



GEORGIA AT THE CROSSROADS: TIME TO ENSURE ACCOUNTABILITY AND JUSTICE FOR TORTURE

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EXECUTIVE SUMMARY

The 'Rose Revolution' has raised a great deal of hope in Georgia that the country will finally succeed to free itself from the legacy of the authoritarian system and commit itself to the rule of law and full protection of human rights. The year 2004, the first year in which the new Government was in power, brought a number of encouraging developments, in particular several initiatives for reform and a number of measures to combat torture. However, as stressed by the United Nations Special Rapporteur on Torture following his visit to Georgia in February 2005, "torture still exists in Georgia" and there is an "apparent culture of impunity".¹ Torture is still widely used, in particular as a means to extract confessions or extort money, especially in pre-trial detention. Whilst this has been recognised by officials, much needs to be done to make Georgia's obligations to prohibit torture a reality in practice and to provide overdue justice and reparation to the survivors.

Georgia has become party to the major treaties outlawing torture, in particular the UN Convention against Torture and the European Convention on Human Rights. Over the last few years, a wide range of legal and institutional reforms, including the approval of a Plan of Action against Torture, have been initiated. However, actual implementation has been inconsistent and serious concerns remain in light of the continued prevalence of torture.

The present Report highlights the practice of torture in Georgia from its independence. The examination of Georgia's compliance with its obligations under international human rights law discloses a series of deficiencies that have both contributed to and resulted in impunity for torture. For example, the domestic legal framework fails to make torture a specific criminal offence in line with Article 1 of the UN Convention against Torture and it does not ensure victim and witness protection or prompt and impartial medical examinations. Doubts about the political will to prosecute torture cases and the degree of independence of the judiciary complete a picture in which the odds are heavily stacked against accountability. Torture survivors continue to be largely ignored, unprotected and deprived of justice. Torture survivors are also commonly left without any form of official remedies or reparation including rehabilitation, forcing them to rely on the support provided by non-governmental rehabilitation centres instead.

The Government has progressed a series of reforms addressing a range of areas impacting on the prohibition of torture, for example, the reform of the Criminal Procedure Code and institutional reforms to the procuracy and police. There is also the ongoing, if delayed, implementation of the Plan of Action against Torture approved by the Government in 2003. However, as will be discussed further below, not all of the shortcomings pointed out above are addressed in present reform initiatives.

The reform agenda is likely to effectuate certain positive changes but there are concerns about the process as well as the sustainability and effectiveness of the reforms themselves. There does not appear to be a concrete or long-term strategy as to how and by whom the various reform initiatives will be monitored. Also, laws have been drafted by nominally independent institutions close to the Government and with little or no prior consultation of all concerned stakeholders, raising concerns about transparency. It is critical that relevant international standards binding on Georgia are taken as the benchmark and that concerned civil society groups in Georgia are widely consulted.

¹ UN Press Release, *Special Rapporteur on Torture Ends Visit to Georgia*, 1 March 2005, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/C88F7BC329131D26C1256FB7002C5AAC?opendocument>. See also Preliminary Note by the UN Special Rapporteur on Torture, *Mission to Georgia*, 2005. Please note that full citations of all footnoted material appear at the end of this Report.

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I. INTRODUCTION

The aim of this Report is to identify the main factors contributing to the lack of accountability for torture and justice for torture survivors. The recent change in Government brought with it the promise that the legacy of torture and impunity would be overcome. Although the Government has taken some steps to combat torture, the practice persists not least because of deep-seated structural problems, in particular impunity. The current challenge is therefore to use the present opportunities and international support to formulate a coherent anti-torture policy and to carry out the necessary reforms at all levels in order to provide justice for past violations and build the foundations for a Georgia free of torture. To this end, the Report examines critically the ongoing reform initiatives and proposes ways in which the Government and the judiciary may bring about greater accountability for torture and bring Georgian law and practice in line with international standards. A particular focus is on the role of survivors of torture, and those working on their behalf, in the process of seeking accountability and other forms of reparation.

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The Report draws on REDRESS' work on the Istanbul Protocol (a manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment) Implementation Project, an initiative of the International Rehabilitation Council for Torture Victims (IRCT) and the World Medical Association (WMA) in collaboration with the Human Rights Foundation of Turkey (HRFT), and Physicians for Human Rights USA (PHR USA). In the course of that project, REDRESS and Article 42 provided training to legal professionals on relevant international standards and their implementation in domestic law and practice, in Georgia in mid-November 2004. The principal author of this Report also held a range of discussions with Georgian NGOs, officials and members of international organisations.

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II. CONTEXT OF TORTURE IN GEORGIA

i. Political background

Historical background and internal conflict

Georgia, situated in the Caucasus and bordering on Russia, Azerbaijan, Armenia and Turkey, is a multi-ethnic state whose population of approximately 5.5 million consists of around 70% ethnic Georgians with substantial minorities of Armenians, Russians, Azeris, Ossetians and Abkhaz as well as a smaller number of Greeks, Jews, Yezidi Kurds and others.² The majority of the population is Georgian Orthodox with considerable other faith-groups, such as Russian Orthodox, Muslim, Armenian Apostolic, Jews, Lutherians and Jehovah's Witnesses.³

Having become part of the Russian empire in the early 19th century, Georgia declared its independence on 26 May 1918 following the Russian Revolution. Soon thereafter, Soviet troops invaded Georgia and it was absorbed into the Soviet Union with the status of a Soviet Socialist Republic.⁴ When Georgia became independent in April 1991 following the break-up of the Soviet Union, it inherited the legacy of a totalitarian system. Power was centralised with repressive law enforcement agencies and security apparatuses with virtually no public accountability. Torture was used as a means to suppress dissent and maintain order.⁵

On 9 April 1991, Georgia became an independent, unitary and indivisible state. Zviad Gamsakhurdia was elected first President in May 1991 but was soon succeeded by Eduard Shevardnaze in October 1992, who became the dominant political figure in the 1990s.

The unity and territorial integrity of Georgia was challenged from the outset as Georgia became embroiled in two major conflicts.⁶ In Abkhazia, located in the North West of the country, simmering tensions over its post-Soviet status resulted in armed conflict when Georgian troops and paramilitaries invaded Abkhazia in August 1992.⁷ By the end of 1993, Abkhazian forces, with assistance from the Russian military, succeeded in expelling Georgian troops.⁸ The conflict was characterised by serious violations of human rights and norms of humanitarian law on both sides.⁹ Most of the ethnic Georgian population in Abkhazia fled the region and remain internally displaced.¹⁰ Subsequently, the parties agreed on a ceasefire and a boundary line that has been patrolled by Russian troops since 1994. The Abkhaz Government issued a Constitution in 1994, and since then Abkhazia has enjoyed virtual independence under leader Vladislav Ardzinba (voted out of office in October 2004), whose Government has been accused of serious human rights violations, including

² See UN Paper, *Minorities in the South Caucasus*, 2003, pp.2 et seq.

³ Report by the UN Special Rapporteur on freedom of religion or belief, *Visit to Georgia*, 2003, paras.16 et seq.

⁴ See UN Core Document, *Georgia*, 2000, paras.31-40.

⁵ See for example Amnesty International, *Torture in the Eighties*, pp. 220 et seq. An example of current references to the Soviet legacy can be found in Former Prisoners for Human Rights, *Reanimation of Soviet Rule*.

⁶ See on the conflict in Ajara, which was recently brought to an end, International Crisis Group, *Saakashvili's Ajara Success*.

⁷ See for a brief overview of the development of the conflict the Report of the Representative of the UN Secretary-General on internally displaced persons, Deng, *Profiles in displacement, Georgia*, 2001, and on the history of the conflict Human Rights Watch, *Georgia/Abkhazia*, available at <http://www.hrw.org/reports/1995/Georgia2.htm>.

⁸ Ibid.

⁹ See Amnesty International, *Report 1993*, pp.133, 134 and Human Rights Watch, *Georgia/Abkhazia*.

¹⁰ Ibid.; UN Representative of the UN Secretary-General, Deng, *Profiles in displacement, Georgia*, 2001, paras.15 et seq.; UN Paper, *Minorities in the South Caucasus*, 2003, pp.19 et seq. and report by Mr Gil-Robles, *On his visit to Georgia, 1-10 June 2000*, Council of Europe, pp.15 et seq.

torture and ill-treatment.¹¹ Abkhazia remains out of reach to the Georgian Government and despite the change in Government in Georgia in late 2003, the status of the conflict in Abkhazia continues.

In South Ossetia, located in the Central North of the country, armed conflict between Ossetian and Georgian militias broke out in January 1991. This followed South Ossetia's declaration of sovereignty in September 1990 and Georgia's response, which consisted of abolishing the autonomous status of the region and entering Tskhinvali, the capital of South Ossetia.¹² The conflict, which was characterised by violations of human rights and humanitarian law by both sides,¹³ ended when a ceasefire was agreed in June 1992. As a result of the conflict, most ethnic Georgians left South Ossetia and many Ossetians fled both from South Ossetia and from other parts of Georgia to the Republic of North Ossetia in the Russian Federation.¹⁴ Since 1992, a fragile peace has been maintained but renewed fighting in July/August 2004 triggered by Georgia's attempt to bring South Ossetia under central government control raised the prospect of a further armed conflict.¹⁵ As in Abkhazia, the conflict remains largely unresolved.

The state of human rights protection during the last decade

In 1995, a new Constitution was adopted that declared Georgia a democratic republic headed by a President with far-reaching powers and a Parliament consisting of a single chamber.¹⁶ The Constitution includes a chapter guaranteeing civil and political rights,¹⁷ provides for the direct applicability of international human rights treaties¹⁸ and allows individuals to petition the newly established Constitutional Court for the protection of rights and freedoms.¹⁹ The Constitution also recognises the independence of the judiciary.²⁰

Yet, several reports from a wide range of sources detailed continuing human rights violations, including torture and other violent repression of dissent throughout the second half of the 1990s.²¹ Despite a series of reform initiatives that were initiated or accelerated after Georgia's accession to the Council of Europe in 1999, there remained a stark discrepancy between law and practice into the early 2000s.²² These factors, together with political, social

¹¹ See for example reports by the Secretary-General on the situation in Abkhazia, Georgia, UN Doc. S/2004/570, paras.25 et seq. and UN Doc. S/2004/822, paras.25 et seq. See also the cases of *Mamasakhlisi v. Georgia and Russian Federation*, case number 29999/04, and *Nanava v. Georgia and Russian Federation*, case number 41424/04, currently pending before the European Court of Human Rights.

¹² International Crisis Group, *Georgia: Avoiding War in South Ossetia*, pp.3 et seq. and UN paper, *Minorities in the South Caucasus*, 2003, pp.24 et seq.

¹³ See Human Rights Watch, *Bloodshed in the Caucasus*, and International Crisis Group, *Georgia, Avoiding War in South Ossetia*, pp.5 et seq.

¹⁴ UN Representative of the UN Secretary-General, Deng, *Profiles in displacement, Georgia*, 2001, paras.20, 21.

¹⁵ *Ibid.*, in particular pp.14 et seq.

¹⁶ The Constitution of Georgia, adopted on 24 August 1995. See Chapter III on the Parliament of Georgia and Chapter IV on the President of Georgia.

¹⁷ Chapter II of the Constitution.

¹⁸ Article 6 (2) and 7 of the Constitution. See on this point *infra* at III (2) (ii).

¹⁹ Article 42 (1) of the Constitution.

²⁰ See Chapter V on Judicial Power, in particular Article 82 (3) of the Constitution. See on the judiciary ABACEELI, *Overview of the Legal System: Georgia*, pp.6 et seq.

²¹ See Amnesty International, *Georgia: Torture and Ill-treatment* and *Georgia: Continuing allegations of torture and ill-treatment*; as well as Annual Reports on Human Rights in the OSCE Region by the International Helsinki Federation, available at http://www.ihf-hr.org/documents/?sec_id=3.

²² See Report by Mr Gil-Robles, *On his visit to Georgia, 1-10 June 2000*, Council of Europe and Report of the Public Defender of Georgia, *On the Situation of Protection of Human Rights and Freedoms in Georgia*.

and economic problems, resulted in growing pressure on the Shevardnaze Government, both within and outside of Georgia, and ultimately resulted in its fall in November 2003 in what has been dubbed the 'Rose Revolution'. Mikhail Saakashvili emerged as one of the leading figures of this revolution and was elected as the new President in January 2004.²³

The 'Rose Revolution' brought with it the promise of a strengthened rule of law and greater protection of human rights. Yet, already in the first year in which the new Government came to power, there are consistent reports about the continued use of torture and ill-treatment in police custody, the excessive use of force by police and prison officers, at times publicly endorsed by the President, and attacks on religious minorities. A further area of concern is the continuing risk that Chechens charged with acts of terrorism are extradited to the Russian Federation despite the real danger that they will face ill-treatment and torture.²⁴

ii. Practice of Torture

The prevalence of torture has dogged Georgia since its independence. Its continuing and widespread use, mainly by law enforcement agencies against detainees in the course of criminal investigations, has been reported throughout the last 14 years by international and regional bodies,²⁵ detailed by domestic and international human rights organisations and lawyers,²⁶ and also recognised by members of the Government and state authorities themselves.²⁷ The use of torture and other forms of ill-treatment continues to be reported following the 'Rose Revolution', indicating that the practice is deeply ingrained in the culture of law-enforcement.²⁸

Most reports, based on interviews with detainees, prisoners and others, illustrate that torture usually takes place in pre-trial detention immediately following arrest.²⁹ Torture has also been reportedly employed by other agencies besides the police, such as members of the state security, the army, penitentiary staff and the General Prosecutor's Office, in order to extract confessions,³⁰ extort money, either from the victim or his/her relatives, and as a means of

²³ International Crisis Group, *Georgia: What Now?*

²⁴ See Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, and Amnesty International, *Europe and Central Asia*, pp.33 et seq.

²⁵ European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, paras.20 et seq.; *Concluding Observations of the Human Rights Committee: Georgia*, 2002, para.8 and *Concluding observations of the Committee against Torture: Georgia*, 2001, para.81 and International Helsinki Federation, *Torture in Selected OSCE Participating States*.

²⁶ International Society for Human Rights, *Human Rights in the Republic of Georgia (CIS)*; Former Political Prisoners for Human Rights, *State of Protection of Human Rights*; Amnesty International, *Georgia, Torture*, and *Georgia, Continuing allegations*, and Human Rights Watch, *Backtracking on Reform*. See also the monthly newsletters of the Human Rights Information & Documentation Centre, *Human Rights in Georgia*, available at www.humanrights.ge.

²⁷ See *Second Periodic Reports of Georgia* to the Committee against Torture, 2000, para.21; European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, para.24.

²⁸ See Former Political Prisoners for Human Rights, *Torture, Inhuman, Humiliating Treatment in Georgia*; Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, and Amnesty International, *Europe and Central Asia*.

²⁹ See Amnesty International, *Georgia, Continuing allegations*, p.3; European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, paras.20 et seq.; International Helsinki Federation, *Torture in Selected OSCE Participating States*, pp.23, 24.

³⁰ The Constitution of Georgia of 1995 (Articles 18 (4) and 42 (7)) and the Criminal Procedure Code (Cr PC) (Articles 7 (6) and 119) both prohibit using coercion to obtain confessions and declare that confessions obtained by unlawful means shall have no legal force. Moreover, judges shall not base a conviction on a confession alone (Article 132 (5) Cr PC). However, in practice many convictions have been based on forced confessions that are still used as one of the main methods of investigations. See Georgian Centre for Psychosocial and Medical Rehabilitation of Torture Victims, *Human Rights: Focus on Torture*, Chapter on Assessment of Torture, pp.3 et seq.

intimidation.³¹ The practice of using fellow inmates to torture other inmates, in return for advantages, is apparently also common.³²

The forms of torture that have been reported include beatings, often with hard objects, beating on the soles of the foot, tearing off nails or sticking sharp objects into nails, asphyxiation by using a gas mask, forcing people to sit on broken bottles, prolonged suspension of the body in an inverted position, electric shocks and various forms of threats, insults and humiliation.³³ While there appear to be few cases of sexual torture, the threat of rape and other forms of sexual abuse is reportedly used frequently to force confessions or achieve other aims, such as extorting money.³⁴

Those suspected of crimes and taken into police custody are most at risk of torture. Political activists and human rights defenders are also reported to have been subjected to torture.³⁵ Moreover, members of ethnic and religious groups have reportedly been ill-treated on the grounds of their ethnic and/or religious identity by extremist vigilante groups without decisive action taken by authorities to put an end to this practice, and in some instances by local police contingents themselves.³⁶ Chechen refugees and internally displaced persons are particularly vulnerable to torture or other forms of ill-treatment.³⁷ Chechen refugees have been extradited or deported to neighbouring countries, including Russia, even though there is an obvious risk of torture following deportation or extradition.³⁸ Children have reportedly also been subjected to torture and other forms of ill-treatment.³⁹ Furthermore, conditions in detention and prison facilities are poor and several detainees have reportedly died largely as a result of not receiving adequate and timely medical treatment.⁴⁰

Several deaths in custody have reportedly resulted from torture.⁴¹ The Georgian Centre for Psychosocial and Medical Rehabilitation of Torture Victims (GCRT), the treatment centre Empathy and the Georgian Medical Association have all documented the physical and psychological consequences of torture in numerous cases.⁴²

³¹ See Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, pp.9 et seq.

³² REDRESS Interview with GCRT lawyers in Tbilisi in November 2004.

³³ Rehabilitation Centre Empathy, *Mental and Psychological Consequences of Torture*; Labauri, *Background and Physical Consequences of Torture in Georgia* and GRCT, *Human Rights: Focus on Torture*.

³⁴ Rehabilitation Centre Empathy, *Mental and Psychological Consequences of Torture*, p.15.

³⁵ See for example Human Rights Watch, *Georgia: "Vicious" Assault on Rights Leaders and Former Political Prisoners for Human Rights, Torture, Inhuman, Humiliating Treatment in Georgia*.

³⁶ See Report by UN Special Rapporteur on freedom of religion or belief, *Visit to Georgia*, 2003, paras.63, 64.

³⁷ See Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, pp.18 et seq. and Rehabilitation Centre Empathy, *Mental and Psychological Consequences of Torture*, pp.12, 15.

³⁸ Baratashvili, Baramidze and Rekhviashvili, *Violations of the Rights of Chechen Refugees in Georgia*. See also case of *Abdulhamid Aliev* of 28 October 2002 in which the Supreme Court of Georgia held that the petitioner had a right to appeal the decision of the General Prosecutor's office to extradite him to the Russian Federation on the grounds of Article 6 (right to a fair trial) of the European Convention on Human Rights.

³⁹ Concluding Observations Committee on the Rights of the Child, *Georgia*, 2003, paras.34, 64 and 68; OMCT and HRIDC, *Rights of the Child in Georgia*, pp.10 and 11 as well as Rehabilitation Centre Empathy, *Monitoring and prevention of Torture in Georgia*.

⁴⁰ European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, paras.55 et seq. and *Responses of the Georgian Government to the report of the CPT*, 2004, p.13; Concluding observations of the Committee against Torture, *Georgia*, 2001, para.81 (g) and Report of the Public Defender of Georgia, *On the Situation of Protection of Human Rights*, pp.49 et seq.

⁴¹ Amnesty International, *Georgia, Continuing allegations*, pp.9, 10 and Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, p.7.

⁴² Rehabilitation Centre Empathy, *Mental and Psychological Consequences of Torture* and GRCT, *Human Rights: Focus on Torture*.

Reports and studies, including interviews with officials, victims of torture and citizens (such as the one carried out by GCRT) indicate that several factors contribute to the prevalence of torture and ill-treatment in Georgia.⁴³ These factors are both political, such as the perceived lack of political will to take effective preventative measures, and structural, including a weak rule of law, insufficient accountability as well as resource constraints that often result in lack of professionalism and concomitant resort to unlawful measures. A low level of rights awareness in the population and a general mindset in society that fosters resort to violence and cruelty are identified as additional factors for the persistence of torture and ill-treatment.⁴⁴

III. THE IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS IN GEORGIA

III.1 International obligations

i. Treaty commitments and acceptance of individual complaints mechanisms

Georgia has become party to the following treaties prohibiting torture:

- ❑ Geneva Conventions of 12 August 1949 [14 September 1993]
- ❑ UN International Covenant on Civil and Political Rights [3 May 1994]
- ❑ First Optional Protocol to the International Covenant on Civil and Political Rights [3 May 1994]
- ❑ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [26 October 1994]
- ❑ Second Optional Protocol to the International Covenant on Civil and Political Rights [22 March 1999]
- ❑ European Convention for the Protection of Human Rights and Fundamental Freedoms [20 May 1999]
- ❑ European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [20 June 2000]
- ❑ Rome Statute of the International Criminal Court [5 September 2003] (Georgia has, however, signed a bilateral immunity agreement with the USA in February 2003 not to surrender each other's citizens to the International Criminal Court without the consent of the other government).⁴⁵

By ratifying the first optional protocol to the International Covenant on Civil and Political Rights (ICCPR), Georgia has accepted the individual complaints mechanism of the Human Rights Committee relating to violations of the ICCPR. Torture survivors and relatives of torture victims may also bring a claim to the European Court of Human Rights pursuant to the European Convention on Human Rights once domestic remedies have been exhausted.

⁴³ See *ibid.* and Amnesty International, *Georgia, Continuing allegations*, p. 10.

⁴⁴ *Ibid.*

⁴⁵ See Coalition for the International Criminal Court, *Summary of Information on Bilateral Immunity Agreements (BIA)* and on the incompatibility of such agreements with State parties' obligations under the Rome Statute, *U.S. Bilateral Agreements*, <http://www.iccnw.org/pressroom/factsheets/FS-CICC-BIAs.pdf>.

ii. The Prohibition of Torture: Substantive obligations under international law

All states, including Georgia, are bound by the prohibition of torture and the obligations flowing from it not only as a matter of treaty law but also under customary international law.⁴⁶

III.2 Implementation of international obligations in domestic law and practice

i. Obligation of States Parties to implement international treaty obligations

As already recognised by the Permanent Court of International Justice in 1925 "...a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."⁴⁷

As a general rule, states parties have discretion as to how they ensure the effective application of a treaty in their domestic order, including incorporation,⁴⁸ unless a treaty specifically obligates states parties to incorporate its provisions into domestic law and/or accord them a specific type of status. The United Nations Human Rights Committee recently issued a General Comment on the nature of obligations under the ICCPR in which it detailed which steps member states should take to give effect to the rights contained in the Covenant.⁴⁹

"... unless the Covenant's rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2."

ii. Implementation of international treaties in Georgia

Similarly to other countries formerly part of the Soviet Union, Georgia changed the system governing the status of international treaties in domestic law, moving from a system where separate implementing legislation was required towards a system where international treaties have, in principle, direct applicability and superior status vis-à-vis domestic law, at least in respect of statutory law.⁵⁰ Article 6 (2) of the 1995 Constitution provides that "[T]he legislation of Georgia shall correspond to universally recognised principles and rules of

⁴⁶ See on the status of the prohibition of torture ICTY, *Prosecutor v. Furundzija*, paras.144 and 148 and the judgment of the European Court of Human Rights *Aksoy v. Turkey*, para.62.

⁴⁷ *Exchange of Greek and Turkish Populations*, Advisory Opinion, p.20.

⁴⁸ See e.g. European Court of Human Rights, *Case of Swedish Engine Drivers' Union v. Sweden*, para.50 and Ingelse, *Torture*, p.259.

⁴⁹ Human Rights Committee, *General Comment No.31*, 2004, para.13.

⁵⁰ Danilenko, *Implementation of International Law in CIS States*.

international law. An international treaty or agreement of Georgia, unless it contradicts the Constitution of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts.” This provision is complemented by Article 7 of the Constitution pursuant to which “[T]he State shall recognise and protect universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the state shall be bound by these rights and freedoms as directly acting law.”

Articles 6 and 7 of the Constitution indicate that international treaties, such as the UN Convention against Torture, have a status superior to statutory law but not the Constitution. However, they are not clear on whether a treaty is directly applicable, and if so, under which circumstances. Article 6 (1) of the Law on “International Treaties” lays down that an international treaty to which Georgia is party is an integral part of Georgian legislation and Article 4 of the Law “On Normative Acts” stipulates that such an international treaty is considered to be a normative act in Georgia, implying direct applicability. However, the law does not fully clarify whether provisions of all international treaties are considered to be self-executing or whether some require further implementing legislation.⁵¹ The wording of Article 7 of the Constitution suggests that provisions relating to rights and freedoms are directly applicable in Georgia. Yet, in the absence of clear guidelines in the Georgian law itself, it is ultimately the responsibility of the courts to decide whether international treaty norms are directly applicable where a case before them raises the issue. Both the Supreme Court and the Constitutional Court have applied international human rights treaties, particularly the European Convention on Human Rights, in their respective jurisprudence.⁵² However, the district courts have largely failed to do so⁵³ and greater awareness on the part of the judges is needed to ensure the application of such international standards at that level.

IV. ENFORCEMENT OF INTERNATIONAL OBLIGATIONS

IV.1 Steps taken by Georgia to comply with international obligations relating to the prohibition of torture

Georgia has embarked on a series of legal and institutional reforms since 1995, accelerated by its accession to the Council of Europe in 1999.⁵⁴ The Constitution of 1995 contains a chapter on human rights.⁵⁵ It also enshrines the prohibition of torture⁵⁶ and coercion of an arrested person and provides for the inadmissibility of evidence obtained through illegal

⁵¹ See on the doctrine of self-executing treaties Vasquez, *The Four Doctrines of Self-Executing Treaties*.

⁵² Georgian courts have applied the European Convention on Human Rights in 41 cases in the period of 2000 to early 2003 (two of which were decided by district courts). The Constitutional Court has applied other international treaties, in particular the ICCPR, in about ten cases in the same period and has also referred to non-binding acts such as the Universal Declaration of Human Rights in seven cases. See for a comprehensive study Korkelia, *The Application of the European Convention on Human Rights in Georgia*. Most cases relate to Article 6 of the European Convention on Human Rights, see for example the case of *Abulkhamid Aliev* decided by the Supreme Court of Georgia on 28 October 2002, the case of *Piruz Beriashvili and Revaz Djimsherishvili v. Parliament of Georgia* and the case of *LTD "Uniservice" v. Parliament of Georgia*, decided by the Constitutional Court on 29 January 2003 and on 21 December 2004 respectively. See also references in second periodic report of Georgia to the UN Committee against Torture, 2000.

⁵³ *Ibid.*

⁵⁴ See for further information *A Study on the Compatibility of Georgian Law*, Council of Europe, 2000, pp.12 et seq., and Council of Europe, Parliamentary Assembly, *Honouring of obligations and commitments by Georgia*, 2004.

⁵⁵ Chapter Two, Articles 12-47 of the Constitution.

⁵⁶ Article 17 (2) of the Constitution: “Torture, inhuman, cruel, treatment and punishment or treatment and punishment infringing upon honour and dignity shall be impermissible.”

means.⁵⁷ In 1995, the post of the Public Defender (Ombudsman) was established to protect human rights and freedoms although its powers remain rather limited.⁵⁸

There has been a series of initiatives by civil society groups and lawyers, especially in the course of the last five years, which have monitored and exposed torture,⁵⁹ successfully challenged the constitutionality of laws⁶⁰ and brought a series of cases before the Human Rights Committee⁶¹ and the European Court of Human Rights.⁶² These initiatives have resulted in enhanced judicial scrutiny by both domestic and regional courts. In parallel, several reform initiatives, both legal and institutional, have been undertaken since 1999, with the assistance of the Council of Europe, the European Union, the OSCE and others.⁶³

The Shevardnaze Government initiated only partial reforms, having failed to reform law enforcement agencies, and in May and July 1999 it even removed existing safeguards against torture, such as the right to lodge a complaint with a court about torture and ill-treatment in the course of pre-trial detention.⁶⁴ On the other hand, in September 2003, the then Government approved a Plan of Action against Torture (2003-2005) that had been developed in co-operation with the OSCE.⁶⁵ The objectives of the Plan are to implement Georgia's international obligations including the prevention and punishment of torture, and the protection of women and minors from torture.⁶⁶ The Plan is based on a division of tasks between various bodies, in particular the National Security Council, the Ministry of Internal

⁵⁷ Article 18 (4) of the Constitution states that "Physical or mental coercion of an arrested or a person otherwise restricted in his/her liberty shall be impermissible." (It is not clear whether Article 18 (4) is a non-derogable right as the President may, pursuant to Article 46 (1) of the Constitution, restrict certain constitutional rights in case of a state of emergency or martial law, including the one contained in Article 18 (4)). Article 42 (7) reads: "Evidence obtained in contravention of law shall have no legal force."

⁵⁸ Article 43 of the Constitution and Law on the Public Defender of Georgia, 1996.

⁵⁹ These organisations include the Torture Rehabilitation Centres GCRT and Empathy, Human Rights Information and Documentation Centre, Liberty, Former Political Prisoners, Centre for the Protection of Constitutional Rights, Georgian Young Lawyer's Association and Article 42.

⁶⁰ See for example the case of *Piruz Beriashvili and Revaz Djimsherishvili v. Parliament of Georgia*.

⁶¹ See e.g. Views of the Human Rights Committee concerning Communications No.623/1995, 624/1995, 626/1995 and 627/1995 adopted on 29 May 1998 in UN Docs. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995 and CCPR/C/62/D/627/1995.

⁶² The European Court of Human Rights rendered its first judgements against Georgia in 2004 in the case of *Assanidze v. Georgia*, Judgment of 8 April 2004, and in 2005 in the case of *Shamayev and others v. Georgia and Russia*, Judgment of 12 April 2005. As of late 2004, the NGO Article 42 alone had submitted 20 cases to the European Court of Human Rights, several of which concern alleged violations of Article 3 and are currently pending before the European Court of Human Rights. As of 23 February 2005, 111 cases were pending and 68 applications had been declared inadmissible, see <http://portal.coe.ge/index.php?lan=en&id=geo&sub=0>.

⁶³ See for the activities of the Council of Europe in Georgia the website of its information office in Tbilisi, www.coe.ge; for the European Union's external relations with Georgia http://europa.eu.int/comm/external_relations/georgia/intro/ and the homepage of the Delegation of the European Commission to Georgia and Armenia <http://www.delgeo.cec.eu.int/> and for the OSCE <http://www.osce.org/georgia/>.

⁶⁴ See concerns expressed in this regard in Concluding observations of the Committee against Torture: *Georgia*, 2001, para.81 (c) and Human Rights Watch, *Backtracking on reforms*.

⁶⁵ Decree of the President of Georgia, No.468, 27 September 2003, *On Approval of the Plan of Action against Torture in Georgia* (2003-2005).

⁶⁶ The Plan has five objectives: 1. Adoption of amendments to the existing legislation and elaboration of new legal acts (Purpose according to Plan: to enforce the implementation of international obligations assumed by Georgia and recommendations of the respective UN treaty bodies in the field of human rights); 2. Prevention and punishment of torture, other cruel, inhuman and degrading treatment and punishment (to minimize the possibility of applying torture, other cruel, inhuman and degrading treatment and punishment, to combat impunity, and institute criminal or administrative proceedings to punish those to blame); 3. Prevention and unacceptability of torture, other cruel, inhuman and degrading treatment and punishment in the penitentiary system (reform of Georgian penitentiary, improvement of living conditions, food and medical treatment for convicts); 4. Special measures to fully protect women and minors from torture, other cruel, inhuman and degrading treatment (prevention of torture, other cruel, inhuman and degrading treatment against minors, improvement of living conditions, food and medical treatment for women and minor convicts); 5. Monitoring in the field of combating torture, other cruel, inhuman and degrading treatment and punishment (control over the implementation of the Plan, identification and analysis of existing problems, elaboration of recommendations for solving them).

Affairs, the Ministry of Justice, the Inspector General's Office, the Public Defender's Office and the Prosecutor General's Office of Georgia. All of these bodies are responsible for carrying out specific types of activities as defined in the Plan and in accordance with the timetable provided.⁶⁷ The National Security Council has overall responsibility for the implementation of the Plan and shall submit annual reports on its implementation.

While there have been delays in its implementation, largely due to the change in Government, several steps have been taken in furtherance of the Plan. Besides ongoing law reform, these include, for example, a memorandum between the Public Defender's Office and the Minister of Internal Affairs in January 2005 to carry out inspection visits of police lock-ups with a view to preventing torture and investigating any cases of ill-treatment that may come to their attention.⁶⁸ At the time of writing, it seemed unlikely that the Plan would be fully implemented by the end of the year 2005 as originally envisaged.

Several law reform initiatives are underway, such as the reform of the Criminal Procedure Code and the Penal Code, and the institutional reform of the Procuracy and the Police. In 2004, a working group was established to finalise the new draft Criminal Procedure Code with a view to bringing the Code in line with European standards. This followed the previous drafting attempts of the previous Government in 2003, which had been abandoned following the change of Government.⁶⁹ In March 2005, the first set of amendments of the Criminal Procedure Code were adopted.⁷⁰

The reform of the Procuracy and the Police is aimed at enhancing professionalism and thereby combating corruption and illegal methods of investigation. This reform process was still in its early stages at the time of writing.⁷¹ Ongoing training programmes for members of the Procuracy, the police and the judiciary, with the financial and practical assistance of international and regional bodies complement the institutional reform.⁷²

Although their main focus is not necessarily related to human rights, these reforms carry the potential of reducing the prevalence of torture by strengthening the rights of detainees, increasing accountability and making the work of the Procuracy and the Police more professional.

The reforms taken to date are reviewed in more detail below at IV.3.

⁶⁷ See for example 2.2.2. of the Plan: **Objectives:** Prevention and punishment of torture, other cruel, inhuman and degrading treatment and punishment; **Purpose:** To minimize the possibility of applying torture, other cruel, inhuman and degrading treatment and punishment, to combat impunity, and institute criminal or administrative proceedings to punish those to blame; **Types of activities:** Verification and, if necessary, investigation of any complaint lodged by a citizen or his lawyer, or information published in the media regarding alleged torture/ill-treatment; **Responsibility:** Prosecutor-General's Office of Georgia, Ministry of Internal Affairs of Georgia; **Date:** 2003-2005.

⁶⁸ The inspection teams consist of four groups of three people each. Within the first two weeks after their inception, the groups have visited 20 detention facilities in the Tbilisi areas. The visits are expected to be extended to the whole of Georgia in due course.

⁶⁹ See CoE Information Office Tbilisi, *Expert Meeting on amendments to the Current Criminal Procedures Code of Georgia and the Draft Criminal Procedures Code of Georgia*, and for further information the website of the American Bar Association, Central European and Eurasian Law Initiative (ABACEELI), at <http://www.abanet.org/ceeli/countries/georgia/program.html>.

⁷⁰ These changes are discussed in more detail below at IV, 2, ii.

⁷¹ See for further information the webpage of the European Commission (EC) Delegation to Georgia and Armenia, *The European Union assists reform of the Procuracy in Georgia*, at www.delgeo.cec.eu.int/en/press/1jun2004.html.

⁷² Several training initiatives are underway, carried out by Georgian or other organisations, such as ABACEELI, or international experts, often with the support of the Council of Europe, European Commission or the OSCE. See for example *Responses of the Georgian Government to the report of the CPT*, 2004, p.9.

IV.2 Accountability of perpetrators of torture

i. Impunity for torture: The evidence

Several official bodies collect statistics concerning the number of complaints about torture. However, due to the lack of integrated overall statistics, it is not possible to provide a consistent picture because the statistics are based on different criteria. Nonetheless, it is understood that hundreds of complaints about torture and other forms of ill-treatment have been lodged with the Public Defender, the Ministry of Internal Affairs, the Procuracy and the judiciary in 2004.

The number of cases of torture actually investigated is comparatively small. For example the Procuracy investigated 24 cases of torture under Article 335 of the Criminal Code in the period 2002-2004.⁷³ Out of these cases, two had reached trial, seven were suspended, twelve were still ongoing and three had resulted in plea-bargaining in late 2004. Concerning the 62 cases investigated under Article 333 of the Criminal Code (abuse of power) in the same period, 16 were terminated, 13 suspended, 3 finished with plea-bargaining, 10 investigations were ongoing and 20 cases were pending for trial by the end of 2004. The Inspector General in the Ministry of Internal Affairs (IGMIA) had fourteen cases of torture (Article 126 of the Criminal Code) under investigation in the period from January to November 2004.⁷⁴

The IGMIA is responsible for internal inquiries into complaints concerning police misconduct, including torture allegations, and has the power to recommend sanctions that need to be approved by the Minister or Deputy Minister. It has taken disciplinary measures against a number of police officers accused of torturing and ill-treating detainees and others. Such measures range from suspending officials during investigations, moving officials to other stations of duty to dismissal.⁷⁵ The Ministry of Justice has also taken disciplinary measures against officials that have violated prisoners' rights. However, to date, there are no known cases in which a public official has been convicted for an act of torture either under Article 126 or Article 335 of the Criminal Code.⁷⁶

The available figures demonstrate that the usual response in torture cases has been to impose disciplinary sanctions only. The lack of convictions stands in stark contrast to the considerable number of reported cases of torture and other forms of ill-treatment.

ii. Reasons and consequences of the failure to ensure accountability for torture

- Lack of a specific offence of torture in line with Article 1 CAT

⁷³ Figures provided by the General Prosecutor's Office. See also the figures on police misconduct in 2004 contained in Human Rights Watch, *Uncertain Torture Reform*, pp.10, 11.

⁷⁴ See Makharashvili, *Protocol tackles Georgia's "major problem" of torture*.

⁷⁵ See *Responses of the Georgian Government to the report of the CPT, 2004*, p.10, and *Georgia's second report to the Committee against Torture, 2000*, para.42.

⁷⁶ See *ibid.*, paras.40 et seq. for the period 1997- first half of 1999 and for the recent practice Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, p.10. According to the Georgian Government, in its responses to the report of the CPT, 2004, p.10, 81 cases of those investigated by the Inspection General in the relevant period had disclosed facts of human rights violations and "[C]riminal liability was imposed on 14 police officers, 34 officers were dismissed from the system of Internal Affairs, 22 person [sic] were dismissed along with there are high officials, different disciplinary sanctions were imposed on more than 100 policemen, which thrice exceed the indicators of last year." However, the information provided by the Government did not specify the kind of human rights violations for which the officers had reportedly been held accountable.

Both the ICCPR and the UN Convention against Torture oblige Georgia to prohibit torture in its domestic law.⁷⁷ This obligation is also part of international humanitarian law.⁷⁸ Article 2 (1) of the UN Convention against Torture obligates each state party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” According to Article 4 of the UN Convention against Torture, torture must be made a crime in domestic law, punishable with appropriate penalties. In the light of persistent shortcomings in the legal framework of several countries, the Committee against Torture has consistently urged states to make torture a specific offence in domestic criminal law,⁷⁹ and/or to ensure that the offence of torture is in line with Article 1 of the UN Convention against Torture.⁸⁰

Article 126 (1) of the Criminal Code, under the subheading of “torture”, criminalises the offence of “systematic beating or other violence that has resulted in the physical and psychological suffering of the victim but has not produced the consequences set out in Articles 117 or 118.”⁸¹ This offence is punishable by restriction of freedom not exceeding two years or by a prison sentence not in excess of three years. Article 126 (2) (t) of the Criminal Code sets out an aggravated form of this offence for those cases where the act is committed by use of one’s official position. It is subject to a punishment of imprisonment ranging from three to six years and possible deprivation of the right to occupy an official position or pursue a particular activity for the term of three years.

Under Article 333 (1) of the Criminal Code, the penalty for “abuse of power” is either a fine, detention of up to four months, imprisonment for up to three years, or deprivation of the right to occupy an official position or pursue a particular activity for up to three years.⁸² Additionally, Article 335 (1) of the Criminal Code, which came into force in July 2003, states

⁷⁷ Articles 2 and 4 of the UN Convention against Torture and Article 7 of the ICCPR. Article 1 of the UN Convention against Torture defines torture as follows: “(1) For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

⁷⁸ See for example common Article 3 of the four Geneva Conventions of 1949.

⁷⁹ See, for example, the Concluding Observations of the Committee against Torture in respect of: Denmark, UN Doc. CAT/C/CR/28/1, 28 May 2002; Russian Federation, UN Doc. CAT/C/CR/28/4, 28 May 2002; Saudi Arabia, UN Doc. CAT/C/CR/28/5, 28 May 2002; Sweden, UN Doc. CAT/C/CR/28/6, 28 May 2002; Zambia, UN Doc. CAT/C/XXVII/Concl.4, 23 November 2001; Kazakhstan, UN Doc. A/56/44, paras. 121-129, 17 May 2001; Costa Rica, UN Doc. A/56/44, paras.130-136, 17 May 2001; Belarus, UN Doc. A/56/44, 20 November 2000; Paraguay, UN Doc. A/55/44, 10 May 2000; Poland, UN Doc. A/55/44, 5 May 2000; Kyrgyzstan, UN Doc. A/55/44, 18 November 1999; Azerbaijan, UN Doc. A/55/44, 17 November 1999; Austria, UN Doc. A/55/44, 12 November 1999; Finland, UN Doc. A/55/44, 12 November 1999; Bulgaria, UN Doc. A/54/44, 7 May 1999 and Ingelse, *Torture*, p. 337.

⁸⁰ See, for example, the Concluding Observations of the Committee against Torture in respect of: Israel, UN Doc. CAT/C/XXVII/Concl.5, 23 November 2001; Indonesia, UN Doc. CAT/C/XXVII/Concl.3, 22 November 2001; Slovakia, UN Doc. A/56/44, paras.99-105, 11 May 2001; Bolivia, UN Doc. A/56/44, paras. 89-98, 10 May 2001; Uzbekistan, UN Doc. A/55/44, 19 November 1999; Canada, UN Doc. A/56/44, paras.54-59, 6 December 2002; Armenia, UN Doc. A/56/44, 17 November 2000; Slovenia, UN Doc. A/55/44, 16 May 2000; USA, UN Doc. A/55/44, 15 May 2000; El Salvador, UN Doc. A/55/44, 12 May 2000; China, UN Doc. A/55/44, 9 May 2000 and Morocco, UN Doc. A/54/44, 17 May 1999.

⁸¹ Articles 117 and 118 of the Criminal Code prescribe a punishment of up to twelve years imprisonment for intentional serious and less serious damage to an individual's health.

⁸² Article 333 (1) of the Criminal Code states: “Exceeding official powers by an officer or a person equal thereto that has inflicted a substantial damage to the right of a natural or legal person, legal public or state interest shall be punishable by fine or by jail time up to four months in length or by imprisonment for up to three years in length, by deprivation of the right to occupy a position or pursue a particular activity for the term not in excess of three years”. Article 333(2) states: “Exceeding official powers by a state-political official shall be punishable by fine or by imprisonment for up to five years in length, by deprivation of the right to occupy a position or pursue a particular activity for the term not in excess of three years”. Article 333(3) states that “The action referred to in Paragraph 1 or 2 of this article, perpetrated (a) repeatedly, (b) under violence or by application of arms and (c) by insulting the dignity of a victim shall be punishable by prison sentences ranging from three to eight years in length, by deprivation of the right to occupy a position or pursue a particular activity for the term not in excess of three years”.

that where a prosecutor or investigator in a criminal case compels a suspect, victim or witness to give evidence, or compels an expert to submit an opinion by means of threats or any other illegal act, they commit a criminal offence punishable by imprisonment from two to five years. Under Article 335 (2), it is an aggravated form of this offence where this act is committed by resorting to violence, abuse or torture, which is punishable by four to ten years of imprisonment.

The definition of “torture” employed in Article 126 (1) of the Criminal Code, which is also used in Article 335 (2) (b), does not conform to Article 1 of the UN Convention against Torture in several important respects:

- By introducing the element of “systematic” beating or other violence, it appears to exclude single acts of torture regardless of their severity;
- By stressing “beating or other violence”, which are of a physical nature, and by requiring the act to produce physical injuries, the definition appears to exclude forms of mental torture;
- The definition fails to clarify that torture is an intentional act (or omission);
- It does not specify that torture must have a purpose, such as obtaining a confession, punishment, discrimination;
- The definition is silent on the role of public officials in torture.

As a result, torture according to Article 126 (1) of the Criminal Code is an act of physical violence that may be committed by anyone, even without the active participation or acquiescence of a public official and for any reason as long as it produces the form of suffering specified therein that is of a less serious nature than that laid down in Articles 117 and 118 of the Criminal Code. The definition contained in Article 126 (1) of the Criminal Code therefore fails to capture the specific nature of torture as an act committed either by officials themselves or with their acquiescence, which consists in intentionally using physical and mental (emphasis added) forms of pain for a specific purpose.⁸³

The UN Committee against Torture recommended that Georgia “amend its domestic penal law to include a definition of torture which is fully consistent with the definition contained in article 1 of the Convention, and provide for appropriate penalties.” The Special Rapporteur on Torture made the same recommendation.⁸⁴ Equally, the UN Human Rights Committee recommended that Georgia “should ensure that all forms of torture are punishable as serious crimes under its legislation, in order to comply with Article 7 of the Covenant.”⁸⁵

- Difficulties in exercising the right to complain and the lack of victim and witness protection

Article 12 of the UN Convention against Torture provides that each state party “shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” Moreover, according to Article 13 of the UN Convention against Torture, “Each State Party shall ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” A similar obligation arises from Article 7 of the ICCPR as set out by the UN Human Rights Committee.⁸⁶

⁸³ See Baratashvili and Baramidze, *Prevention of Torture, Inhuman or Degrading Treatment or Punishment in Georgia*.

⁸⁴ See Preliminary Note by the UN Special Rapporteur on Torture, *Mission to Georgia*, 2005, para.14 (b).

⁸⁵ See Concluding Observations of the UN Human Rights Committee: *Georgia*, 2002, para.8.

⁸⁶ See Human Rights Committee, *General Comment 20*, para.14.

International treaties do not explicitly define a right of effective access to complaints procedures, but they do cover a range of subsidiary rights aimed at enhancing access to such mechanisms. These include the right to be informed about available remedies and complaints procedures as well as the right to have access to lawyers, physicians and family members, and, in the case of foreign nationals, diplomatic and consular representatives. They also include the right to have access to external bodies, the right to compel competent authorities to carry out an investigation and the right of effective access to the investigatory procedure, including the right to undergo a timely medical examination.⁸⁷

Furthermore, Principle 33 (4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁸⁸ provides that neither the detained or imprisoned person nor any complainant shall suffer prejudice for making a request or a complaint and Article 13 of the UN Convention against Torture expressly requires states to protect complainants and witnesses from intimidation. Such an obligation has also been recognised by the European Court of Human Rights in the cases of *Kaya v Turkey* and *Assenov & Others v. Bulgaria*.⁸⁹

While survivors may submit complaints about torture to various state authorities,⁹⁰ in practice, one of the major problems faced by torture survivors who remain in detention is the lack of prompt access to a lawyer of their choice.⁹¹ This, together with the lack of awareness about their rights and the failure of officials to inform detainees about their rights, acts as an impediment to lodging complaints in the initial phase of investigations.⁹²

An even greater disincentive is the lack of effective programmes for victim and witness protection. The Code of Criminal Procedure enables victims, witnesses, experts, accused persons and other parties to proceedings to apply for protection to the investigatory body if there is a genuine danger of an infringement of their rights, and stipulates a corresponding duty on the authorities to take steps for the protection of the persons concerned.⁹³ In practice, state authorities have suspended alleged perpetrator(s) of torture or in some cases have transferred them to other stations of duty. However, in several instances authorities have taken no measures to ensure protection of victims and witnesses.⁹⁴ Against this background, there are consistent reports that torture survivors have refrained from lodging complaints or pursuing their cases further, often out of an apparent fear of intimidation and harassment by those implicated in torture, or other adverse consequences for themselves or

⁸⁷ See on these rights, REDRESS, *Taking Complaints of Torture Seriously*, p.11.

⁸⁸ Adopted by UN General Assembly Resolution 43/173 of 9 December 1988.

⁸⁹ *Kaya v. Turkey*, para.86 and *Assenov and others v. Bulgaria*, para.169.

⁹⁰ Under the system in place in early 2005, complaints about torture may be made to the police, IGMIA, Ministry of Justice, the Procuracy and the Public Defender (see Article 263 (1) Cr PC and Articles 13 et seq. of the Law of the Public Defender of Georgia). Suspects have an express right to lodge complaints with the Procuracy or a judge against acts or decisions of the investigating bodies (Article 73 (1) (k) Cr PC). The IGMIA is responsible for internal investigations concerning misconduct of law-enforcement personnel and the Ministry of Justice for misconduct of persons working in the penitentiary system and both can impose disciplinary sanctions (see Article 202 (3) Cr PC and with regard to disciplinary measures the Law of the Republic of Georgia on Police (27 July 1999) and Organic Law on Procuracy (21 November 1997)). Where the misconduct in question is of a criminal nature, complaints or information about such crime are to be forwarded to the Procuracy (Articles 61 and 62 (2) Cr PC). A judge who hears complaints of alleged torture may also request the Procuracy to investigate such allegations (Article 45 (2) Cr PC).

⁹¹ See European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, para.40 and Concluding observations of the Committee against Torture, *Georgia*, 2001, para.81 (e).

⁹² See European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, paras.46, 47.

⁹³ Article 109 Cr PC.

⁹⁴ See Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, pp.7 et seq. The judiciary has also on occasion failed to provide protection. A case in point is an incident where "the prosecutor's petition to suspend three policemen charged with abuse of power was not accepted by the court, and the policemen concerned continued to work in law enforcement." See European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, para.24.

their families.⁹⁵ This has been particularly acute for detainees in a position to identify the perpetrator(s) who face the prospect of continuing harassment or even further torture when they lodge complaints while still in detention. The lack of adequate victim and witness protection seriously hampers the effectiveness of complaints procedures at the early stage of lodging complaints with the authorities.

- No prompt investigations

Articles 12 and 13 of the UN Convention against Torture expressly require prompt investigations upon receipt of complaints of torture or hearing about torture. The need to promptly investigate allegations of torture has been equally recognised by the UN Human Rights Committee⁹⁶ and the European Court of Human Rights.⁹⁷ The obligation to open an investigation promptly “whenever there are reasonable grounds to believe that an act of torture has been committed”, be it on the basis of a complaint or otherwise, requires state authorities to act as quickly as possible, i.e. without any unnecessary delay, in beginning and conducting the investigation.⁹⁸

The Procuracy is obligated to investigate serious crimes even in the absence of a complaint.⁹⁹ However, until recent amendments were enacted in March 2005, Georgian law did not explicitly require the Procuracy or other competent investigative bodies to promptly open an investigation into torture allegations. The Criminal Procedure Code provided for a time frame of twenty days from the day of hearing about the alleged offence, and this applied to all offences, within which the investigating body had to carry out preliminary steps and decide on opening the investigation.¹⁰⁰ The investigating authorities are now obliged to open an investigation immediately and carry out a full investigation within a reasonable timeframe, which signifies an important improvement of the legal framework applying to investigations.¹⁰¹ In practice, there were delays in the opening of many investigations.¹⁰² As a result, valuable evidence has often been lost and many investigations have been closed after the preliminary phase, forcing victims to go through a potentially lengthy appeals process if they insisted on pursuing their complaints.¹⁰³ The possibility for a complainant to challenge this decision before a hierarchically superior procurator or a judge,¹⁰⁴ while

⁹⁵ See country report on Georgia in International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region*, and, for an explanation by Georgian officials, European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, para.24 according to which complainants often withdraw their complaints at a later stage of proceedings because of the difficulty of proof.

⁹⁶ See General Comment 20, 1994: “complaints [about torture] must be investigated promptly and impartially by competent authorities so as to make the remedy effective.”

⁹⁷ When examining whether an investigation is effective, the European Court of Human Rights has applied the test of whether “the authorities reacted effectively to the complaints at the relevant time.” See *Labita v. Italy*, para.131.

⁹⁸ See decisions by the UN Committee against Torture *Halim-Nedzibi v Austria*; *Encarnacion Blanco Abad v Spain* and *M'Barek v. Tunisia*.

⁹⁹ Articles 24 (4), 261, 263, 264 Cr PC.

¹⁰⁰ Under the old Article 265 Cr PC. Upon hearing about a crime, the investigative authorities should take preliminary measures to examine statements and reports of crimes, such as requesting an explanation and calling for documents. This phase had to be completed within twenty days. The investigative body may then either open a preliminary investigation if there were *prima facie* evidence or refuse to institute such investigation, a decision that could be challenged by the victim within 10 days (Articles 266, 268 and 269 Cr PC). One ground for refusing to open an investigation was the expiry of the statute of limitations pursuant to Article 28 (e) Cr PC. The statute of limitations for the crime of torture (Articles 126 and 335 of the Criminal Code) is ten years according to Article 71 (1) (c) of the Criminal Code.

¹⁰¹ According to Article 271 of the Cr PC, all steps must be carried out in a reasonable time frame, which must not exceed the statute of limitations envisaged by the Criminal Code for the crime in question.

¹⁰² See in this regard Concluding observations of the Committee against Torture, *Georgia*, 2001, para.81 (b).

¹⁰³ See below under Procedural Remedies during Investigations for a more detailed analysis of this practice.

important, has been an insufficient remedy as valuable evidence may have been lost as a result of delays incurred.

The procedure for challenging the lawfulness of detention before a judge is an important opportunity for detainees to raise allegations of torture.¹⁰⁵ However, a judge is not obliged to initiate prompt investigations upon hearing such allegations. The *habeas corpus* procedure has further shortcomings, as it is not obligatory for authorities to bring a detainee before a judge.¹⁰⁶ In practice, where detainees have raised torture allegations in such proceedings, judges have reportedly largely confined themselves to deciding on the validity of the evidence instead of directing the Procuracy to open an investigation into the torture allegations.¹⁰⁷ Judges are widely seen as deferential to state authorities and as siding with the prosecution rather than taking serious steps to establish the truth of the allegation.¹⁰⁸

- Insufficient impartiality of the investigating bodies

Articles 12 and 13 of the Convention against Torture expressly require investigations to be impartial. The Human Rights Committee has also found impartiality to be an implicit requirement for any investigation contemplated by Article 7 of the ICCPR¹⁰⁹ as has the European Court of Human Rights.¹¹⁰

“Impartial” means that an investigation has to be carried out following an appropriate procedure and without apparent bias.¹¹¹ Although independence of the investigating body is not an explicit or absolute requirement, it has repeatedly been held to be a key indication of impartiality.¹¹² It follows that an investigation will commonly not be considered to be impartial if conducted by the same agency that is accused of torture, or by anyone having close professional links to such an agency.¹¹³

There are no special procedures for torture investigations or bodies that investigate allegations of torture. The Procuracy is responsible for the investigation of crimes, including those committed by public officials.¹¹⁴ Criminal investigations are carried out by investigators of the Procuracy that may enlist the assistance of investigators from the IGMIA or from other bodies.¹¹⁵ There are no special units within the Procuracy to investigate torture allegations. The Human Rights Department of the Procuracy has a broad mandate to examine human

¹⁰⁴ Articles 268, 269 Cr PC, which have been abolished in March 2005.

¹⁰⁵ See REDRESS, *Taking Complaints of Torture Seriously*, pp.10 and 30 et seq.

¹⁰⁶ See Article 140 (6) of the Cr PC and critical comments by the CPT on the actual practice of holding hearings in the absence of detainees European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, para.28.

¹⁰⁷ Interviews with various lawyers conducted in Tbilisi in November 2004.

¹⁰⁸ See e.g. explanation provided by the former Government in Georgia's *report to the Committee against Torture*, 2000, paras.44, 45.

¹⁰⁹ See General Comment 20, 1994, para 14.

¹¹⁰ See *Assenov & Others v Bulgaria*.

¹¹¹ See the decisions of the Committee against Torture in the cases of *Encarnacion Blanco Abad v. Spain* and *Khaled Ben M'Barek v. Tunisia*.

¹¹² See *Report of the Special Rapporteur on Torture*, 2001, para.1310 and para.2 of the *Istanbul Protocol*, 2001.

¹¹³ Ibid.

¹¹⁴ Article 55 Cr PC. For information on the status and structure as well as functions and powers of the Procuracy see ABA CEELI, *Overview of the Legal System: Georgia*, pp.11 et seq.

¹¹⁵ Chapters VII- IX Cr PC.

rights violations and may investigate torture cases. However, it is only staffed with three officials and has not proved to be very effective to date.¹¹⁶

The Procuracy's record of investigating torture cases raises concerns about the impartiality of investigations. It has reportedly taken insufficient steps to vigorously pursue allegations of torture, for example, by not immediately inspecting the scene of the crime or taking steps to identify the perpetrator(s).¹¹⁷ Practitioners also report that prosecutors have given undue weight to the version of the accused, e.g. that injuries were self-inflicted or caused by resisting arrest. It has also been reported that prosecutors have put pressure on forensic doctors not to issue medical reports that indicate torture and have accepted bribes to drop cases.¹¹⁸ In addition, in some instances, investigators from the Procuracy themselves claimed to have been threatened by persons believed to have close links to the alleged perpetrators when investigating cases of torture.¹¹⁹

There is no separate and independent oversight body, such as a police complaints commission, charged with investigating police misconduct. The Public Defender has the mandate to receive complaints about human rights violations, including torture, committed by public officials and may investigate such allegations.¹²⁰ However, the Public Defender is not mandated to carry out a full criminal investigation and may only recommend measures to be taken, including prosecution of the suspected perpetrators.¹²¹ The newly appointed Public Defender Mr. Sozar Subari recently sent several hundred case files relating to torture and ill-treatment to the Procuracy with the request to open investigations.¹²² However, to date recommendations made by the Public Defender concerning the institution of criminal or disciplinary proceedings have not led to prompt and effective investigations being carried out by the responsible authorities and charges being brought where sufficient evidence is available.¹²³

¹¹⁶ According to interviews with lawyers and human rights activists in Tbilisi in November 2004.

¹¹⁷ The case of Nikoloz Okruashvili illustrates the shortcomings of investigations into torture allegations carried out by the Procuracy. Nikoloz Okruashvili was detained by the officers of the Ministry of Internal Affairs on 22 April 2003 on suspicion of having committed a burglary. He alleges that he was tortured (by having a black hat and a gas mask put on his face and by being beaten on his soles) after having been taken to the Ministry of Internal Affairs. According to this testimony, the officers involved asked him to make a confession. After losing consciousness, the officers poured water over him and applied electric currents to him. He had no lawyer at this stage and made the confession. Later when the judge was deliberating over preliminary sentencing measures, Nikoloz Okruashvili complained to the judge who delivered a private ruling, giving instructions to the investigative bodies to investigate the alleged torture. The case was sent to the Krtsanisi-Mtatsminda regional Procuracy. The medical report produced following an official medical examination stated that there were no signs of injuries. A second medical report, produced after he had been moved to the isolator under the Ministry of Justice, found that injuries had been inflicted. Nikoloz Okruashvili told the investigators that he could identify the room where the fact of torture had taken place and could identify the perpetrators. His claims were not met by any known response on the part of the procuracy. Although the procuracy formally opened an investigation, under Article 333 but not Article 126 of the Criminal Code, it later suspended it on the grounds that no perpetrator could be identified. This ruling was subsequently overturned by the General Procuracy. At the time of writing, the investigation was ongoing.

¹¹⁸ According to interventions and interviews carried out in the course of the IPIP training seminar in Tbilisi in November 2004.

¹¹⁹ According to information provided by Mr. Zurab Jorjashvili, Article 42, in November 2004.

¹²⁰ The Public Defender may, either separately or parallel to any criminal investigation, receive complaints about torture and carry out an investigation (Articles 13 et seq. of the Law of the Public Defender (LPD), 1996). In so doing, the Public Defender has the power to: access detention facilities of various state authorities without impediment; demand and receive information and documents from authorities, private enterprises and organisations; obtain explanations from public officials; carry out an examination and invite experts to conduct examinations; and access criminal, civil and administrative cases (Article 18 LPD).

¹²¹ Following an investigation, the Public Defender is authorised to forward all materials on any case indicating a crime to the competent authorities with a recommendation to institute criminal proceedings and to make suggestions to competent bodies on disciplinary or administrative responsibilities against persons whose actions caused a violation of human rights (Article 21 (c) and (d) LPD). The Public Defender may also make recommendations on the redress of human rights and freedoms to those public authorities, public officials or legal persons whose activities have caused a violation of human rights (Article 21 (b) LPD).

¹²² Interview with Public Defender in Tbilisi, November 2004.

¹²³ See e.g. Report of the Public Defender of Georgia, *On the Situation of Protection of Human Rights*, pp.60 et seq.

- Ineffectiveness of investigations, in particular lack of prompt and impartial medical examinations

International standards oblige state authorities to investigate cases of torture “effectively”. As held by the European Court of Human Rights in *Aksoy v. Turkey*: “the notion of effective remedy in this context [Article 13 of the European Convention on Human Rights] includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill treatment and permitting effective access for the complainant to the investigatory procedure.”¹²⁴ Moreover, an investigation “must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State.”¹²⁵ What is considered to be effective may vary with the particular circumstances,¹²⁶ though authorities must always make a serious attempt to find out what happened¹²⁷ and “should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.”¹²⁸ Investigations should be of reasonable scope and duration in relation to the allegations.¹²⁹

There are shortcomings relating to the thoroughness of investigations of torture in Georgia. Investigations should be comprehensive and should include visiting the scene of the alleged crime, interviewing the complainant and witnesses as well as interrogating the accused and, of utmost importance, a medical examination of the person alleging torture.¹³⁰ Yet, it is often unclear what, if any of these measures, investigators have taken in the course of investigations, especially when they are closed after the preliminary inquiry (as happened in several cases until the recent changes in March 2005).¹³¹ Where the victim fails to identify the perpetrators, which is often the case due to the use of blindfolds or fear on the part of the victim, frequently no further steps are taken to independently establish the identity of the perpetrators, for example by examining station attendance records and questioning the police officers present during the time of the alleged torture.¹³² Delays in starting investigations also allow the accused to tamper with evidence, for example to remove torture implements or blood stains from the scene of the crime.¹³³

The lack of prompt, impartial and adequate medical examinations is a significant shortcoming in the investigation of torture cases. Georgian law includes several provisions that refer to medical examinations for detainees. Under Article 63 of the Law on Imprisonment a detainee should be medically examined on their entry into a prison facility and description of their physical condition, as well as other information, should be kept on file. Upon his or her request, a detainee should receive a medical check-up and the examining doctor should issue a report on the medical examination.¹³⁴ However, these examinations are not compulsory and the Plan of Action against Torture specifies as activity the “elaboration of a

¹²⁴ *Aksoy v. Turkey*, para.98; *Ilhan v. Turkey*, para.92; *Ogur v. Turkey*, para.88.

¹²⁵ *Askoy v. Turkey*, para.95; *Aydin v. Turkey*, para.103; *Kaya v. Turkey*, para.89.

¹²⁶ *Aktas v. Turkey*, para.299; *Ilhan v. Turkey*, para.63.

¹²⁷ *Timurtas v. Turkey*, para.88.

¹²⁸ *Assenov v. Bulgaria*, para.104.

¹²⁹ *Akkoç v. Turkey*, para.99.

¹³⁰ The Criminal Procedure Code details the range of measures to be taken during an investigation, which, in principle, allow for a full investigation, see Chapters XXXVI, XXXVII, XXXIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV and XLVI Cr PC.

¹³¹ See for cases illustrating this point, Human Rights Watch, *Uncertain Torture Reform*, pp.16 et seq.

¹³² *Ibid.*, pp.19 and 24.

¹³³ Interview with Lawyers in Tbilisi, November 2004.

¹³⁴ Article 145 (6) Cr PC.

draft law on amendments to article 146, paragraph 6 of the Criminal Procedure Code, in order to provide for compulsory medical examination of a detained suspect within the first 24 hours of detention.” Moreover, a detainee has the right to request a medical examination after his or her first interrogation and to receive a written report of the examination.¹³⁵ Where a detainee's request to undergo a medical examination is denied, the detainee or their lawyer can appeal to the regional court and a judge should hear the complaint within 24 hours of the appeal being filed.¹³⁶

In practice, the lack of timely and independent medical examinations has been one of the main factors impeding the case of the prosecution. Reports indicate that law enforcement officials have at times obstructed access to medical examinations and delays in taking medical examinations have made it difficult to ascertain the nature and cause of detainees' injuries.¹³⁷ Detainees principally do not obtain a medical examination by a state doctor until after an interrogation, and often only at a time when there is a probability that physical indications of the detainee's injuries have disappeared. A further obstacle is that criminal investigators have not authorised forensic medical examinations and procurators have refused to overturn such decisions.¹³⁸

There are also concerns about the independence of examinations. Forensic medical examinations are carried out by state-appointed doctors through the Centre for Forensic Medical Expertise,¹³⁹ not a doctor chosen by the detainee.¹⁴⁰ Lawyers have reported that state-appointed doctors often lack impartiality and are open to bribes and executive pressure. This is due to low salaries and their vulnerable position, i.e. the possibility of being dismissed or facing other disadvantages where their work contradicts their superiors. The impartiality of medical examinations is further undermined by the fact that they have been conducted in the presence of law enforcement officials, contrary to Georgian law.¹⁴¹ Where a detainee undergoes a medical examination, and medical evidence of injuries is available, official medical reports often state that such injuries were self-inflicted and officials claim that the injuries were sustained when the detainee resisted arrest, or by falling down.¹⁴²

¹³⁵ Article 73 (1) (f) *ibid.*

¹³⁶ *Ibid.*

¹³⁷ See Summary Record of the 461st meeting of the UN Committee against Torture, *Georgia*, 2001.

¹³⁸ *Ibid.* Under Soviet Ministry of Health regulations that are still in force, the permission of the investigator conducting the criminal investigation or a judge must be secured before a detainee can be visited by a medical professional in a detention facility. Article 2 of the Soviet Ministry of Health Rules on Forensic Medical Examination of 21 July 1978 states, "Forensic medical examination to establish a degree of bodily injury is conducted pursuant to a resolution of the inquest investigator, investigator, procurator or court's decision. Forensic medical examination can be carried out by the written request of the Procuracy, Ministry of Internal Affairs, Committee of State Security, and judges in order to reveal facts relevant to the opening of criminal investigations". [Own translation]

¹³⁹ In November 2004, this Centre came under the authority of the competent department of the Ministry of Justice after the authority was shifted from the Ministry of Health.

¹⁴⁰ Article 356 et seq. Cr PC. Forensic medical investigations are governed by the Criminal Code, the Criminal Procedure Code and instructions stemming from USSR times that are in the process of being replaced. See U.S.S.R. Ministry of Health Rules on Forensic Medical Examination of 21 July 1978 governing objectives and purposes of forensic-medical examinations, authority to conduct forensic-medical examinations, modalities of carrying out forensic-medical examinations, preparation of forensic-medical reports and obligations of forensic-medical experts vis-à-vis investigators, prosecutors and courts. Related statutory regulations concern organisational matters, including the required professional expertise of forensic-medical experts. A new law on Forensic Medical Investigations was accepted at the first hearing but its adoption, dependant on passing the third reading, has not been expedited and the bill is still pending.

¹⁴¹ See Human Rights Watch, *Backtracking on Reform*, and European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, para.31.

¹⁴² See Former Political Prisoners for Human Rights, *State of Protection of Human Rights* and Report of the Public Defender of Georgia, *On the Situation of Protection of Human Rights*, p.76.

In exceptional cases, an independent forensic doctor can examine a detainee in order to determine whether they have been subjected to torture.¹⁴³ However, such examinations have to be paid for by the survivor him/herself.¹⁴⁴ In practice, some detainees have reportedly refrained from exercising their right to an independent medical examination, apparently out of fear that they will be subjected to retaliation by authorities.¹⁴⁵

- Procedural remedies during investigations

All parties to criminal proceedings, other individuals and legal persons, such as NGOs or the media, have the ability to challenge procedural irregularities or decisions taken by investigative bodies by means of lodging a written or oral complaint. While this procedure, which includes judicial review of a decision to suspend or close an investigation, can act as a means to ensure that full investigations are undertaken, it has in practice only partially remedied the shortcomings apparent in the investigation of torture cases.¹⁴⁶ In some cases, where lawyers appealed a decision by the Procuracy to drop criminal charges against an alleged perpetrator at the district court, the court overturned the decision and ordered the Procuracy to re-open the case. However, despite the court ruling, after re-opening the case, the Procuracy reached the same determination and did not proceed with the prosecution.¹⁴⁷ While this could be appealed again, this would lead to drawn out proceedings that are more likely to frustrate the complainant than result in a successful prosecution. Where this has resulted in the loss of crucial evidence, the possibility of challenging the decision to close an investigation or to drop charges cannot substitute for the initial failure to carry out a prompt and full investigation.

- Failure to prosecute and punish perpetrators of torture

Where the Procuracy has brought charges against those accused of torture, these have often been for less serious offences than torture as defined in Article 126 or Article 335 of the Criminal Code. In proceedings before the district courts¹⁴⁸ a conviction is often contingent on medical reports, which are presented by expert witnesses. Medical experts employed by a state institution, such as the Ministry of Justice, formerly Ministry of Health, and, in specific cases, medical professionals who are licensed but not employed by a state institution can present an expert opinion in criminal proceedings.¹⁴⁹ However, medical reports are often inconclusive, in particular where medical examinations have not been carried out impartially or in a timely manner.

¹⁴³ Article 359 (2) Cr PC.

¹⁴⁴ European Committee for the Prevention of Torture, *Report to the Georgian Government*, 2002, para.30.

¹⁴⁵ Interview with various lawyers in Tbilisi, November 2004.

¹⁴⁶ The victim has, through his/her lawyer, the right to be informed about the process of investigations and may submit evidence to further the case of the prosecution (Article 69 Cr PC, and, for his/her rights as civil plaintiff Article 86 *ibid.*) Upon conclusion of the investigation, the Procuracy may either indict the suspect(s) (Articles 24 (7), (8), 281 *et seq.* and 401 *et seq.* Cr PC) or close the file if it decides that a prosecution will not proceed for lack of sufficient evidence or other reasons (Article 285 (2) and (3); 390 *et seq.* (Suspensions on the grounds of Article 29); 395 *et seq.* (Termination on the grounds of Article 28)). The victim or his/her lawyer may challenge such a decision, as well as other procedural decisions made in the course of investigations (see on the general right of participants of criminal proceedings to challenge official acts during the course of investigations Articles 21 and 234 *et seq.* Cr PC) Such challenge may be brought before the hierarchically superior prosecutor or the judge within 15 days who may order the investigation to be reopened (Articles 399 and 400 Cr PC). If the Procuracy again decides to close the file, this decision may be appealed in the same way but a victim cannot force the Procuracy to bring charges and the right to bring private prosecutions is limited and not applicable in torture cases (Article 27 Cr PC).

¹⁴⁷ See for case studies Human Rights Watch, *Backtracking on Reform*, and *Uncertain Torture Reform*, p.17.

¹⁴⁸ See on the jurisdiction of courts Articles 46-48 Cr PC.

¹⁴⁹ Articles 96, 97 and 356 *et seq.* *ibid.*

A further concern is the practice of using plea bargains, following recent changes in the Criminal Procedure Code, reportedly as a means to prevent convictions of suspected torturers.¹⁵⁰

As a result, even where cases have been brought against those accused of torture or other forms of ill-treatment, there have been few if any convictions. While the lack of convictions makes it impossible to comment on the sentencing practice of courts, it should be reiterated that the maximum punishment periods set out in the relevant articles, in particular the six years maximum imprisonment for public officials in Articles 126 of the Criminal Code, do not provide for punishment commensurate with the gravity of the crime of torture.¹⁵¹

- Lack of reparation for torture survivors

The right to reparation for victims of serious human rights violations, including torture, is well-established under general international law.¹⁵² It comprises both the procedural right to an effective remedy and the substantive right to reparation.

States have an obligation to provide reparation for torture both as a matter of treaty law, such as Article 14 of the UN Convention against Torture,¹⁵³ Article 2 (3) in conjunction with Articles 7 and 10 of the ICCPR, and regional human rights treaties, as well as customary international law.¹⁵⁴ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which were recently adopted by the Commission on Human Rights,¹⁵⁵ identify the following forms of reparation: restitution,¹⁵⁶ compensation,¹⁵⁷ rehabilitation¹⁵⁸ as well as satisfaction¹⁵⁹ and guarantees of non-repetition.¹⁶⁰

¹⁵⁰ See Human Rights Watch, *Uncertain Torture Reform*, pp. 11 et seq. Concerns have also been raised by the Council of Europe, Parliamentary Assembly, Resolution 1415 (2005), *Honouring of obligations and commitments by Georgia*, para. 9 (viii) (a): [asking the Government of Georgia to] "a. critically review the present practice of the "plea bargaining" system which – in its present form – on the one hand allows some alleged offenders to use the proceeds of their crimes to buy their way out of prison and, on the other, risks being applied arbitrarily, abusively and even for political reasons."

¹⁵¹ Although the Committee against Torture has not specified the length of imprisonment, comments on States parties' reports indicate that the range of punishment should be imprisonment of between six and twenty years. See Ingelse, *Torture*, p.342.

¹⁵² See Permanent Court of International Justice, *Chorzow Factory Case*; International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* and Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001.

¹⁵³ Article 14 reads: "(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

¹⁵⁴ See for an overview REDRESS, *Reparation, A Sourcebook*, in particular pp.14 et seq.

¹⁵⁵ Adopted by the Commission on Human Rights at its 61st session, UN Doc. E/CN.4/RES/2005/35, 20 April 2005.

¹⁵⁶ "Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship; return to one's place of residence, restoration of employment and return of property." Ibid.

¹⁵⁷ "Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; and (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services." Ibid.

¹⁵⁸ "Rehabilitation should include medical and psychological care as well as legal and social services." Ibid.

¹⁵⁹ "Satisfaction should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery,

The laws of Georgia do not provide for an express right to reparation in cases of serious human rights violations. Article 39 of Georgia's Law on the Constitutional Court specifies that individuals may directly petition the Constitutional Court if they believe that their constitutional rights, as outlined in Chapter II of the Constitution, have been breached. However, the Court itself may not award reparation for fundamental rights violations. Article 42(1) of the Constitution provides that an individual has the right to appeal to a court to protect his rights and freedoms and Article 42(9) states that any individual who suffers damage caused by illegal actions of the state, self-governing bodies, or their officials "shall be guaranteed to receive complete compensation from state funds through court proceedings." This right to litigation can be exercised in criminal or civil proceedings, both of which allow victims of unlawful action by a public official, including torture, to claim compensation for physical and moral damages.

Victims of crime are entitled to become party to criminal proceedings in order to bring civil claims in the course of proceedings.¹⁶¹ Alternatively, victims of torture may bring civil claims directly before civil courts.¹⁶² Torture survivors may also seek rehabilitation and compensation for damage resulting from unlawful actions of the criminal procedure bodies in a special procedure.¹⁶³ According to this procedure, "A person considering him/herself to be a victim is entitled to file a complaint with a court prior to the completion of the pre-trial investigation" and "the complaint shall be considered by a judge sitting alone."¹⁶⁴ 'Rehabilitation' will primarily be provided for unlawful detention and imprisonment, as well as compulsory treatment, but not for torture as such.¹⁶⁵ 'Compensation' is due, irrespective of

identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights and international humanitarian law training and in educational material at all levels." Ibid.

¹⁶⁰ "Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights and serious violations of international humanitarian law." Ibid.

¹⁶¹ Articles 30 et seq. Cr PC. Such civil action can be brought, free of court fees, at any time during the criminal procedure prior to the commencement of trial, either by the victim him/herself or, where the victim has died, by his/her legal successors against the person responsible for the crime (Article 33 Cr PC). A successful claim is dependent on the outcome of criminal proceedings and a court has to dismiss the civil action where proceedings have been terminated on the grounds of a lack of commission of a crime, namely torture or other relevant crimes, such as abuse of office (Article 41 (1) and (2) Cr PC). However, where proceedings have been suspended because the identity of the perpetrator is unknown or the suspect has absconded, the victim of the crime may in principle bring an action before civil courts on the basis of state liability (Article 33 (4) Cr PC).

¹⁶² Articles 177 et seq. of the Civil Procedure Code of 1997. The civil action has to be brought before the competent District Courts within three years from the time the act or omission for which damages are sought has taken place (Article 1008 Civil Code of 1997). Public officials and state authorities are jointly liable for any unlawful physical and mental damage caused (Article 1005 (1) Civil Code). The plaintiff carries the burden of proof whereby the Court is free in evaluating the evidence submitted by the parties (Articles 102 (1) and 105 (2) of the Civil Procedure Code). There is no need to prove the existence of a crime and the identity of the perpetrator if a criminal court has already issued a final verdict on these matters (Article 106 (c) Civil Procedure Code).

¹⁶³ Chapter XXVIII Cr PC.

¹⁶⁴ Article 227 (1) Cr PC.

¹⁶⁵ Article 219 Cr PC: "(1) A person, having been unlawfully or unreasonable convicted, accused or committed to compulsory treatment shall be restored to his rights (shall be rehabilitated), provided that his innocence or groundlessness of his committal to compulsory treatment has been ascertained. (2) Grounds for rehabilitation are the judgment of acquittal, as well as the ruling of an inquirer, body of inquiry, investigator or prosecutor, court ruling or decision on dismissal of the matter on the grounds indicated in subsections a), b), c), d), e), j), m), n) and p), Article 28(1), as well as on revocation of the unjust court ruling /decision on applying a coercive medical measure" (as translated by the Consulting Firm "Dikke International" Ltd.).

the outcome of the criminal case in question, where the accused or another person has suffered property, physical or moral damage as a result of unlawful or unreasoned actions of the investigating bodies.¹⁶⁶ In practice, there have only been a few successful cases under this procedure.¹⁶⁷ Rehabilitation has been awarded in 56 cases from 2001-2004, amounting to a total sum of 265 889 Lari (approximately \$149,376). The bulk of rehabilitation was paid for mental distress, ranging from 500 Lari (approx. \$280) to 25000 Lari (approx. \$14,000).

There are a range of obstacles when pursuing torture related claims that raise serious doubts about the effectiveness of existing remedies. Civil actions in the course of criminal proceedings are bound to fail because of the lack of prompt and impartial investigations of torture cases, and the subsequent termination of cases, as referred to above. Article 33 of the Criminal Procedure Code gives victims the right to seek pecuniary damages from the state even where the perpetrator(s) cannot be identified, but the application of this provision has been postponed until January 2006 pursuant to Article 681 (2) of the Criminal Procedure Code. In civil proceedings, victims of torture face high costs and the difficulty of proving torture as a prerequisite for a successful claim. Moreover, courts have refused to hear cases against the state where the plaintiff has failed to identify the perpetrator(s).¹⁶⁸ In practice, the absence of effective investigations and protection means that victims who fail to identify perpetrators out of fear for negative repercussions, or cannot do so for other reasons, commonly fail at the first hurdle of admissibility.

Even where courts have held the State liable for illegal conduct constituting a breach of rights, reparation is commonly confined to compensation only. The amount of compensation awarded is limited as the state has set aside an annual budget of 50,000/100,000 Lari (approx. \$ 28,000/56,000) out of which all compensation awards made against the state are to be paid.¹⁶⁹ In some cases, the amount of compensation awarded against the state has been reduced upon appeal by reference to budgetary constraints.¹⁷⁰ Furthermore, state authorities have apparently routinely failed to comply with adverse court rulings. This has left successful plaintiffs empty-handed in light of the lack of effective enforcement procedures against the state.¹⁷¹

¹⁶⁶ Article 221 Cr PC. Compensation for physical damage shall be in full. Moral damages are not monetary in nature but encompasses a duty, *inter alia*, that the appropriate authority shall offer the victim its apologies in writing. Claims for physical compensation can be submitted in the course of criminal proceedings and while serving the sentence and thereafter within 6 months following release (Article 224 (2) Cr PC). The claim is heard by a judge and can be appealed but the ruling excludes recourse to civil courts seeking compensation for the same subject matter (Article 227 (2) Cr PC).

¹⁶⁷ The courts of first instance rehabilitated 12 out of 17 persons that had claimed rehabilitation in 2002, 8 out of 10 in 2003 and 4 out of 6 in the first quarter of 2004. The Criminal Case Collegium of the Supreme Court of Georgia upheld 1 rehabilitation claim each in 2001 and 2002, 7 claims in 2003 and 1 claim in the first quarter of 2004. The Criminal Case Chamber of the Supreme Court heard 6 appeals on rehabilitation cases in 2001, 12 in 2002, 25 in 2003 and 8 in the first quarter of 2004, 20 of which were successful.

¹⁶⁸ See for example the case of *Samkharadze*, decided by the Regional Court in Vake-Saburtalo in 2003, the decision of which has been challenged by lawyers before the European Court of Human Rights.

¹⁶⁹ This is not laid down by law but adopted as administrative practice. The sum allocated for rehabilitation purposes was 59 000 Lari in 2001, 50 000 Lari each in 2002 and 2003 and 100,000 Lari in 2004.

¹⁷⁰ *Tamaz Shapatava v Georgia*, an application pending before the European Court of Human Rights relating to a judgment of the Supreme Court of 18 June 2002 is a case in point. He demanded rehabilitation and compensation of 1 000 000 USD for the moral damage resulting from his unlawful detention that had lasted one year. The Supreme Court of Georgia awarded him 14 000 Lari as rehabilitation on the grounds that there is a social-economic crisis in Georgia and that the sum of money (50 000 Lari) set aside in the budget is envisaged for dozens of persons and cannot be spent on one person only. Article 42 has brought this case before the European Court of Human Rights arguing that the low amount of damages awarded signifies a lack of effective remedies for such breaches in violation of Article 13 of the European Convention on Human Rights.

¹⁷¹ Complaints against public officials tasked with enforcing judgments brought under Article 18 of the Law on Enforcement Proceedings of 1999 challenging the lack of action to enforce awards against the Government have to date been unsuccessful. The lack of effectiveness of enforcements is at present being challenged by Article 42 before the European Court of Human Rights in the case of *Kokashvili v. Georgia*, N 2111003. See on the generic problem of non-enforcement of judgments in Georgia *A Study on the Compatibility of Georgian Law*, Council of Europe, 2000, pp. 60, 61.

IV.3 Need for legal and institutional reforms

Weaknesses in domestic legal framework compounded by impunity

The preceding chapters have disclosed a series of shortcomings, both in law and practice that have contributed to and resulted in impunity for torture and lack of reparation: Torture is not characterised as a specific offence in line with Article 1 of the UN Convention against Torture; there are no adequate programmes for victim and witness protection; investigations are not carried out promptly, impartially and effectively; existing remedies are not effective and torture survivors commonly do not obtain reparation for the harm suffered. This analysis of the current situation necessarily raises the question of whether current measures to address these problems are adequate and (potentially) effective and what further steps should be taken to combat impunity for torture and to provide justice for victims. The combination of legal, structural and societal factors that facilitate torture means that any efforts to overcome impunity for torture in Georgia will have to tackle the phenomenon at several levels, i.e. policy, awareness raising and legislative as well as institutional reforms. Although some first steps have already been taken to this end, it will take a sustained effort backed up by sufficient political will to bring about the required fundamental changes to establish fully the rule of law and end impunity.

i. Plan of Action against Torture

The Plan of Action against Torture, the current status of which has been described above, is a valuable blueprint that addresses several important areas of reform. However, only limited progress has been made to ensure implementation of the Plan within the envisaged timeframe after the change in government.¹⁷²

ii. Legal reforms

- Making torture a specific criminal offence

The previous Government adopted, in July 2003, a new article in the Criminal Code (335) that made coercion to give evidence a criminal offence whereby torture used as a means of coercion constitutes an aggravating circumstance. Although the addition of this offence was welcomed, this amendment has not fully complied with recommendations made by the UN Committee against Torture and the Human Rights Committee in failing to define torture in line with Article 1 of the UN Convention against Torture. The absence of a satisfactory definition of torture not only falls short of what is required of Georgia by international standards, it also contributes to a failure of public officials, health officials and others, as well as society at large to grasp fully the meaning of torture and to act accordingly in combating it. A project has recently been initiated in which officials from the General Prosecutors' office, the Ministry of Justice, academics and NGO representatives are considering changes to the existing criminal law so as to align it with the definition of torture found in the UN Convention against Torture. It is hoped that this project will successfully incorporate a specific offence of torture in line with international standards, both with regard to the definition of torture and the punishment prescribed.¹⁷³

¹⁷² At the time of writing, meetings of the implementing partners had been scheduled.

¹⁷³ The project envisages the insertion of a new Article 144 (1) into the Criminal Code that makes torture a specific offence carrying a punishment of three to seven years imprisonment. The draft Article 144 (1) broadly uses the language of Article 1 of the UN Convention against Torture, without, however, specifying discrimination as a purpose and without making the involvement of a public official an integral part of the definition. Instead, as under current law, the commission of the offence

- Reform of the Criminal Procedure Code

At the time of writing, Government officials and independent experts were deliberating the draft Criminal Procedure Code that has been the result of revisions of criminal procedure law undertaken throughout 2004 and some amendments have been adopted in March 2005, including, *inter alia*, the abolishment of the initial phase of preliminary investigations, the right to request free medical examinations at any stage of proceedings, various changes to make investigations more effective, the introduction of a more adversarial system and changes to the plea bargaining procedure.

While the streamlining of investigations promises to increase effectiveness, and some measures for victim and witness protection are envisaged in the draft Code, there remain doubts as to whether these changes are far-reaching enough to ensure impartiality of investigations and effective protection of victims and witnesses in the actual practice.

- Reparation and effective remedies

There are at present no reform initiatives either to introduce a specific right to reparation for human rights violations, including torture, into domestic law, or to strengthen the position of torture survivors by making existing remedies more effective.

iii. Institutional reforms

- Reform of the Police and the Procuracy

The objective of the reform of the Police and the Procuracy is to enhance the professionalism of the services and, by so doing, to improve policing, to make criminal investigations more effective and to combat corruption.

A first and rather specific reform measure has been the setting up of a special patrol police. This has been welcomed by observers, in particular for reducing violations and bribery by the police responsible for traffic.¹⁷⁴ Further reforms that are being considered concern structural changes, such as the forming of a gendarmerie falling under the authority of the Ministry of Defence instead of the present administrative police and the separation of the criminal police from the Ministry of Internal Affairs, measures to make the work of the forces more professional, and human rights training of officers.¹⁷⁵ A further measure envisaged is the merging of the Ministry of State Security and the Ministry of Internal Affairs into a newly established Ministry of Police and Public Security.

The envisaged reforms are welcome developments, as the use of modern investigation methods by better paid officials (a rise in salaries is considered as part of reforms) can be expected to reduce the incentive to resort to torture and ill-treatment as means of extracting confessions and extorting money. It is not possible to make detailed comments at the time of writing because the reforms have not been sufficiently advanced. However, it is notable that the known institutional reform proposals do not include specific moves to make investigations in torture cases more impartial and effective. There is a need for more thorough reforms in this regard, for example by setting up special anti-torture units or even an independent body

by a public official constitutes an aggravating circumstance. Articles 126 and 335 are to be changed so as to reflect the introduction of a new offence of torture.

¹⁷⁴ Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, p.3.

¹⁷⁵ Council of Europe, *Honouring of obligations and commitments*, 2004, para.26.

tasked with investigating police misconduct, including torture.¹⁷⁶ In the absence of such changes, structural shortcomings identified in this and other reports that ultimately result in impunity for perpetrators of torture are likely to persist.

- Strengthening the capacity of the Public Defender

The appointment of the new Public Defender in September 2004 was followed by an increased budgetary allocation for the Public Defender's Office for 2005, which is four times higher than in the previous year. The Office is currently recruiting new staff after old staff have left and some internal restructuring can be expected. Plans to restructure the office completely and to create several Ombudsmen, which would have weakened the standing of the Public Defender, have been shelved. At the time of writing, there are no concrete initiatives to enlarge the powers of the Public Defender but the increased resources and new staff may result in an enhanced capacity to combat torture, in particular investigating torture cases. The recent joint initiative of conducting inspection visits to police lock-ups is a promising first step towards a more proactive anti-torture policy of the Public Defender.¹⁷⁷

- Reform of the judiciary

Recent amendments of the Constitution made on 6 February 2004 have given the President the power to appoint and dismiss judges,¹⁷⁸ a move bound to undermine the independence of the judiciary in Georgia.¹⁷⁹ Further constitutional amendments were under consideration at the time of writing. The reforms envisage the nomination of all Constitutional Court judges by the President and the dismissal of present judges of the Constitutional Court and Supreme Court, with the exception of the President of the latter, the introduction of a genuine constitutional complaint and limiting the tenure of Constitutional Court judges to a single term.¹⁸⁰ In the light of longstanding concerns over the independence of the judiciary in Georgia, it is critical that any steps towards enhancing accountability, efficiency and transparency as well as strengthening independence of the judiciary will not be hampered by executive interference through the use of the power to appoint and dismiss judges.

- Reform of the penitentiary system

The ongoing reform of the penitentiary system aims at improving the prison regime that is suffering from a plethora of problems. The Government has taken important steps, both practical, such as building new prisons to improve conditions of detention and reduce overcrowding, and structural, such as amending the law of imprisonment and the bringing of

¹⁷⁶ See for a comparative survey of relevant State practice, and practice of such bodies, REDRESS, *Taking Complaints of Torture seriously*, in particular pp.20 et seq.

¹⁷⁷ See *supra*, at IV, (2) (ii).

¹⁷⁸ Article 73 (1) (p) of the Constitution: "The President of Georgia shall ... preside over the highest Council of Justice of Georgia, appoint and dismiss the judges in accordance with the Constitution and the procedure proscribed by the Organic law as well."

¹⁷⁹ See on concerns about the independence of the judiciary Concluding Observations of the UN Human Rights Committee: *Georgia*, para.12: "The Committee expresses its concern at the existence of factors which have an adverse effect on the independence of the judiciary, such as delays in the payment of salaries and the lack of adequate security of tenure for judges. The State party should take the necessary measures to ensure that judges are able to carry out their functions in full independence, and should ensure their security of tenure pursuant to article 14 of the Covenant. The State party should also ensure that documented complaints of judicial corruption are investigated by an independent agency and that the appropriate disciplinary or penal measures are taken."

¹⁸⁰ See Council of Europe, *Compliance with commitments and obligations, 2005*, paras.25 et seq.

the penitentiary system under the control of the Ministry of Justice.¹⁸¹ Although the focus of this reform is not torture-specific, the Ministry of Justice has already used disciplinary measures for violations of prisoners' rights. In October 2004, by order of the Ministry of Justice following an earlier Presidential Decree, a monitoring group drawn from various human rights organisations and public figures was established to enter prisons at any time without the need for prior authorisation.¹⁸² The process is still in its early stages but has the potential to prevent torture and ill-treatment, at least in prisons (although most torture reportedly takes place in pre-trial detention).

IV.4 Further measures: Human rights training and the implementation of the Istanbul Protocol

Several initiatives are under way to provide human rights training to members of the Procuracy, lawyers, police and the judiciary.¹⁸³ In an important recent initiative by national and international non-governmental organisations, government officials, members of the Public Defender's office, health professionals and lawyers were trained in how to use the Istanbul Protocol in investigating and documenting torture cases.¹⁸⁴ The training seminar brought together, for the first time, a large number of health and legal professionals dealing with cases of torture. It resulted in a series of concrete commitments by several participants not only to ensure that courses on the prevention and prohibition of torture and the use of the Istanbul Protocol are included in the curricula of their universities and other teaching institutions but also to join forces in preventing and combating torture.

¹⁸¹ See on recent legal reforms the amendments to the Law on Imprisonment made in 1999 and 2002. An overview of the reform process in the Georgian Penitentiary System can be found in Responses of the Georgian Government to the report of the CPT, 2004, Annex 1.

¹⁸² See in this context also critical comments by NGOs that have not been selected as part of the monitoring team, Human Rights Information and Documentation Centre, *One Step Forward, Two Steps Back*, p.39.

¹⁸³ Such training has been provided by or with the aid of international organisations, such as the Council of Europe and the OSCE, organisations such as ABACEELI and national human rights organisations, for example the Human Rights Information and Documentation Centre.

¹⁸⁴ See supra, Introduction. See also Makharashvili, *Protocol tackles Georgia's "major problem" of torture*.

V. RECOMMENDATIONS

THE GOVERNMENT OF GEORGIA IS URGED TO:

1) Anti-Torture Policy

- Publicly commit to an anti-torture policy with the aim of combating torture at the hands of state officials, in particular the police, comprising the following elements:
 - *Public announcement* of an anti-torture policy in official documents and media, committing the Government and its officials to combat torture at all levels through prevention, accountability and reparation for torture survivors;
 - *Consistent* application of policy, in particular avoidance of contradictory statements that can be interpreted as giving law-enforcement personnel the authority to use illegal force in combating crime;
 - *Transparent* application of policy, in particular open and non-discriminatory consultation of all civil society groups and individuals working on torture issues;
 - *Committing* to a set of specific policy goals in combating torture, in particular
 - (i) acceding to international treaties and accepting mechanisms aimed at combating torture, such as the Optional Protocol to the UN Convention against Torture and the individual complaints mechanism under Article 22 of the UN Convention against Torture;
 - (ii) bringing existing legislation into conformity with the requirements of the UN Convention against Torture and the European Convention on Human Rights;
 - (iii) ensuring protection of detainees during pre-trial detention;
 - (iv) combating impunity by ensuring disciplinary and criminal accountability of those responsible for torture, not only the actual perpetrators but also superiors ordering, tolerating or failing to prevent torture; and
 - (v) providing reparation for torture survivors and the relatives of those who died from torture, in particular by means of public acknowledgement of state responsibility, adequate compensation and rehabilitation for torture survivors;
- As a first step, implement the *Plan of Action against Torture* without delay.

2) Legal Reforms: Ensure an adequate legal framework implementing Georgia's international obligations relating to the prohibition of torture in domestic law

- Undertake, in consultation with legal experts and a cross-range of civil society representatives, a thorough review of existing legislation with a view to ensuring conformity with Georgia's obligations under international treaties, in particular the UN Convention against Torture, by abolishing or amending inadequate legislation and adopting new legislation where necessary;
- On the basis of the findings of this report, the following legislative changes should be made to this end:
 - Insert a *specific offence of torture* into the Criminal Code. The definition of torture constituting the offence should be in line with the definition contained in Article 1 of the UN Convention against Torture. This offence of torture should be inserted in the chapter of the Penal Code on crimes against the rights and freedoms of the person,

and article 335 (2) (b) of the Penal Code be deleted. Adequate punishments commensurate with the gravity of the offence should be stipulated in the Code;

- In the Criminal Procedure Code and laws relating to criminal investigations:
 - (i) *Ensure effective complaints procedures:* In order to enable detainees to lodge a complaint without fear of adverse repercussions, the right to lodge a complaint directly with a judge who should be obliged to initiate investigations unless the complaint is manifestly ill-founded. The law should provide for a victim and witness protection programme that includes the right to a transfer and/or the obligation of the authorities to suspend the alleged perpetrator(s) of torture where a complaint is not manifestly ill-founded. Any unjustified interference with the right to complain should be made subject to criminal and disciplinary sanctions;
 - (ii) *Ensure effective investigations:* Failure to commence prompt and full investigations in the absence of reasonable grounds should be made subject to disciplinary sanctions. A new department or unit should be set up in the Procuracy, by law, which is responsible for the prosecution of torture and other serious human rights violations. Investigations should be carried out by officers from this department/unit or by officers from special police departments/units created for this purpose. The Ministry of Justice and Ministry of Internal Affairs should issue instructions detailing the measures of investigation to be taken in torture cases within a specified time-limit, including visiting the scene of the crime, interrogating the victim, witnesses and alleged perpetrator(s) and ordering a medical examination. Non-compliance should be made subject to disciplinary sanctions;
 - (iii) *In particular, ensure availability of timely and accurate medical evidence:* Medical examinations of detainees should be made compulsory upon entering and leaving all places of detentions, including and in particular police lock-ups. Investigating authorities and judges should be obliged to order promptly a medical examination upon hearing credible allegations of torture. The law should specify that doctors be granted unhindered access to detainees and that any interference is subject to disciplinary sanctions. A new law on forensic medicine should be adopted replacing existing Soviet-era legislation, which should ensure that forensic examinations in torture cases are carried out in line with international standards, such as the ones contained in the Istanbul Protocol;
- *Reparation:* Adopt an express right to reparation for torture and other serious human rights violations. The provisions providing for rehabilitation and compensation in criminal proceedings should be made explicitly applicable to torture. Existing procedural laws clarifying that state authorities can be sued even where the individual perpetrator(s) have not been identified should be applied with immediate effect. With regard to the amount of compensation to be awarded, the law should specify that it should be commensurate with the gravity of the crime and not be subject to budgetary restrictions. The law on enforcement should be amended so as to ensure enforcement of awards against the state authorities and individual perpetrators.

3) Institutional reforms

- Institutional reforms should include an anti-torture focus, obliging those responsible for the reforms to consider the impact of suggested measures on the prevention and eradication of torture. The reforms should be co-ordinated so as to avoid duplication and inconsistency and to maximise their impact;

- *Police and Procuracy:*
 - (i) Create separate anti-torture units within the Procuracy and Police that are provided with sufficient resources and professional training and obliged to issue annual reports to be made public. These reports should detail the methods of their work and provide statistics about complaints, number of investigations carried out and outcome of investigations, including difficulties encountered. The units should operate a hotline for complaints that is accessible for detainees and others 24 hours a day;
 - (ii) Enhance professionalism of investigation techniques and raise salaries so as to reduce the risk of extortion, bribes and inadequate investigations;
- *Public Defender:* Provide the Public Defender's Office with adequate resources for enhanced outreach and effectiveness and strengthen its mandate to combat torture;
- *Judiciary:* Ensure the independence of judges by carrying out judicial reforms in line with the recommendations of the Council of Europe and international standards;
- *Penitentiary system:* Continue present reform efforts, in particular by monitoring prison conditions and by providing adequate resources to ensure that conditions of detention are adequate and that detainees are provided with the medical treatment they need.

4) Practice concerning complaints and investigation mechanisms and access to justice and reparation

- The rights, wishes and needs of victims of torture should be considered throughout investigations, including the right to be protected, to have legal assistance and to be informed about the progress of their case. The Prosecutor General and the Ministry of Internal Affairs should make the prosecution of torture cases a priority and issue specific instructions to the Procuracy and the Police as appropriate. Where there is a prima facie case of torture, the alleged perpetrators of torture should be suspended and subjected to a full criminal and disciplinary investigation. There should be internal anti-torture policies and law-enforcement personnel should be encouraged not to tolerate torture and be given the opportunity to inform their superiors and the Public Defender about relevant torture practices in confidence. Where sufficient evidence is available, torture cases should be prosecuted by the relevant authorities;
- *Reparation for torture should be an integral element of the anti-torture policy.* To this end, torture survivors should be provided with access to justice, including legal aid, and the additional right to claim reparation in administrative proceedings. There should be an explicit commitment not to restrict awards relating to torture by reference to budgetary constraints and to comply with any adverse decisions speedily. The state should also provide rehabilitation programmes for torture survivors. The Public Defender should be encouraged to recommend compensation and other forms of reparation in torture cases;
- *Raise awareness through appropriate training about relevant international standards on the prohibition of torture and reparation for torture.* International standards and their practical application should be made part of the curricula for the training of future police officers and members of the Procuracy, for staff joining the Public Defenders' Office and for law and medical students. Once fully qualified, police officials, members of the Procuracy, staff of the Public Defenders' Office, judges and doctors, in particular forensic doctors, should be provided with regular training aimed at providing updated information

about relevant developments and transfer of skills to deal with practical problems that arise when dealing with torture cases.

5) Strengthen the Awareness of the Judiciary of the Plight of Torture Survivors

- Ensuring that all judges have sound knowledge of relevant international standards;
 - Recognising the need to uphold torture survivors' rights in all judicial proceedings;
 - To this end, incorporating the wide array of international human rights law, including but not limited to the jurisprudence of the European Court of Human Rights, in jurisprudence;
 - Acting upon complaints about torture coming to the attention of judges by refusing to admit confessions extracted under torture and requesting the Procuracy to carry out a full investigation, in particular prompt medical examinations;
 - Taking appropriate steps during trials of alleged perpetrators of torture to ensure that all kinds of evidence have been considered, in particular impartial medical expert testimony;
 - Considering the gravity of the crime of torture when sentencing convicted perpetrators;
 - Taking into account the seriousness of torture as one of the worst violations of human rights and the severe impact it has on individual victims, their families and society at large when making determinations as to the appropriate nature and scope of reparation;
 - Not confining the scope of reparation to compensation but awarding other forms of reparation, taking into account the particular needs and circumstances of torture survivors;
 - Proposing legal and institutional reforms where existing law and/or practice relating to torture falls short of international standards and fundamental rights protection under the Georgian Constitution;
 - Ensuring, by means of appropriate procedures, that court judgements are enforced.
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- ***Civil Society, in particular NGOs, lawyers, doctors, academics, the media and others are urged to maximise their efforts in combating torture by:***
 - Taking a proactive stance in demanding accountability of those responsible for torture by supporting torture survivors in lodging complaints, initiating legal challenges and providing pro bono legal services;
 - Bringing challenges concerning the prohibition of torture, in particular where there is a failure of the state to provide effective remedies, including investigation of torture cases, before the European Court of Human Rights or the Human Rights Committee, once domestic remedies have been exhausted, with a view both to obtaining justice for the torture survivors concerned and to inducing structural changes;
 - Raising public awareness through programmes, studies and documentaries about the practice of torture, its impact on victims and society at large, and the importance of redressing violations to enable torture survivors and the families of torture victims to rebuild their lives, and exploring strategies to further their right to reparation;
 - Providing information and guidance through professional associations or other channels to those most likely to come into contact with torture survivors (medical professionals, lawyers, government officials, NGOs, citizen advice centres etc.). The information should be both of a general nature about torture and its consequences, including the legal situation, and of a practical nature as to how to help torture survivors seeking medical treatment, legal advice or other forms of assistance;

- Co-ordinating their activities in the fight against torture, and providing assistance or constructive input in relation to government initiatives aimed at combating torture;
- Enhancing their knowledge about the practice of torture, international standards, comparative experiences and domestic challenges through training and exchange of information.

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