁹⁸. The legislative amendment in question was introduced without an adequate assessment of the internationally accepted approaches developed in this regard. The standard provides for relating the age of criminal responsibility to the age at which juveniles assume civil responsibilities in other spheres such as marriage, the end of compulsory schooling and employment⁹⁹. In the event, implementation of the provision in question was postponed due to lack of the necessary infrastructure. However, subsequent developments have demonstrated that temporary or time specific problems in relation to juvenile delinquency and combating criminality in general can be solved through a complex of preventive, administrative, educational and other measures without embarking on the use of really punitive instruments.

1.8 Legal Safeguards against Ill-treatment

The draft CPC has incorporated several provisions in line with the CPT requirements on legal safeguards on prevention of ill-treatment¹⁰⁰, including those on access to a doctor and notification upon custody. However, it still lacks certain crucial components of the set of corresponding standards. The two rights are formulated without sufficient emphasis on the requirement that they must apply from ‘the outset of deprivation of liberty’ and that detainees must be able to choose their own doctor. The observations on the specific shortcomings in respect of criteria determining the starting moment of deprivation of liberty are relevant and should be highlighted in this regard also¹⁰¹. The provisions should set safeguards that are used in case of postponement of application of the rights concerned (informing the detainee concerned, respective approval and possibilities for appeal). Besides, the repetitive, but inconsistent provisions on information about these rights¹⁰² do not stipulate that they have to be properly explained to detainees.

One more criticism is that neither the draft nor the current CPC provide for record keeping by police and other detaining agencies. Such records are essential as a separate safeguard (in addition to protocols of detention) against ill-treatment and violations of the right to liberty and security¹⁰³.

⁹⁶ *Ibid.*

⁹⁷ Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe to Member States Concerning Prison Overcrowding and Prison Population Inflation, paragraph 20. Recommendation Rec(2000) 22 of the Committee of Ministers of the Council of Europe on improving the implementation of the European rules on community sanctions and measures, paragraphs 2-4.

⁹⁸ Amendments to the Criminal Code introduced by Laws N4785 of 23.05.2007, N5196 of 04.07.2007.

⁹⁹ Rule 4.1 of the UN Standard Minimum Rules on the Administration of Juvenile Justice adopted by the UN General Assembly resolution 40/33 of 29 November 1985.

¹⁰⁰ See paragraph 6 of Article 185, Article 187. See the CPT’s 2nd, 6th and 12th General Reports: CPT/Inf (92) 3; CPT/Inf (96) 21; CPT/Inf (2002) 15.

¹⁰¹ See observations in section 1.1 above.

¹⁰² Paragraphs 1 and 2 of Article 41 and paragraph 1 of Article 185 of the draft CPC.

¹⁰³ See also *Menesheva v. Russia*, application no. 59261/00, ECtHR Judgment, 9 March 2006, at paragraph 87.

2. EXECUTION OF IMPRISONMENT AND PROBATION

2.1 Overcrowding and Living Conditions

According to statistics provided by the Penitentiary Department of Georgia the total prison population comprised more than 19 929 persons at 1 October 2008. This represents a more than 300 % increase in comparison to 2004, when 6500 were held. Moreover, according to the same data, combined with Ministry of Justice orders setting upper limits, where available, the population of many of the establishments exceeded their official capacity.

Notwithstanding the radical increase in the prison population and the resultant problem of overcrowding, in some cases extreme, and despite recommendations made by different international organizations and bodies over a number of years,¹⁰⁴ the legislation, including the draft CI and other relevant texts, has not incorporated any national strategies or mechanisms to address these urgent problems¹⁰⁵.

Both the legislation in force and the draft CI do not meet the basic international standards on living conditions of prisoners. The level of overcrowding becomes especially evident in light of the domestic standard on minimum living space for individual prisoners. Neither the current law, which stipulates 2 m² for the majority of categories of prisoners (2,5-3-3,5 m² for those kept under 'prison regime', women, patients and juveniles accordingly)¹⁰⁶ nor the draft CI, which lays down the basic norm of 3 m² per inmate,¹⁰⁷ meets the international standard of 4 m² set by the CPT for multi-occupancy accommodation¹⁰⁸. The norms in question also do not envisage corresponding standards for single occupancy.

There are some other comparatively minor but specific deficiencies in the standards for material conditions laid down in the draft CI. There is no provision for laundry. Dietary requirements are not specified in sufficient detail.¹⁰⁹ The clause entitling prisoners to a shower omits to mention that the shower should be warm¹¹⁰. The particular standard dealing with access to natural light and ventilation has been referred to without specifying its adequacy and is limited just to mentioning 'a window'¹¹¹. The ambiguous general stipulation that living conditions should meet the requirements of respective bylaws does not contain any indications of criteria that such bylaws must meet¹¹².

2.2 Legal Status of Prisoners

Although the CI has been improved in accordance with certain recommendations and suggestions of international experts, some provisions on the legal status of prisoners remain ambiguous.¹¹³

¹⁰⁴ See among others the CPT report on the 2007 visit to Georgia, CPT/Inf (2007) 42, para. 32.

¹⁰⁵ See Rule 18.4 of the European Prison Rules, Recommendation (99) 22 of the Committee of Ministers of the Council of Europe on Prison Overcrowding and Prison Population Inflation.

¹⁰⁶ Paragraph 2 of Article 33 of the Law on Imprisonment.

¹⁰⁷ Paragraph 2 of Article 98, paragraph 3 of Article 105, paragraph 2 of Article 111. Only women and juveniles will be entitled to a more 'generous' rate of 3,5 and 4 m² (Paragraph 2 of Article 122 and Paragraph 1 of Article 120).

¹⁰⁸ See the CPT report on the 2007 visit to Georgia, CPT/Inf (2007) 42, para. 61.

¹⁰⁹ Paragraph 4 of Article 17 of the draft CI compared to Rule 22.1 of the European Prison Rules.

¹¹⁰ Paragraph 2 of Article 15.

¹¹¹ Paragraph 2 of Article 9 of the draft CI.

¹¹² Paragraph 1 of Article 9 of the draft CI.

¹¹³ Paragraph 2 of Article 9 *etc.*

Moreover, they are subject to excessively stringent limitations and do not correspond to internationally recognised classifications of human rights and related standards. The key article that provides for the list of prisoner's rights omits any reference to family life¹¹⁴. Although it is a non-exhaustive list, the importance of the right in question should not be underestimated but such an inference may be implied¹¹⁵. At the same time, visiting arrangements and other components of contacts with the outside world are dealt under the heading of 'conditions of life'¹¹⁶.

The legislative framework disregards the guiding principle which stems from the Convention and is enshrined in the European Prison Rules, according to which restrictions on prisoners' rights 'shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed'¹¹⁷. As a result, legal provisions on certain entitlements set arbitrary maximum limits. This is the case in respect of the number of visits and telephone calls permitted, and provision of writing materials¹¹⁸. The draft CI implies a blanket ban on short-term leave for the majority of convicts. It does not provide for any possibility of applying an individual and therefore a proportionate approach, as required by Convention law.¹¹⁹ The wording of many restrictive clauses is general and imprecise, thus failing to meet the requirements of clarity and foreseeability. These legislative shortcomings leave considerable room for arbitrariness. Thus, the general clause providing for administrative control of telephone conversations of prisoners does not specify any limit whatever on such control¹²⁰. There are similar clauses in the current legislation¹²¹.

2.3 Remand Prisoners

The legal framework on remand prisons and prisoners has preserved an outdated concept whereby the regime to which such prisoners are subject is considered as an element of the prosecuting machinery. This approach is evident from the statement made regarding the aims of this type of establishment : 'isolation and assistance to preliminary investigation'.¹²² This assertion should attract particular attention in view of the planned intended institution in Georgia of a separate ministry dealing with execution of sanctions, and the resultant danger of treating it as yet another law-enforcement agency.

¹¹⁴ Article 7 of the draft CI.

¹¹⁵ Especially due to excessive limitations imposed on it. See below.

¹¹⁶ Paragraph 1 of Article 8 of the draft CI.

¹¹⁷ Rules 3 24.4 of the European Prison Rules. Recommendation (2006)2 of the Committee of Ministers of the Council of Europe.

¹¹⁸ Articles 10, 13, 97, 106, 112, 120, 122, 127 of the draft CI and respective provisions of the current Law on Imprisonment. The introduction of paragraph 4¹ in Article 48 of the latter has not remedied the deficiency in question, due to extraordinary character of 'additional' visits and the wording of 'not more than' used in the itemizing provisions (Articles 73-74, 77-80, 83 of the Law on Imprisonment).

¹¹⁹ Articles 92, 128 provide it for convicted persons serving their sentences in an open type institution, women and 'accused' only. The Law on Imprisonment uses the same approach, but to a far wider circle of prisoners (Article 49). To compare to *Ploski v. Poland*, application no. 26761/95, ECtHR Judgment, 12 November 2002, paras 33-39. See also Rule 24.7 of the European Prison Rules.

¹²⁰ Paragraph 2 of Article 13 of the draft CI. To be compared to *Malone v. the UK*, application 8691/79, ECtHR Judgment, 2 August 1984, paras. 66-80. More detailed provisions on controlling prisoners' correspondence (paragraphs 4-6 of Article 10 of the draft CI) are partially revoked by specifying clauses that actually exclude guarantees provided in certain paragraphs (paragraph 4 of Article 106 and paragraph 3 of Article 112). The same applies to clauses on supervision of visits and use of technical means of surveillance, which use imprecise wording: 'as envisaged by legislation' without providing for specific grounds, safeguards and other conditions of their legitimacy (7 of Article 11, paragraph 2 of Article 84).

¹²¹ For example, paragraph 1 of Article 76 of the Law on Imprisonment provides for solitary confinement 'in case of need'.

¹²² Paragraph 1 of Article 23 of the draft CI. To be compared to Rules 95.1-95.3 of the European Prison Rules.

The considerable reduction in the scope of rights applicable to remand prisoners clearly contradicts the presumption of innocence and specific standards enshrined in the European Prison Rules¹²³. Examples of such unjustified restrictions include the absence of any entitlement to work and to education¹²⁴, as well as limitations on visits beyond those suggested by requirements of criminal procedure and the particular situation in the establishment concerned.¹²⁵

2.4 Imprisonment Strategies

The legislative framework envisages a range of possibilities for applying progressive imprisonment schemes, including relocation to establishments with less strict regimes¹²⁶, substitution of the remaining term of imprisonment with a more lenient type of punishment¹²⁷ and release on parole¹²⁸. However, the existing practice developed against the background of existing avenues for gradual reintegration, and release on parole in particular, has been significantly obstructed for a considerable period of time.¹²⁹ This threatens the whole set of legal provisions concerned. In such a situation a change to, or parallel introduction of, mandatory principles requiring consideration of such practices¹³⁰ could be seen as an additional safeguard against continuing or repeated shortcomings in the implementation of the such schemes.

In addition, the draft CI does not contain precise provisions on substitution of the remaining term of imprisonment with a period of conditional release¹³¹. It does not spell out avenues for appeals against negative decisions of the responsible decision making body, the ‘Permanent Commission’ either, as has been done in respect of imposition of disciplinary punishments¹³².

As to the legislation in force, recent developments with regard to introduction of substitution of the remaining term of imprisonment with community/socially useful work could be seen as positive.¹³³ However, elements of the draft legislative amendments make the whole move highly questionable, especially with regard to provisions incorporating limitations on contacts with family members and close relatives¹³⁴, and allocation of convicts to a specified place¹³⁵. These elements imply a substantial move away from what is often considered the rehabilitative essence of this type of sanction, keeping convicted persons in or returning them to a normal social

¹²³ Rules 95.1-95.3.

¹²⁴ Paragraph 3 of Article 7, Chapters XVIII and XIX of the draft CI. There are certain difficulties with providing remand prisoners with relevant activities, but it should not lead to absolute deprivation of the rights in question. See Rule 100 of the European Prison Rules, Recommendation (2006)13 of the Committee of Ministers of the Council of Europe on the Use of Remand in Custody, paras. 35-44

¹²⁵ Article 127 of the draft CI introduces a maximum limit of short-term visits for remand prisoners (not more than 4 per month).

¹²⁶ Paragraph 4 of Article 105, paragraph 3 of Article 111 of the draft CI.

¹²⁷ Article 73 of the Criminal Code, paragraph 1 of Article 71, paragraph 5 of Article 133 of the draft CI.

¹²⁸ Article 72 of the Criminal Code, paragraph 1 of Article 71, Article 74, paragraph 5 of Article 133 of the draft CI.

¹²⁹ See the Report of Public Defender of Georgia in respect of the Second Half of 2007.

< <http://www.ombudsman.ge/uploads/reports/annualreport2007part2.pdf>>, consulted on 01.10.2008. The same concerns apply to a release heavily ill or elderly prisoners (Article 62 of the Law on Imprisonment). See also Article 73 of the draft CI.

¹³⁰ Recommendation (2003)22 of the Committee of Ministers of the Council of Europe to Member States on Conditional Release (Parole), paras. 22-24.

¹³¹ At least analogous to those for parole. See Article 74 of the CI.

¹³² Articles 109, 115, 130 and 133 of the draft IC.

¹³³ See the set of draft laws amending Criminal and Criminal Procedural Codes, Laws on Imprisonment and Probation that were given their first reading by the Parliament in July 2008.

¹³⁴ See paragraph 4 of draft Article 33¹ of the Law on Probation.

¹³⁵ See paragraph 3 of draft Article 73 of the Criminal Code.

environment. At the same time there are no indications as to the modalities governing the accommodation, or other regime elements for this category of convicted. Also unclear are the nature of the emerging figure of the ‘representative in charge of execution of sentence’¹³⁶, the length of the working day¹³⁷ when the sanction is substituted for a remaining term of imprisonment, and other conditions of labour.

2.5 Reintegration Strategies/ Juveniles

It is extremely important that the draft CI declares its orientation towards basic elements of contemporary penological thinking. This includes constructive and individual means of preventing re-offending, of promoting resettlement, and of providing prisoners with planned, assisted and supervised reintegration into the community¹³⁸. However, the related provisions require further elaboration in respect of the explicit introduction of individual sentence planning, in particular with regard to the rehabilitation of juveniles¹³⁹. The latter point is just one facet of the inadequacy of norms and approaches developed in respect of juvenile prisoners. This assertion is made on the basis of a number of deficiencies, in particular: lack of flexibility in the regime supposed to meet the need for individualisation of their treatment, maintaining effective contacts with families and the outside world in general; omission of specific provisions in respect of juveniles kept on remand; and omission of requirements regarding specialised training of the staff working with them.¹⁴⁰

2.6 Discipline and the Use of Force

One of the most serious areas of concern relates to provisions for the disciplinary responsibility of prisoners. In addition to drafting and structural deficiencies in the CI,¹⁴¹ there are substantial and operational shortcomings in the provisions. These include a lack of specific definitional elements in the description of ordinary disciplinary violations at all types of establishments¹⁴² and inadequate provisions on material conditions to be ensured in isolation cells.¹⁴³ Also unsatisfactory is the inclusion of deprivation of visiting and phone entitlements as a general disciplinary punishment¹⁴⁴. If such a penalty is used, it should only be considered in relation to offences deriving from and related to visits and telephone calls.

¹³⁶ See paragraph of draft Article 68¹ of the Law on Imprisonment and paragraph 3 of Article 33¹ of the Law on Probation. Due to analogous but inconsistent references to ‘a representative’ it remains unclear whether it is the same kind of official. From the context of the amendments it seems that ‘representatives’ or ‘authorized organs’ do not form part of the Probation Service or Penitentiary System. Moreover, the proposed system strips the administration of penitentiary establishments of the power to initiate an application regarding the respective scheme, and limits their role in leading the process of execution of imprisonment. There are neither grounds for shifting the initiative to such representatives, nor criteria which they are obliged to follow in this regard. The explanatory comments fail to offer enlightenment.

¹³⁷ Paragraph 3 of the draft Article 73 of the Criminal Code excludes application of Article 44 requirements for

¹³⁸ Articles 1, 75, 142-144 of the draft CI.

¹³⁹ Article 121 of the draft CI.

¹⁴⁰ Article 120 of the draft CI.

¹⁴¹ See chapter 3.2 below.

¹⁴² Paragraphs 1 of Articles 102, 109, 114, 129 of the draft CI. See Rule 57.2.a of the European Prison Rules.

¹⁴³ Paragraphs 1 of Articles 110, 116, 117 of the draft CI.

¹⁴⁴ Paragraphs 2 of Articles 114, 129 of the draft CI. See the Commentary to Recommendation (2006)2 of the Committee of Ministers of the Council of Europe to Member States on the European Prison Rules, in respect of Rule 60.

There may arguably and exceptionally be a need for punishments to be applied beyond those in the repertoire of internal disciplinary sanctions, for example the ordinary criminal law and its attendant principles of responsibility may be applied to grave violations committed within prison. However, the amendments to the Law on Imprisonment introduced in June 2007,¹⁴⁵ which provide for ‘administrative arrest’ for prisoners, represent an imposition of what are actual criminal sanctions¹⁴⁶. This is an entirely unacceptable hybrid based on a different set of procedural rules that, despite the fact that the current amendment represents a substantial improvement on the initial draft, do not contain major fair trial guarantees and other safeguards.¹⁴⁷ The set of norms lacks clarity, and the wide definition of ‘grave violations’ leads to a grave risk of arbitrariness. The procedure evades basic procedural norms and principles, including the presumption of innocence and the related burden of proof¹⁴⁸, the guarantee of adequate time and facilities for the defence¹⁴⁹, the right to meet a lawyer in private and the availability of a free legal aid at all stages of the proceedings¹⁵⁰ and so on.

The draft CI contains stipulations on use of lethal force vis-à-vis escapees that are inconsistent with the Convention law. They are too broad due to the omission of the requirement that the use of force be proportional to the threat caused by such prisoners¹⁵¹. The draft CI needs to be adjusted to international standards on the use of firearms, including criteria of absolute necessity and positive obligations under Article 2 of the Convention, as interpreted by the ECtHR. The issues that must be dealt with include the planning and control of use of lethal force, the quality of regulating provisions and the training of staff.¹⁵²

2.7 Public Monitoring

The provisions governing the powers and responsibilities of the public monitoring boards¹⁵³ need to be upgraded in accordance with relevant international standards.¹⁵⁴ Accordingly, the CI should also provide for appropriate access to information, documentation and records; the entitlement to meet prisoners in private; arrangements for publication of monitoring results; additional, also financial, guarantees of independence; and the inclusion of human rights issues in the scope of the activities of the national monitoring board.

¹⁴⁵ Articles 30¹⁻⁵ of the Law on Imprisonment.

¹⁴⁶ See *Ezeh and Connors v. The United Kingdom*, applications nos. 39665/98 and 40086/98, ECtHR [GC] Judgment, 9 October 2003, paras. 69-130.

¹⁴⁷ The shortcomings of this type of procedure lie in awkward inclusion of elements of civil procedure akin to challenging individual administrative acts. See paragraphs 7, 14 and 15 of Article 30¹ of the Law on Imprisonment.

¹⁴⁸ S/paragraph ‘z’ (according to the Georgian alphabet) of paragraph 7 of Article 30¹ implies that an indictment can be brought without any evidence. There is no obligation or suggestion for the penitentiary administration that performs the prosecution even to seek an explanation of the defendant. Although Article 30² operates with the standard of ‘doubtless evidences’ for rendering a guilty decision by a judge, such admission of possibility of bringing charges without any evidence is a serious departure from prosecuting standards and policies.

¹⁴⁹ Paragraph 13 of Article 30¹ of the Law on Imprisonment.

¹⁵⁰ Paragraphs 10 and 15 of Article 30¹ of the Law on Imprisonment.

¹⁵¹ See paragraph 3 of the Article 87 and *Nachova v. Bulgaria*, applications nos. 43577/98 and 43579/98, ECtHR [GC] Judgment, 6 July 2005, paras. 93-109.

¹⁵² Article 87 of the draft CI. *McCann v. the United Kingdom*, application 18984/91, ECtHR Judgment, 27 September 1995, paras. 202-214; *Makaratzis v. Greece*, application no. 50385/99, ECtHR Judgment, 20 December 2004, paras. 56-72). See also paragraph 3 of the Article 87 in comparison to *Nachova v. Bulgaria*, applications nos. 43577/98 and 43579/98, ECtHR [GC] Judgment, 6 July 2005, paras. 93-109.

¹⁵³ Articles 65-66, paragraph 1 of Article 90 of the draft CI.

¹⁵⁴ See Rules 9, 93 of the European Prison Rules; CPT’s 2nd General Report, CPT/Inf (92) 3 [EN], para. 54; Articles 17-20 of the Optional Protocol to the Convention against Torture.

It would be advisable to incorporate in the CI any arrangements concerning the National Preventive Mechanism instituted in accordance with the obligations undertaken by Georgia as a party to the Optional Protocol to the Convention against Torture (OPCAT), so long as such arrangement adequately reflect the state's obligations under OPCAT.

2.8 Institutional Interaction

In addition to observations made concerning the distancing of the penitentiary system and other agencies dealing with execution of criminal sanctions from investigating and prosecuting authorities, particularly in respect of dubious role of remand institutions¹⁵⁵, it should be emphasised that there is a clear need for further enhancement of the institutional status of the military component (perimeter guards) of the penitentiary department in line with the requirement of separation from respective services.¹⁵⁶ If Georgia, as an interim measure, is obliged to use military forces for these purposes, arrangements should exclude any control over the establishments' regime, as well as any interaction with prisoners, and should guarantee the specific training and instruction on emergency matters, not least those dealt with above under section 2.6.

Interaction with other branches of government should also be clarified. The draft CI should be supplemented with expanded provisions on healthcare in prisons and provide more detailed criteria for its integration into, and compatibility with, national health policy, as well as for its interaction with general health administration.¹⁵⁷ It is worrying that in this regard the current version of the CI offers considerably less guidance than previous versions. The recent hasty introduction of a private health insurance scheme with regard to prisoners and prison staff makes precision even more imperative, as experience elsewhere has shown that rights protection requires contractor obligations to be clearly spelt out when contracts with private companies are entered into.

2.9 Probation

According to the Law on Rules of Execution of Non-Custodial Punishments and Probation, which represents one of the most recent complete pieces of legislation in this area, Georgia has opted for a joint agency approach and for a single law covering both components of the non-custodial aspects of penal policies¹⁵⁸. In view of planned creation of an independent governmental agency that would be responsible for the whole area of execution of criminal sanctions, it should be mentioned that such a move does not contradict international standards, but is quite exceptional¹⁵⁹.

As to the LP, it has failed to remedy the deficiencies inherent in the previous law on community sanctions and probation. It contains a weak reference to the human rights applicable in this context¹⁶⁰. It does not provide for an appropriately developed outline of the range of re-socialisation strategies and the means to be employed for that purpose, including the requirements for specifically trained staff. It does not envisage any analogous obligations in respect of other

¹⁵⁵ See chapter 2.3 above.

¹⁵⁶ Article 86 of the draft CI. See Rule 71 of the European Prison Rules.

¹⁵⁷ See Rules 40-47 of the European Prison Rules. Article 145 of the draft CI consists of just two general sentences now.

¹⁵⁸ Adopted on 19 June 2007. Hereinafter LP.

¹⁵⁹ On the main concerns see remarks made in chapters 2.3 and 2.8 above.

¹⁶⁰ Article 10 of the LP. See the comments on the similar provision of the draft CI in chapter 2.2 above.

non-custodial sentences or pre-trial measures¹⁶¹. Another systemic failure relates to lack of stipulations ensuring the required coordination and interaction of the service with the penitentiary establishments¹⁶². This could and should be remedied in the process of planned changes in the governmental structures.

An immediate finding by the Probation service that a parolee has violated his conditions of parole can result in a loss of liberty if the court subsequently confirms that he should be returned to prison as a result. A serious weakness of the current law is that, in spite of the consequences of these administrative procedures in terms of loss of liberty, the law does not provide even minimal safeguards, such as legal assistance and avenues for appeal against the decision to revoke parole¹⁶³. The fees set out in the LP that a parolee has to pay as a bond to allow temporary travel abroad are excessive and not coherent with the aims and objectives of a probation law¹⁶⁴. In general it can be said that the absence of a clear Probation policy statement has meant that the LP has retained its secondary and incoherent character. It has failed to contribute to resolving concerns regarding controversial developments in respect of implementation of community sanctions and alternatives to deprivation of liberty. It has failed to convince both those who allocate resources, and those responsible for sentencing, and represents a huge missed opportunity in the development of Georgia's penal policy that cannot be remedied too soon.

3. ISSUES OF LAW-MAKING

3.1 General Remarks

The outline above of developments in penal legislation and related practice has demonstrated that the process of reform has too often been carried out without a sufficiently fundamental scientific and methodological justification, and in the absence of other necessary basic preparatory work. The urgent need to combat organized crime and corruption, to dismantle obsolete state structures, and to meet the many other challenges faced by Georgia since the end of 2003 makes the often too prompt action and the resulting weaknesses of the current system understandable, but does not justify them.

Policy and law-making processes had been very much affected by responses to perceived 'needs of the moment' that have frequently been too simplistic in manner. Thus, a punitive stance has often prevailed over the introduction of coherent contemporary penological models and instruments. In addition, on certain occasions the process had been characterised by eclectic, piecemeal introduction of elements and approaches intrinsic to very different jurisdictions and legal traditions. In a number of instances there have been cases of mere 'transplantation' of statutory provisions. It is noteworthy that many of the legislative techniques and concepts used were based on the legal traditions and mindset of civil law, inquisitorial systems. Moreover, large-scale and fundamental legal developments require time-consuming and complex work involvement amendments to a large number of related legal texts and provisions. This has not

¹⁶¹ Article 40 of the LP applies to parole and refers to 'tutoring' and 'other actions', delegation of these obligations to social services or respectively trained persons only. See Recommendation Rec(2000)22 of the Committee of Ministers to member states on improving the Implementation of the European Rules on Community Sanctions and Measures and Recommendation No. R (97) 12 on Staff Concerned with the Implementation of Sanctions and Measures.

¹⁶² See also Recommendation (2003)22 of the Committee of Ministers of the Council of Europe to Member States on Conditional Release (Parole), paras. 12,15.

¹⁶³ Articles 12-13 of the LP.

¹⁶⁴ Article 14 of the LP.

been done, and it has led to numerous inconsistencies and conflicts between different stipulations and pieces of legislation¹⁶⁵.

While certain immediate and legitimate aims have sometimes been served, in the long term this has not obviated the need for more comprehensive and thoughtful preparation and review, as well as for critical assessment in terms of compatibility with the entire legal system, and the economic and societal situation in the country. While they may not be unacceptable in principle, some provisions, given their novelty, their isolated nature and the manner of their implementation, require additional safeguards. This is essential to ensure that Georgia adheres to the key provisions under the Convention and other European standards by which it is bound.

The inconsistent and hasty introduction of new legal frameworks¹⁶⁶ has led to countless and frequently contradictory legislative amendments. This can be illustrated by the series of changes to the “Law on Disciplinary Responsibility of Judges of Courts of General Jurisdiction and Disciplinary Adjudication”. Although this law has raised concerns primarily in respect of independence of judiciary, the situation of insecurity in the area of penal and related legislation brought about by the manner and form of its introduction undermines one of the key components of the European Convention, namely, the requirement of legal certainty. It is axiomatic that this element is essential for the rule of law and democracy in general. In addition, legislative techniques and the quality of drafting leave much to be desired; many limitations have been defined in general terms that do not meet the requirement that legal provisions should be precise and foreseeable¹⁶⁷. As a consequence, significant numbers of related legal texts contain repetitive and inconsistent provisions¹⁶⁸.

3.2 Drafting Deficiencies of the Main Codes in Issue

The regrettable quality of the overall development of a normative basis in the area concerned can be inferred from the principal terminological and other inconsistencies between two main draft pieces of legislation, the CPC and CI. In spite of the fact that consistency of norms within the entire legal system is an indispensable component of any legislative process, these draft laws have remained disassociated from and inconsistent with each other¹⁶⁹. Thus, the draft CI operates with the term ‘accused’¹⁷⁰, which according to the criminal procedure is much wider since it also includes individuals who are not subjected to remand in custody¹⁷¹. There are many other principal provisions in the draft CI that contradict or significantly differ from those defined and applied by the draft CPC¹⁷². Unlike the latter, the draft CI uses inconsistent provisions, which do not contain an exhaustive reference to the types of decisions that could be taken in respect of

¹⁶⁵ There is no unified approach towards concepts and notions used in the legislative framework in issue. In addition to discrepancies indicated above (see chapter 1.4, supra note 68 etc.), it is illustrative that both the draft CPC and the draft CI are inconsistently using terms of ‘investigation’ and ‘imprisonment’ or ‘pre-trial investigation’, ‘preliminary investigation’ and ‘preliminary imprisonment’ (Articles 4.17, 34,35, Chapter XII, 99, 122-130, 163, 186, 199, 210 and other provisions of the draft CPC, Articles 23, 127, 3.3 and other respective articles of the draft CI). It should be mentioned that more recent versions of the draft CPC remedied that inconsistency partially.

¹⁶⁶ The overall scale and intensity of modifications of the draft CPC during its recent preparation for the second reading at the Parliament can also serve as an illustration of such approach to the law-making process.

¹⁶⁷ *Supra notes* 46,47,117.

¹⁶⁸ For example, compare paragraphs 12 of Article 41 and 1 of Article 199 of the draft CPC. Other major problems of this kind are discussed throughout the paper.

¹⁶⁹ This is the first attempt to deal with the issue, since international experts involved had limited possibilities to address it so far.

¹⁷⁰ ‘ბრალდებული’. See Articles 3, 6 and so on throughout the draft CI.

¹⁷¹ See para. 6 of Article 4 and other respective provisions of the draft CPC.

¹⁷² See footnote 160 above in respect of use of terms ‘imprisonment’ and ‘preliminary imprisonment’.

remanding person in custody¹⁷³ and contradict the approach introduced in the CPC regarding the execution of sentences from the moment of their pronouncement by the courts of the first instance¹⁷⁴. Inconsistencies of this kind could be illustrated also by superfluous provisions on medical screening and other safeguarding elements of admission procedures for remand prisoners.¹⁷⁵

Although taking into account certain points put forward by domestic and international experts, the draft CI remains highly problematic in terms of its structure, thoroughness, internal consistency and clarity¹⁷⁶. Presumably it is constructed along the usual line of progressing from general stipulations to specific ones. However, many general provisions and principles are mixed up with constituting elements that should be dealt with in specifying sections and *vice versa*. Thus, for example, while suggesting a non-exhaustive list of constitutional rights, Article 7 incorporates the minimum standard of one hour for outdoor exercise, which is an important, but still a specific constituent of humane treatment. Similarly, the particular standard of access to natural light and ventilation has been referred to without any consistency in respect of the structure of the draft CI, or of the article that provides for a general rule that living conditions should meet the requirements of respective bylaws.¹⁷⁷ The draft CI does not clarify many specific notions and terms used. It does not specify what they mean in the prison context¹⁷⁸. It contains a series of repetitive provisions, some of which are contradictory¹⁷⁹. The examples mentioned are purely of an illustrative nature. The drafting defects are so serious and extensive that they would undoubtedly hinder effective implementation of the IC in practice. It is likely to prove impossible to remedy them within the framework of parliamentary hearings.

CONCLUSION

The constructive amendments to the draft legislation in question that have been highlighted above, and some recent trends in the application of penal legislation in Georgia, suggest that the authorities have an appreciation of the problem areas, and some degree of readiness to solve them. However, the serious shortcomings which remain in legislation and practice call for more prompt, systemic and comprehensive measures to remedy persistent shortcomings. Continued assistance from international actors, including in the form of intellectual and financial support, will be of great importance in this regard.

¹⁷³ See paragraph 1 of Article 200 of the draft CPC. To be compared to Paragraph 1 of Article 5 of the draft CI. This provision is replicated with an additional requirement in respect of identification document in paragraph 1 of Article 67 of the draft CI.

¹⁷⁴ See paragraph 2 of Article 162 of the CPC, paragraph 2 of Article 199 of the draft CPC. To be compared to Paragraph 2 of Article 5 of the draft CI. This provision is replicated with an additional requirement in respect of identification document in paragraph 2 of Article 67 of the draft CI. See also Article 77 of the draft CI.

¹⁷⁵ See paragraph 2 of Article 18, Article 125 of the draft CI. To be compared with the provisions referred to in footnotes 96-97 above.

¹⁷⁶ Respective deficiencies of the draft CPC are addressed in chapter I above. However, it should be mentioned that this document is of better quality in terms of methodology and structure.

¹⁷⁷ Paragraph 2 of Article 9 of the draft CI. The rest of components on living conditions are dealt in the specific provisions afterwards.

¹⁷⁸ For example, it uses the term 'night hours' without specifying it (Paragraphs 2 of Articles 14, 120, paragraph 5 of Article 25 and so on). It could be done by a reference to the definition used in the criminal procedure. The draft CI in its Article 7 just mentions the right to freedom of thought, conscience and religion without further indications of its applicability in custodial settings.

¹⁷⁹ There are repetitive and contradictory clauses on use of means of surveillance (Articles 26,27, 84, paragraph 6 of Article 126); repetitive paragraphs of articles on disciplinary procedures (Articles 109, 115, 130), repetitive restrictions on use of television and radio (paragraph 2 of Article 14, paragraphs 3 of Articles 106, 120) in the draft CI.

Further development of penal policies and legislation requires close and thoughtful attention to some fundamental issues. International standards and obligations assumed by Georgia, as well as purely pragmatic considerations of effectiveness in the legislative process, the proper administration of justice and the adequate functioning of the state machinery, all call for thorough elaboration, assertion of basic concepts and clear statements of long-term guiding principles.¹⁸⁰ It is still not too late to base the development and establishment of Georgian law and practice on a coherent, clearly elaborated and specific penal strategy, and on well thought-out policies deriving from such a strategy, but this will demand some immediate, practical decisions as to how to tackle the deficiencies in law and draft laws which we have highlighted.

¹⁸⁰ The existing Strategy on Criminal Justice Reforms of 2006 is of a rather general character and limited in value. It cannot be considered to meet the requirements of a fundamental strategic document. It does not include the results of scientific research, comparative analysis, or an assessment of expected consequences, probable effects and compatibility with other domestic legislation and international human rights law. The Action Plan, a compilation of important, mid-term (now partially outdated) objectives, also fails fully to address certain key issues of policy, practice and law, including international legal obligations. Moreover, the plans are disproportionately characterised by institutional and administrative components which, though important, fail to address or reflect crucial areas.

Annex I

III. LIST OF SOURCES

Sources of International Standards Invoked

European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

UN Convention against Torture

Optional Protocol to the UN Convention against Torture

Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules

Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to Member States on the Use of Remand in Custody, the Conditions in Which it Takes Place and the Provision of Safeguards against Abuse

Explanatory Memorandum to Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to Member States on the Use of Remand in Custody, the Conditions in Which it Takes Place and the Provision of Safeguards against Abuse

Recommendation (2003)22 of the Committee of Ministers of the Council of Europe to Member States on Conditional Release (Parole)

Recommendation Rec(2000)22 of the Committee of Ministers of the Council of Europe to member states on Improving the Implementation of the European Rules on Community Sanctions and Measures

Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe to Member States concerning the Simplification of Criminal Justice

Recommendation Rec(2000) 19 of the Committee of Ministers of the Council of Europe to Member States on the Role of Public Prosecution in the Criminal Justice System

Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe to Member States Concerning Prison Overcrowding and Prison Population Inflation

UN Standard Minimum Rules on the Administration of Juvenile Justice adopted by the UN General Assembly resolution 40/33 of 29 November 1985

Allan v. the United Kingdom, application no. 48539/99, ECtHR Judgment 5 November 2002

Assenov and Others v. Bulgaria, application no. 24760/94, ECtHR Judgment, 28 October 1998

B. and P. v. the United Kingdom, applications nos. 36337/97 and 35974/97, ECtHR Judgment, 24 April 2001

Chakvetadze v. Georgia, application 29869/07, ECtHR Decision, 21 October 2008

Corigliano v. Italy, application no. 8304/78, ECtHR Judgment, 23 November 1982

Deweert v. Belgium, application no. 6903/75, ECtHR Judgment, 5 February 1980

Doorson v. the Netherlands, application no. 20524/92, ECtHR Judgment, 26 March 1996

Ezeh and Connors v. The United Kingdom, applications nos. 39665/98 and 40086/98, ECtHR [GC] Judgment, 9 October 2003

Gusinskiy v. Russia, application no. 70276/01, ECtHR Judgment, 19 May 2004

Hirst v. the United Kingdom (No.2), application no. 74025/01, ECtHR (GC) Judgment, 6 October 2005

Jablonski v. Poland, application no. 33492/96, ECtHR Judgment, 21 December 2000

Keus v. the Netherlands, application no. no. 12228/86, ECtHR Judgment, 28 September 1990

Khan v. the United Kingdom, application no. 35394/97, ECtHR Judgment 12 May 2000

Makaratzis v. Greece, application no. 50385/99, ECtHR Judgment, 20 December 2004

Malone v. the UK, application 8691/79, ECtHR Judgment, 2 August 1984

McCann v. the United Kingdom, application 18984/91, ECtHR Judgment, 27 September 1995

Menesheva v. Russia, application no. 59261/00, ECtHR Judgment, 9 March 2006

Nachova v. Bulgaria, applications nos. 43577/98 and 43579/98, ECtHR [GC] Judgment, 6 July 2005

Neumeiser v. Austria, application no. 1936/63, ECtHR Judgment, 27 June November 1968

Patsuria v. Georgia, application no. 30779/04, ECtHR Judgment, 6 November 2007

Ploski v. Poland, application no. 26761/95, ECtHR Judgment, 12 November 2002

Rowe and Davis v. the United Kingdom, application no. 28901/95, ECtHR Judgment, 16 February 2000

Sarban v. Moldova, application no. 3456/05, ECtHR Judgment, 4 October 2005

Teixeira de Castro v. Portugal, application no. 25829/94, ECtHR Judgment, 9 June 1998

Van Mechelen and Others v. the Netherlands, applications nos. 21363/93, 21364/93, 21427/93 and 22056/93, ECtHR Judgment, 23 April 1997

CPT report on the 2007 visit to Georgia, CPT/Inf (2007) 42

CPT's 2nd, 6th and 12th General Reports: CPT/Inf (92) 3; CPT/Inf (96) 21; CPT/Inf (2002) 1

National Legislation

1. Criminal Code of Georgia, 22 July 1999;
2. Changes/amendments to The Criminal Code of Georgia of 1999;
3. Criminal Procedural Code of Georgia, 1998;
4. Changes/amendments to The Criminal Procedure Code of Georgia of 1998;
5. Draft Criminal Procedural Code of Georgia, 2006;
6. Georgian Law on Imprisonment, 22 July 1999;
7. Changes/amendments to The Georgian law on Imprisonment of 2000;
8. Draft Imprisonment Code (2007);
9. Explanatory Card on the draft Imprisonment Code
10. The law of Georgia on Non-custodial Sentences and Probation, 19 June 2007;
11. Changes/amendments to Law on Probation;
12. The former law of Georgia on Non-custodial Sentences and Probation, 19 June 2001;
13. Organic law on Georgian Prosecutor;
14. General comments on the draft Prison Code by PRI Alternative working Group, 2006;
15. Comments on the draft Code of Imprisonment, PRI, 2006;
16. GYLA comments on Draft Code of Imprisonment ;
17. Analysis of the Juvenile Justice System in Georgia by Professor Carolyn Hamilton, 2007;
18. Implementation Plan for the Strategy on Criminal Justice Reforms in Georgia, June 12 2006;
19. Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 2 April 2007
20. CCPR.C.GEO.CO.3.CRP. – Concluding Observations of the UN Human Rights Committee on Georgia, 19 October 2007;
21. Remarks and comments on the Law on Non-custodial Sentences and Probation;
22. Practical Recommendations on basic issues of Criminal Procedural Code for Magistrate Judges by the Supreme Court of Georgia, 2007;
23. Report of Georgian Public Defender, Second Half of 2006.

Annex II

IV. OFFICIAL COMMENTS BY THE MINISTRY OF JUSTICE

I. CRIMINAL LAW AND PROCEDURE

It is regrettable to note that majority of the comments provided by experts fail to take into account the progressive context of the draft CPC, which is conceived by its drafters as being a considerable leap forward in terms of transparency, adversarial procedure, far more detailed rules of evidence (especially evidentiary standards) and other notable achievements. Negative perceptions by experts are, perhaps, based on premise that current, sometimes rightly criticized practices are presumed to be carried over into the draft Code as well. In relation to the latter, the drafters of the Code view it as a radical step forward that should discourage abuse of unnecessarily complicated and formal procedures that are prevalent in current criminal procedure. There shouldn't be an assumption that current team of drafters is unwilling to openly discuss problems, especially when the new CPC is one of the measures aimed to redress these concerns.

1.1 Liberty and Security of Person

Experts discuss their concerns in terms of rates of deprivation of liberty and pre-trial detention, backed up by statistics that show increase in number of detained/incarcerated defendants. However, the situation “on the ground” does hardly favor a quick judgment made in favor of “custodial mentality”, more so when the fact of stable proportion of those in detention (45%) has remained the same. It is also unclear where dividing lines are drawn between custodial and non-custodial attitudes (comparison to other European states where such rates would be abnormal is lacking). The report also fails to note the percentage of crime deemed of being particularly serious (such as armed robbery, murder, rape) within *sentencing* rates (46% imprisonment), as well as common length of sentence that can draw a very different picture once these factors are taken into account.

Another serious concern raised is “pecuniary” aspect of the policy related to detention/imprisonment. The report contains some strong wording in terms of “buying freedom” by payment of bail, as demonstrated by a specific case where purchase of stolen mobile phone has been subject to excessive sum of 170,000 GEL; without discussion of the particulars of the case, especially where experts argue later that bail does primarily serve as a deterrent to abscond, rather than correlation to the gravity of crime committed, it is unclear what conclusions can be derived from this point. As to visible correlation between fines and conditional sentences, premature conclusions as to the pecuniary interest of the criminal justice agencies may be partially attributed to general misunderstanding of sentencing system under the Criminal Code of Georgia, where fines are mostly regarded as supplementary form of punishment and custodial sentences – the main (as a direct substitute to imprisonment), hence the practice of “bundling” these together in most cases. It should be also noted that the text of expert opinion points to the fact that “bail is often subsequently converted into a fine”, with relevant footnote omitting any evidence in this regard but going rather into clearly irrelevant correlation between fines and custodial sentences. This notable paragraph puts its final emphasis on policies that “have led to an excessive application of detention, which, in addition, is fundamentally unfair to poorer persons who cannot afford to pay”. No further evidence is presented to support this claim.

The very next paragraph hints at the conclusion by experts that, in spite of showing improvements in this regard by relevant statistics, Georgia fails to comply with obligation under Article 1 of the ECHR, and that system established in the country does not guarantee the rights in question to “everyone”. Alleged case of Georgia expressly discriminating between its own citizens within the criminal procedure context is left without any explanations or evidence.

We seem compelled, at the same time, to agree that experts rightly point out to deficiencies in Article 41, par. 12 of the CPC that states the “need to ensure execution of sentence” as one of the ground for deprivation of liberty. This notable omission is remedied, however, by the fact that specific articles of the CPC that deal with grounds for detention (Article 202, par. 1) do not contain any such clause. This is a subject of technical review rather than demonstrating intent to go beyond the spirit and letter of the Convention.

Another point made in the same paragraph relates to absence of “periodic automatic review of the legality of continued remand in custody”. It is notable that decision of the Strasbourg Court in *Keus v. the Netherlands* (as noted in the footnote to this point made by experts), in its par. 24, does not provide for any sort of positive obligation to establish such automatic review. The wording of the paragraph 24 is the following: “24. Consideration of the Netherlands legal system as described above (see paragraphs 12-16) leads the Court to conclude that the contested proceedings amounted to an “automatic periodic review of a judicial character” within the meaning of the *X v. the United Kingdom* judgment of 5 November 1981 (Series A no. 46, p. 23, § 52). According to the case-law on the scope of paragraphs 1 and 4 of Article 5 (art. 5-1, art. 5-4), in order to satisfy the requirements of the Convention, such review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5 (art. 5): to protect the individual against arbitrariness, in particular with regard to the time taken to give a decision.” At the same time, *X. v. the United Kingdom*, noted as a source for such obligation, in its par. 52, goes in entirely opposite direction: “52. Furthermore, as the Government themselves pointed out, the content of the obligation imposed on the Contracting States by Article 5 par. 4 (art. 5-4) will not necessarily be the same in all circumstances and as regards every category of deprivation of liberty (see, mutatis mutandis, the above-mentioned De Wilde, Ooms and Versyp judgment, pp. 41-42, par. 78). ... By virtue of Article 5 par. 4 (art. 5-4), a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is thus in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the “lawfulness” - within the meaning of the Convention (see paragraph 57 below) - of his detention, whether that detention was ordered by a civil or criminal court or by some other authority.” And, in the very next paragraph, the Court notes: “53. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere, for the Contracting States are free to choose different methods of performing their obligations.” The point of argument made here is the Convention does not provide a positive obligation for *automatic* review and does not provide for specific *periods* (intervals) when this should be done; in this regard, the novel system of draft CPC in relation to revision of detention by motion of the defense *at any time*, (Article 203, par. 8), coupled with the right to separately appeal the decision of the court in this regard to higher court (the right not found in many European jurisdictions - Article 204 in its entirety), is, in our opinion, a flexible system capable of guarding against arbitrary detention as required by the Convention practice.

Closely following this topic, experts suggest that the CPC provides for a possibility of closed hearing for appealing coercive measures. There is a clear misunderstanding in this regard: par. 4 of Article 204 does indeed require closed (written) hearing as to *admissibility* of the complaint,

however, once compliant is declared admissible, the judge must hold oral hearing on merits of the appeal (par. 5 of the same Article). Same applies to appeal procedures in relation to final judgments, which is also noted by experts in the same context. And, while experts note the cases of *Jablonski* and *Patsuria* as grounds for extending already detailed guarantees of the CPC for bringing forward arguments in favor of release, the report fails to note the draft CPC does not restrict the freedom of parties to argue on these (and any relevant) matters before the court and the cited decisions of the Strasbourg Court do not create a *positive obligation* for the states to expressly encourage such arguments in their national legislation. Finally, the notice of formal requirements for the detention order contained in par. 6 of Article 203 is clearly misjudged as being an exhaustive “laundry list” for such orders, precluding judges from actually enforcing their general obligation to render a *reasoned* (substantiated) decision in any case.

Another obvious misunderstanding relates to general perception of court guidelines (issued by the Supreme Court of Georgia) on this matter. Even though it is a useful document for unified practice in certain aspects (mostly sentencing), the experts must note that guidelines carries only *recommendatory* force for any judge, of any court, in any criminal case. Deficiencies in non-obligatory guidelines, some of these rightly pointed out, do not relieve the judges from an obligation to substantiate their decisions both in terms of national legislation (i.e the provisions of the CPC expressly requiring reasoned decisions) and the Convention law.

Experts also state their major concern as to unclear terms as to the moment when deprivation of liberty starts. Even though the general notice of “restriction of liberty guaranteed by Article 18 of the Constitution of Georgia” may not seem sufficient for external insight, it has created virtually no problems as to its implementation in everyday practice (this particular provision is actually borrowed from current legislation). Deprivation of liberty is always understood to occur whenever any person who is suspected of having committed a crime has his/her physical liberty restricted in a manner that precludes him/her from exercising a right to freedom of movement; to put it differently, arrest/detention starts with the very first restrictive physical contact with the person being detained. Extensive trainings were given to the police, prosecutors and judges on these matters when these rules were introduced back in April 2005. And it is to be noted, admittedly with great relief, that the procedure of “stop and frisk” has been banished from the latest version of the CPC.

1.2 Alternatives to Detention

There is common misunderstanding as to intentions of the drafters of the new CPC with regard to alternative to detentions. Even though there is a very wide list of possible measures listed in Article 192, par. 1 and 2, the second list in par. 2, as pointed out, is left without detailed procedural regulation. While experts conclude this to be a legislative deficiency of the Code and indication of the will to “sabotage” these extended forms of preventive (coercive) measures by applying only “classic” ones such as detention, bail and personal surety, the major difference between these two lists lies in the word “also” in the second paragraph, which means that measures such as obligation to report, electronic monitoring, submission of ID and others are viewed as *additional preventive measures* that apply in conjunction with “classic” non-custodial measures. One has to agree that application of electronic monitoring or obligation to forfeit ID to the detainee is absurd at best. Therefore, a varied list of additional non-custodial measures, expected to apply in combination with personal surety or obligation of due conduct, does actually increase the chances of choice in favour of non-custodial measures by tailoring specific restrictions more closely to particular circumstances of the case. In other words, measures under par. 2 of Article 192 do not have independent application and should be applied in combination with other non-custodial measures (the wording on “availability of material resources” has been

scrapped from the latest version of the Code). Moreover, this expanded range of preventive measures has been actually directly “imported” from CoE Council of Ministers' recommendation.

Again, experts chose to pursue a belief that application of bail in Georgia is driven by pecuniary interests of the state. The experts further reach the (similarly unexplained) conclusion that “neither the draft CPC nor the existing legislation stipulates explicit powers of the courts to decide on or change the amount of bail requested by prosecutors”. Par. 5 of Article 197 expressly notes that it is indeed the *judge* who decides on the final amount of bail and not the prosecutor who simply files a motion; the wording is clear enough to dispel any concerns that Georgia is authorizing prosecutors to dictate the amount of bail, especially where par. 8, in no less clear terms, provides for return of bail to the defendant after judgment has entered into force, ruling out a pecuniary interest on the part of the state). Lastly, a footnote by which experts declare that “the wealthy appear to be at an unfair advantage in comparison to the have-nots” is another statement that is not supported by any facts and figures.

1.3 Fair Trial Guarantees

Authors of the report pursue the view that fully adversarial nature of the proceedings under the draft CPC represents a deviation from fair trial guarantees, namely, by escaping positive obligation of the state to ensure “real” equality of arms for the defense rather than distancing itself from the proceedings. One of the suggested avenues of improvement is imposition of an obligation on the prosecutor to actively seek and investigate evidence favorable to the defense. Such highly theoretical debate (not supported to reference to any case law or established international standards) is rather a criticism of choice made by the country rather than an avenue for specific action, and, as rightly pointed out by experts, much depends on financial, institutional and other relatively “technical” aspects to shield the defense from arbitrariness and abuse. Such institutional framework is an internal matter of all criminal justice agencies involved and, in absence of specific discussion of any such institutional features, is not a subject of theoretical debate. As to availability of legal aid, the fact that the Code does not deal in detail with additional financial obligation of the state to provide adequate assistance to the defendant where necessary, does not mean that this issue is omitted altogether: the separate Law on Legal Aid regulates these matters extensively, and provides for possibility of legal aid even on an *ad hoc* basis, beyond regular qualifying requirements.

Experts further note that limitations on defendant’s rights in the CPC are excessively wide and undermine the entire system of fair trial guarantees. One such example is exclusion of defense from questioning of witnesses. However, the Articles referred to (Articles 44 and 117 in new numeration), merely deal with, respectively, the failure of defense to appear for questioning of witness (with guarantees for postponement of questioning rather than unilateral action on the part of the prosecutor) and the right of *both parties* (not prosecution exclusively) to question witness in the absence of the other party, with mandatory judicial approval. Experts also criticize the CPC for authorizing withholding of evidence acquired through covert investigative actions; this logic defeats the very purpose of covert investigative actions of being *covert* and operating without knowledge of any person concerned. As a safeguard against abuse, it should be also taken into account that evidence collected through covert investigations should be turned over to the defense at the pre-trial hearing (Article 87, par.5) – at least two weeks before the main hearing.

In the same paragraph, experts point to failure of the CPC to define the moment where prosecution commences (charges are brought). The major problem identified is not the lack of clarity (experts do point out that arrest and bringing official charges are formal actions that define the start of prosecution), but rather the inability of the “potential” defendant to avail

himself/herself of the rights accrued to the defense. This would be entirely true if not for one important provision in the Code (Article 116), which defines the conduct of an *interview* with a witness that is an entirely voluntary procedure and no evidence is admissible from such interviews; prosecutors/investigators are not entitled to coerce anyone, including potential defendant, to testify before them, unless they are summoned by court – and in open court, fair trial protections and guarantees are fully available to potential defendant (witness). Therefore, investigation/prosecution agencies are deprived of any ulterior motives to actually question potential defendants as witnesses, since this makes no real difference in terms of evidence.

As a brief note to experts' observation on covert investigative actions, the working group has acknowledged deficiencies in this chapter at the latest review of the CPC in January 2009 (CoE session in Paris) and is currently working to remedy these shortcomings.

Media freedom at trials (court hearings) is another concern raised by experts. While the Convention law and practice does indeed provide for presumption in favor of public and open hearings, it does also note the inherent restrictions that can be used for restricting publicity of the proceedings in order “to promote the free exchange of information and opinion in the pursuit of justice” (case of *B. & P. v. the United Kingdom*, par. 37, as indicated by experts themselves). The same can be said about suggested prohibition on a blanket ban on publicity of hearings, since the arguments of the Strasbourg Court in *Hirst v. the United Kingdom* (referred to by experts) do not concern any discussion as to legitimacy of a blanket ban (even in the context of the case in question, namely, prisoners' right to vote). Therefore, a “compromise” solution in Article 107 of the draft CPC is indeed favoring an open and public hearing by default, while restrictions can be made only where interests of justice and parties so require, in full compliance with above-noted requirements in Convention practice.

1.4 Prosecution

Experts indicate, in their comments, that virtually unlimited discretionary powers of prosecution in relation to decision to prosecute are violating “the principles of equality of all citizens before the law, and individualisation of criminal justice”. There is nothing in the wording of corresponding Articles of the Code to even suggest that prosecutors will be able to discriminate against certain categories of persons on any grounds, and to prevent individual approach to criminal cases in using discretionary prosecution.

Statements in the next paragraph related to dominance and monopoly of the prosecution in the application of coercive measures and punishment are based on statistics of granting prosecutor's motions, which are about 95% as of now. Such reasoning is flawed for two reasons: first, it fails to take into account the ratio of “custodial” motions in relation to “non-custodial” ones, and, secondly, makes an assumption that high ratio of granting motions automatically stands for dominance of prosecution over the courts; while the latter aspect may be given some merit, the statement is not backed by comparison to other jurisdictions to demonstrate that Georgian practice represents a serious deviation from the norm.

A general agreement reached at the last meeting of the working group at CoE premises in Paris (January 2009) is that general guidelines for prosecution, as pointed out by experts, should be open and available to wider public, while internal instructions should not go against the principles that such guidelines establish.

1.5 Plea-bargaining

Experts use particularly harsh wording towards the practice of plea agreements in Georgia, deeming its unfairness as a result of many detention and sentencing factors prevalent in the criminal justice system of Georgia. Such a general statement is indeed difficult to counter, especially when reasons for such approach are simply references to already questionable arguments made in other parts of the report. However, there is an interesting example of (so far) the only case dealt with by ECtHR in the context of summary procedures on the basis of the guilty plea, that is, *Deweere v. Belgium*. By equalizing plea bargaining system of Georgia with the circumstances in the *Deweere* case, several factors escape experts' attention: in declaring guilty plea by Mr. Deweere as being tainted by constraint, the Court paid particular note to extraordinary circumstances of the case, namely, especially harsh WWII-time legislation still applicable, very significant difference between the sanction offered and provided by the said law, and, most importantly, lack of formal appeal procedure available to the defendant. While current Georgian legislation as well as draft CPC do provide appeal as a remedy, remaining two points clearly indicate that "unfairness" of plea bargaining is to be judged on merits of any specific case rather than being declared an unfair procedure by default, even by reference to other, seemingly related, but still generalized practices.

1.6 Jury Trials

Experts devote some of their comments to the system of jury trials, mostly to technical omissions in respective provisions and general lack of definition of their scope, lack of research, need for taking administrative and financial matters into account, as well as "immaturity" of the Georgian society for dealing with jury trials. Except for the last point, these are fair observations indeed and such issues remain a subject of further work, which is admittedly still rather far from completion.

1.7 Criminal Code and Sentencing

We have to agree with general observations of experts in this specific area. The current processes with creation of a separate Ministry of Probation, Penitentiary and Legal Aid, as well as process of inter-agency criminal justice reform council, with two dedicated groups for penal reform and probation, is an indicator of the readiness of the Georgian government to seriously revise its Soviet heritage of overly repressive sentencing approaches. As to the age of criminal responsibility, a related process of juvenile justice reform (also a part of inter-agency commission for the reform of criminal justice) is looking closely into problems of juvenile delinquency and several important reforms in this area (diversion, prevention, etc) are planned already in 2009.

1.8 Legal Safeguards against Ill-treatment

There are no major comments from our side on experts' conclusions under this heading.

2. CODE OF IMPRISONMENT

As regards the Code of Imprisonment (CI) and the related practice of penitentiary institutions, here the situation is different from the CPC. In particular, the CI was drafted few years ago, and at the present moment it is still in the process of active revision and amendment. Admittedly, the CI as it stands now has technical and structural shortcomings which will be remedied in the process of the review. In addition, number of changes will be introduced in the substantive part of the code. Namely, many topics such as Discipline, Juveniles etc., will be amended in order to meet the international standards. Moreover, it is planned to restructure the CI and as an example to introduce the separate chapter on juvenile prisoners (similar to the new CPC).

Further, it is notable that along the lines of Criminal Justice Reform that is currently ongoing, Working Group on Penal Reform which has started its intensive meetings from February this year is dedicated to review structural, substantive and operational shortcomings of the CI and subsequently to introduce changes both to the document and to practice of penitentiary institutions.

Although the process of drafting and revision as mentioned is still under way, we would like to briefly comment on several aspects of the report related to the CI.

2.1 Overcrowding and Living Conditions

In response to the problem of overcrowding in penitentiary institutions emphasized in the report, we would like to note that indeed the CI does not incorporate international standard of 4 m² of living space per inmate. Derived from the current situation in penitentiary institutions, it would not be plausible to incorporate non-enforceable provisions in the CI, at least at this stage. However, this does not mean that the State does disregard this problem or does not seek to incorporate national strategies/mechanisms to address the problem. The solutions will be found and implemented eventually.

With regard to the material conditions of prisoners and related details, it should be emphasized that CI, in a manner similar to other codified legal acts of Georgia, is not designed to incorporate or to prescribe detailed regulations on specific aspects of prison life. It is common to Georgian legislation that specific regulations are set forth in relevant bylaws.¹⁸¹ Along these lines - to name just one example - dietary requirements in prisons for various types of prison inmates, as well as the procedures for the special commission on the above-mentioned matter, is regulated by respective bylaws such as joint Decrees of Minister of Justice and Minister of Labour, Health and Social Affairs of Georgia. In addition, it needs to be emphasized here that the reference to relevant legislation in the CI, such as “in a manner prescribed by law”, should by no means be considered as lacunae of penal legislation; this rather serves a practical purpose of leaving the Code as simple and accessible as possible, while at the same time creating a basis for more detailed and elaborate laws/bylaws on relevant topics.

2.2 Legal Status

Regarding the legal status and the human rights standards for prisoners, although the CI does not provide for detailed list of rights of prisoners, it would not be justifiable to state that the rights of

¹⁸¹ To that effect the Article 9 of CI stipulates that the conditions of life should be in accordance of the joint Decree of the Minister of Justice, Minister of Labour, Health and Social Affairs of Georgia.

prisoners are not in line with international standards on the sole ground of absence of the explicitly prescribed right to family life. The family life of the prisoner is indeed implied in the right to “private life and correspondence”.¹⁸² In addition, enforcement mechanisms for the mentioned right – namely, the visiting arrangements – are present in the CI. Nevertheless, it would indeed be generally reasonable to revise the structural and technical aspects of human rights provisions in the corresponding chapters of the CI.

As to the proportionality principle while restricting the rights of prisoners, European Prison Rules (EPR) 24.4 provides that “the arrangements for the visits shall be such as to allow prisoner to maintain and develop family relationships in as normal a manner as possible.” As the commentary to the EPR further provides, the restrictions on communication should be kept to the minimum. This however to our belief does not imply that setting maximum *reasonable amount* of visits interferes with the mentioned right of inmates. Further, the same paragraph of the commentary to the EPR states that “communications of all kinds can be restricted and monitored for purposes of internal good order, safety and security of the prison”. In addition, restrictions are allowed to meet the needs of continuing criminal investigations, to prevent the commission of further crime and to protect victims of the crime.

Indeed, we agree that the Code should be detailed enough to encompass the modalities and scope of the restrictions to the rights of prisoners. This, however, should not go too far to overstretch the capacities that the CI provides for. We take into consideration that “the rules concerning the restrictions must be spelt out clearly and should not be left to the discretion of the prison administration.”¹⁸³ To that effect, specific suggestions and solutions proposed by experts as to the practical and legislative regulations for the visits and contacts of inmates with the outside world are more than welcome.

In our opinion, though, certain aspects of rights of prisoners are guaranteed with sufficient certainty in the CI, to name just one example, as the commentary to the EPR notes “correspondence can be checked to see that it does not contain illegal articles but needs only to be read if there is a specific indication that its contents are illegal” – this requirement is fully met in the relevant provision of the CI.¹⁸⁴

Concerning the points raised in connection with the leaves of penitentiary institution, indeed the CI does not grant this right to the certain category of prisoners. We acknowledge that it is the obligation of prison authorities to facilitate the contact with the outside world, thus “leaves for humanitarian purposes should be allowed, in case there is not risk of prisoner absconding”,¹⁸⁵ and although we admit the implementation of this right for all categories of prisoners can be fairly difficult, solutions to remedy this lacunae will certainly be worked out.

2.3 Administrative control on phone conversations

It is true that article 13 par. 2 of the CI does not give any details as to the scope of the control. Admittedly, separate provisions or even mechanism are to be incorporated in the CI in order to spell out detailed rules for exercising such control. As provided for in *Malone v. UK*, it is essential that power to intercept communications is “laid down with reasonable precision in accessible legal rules”, in addition, “the scope and manner of exercise of the discretion conferred on the relevant

¹⁸² Article 7 para 1. (l) of draft CI.

¹⁸³ EPR Commentary.

¹⁸⁴ Article 10 of draft CI.

¹⁸⁵ *Ploski v. Poland*, judgment of 12/11/2002.

authorities”¹⁸⁶ is clearly defined. (Although this case concerns the interception of communication in different settings than the penitentiary institution, it sets the standard regarding the control over the telephone conversations). Again, it would be more than desirable that precise regulations are worked out within the framework of the WG on Penal Reform.

With regard to the remand prisoners, our comments will not concern the specific guarantees for them that are indeed to some extent lacking in the CI (such as right to work and education, etc.), rather to the conceptual aspects of the detention on remand and its aims. We would not agree that by reference to the aim of pre-trial detention facility as being the “isolation and assistance to preliminary investigation” the presumption of innocence that is very well spelled out in procedural legislation is somehow impaired or influenced. The very essence of pre-trial detention is that although presuming the person to be innocent, it is indispensable to place certain restrictions on his liberty, in order not to allow him/her to interfere with the process of investigation. Neither should the pre-trial detention facility be viewed as a part of prosecuting machinery. We are confident that by broadening the scope of the rights of remand prisoners and inserting specific regulations for them relevant international standards will be met.

We would not comment on certain aspects of the report, namely those concerning the separate regime for juveniles and disciplinary sanctions, since those institutions are currently in the process of full revision and amendment. The working groups on Juvenile Justice and Penal Reform are going to have considerable discussions on above matters. Moreover, as noted above, it is planned to devote the specific chapter to the juvenile prisoners. In addition, one of the major directions for the WG on penal reform is to revise the disciplinary procedures¹⁸⁷ in order to meet international standards, and among others, “administrative detention” is in need of closer attention and revision.

As regards the provision concerning the use of lethal force, we acknowledge that they need to be detailed, at the very least to specify that this is the measure of last resort, in line with international standards.

Concerning the monitoring mechanisms, although they are in place at the current moment, (there are the mechanisms of internal control on the level of Ministry, Public Defender and public monitoring boards), the National Preventive Mechanism envisaged by OPCAT is not incorporated in the CI, the reason for this is that the Code was drafted several years ago.

Concerning the issues of probation, the points made by experts are well taken and there is a separate working group of Probation (as a part of the criminal justice reform process) that will be looking into the issues of probation closely.

Lastly, while taking the note of certain deficiencies of the draft code, general spirit of the CI and its attempts to meet international standards while seeking to find the proper balance between the sophisticated legal provisions and the existing country-specific reality should not be underestimated.

¹⁸⁶ *Malone v. UK*, judgment of 2/08/1984, at para.70.

¹⁸⁷ There are projects being implemented to work out the schemes on the individualization of sentence. (One of them is lead by UNICEF).