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COMPATIBILITY OF GEORGIAN LEGISLATION WITH THE STANDARDS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS

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Introduction

Upon the decision of the Ministry of Justice of Georgia within the framework of the Joint Programme between the European Commission and the Council of Europe and in co-operation with the Directorate General of Human Rights of the Council of Europe, the Working Group on the Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and its Protocols has been established. The Group was entrusted with analysing Georgian legislation and practice to identify the legal problems and deficiencies from the point of view of their compliance with the Convention standards and to make recommendations on bringing Georgian legislation in line with the standards of the Convention and its protocols.

The Working Group consisted of three local experts: K. Korkelia, N. Mchedlidze and A. Nalbandov.

The present study covers those articles of the Convention and of its protocols, which were not dealt with in the previous compatibility study carried out by the local experts.[1] In addition the present study discusses new legal instruments - Protocols 12 and 13 - adopted after the completion of the work on the above mentioned study.[2] The present study covers the following articles of the European Convention and its protocols:

- Article 1 (Obligation to Respect Human Rights)
- Article 2 (Right to Life)
- Article 3 (Prohibition of Torture)
- Article 4 (Prohibition of Slavery and Forced Labour)
- Article 5 (Right to Liberty and Security)
- Article 6 (Right to a Fair Trial)
- Article 7 (No Punishment Without Law)
- Article 8 (Right to Respect for Private and Family Life)
- Article 9 (Freedom of Thought, Conscience and Religion)
- Article 12 (Right to Marry)
- Protocol 4, Article 1 (Prohibition of Imprisonment for Debt)
- Protocol 4, Article 3 (Prohibition of Expulsion of Nationals)
- Protocol 6 (Abolition of Death Penalty in Time of Peace)
- Protocol 7, Article 2 (Right of Appeal in Criminal Matters)
- Protocol 7, Article 4 (Right not to be Tried or Punished Twice)

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[1] A Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols: Pilot Project, prepared by A. Kakhniashvili, A.Nalbandov, G. Tskrialashvili, HRCAD(2001)2, 2001.

[2] The current status of ratification of the European Convention and its protocols is as follows:

a) European Convention - entered into force for Georgia on 20 May 1999;
b) Protocol 1 - entered into force for Georgia on 7 June 2002;
c) Protocol 4 - entered into force for Georgia on 13 April 2000;
d) Protocol 6 - entered into force for Georgia on 1 May 2000;
e) Protocol 7 - entered into force for Georgia on 1 July 2000;
f) Protocol 12 - At present not yet in force. Georgia deposited its instrument of ratification on 15 June 2001;
g) Protocol 13 - Signed by Georgia on 3 May 2002 and ratified on 25 May 2003.

- Protocol 7, Article 5 (Equality Between Spouses)
- Protocol 12 (General Prohibition of Discrimination)
- Protocol 13 (Abolition of Death Penalty in Time of War)

The above articles of the European Convention and of its protocols were shared among the members of the Working Group who worked individually on their respective articles. The following members of the Group were responsible for preparing the study under the relevant articles:

- K. Korkelia - Articles 1, 8, 9, 12 of the Convention; Protocol 6, Protocol 7, Article 5 and Protocol 13;
- N. Mchedlidze - Articles 3, 5, 6, 7 of the Convention, Protocol 7, Articles 2 and 4;
- A. Nalbandov - Articles 2 and 4 of the Convention, Protocol 4, Article 1 and 3; Protocol 12.

It is important to note that upon the agreement of the Ministry of Justice and the Directorate General of Human Rights of the Council of Europe it was decided to prepare the original study in English. This would facilitate commenting on the study by the Council of Europe experts without wasting time on translation of the Georgian texts into English. It was also decided that the final version of the study would be translated into Georgian to make it readily available for Georgian readers.

It is clear that the compatibility study cannot be exhaustive. The Working Group has been aware since the very beginning of its work that it would be impossible within the prescribed time to make a thorough study of all legal problems and deficiencies existing in Georgian legislation and practice. Therefore, the Group has primarily focused on the major problems identified in Georgian legislation from the point of view of its compliance with the standards of the European Convention and its protocols.

The Working Group had two meetings with the experts of the Council of Europe. The first meeting was held on 3-4 October 2002, in Tbilisi. Issues such as the working methodology, structure of the study and the scope and contents of the articles of the Convention and its protocols were discussed. The second meeting was held on 27-28 March 2003. At this meeting the experts of Council of Europe made their comments on the compatibility study prepared by the Georgian experts. Other issues of particular importance in terms of compatibility of Georgian legislation with the Convention were also discussed.

The present study takes into account the comments of the Council of Europe experts made at this meeting and subsequently in writing.

On behalf of the local experts I would like to thank the Council of Europe experts: Tamas Ban (Hungary); Piers Gardner (United Kingdom) and Jens Meyer-Ladewig (Germany) whose wisdom has been of great help while making this study. Their comments and advice have been invaluable. I would also like to thank Professor Douwe Korff (United Kingdom), whose editing remarks improved the clarity and conciseness of the English text.

Special thanks go to the Directorate General of Human Rights of the Council of Europe and in particular, Krzysztof Zyman, with whose assistance and encouragement our cooperation became successful.

All those who worked on the compatibility study sincerely hope that the authorities take into account the conclusions and recommendations of the Working Group to improve the protection of human rights and freedoms in Georgia.

The work on the compatibility study was completed at the end of April 2003. Thus, it does not take subsequent legal developments into account.

Konstantin Korkelia
Team Leader of the Working Group

1. ARTICLE 1 – OBLIGATION TO RESPECT HUMAN RIGHTS

Under Article 1 of the European Convention on Human Rights: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

It is clear that Article 1 is a starting point for an analysis of applicability of the European Convention on Human Rights. A three-fold obligation stems from Article 1 which relates to the applicability of the Convention to "everyone", its territorial scope and the obligation to "secure" rights protected under the Convention.

a) Applicability of the Convention to "Everyone"

The expression "everyone" used in Article 1 of the Convention covers not only citizens, but also aliens, stateless persons, persons having dual citizenship and persons lacking legal capacity. Therefore, the States parties to the European Convention and its protocols must guarantee to all persons within their jurisdiction the rights established in Section I of the Convention and its protocols. Although Article 1 of the Convention provides that the Convention is applicable to "everyone", the Convention states *in expresso* that the application of some of the rights to non-nationals may be restricted (for example, under Article 16 political activity of aliens may be restricted).

In general Georgian legislation takes a similar approach, guaranteeing fundamental rights and freedoms to "everyone". The Constitution of Georgia contains the following general provision: "Foreign citizens and stateless persons living in Georgia have the rights and obligations equal to the rights and obligations of citizens of Georgia with some exceptions envisaged by the Constitution and law."[3] This constitutional provision makes it clear that the fundamental rights and freedoms are provided not only to Georgian citizens, but also to citizens of other States or stateless persons.[4]

The Constitution makes a division between the two categories of rights and freedoms applicable, on the one hand, to "everyone", and only to citizens, on the other hand. Under the Constitution the following rights are applicable to "everyone":

- Right to life (Article 15);
- Prohibition of torture (Article 17(2));
- Right to work (Article 30(1));
- Right to privacy (Article 18);
- Right to a fair trial (Articles 40, 42 and 85);
- No punishment without law (Article 42(5));
- Right to respect for private and family life (Article 20);
- Freedom of conscience (Articles 9 and 19);
- Freedom of expression (Articles 19 and 24);

[3] Para. 1, Article 47 of the Constitution of Georgia.

[4] A Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols: Pilot Project, prepared by A. Kakhniashvili, A.Nalbandov, G. Tskrialashvili, HRCAD(2001)2, 2001, 65-66, 80-83, 129.

- Freedom of assembly and association (Articles 25 and 26), except for the establishment of a political party and participation in its activities for which Georgian citizenship is necessary;
- Right to marry (Article 36(1));
- Right to an effective remedy (Article 42(1));
- Prohibition of discrimination (Article 14);
- Protection of property (Article 21);
- Right to education (Article 35);
- Freedom of movement (Article 22);
- Equality between spouses (Articles 36(1)).

The following rights are applied only to citizens:

- Right to free election (Article 28);
- Prohibition of expulsion and extradition of nationals (Article 13(3)(4));
- Right to access to the information maintained by the governmental bodies (Article 41);
- Protection of labour rights abroad (Article 30(3)).

Other normative legal acts of Georgia make express provision on the applicability of the legislation not only to citizens, but also to non-citizens. According to Article 8 of the Law on Citizenship of Georgia citizens of other States and stateless persons staying on the territory of Georgia shall be guaranteed "the rights and freedoms envisaged by the norms of international law and Georgian legislation, including the right to apply to the court and other State bodies for the protection of their ... rights".[5]

According to the Law on the Legal Status of Aliens "in Georgia aliens shall have the same rights and freedoms [...] as Georgian nationals [...]. Aliens in Georgia are equal before the law irrespective of origin, social and property status, racial and national belonging, sex, education, language, religion, political and other opinions, field of activity, place of residence and other status […]. Georgia shall protect the rights and freedoms of the aliens resident in its territory […] Georgia shall protect the rights and legitimate interests of stateless persons temporarily resident outside its borders, who are permanently resident in Georgia, to the same extent as ones of its national" (Article 3).[6]

The Law on Courts of General Jurisdiction states that "every individual has the right to appear directly before the court for the protection of his/her rights and freedoms" (Article 3). The Code of Civil Procedure points out that every person is guaranteed judicial protection of his rights (Article 2) and justice in civil cases is exercised by the court on the basis of every person's equality before the law (Article 5).[7] Under the Code of Criminal Procedure every person is equal before the law and the court.[8]

Despite the general provisions of Georgian legislation prohibiting discrimination of non-citizens, a problem may arise with regard to the right to education of aliens and stateless

[5] 25 March 1993.
[6] 3 June 1993.
[7] 14 November 1997.
[8] 20 February 1998.

persons permanently residing in Georgia. Without going into detailed examination of the problem, it may be pointed out here that the Law on Education,[9] along with the provisions applicable to "everyone", contains a number of provisions governing various aspects of the right to education addressed only to "citizens".[10]

Article 16 of the European Convention permits States to restrict the political activity of aliens.[11] The Article is intended to make an exception to both the principle of non-discrimination under Article 14 and the principle that States parties to the Convention shall secure to everyone within its jurisdiction the rights and freedoms provided for in the Convention. The wording of Article 16 makes it clear that the restriction on the rights of aliens under Articles 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination) relates *only* to the political activity of aliens. If the activity of aliens under Articles 10, 11 and 14 is not a political one, aliens are guaranteed the same rights under these articles as the citizens of the state in question.[12]

It is significant to note that the rights provided for in Georgian legislation are guaranteed not only to natural, but also to legal persons. Article 45 of the Constitution of Georgia expressly states that the basic rights and freedoms enshrined in the Constitution shall apply to legal entities as well with due regard to their contents.

b) Jurisdictional/territorial Scope of the Convention

Article 1 of the European Convention protects "everyone within [the] jurisdiction" of the States parties to the Convention. The States should be able to physically secure the rights and obligations provided for in the Convention and its protocols.[13] In other words, the state should be able to exercise certain power with respect to a person through its governmental institutions.

The notion of jurisdiction referred to in Article 1 of the Convention has been the subject of a number of cases before the Strasbourg supervisory organs. The case-law of the Commission and the Court makes it clear that the notion of jurisdiction is wider than the notion of territory. One of the important cases of the European Court on the notion of jurisdiction is the case *Loizidou* v. *Turkey* in which the Turkish government disavowed any jurisdiction over the activities of the Turkish military forces occupying Northern Cyprus, which forces had prevented the applicant from gaining access to her property. In this case the Court has made an important pronouncement:

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[9] 27 June 1997.

[10] For detailed analysis of the situation concerning the right to education of aliens and stateless persons see A Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols: Pilot Project, prepared by A. Kakhniashvili, A. Nalbandov, G.Tskrialashvili, HRCAD(2001)2, 2001, 128-129.

[11] Article 16 reads as follows: "Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

[12] For detailed analysis see A Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols: Pilot Project, prepared by A. Kakhniashvili, A.Nalbandov, G. Tskrialashvili, HRCAD(2001)2, 2001, 80-83.

[13] A. Robertson & J. Merrills, Human Rights in Europe: A Study of the European Convention on Human Rights, 1993, 27-28.

> "Although Article 1 sets limits on the reach of the Convention, the concept of jurisdiction under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention. [...] In addition, the responsibility of Contracting Parties can be involved because of acts of their effects outside their own territory. ...
>
> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[14]

One of the conclusions to be drawn from this pronouncement of the Court is that a State party to the European Convention may not be held responsible for acts or omissions committed on the territories beyond its control. Another important case on the notion of jurisdiction is *Banković and Others* v. *NATO Member States*.[15] In this case the European Court held that although the jurisdictional competence of a State is primarily limited to its territory,[16] in exceptional cases the responsibility of the State for acts performed outside its territory may be engaged.[17]

The situation with regard to the control of its territory by the Government of Georgia is problematic. Due to the events occurred at the beginning of 90's the Government of Georgia is not in a position to control two of its regions - Abkhazia and Samachablo (former South Ossetia). The two territories of the self-proclaimed republics created as a result of armed conflicts are *de facto* beyond the control of the Government of Georgia. It goes without saying that neither of them is party of the European Convention. Peace-keepers of the Commonwealth of Independent States' (actually consisting of Russian militaries) are deployed on the territory of Abkhazia.[18]

The fact that the Government of Georgia does not control the above two regions has a direct impact on the territorial application of the European Convention and its protocols on these territories and the obligation of Georgia to respect human rights under Article 1 of the Convention.

Georgia did not make any reservation/declaration to the Convention or its Protocols 4, 6, 7 while ratifying the Convention and the above Protocols in 1999/2000. However, Georgia has made territorial declarations to Protocols 1, 12 and 13.[19]

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[14] *Loizidou* v. *Turkey*, 23 March 1995, Series A no. 310, para. 62.
[15] 12 December 2001, ECHR 2001-XII.
[16] *Ibid*, para. 59.
[17] *Ibid*, paras. 67 and 71.
[18] As internationally practiced, the peace-keepers located in Abkhazia have immunity from Georgian jurisdiction.
[19] Georgia has also made a further reservation to Protocol 1 which reads as follows:

The declaration of Georgia contained in the instrument of ratification of Protocol 1 reads as follows:

"Georgia declares that due to the existing situation in Abkhazia and Tskhinvali region, Georgian authorities are unable to undertake commitments concerning the respect and protection of the provisions of the Convention and its Additional Protocols on these territories. Georgia therefore declines its responsibility for violations of the provisions of the Protocol by the organs of self-proclaimed illegal forces on the territories of Abkhazia and Tskhinvali region until the possibility of realisation of the full jurisdiction of Georgia is restored over these territories."[20]

A similar territorial declaration has been made by Georgia with respect to Protocol 12. It states that "Georgia declines its responsibility for the violations of the provisions of the Protocol on the territories of Abkhazia and Tskhinvali region until the full jurisdiction of Georgia is restored over these territories."[21]

Territorial declarations are of particular importance due to the situation in Abkhazia and Samachablo (Tskhinvali region). The *de facto* situation in Abkhazia and Samachablo clearly explains the position of the Georgian authorities.

Although it is clear that the Georgian authorities are not in a position to carry out effective control over the territories of Abkhazia and Samachablo, the abstention from making a territorial declaration while ratifying the Convention and Protocols 4, 6 and 7 may be explained by the prohibition of such reservations/declarations under the Convention. Article 56 of the Convention on territorial application relates to the application of the Convention only to the territories for whose international relations the State is responsible. So it was clearly not relevant to the situation of Georgia. On the other hand, Article 57 on reservations sets forth certain requirements to be meet by the State in order to make a reservation, including a prohibition of a reservation of a general character, and reference to the law in force in the State concerned.[22]

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1. Article 1 of the Protocol shall not apply to persons who have or will obtain status of "internally displaced persons" in accordance with "the Law of Georgia on Internally Displaced Persons" until the elimination of circumstances motivating the granting of this status (until the restoration of the territorial integrity of Georgia). In accordance with the aforementioned law, Georgia assumes responsibility to ensure the exercise of rights over property that exist on the place of permanent residence of internally displaced persons after the reasons mentioned in Article 1, paragraph 1, of this law have been eliminated.

2. Article 1 of the Protocol shall be applied to the operational sphere of "the Law of Georgia on the Ownership of Agricultural Land" in accordance with the requirements of Articles 4, 8, 15 and 19 of this Law.

3. Article 1 of the Protocol shall be applied within the limits of Articles 2 and 3 of the Law of Georgia on Transference into Private Property of the Non-Agricultural Lands Being in Possession of Natural Persons and Legal Persons of Private Law".

4. Article 1 of the Protocol shall be applied within the limits of the "Law of Georgia on Privatisation of the State Property".

5. With regard to the compensation of pecuniary assets placed on accounts of the former Georgian public-commercial banks, Article 1 of the Protocol shall be applied within the limits of the normative act adopted in pursuance of the Decree No. 258 of the President of Georgia of 2 July 2001.

[20] See internet-site of the Council of Europe Treaty Office: [http://conventions.coe.int].

[21] *Ibid*.

[22] K. Korkelia, New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights, 13 European Journal of International Law 2, 2002, 442-444.

It seems that the Georgian Government believed that a territorial declaration/reservation would not be acceptable under the relevant provisions of the Convention. The unacceptability of such a declaration/reservation was subsequently confirmed by the European Court in the admissibility decision of 2001 in the case of *Ilaşcu and Others* v. *Moldova and the Russian Federation*.[23] The territorial reservation made by Moldova with respect to Transdnistria - the territory not controlled by the Moldovan Government - was declared invalid by the European Court as it did not meet the Convention requirements.

At the same time the position of the Georgian authorities may be explained by the temporary situation of lack of control over these territories. The position of the Georgian authorities to abstain from making a territorial reservation/declaration to human rights treaties (which certainly includes the European Convention) was made clear in the Presidential statement.[24] In the statement the President pointed out, on the one hand, the fact that the Georgian authorities are currently unable to carry out effective control over these territories and noted that the jurisdiction of Georgia will be restored soon, on the other hand.

As noted, Georgia made territorial declarations to Protocols 1, 12 and 13 ratified respectively on 7 June 2002, 15 June 2001 and 25 May 2003. It is difficult to identify the reasons for this shift in the approach of the Georgian authorities since the situation of lack of control over these territories remains the same. Given the fact that the Georgian authorities were aware of the pronouncement of the European Court declaring the Moldovan territorial declaration invalid,[25] one may assume that the territorial declarations made at the time of ratification of Protocols 1 and 12 are more of political than legal nature.

Under the European Convention and the case-law of the European Court the rights and freedoms must be guaranteed for all persons *within the jurisdiction* of the contracting parties. Since the Government of Georgia does not exercise effective jurisdiction over the two above-mentioned regions.

It may be argued that the Georgian Government may not be held responsible for violations of the European Convention on the territories beyond its actual control. However, the European Court still has to pronounce on the Georgian-type of situations.[26] The case of *Ilaşcu and Others* v. *Moldova and the Russian Federation* pending before the European Court will shed light on the State responsibility for violations of the Convention. The European Court of Human Rights will have to strike a fair balance between incapacity of the State party to the European Convention to protect human rights on the territories beyond its control and the effective protection of the rights and freedoms enshrined in the Convention.

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[23] 4 July 2001.

[24] Statement of the President of Georgia, E. Shevardnadze "Human Rights Protection is a Key Priority for Georgian State". Available on the internet-site of the Office of Public Defender of Georgia: [www.geopdo.org].

[25] As confirmed by the reference by the representative of the Ministry of Foreign Affairs to the case of *Ilaşcu and Others* v. *Moldova and the Russian Federation* when presenting Protocol 1 before the Parliament. See Parliamentary proceedings of 27 December 2001.

[26] It is to be mentioned here that situation in the case of *Loizidou* v. *Turkey* is quite different, since both states concerned - Turkey and Cyprus - were parties to the European Convention.

Although the issue of the Meskhetian population, who were relocated from Georgia to Central Asia by the Soviet Union in the 1940s, does not arise under this chapter, it seems inappropriate to overlook it in the Study since Georgia undertook a commitment before the Parliamentary Assembly of the Council of Europe with regard to the Meskhetian population. It may only be recalled here that at the time of admission to the Council of Europe (1999), Georgia undertook a commitment, *inter alia*, "to adopt, within two years after its accession, a legal framework permitting repatriation and integration, including the right to Georgian nationality, for the Meskhetian population deported by the Soviet regime, to consult the Council of Europe about this legal framework before its adoption, to begin the process of repatriation and integration within three years after its accession and complete the process of repatriation of the Meskhetian population within twelve years after its accession."[27]

The Presidential decree of 1999 established the State Commission on Repatriation and Rehabilitation of the Population Deported from Southern Georgia and the Government undertook to begin the repatriation process within three years. Up to now no legislation allowing repatriation of Meskhetian population to Georgia has been adopted.[28] Although certain measures have already been taken by the authorities,[29] the problem has not yet been solved.

c) Negative and Positive Obligations

Article 1 of the European Convention on Human Rights requires that the States parties "secure" the rights and freedoms defined in the Convention. Based on the wording of this provision the Convention supervisory bodies interpreted Article 1 as imposing upon States both negative and positive obligations. In other words, the States must in some cases not only abstain from interferences in the rights protected (negative obligation), but also ensure that the Convention guarantees are respected (positive obligation) even with regard to third parties.

It has been long established that, although the essential object of many provisions of the Convention is to protect persons against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned.[30] The European Court has found that such obligations arose under Articles 2,[31] 3,[32] 8[33] and 11.[34] Positive obligation may also arise under other articles.

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[27] Para. II(e) of the Opinion N209 of the Parliamentary Assembly of the Council of Europe (1999). For the text of the Opinion see internet-site of the Council of Europe: [www.coe.int].

[28] Country Reports on Human Rights Practices (2002): Georgia, released by the Bureau of Democracy, Human Rights and Labour of the US Department of State, 31 March 2003, Section 2, para. d.

[29] Resolution N1257(2001) and Recommendation N1533(2001) of the Parliamentary Assembly of the Council of Europe.

[30] *Özgür Gündem* v. *Turkey*, 16 March 2000, ECHR 2000-III, paras. 42 and 43.

[31] *Osman* v. *the United Kingdom*, 28 October 1998, *Reports* 1998-VIII, 3159-61, paras. 115-17; *McCann and Others* v. *the United Kingdom*, 27 September 1995, Series A no. 324, para. 161.

[32] *Assenov and Others* v. *Bulgaria*, 28 October 1998, *Reports* 1998-VIII, 3290, para. 102.

[33] Amongst others, *Gaskin* v. *the United Kingdom*, 7 July 1989, Series A no. 160, paras. 42-49.

[34] *Plattform "Ärzte für das Leben"* v. *Austria*, 21 June 1988, Series A no. 139, para. 32.

On the basis of the concept of positive obligation it may be assumed that the State party to the European Convention should not only abstain from breaching the rights and freedoms set forth in the Convention, but also provide for legal sanctions to be imposed upon persons in breach of the rights and freedoms under the Convention of other persons. The State party must also provide for administrative/legal guarantees to prevent violations of human rights by other persons and, if this is done, the right to institute legal proceedings against the persons who committed such a human rights violation.

Analysis of the criminal, civil and administrative legislation of Georgia makes it clear that they provide prohibitions (sanctions) to be imposed on legal and natural persons who violate the guarantees set forth in the European Convention. The prohibitions (sanctions) to be imposed on persons violating the rights and freedoms of the Convention will be dealt in detail in the context of examination of the specific articles of the Convention.

1.1. Translation of the Texts of the European Convention and of its Protocols into Georgian and their Availability

Translation of the texts of the European Convention and of its Protocols into Georgian and their availability are very important for an effective application of the Convention standards at the national level. The Committee of Ministers of the Council of Europe has stressed the importance of publication and dissemination of the Convention. It underlined the significance that the States "ensure that the text of the Convention, in the language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities, notably the courts, can apply it."[35]

An official translation of the European Convention on Human Rights is generally regarded less than satisfactory. The discrepancies between the authentic texts of the Convention in English/French and the official translation into Georgian are easily noticeable. This may lead to misinterpretation of the rights and freedoms of the Convention at the national level. Such discrepancies are particularly problematic since the Convention is part of Georgian legislation and directly applicable by national institutions, in particular national courts. It should also be noted that there are a number of unofficial translations of the European Convention made by non-governmental organisations.

As for the translation and official publication of the protocols to the Convention, the situation is even worse: neither of the protocols providing substantive rights is published in the Official Gazette, though there are number of unofficial translations of the protocols.

Although national law stipulates that only an official translation of international treaties may be applied by national institutions, the judicial practice seems to depart from this requirement. This may be explained by low quality of official translation of these international documents or unavailability of their official texts. There are a number of cases of national courts in which unpublished international instruments, including human rights treaties have been applied by national courts.

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[35] Recommendation Rec(2002)13 of the Committee of Ministers to Member States on the Publication and Dissemination in the Member States of the Text of the European Convention on Human Rights and of the Case-Law of the European Court of Human Rights, 18 December 2002, para. i.

Given the existing discrepancies between the authentic text and the Georgian text of the Convention, it seems reasonable to suggest that national institutions, including courts apply not only official translations of the Convention, but also authentic texts of the Convention in English and French which may shed light on the possible ambiguities and discrepancies. This is an established practice in a number of States parties to the Convention. In these States along with the official translation of the Convention into a national language the authentic text in English/French is also applied.[36] However, a majority of the Georgian judges do not read English or French which makes it impossible for them to use authentic text of the Convention.

There is already a discussion in legal circles on the need to improve the Georgian translation of the Convention. It seems that the best way is to set up a working group of experts consisting of lawyers (scholars and practitioners) with good knowledge of English/French and Georgian language specialists to work on the improvement of the Georgian texts of the Convention and its protocols.

1.2. Application of the European Convention and the Case-Law of the European Court in Georgia

The European Convention on Human Rights has been part of Georgian legislation since 1999.[37] It must be directly applied by national institutions, including courts. The rights and freedoms provided for in the Convention must be directly ensured for natural and legal persons.

As for the hierarchical status of the Convention among normative acts of Georgia the situation is as follows: The Convention stands lower than the Constitution and Constitutional Agreement,[38] but higher than other normative legal acts such as organic laws, laws, presidential decrees, etc.[39]

The practice of national institutions, in particular courts in applying the Convention is currently developing. There has been an increasing number of cases in which the Georgian courts applied the European Convention. There is a radical shift in applying the Convention by national courts between the years 1999/2000 and 2001/2002.

The courts of the second instance (appeal courts) and the court of cassation are particularly active in this regard. The Constitutional Court of Georgia has also considered a number of

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[36] J. Frowein, Federal Republic of Germany, in: The Effect of Treaties in Domestic Law, F. Jacobs & S. Roberts (Eds.), 1987, 74. Also see, The Relationship between International and Domestic Law: Proceedings of the UniDem Seminar (1993), 1993, 35; D. Jílek & M. Hofmann, Czech Republic, in: Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000), R. Blackburn & J. Polakiewicz (Eds.), 2001, 250.

[37] See Article 6(2) of the Constitution of Georgia and Article 6 of the Law on International Treaties of Georgia.

[38] The notion of Constitutional Agreement has been introduced in the Constitution in March 2001. It is an agreement between the Georgian Orthodox Church and the State of Georgia.

[39] See Article 6(2) of the Constitution of Georgia and Articles 4 and 19 of the Georgian Law on Normative Acts.

cases in which it applied international human rights instruments, including the European Convention.

As far as the application of the case-law of the European Court of Human Rights is concerned, the majority of the national courts seems reluctant to apply the jurisprudence of the European Court. It appears that the majority of Georgian judges misunderstand the role to be played by the case-law of the European Court. In their opinion, since Georgia is not a common law, but civil law country, the case-law of the European Court is not a source of national law and therefore, should not be applied by the national courts.[40] The judicial practice of the States parties to the European Convention makes it clear that this is an erroneous understanding of the role of the case-law of the Court in the practice of national courts.[41]

The Georgian courts should apply not only the text of the European Convention, but also the case-law of the European Court of Human Rights established on the basis of the rights and freedoms of the Convention. Although the European Court takes decisions on specific cases, such decisions interpret the provisions of the Convention. It is difficult to determine the essence of the provisions of the Convention and its protocols without an analysis of the practice of the European Court as expressed in its case-law, in particular since the Convention constitutes a "living instrument".

Human rights standards of the Convention are expressed both in the text of the Convention and in the case-law of the European Court. Therefore, Georgian courts should be guided not only by the human rights standards of the Convention, but also by those expressed in the case-law of the European Court. Application of the case-law of the Court may be of great help to the national courts in the proper interpretation of the rights and freedoms enshrined in the Convention.

Although there is some reluctance to apply the case-law of the European Court by Georgian courts, the analysis of the latter's practice since 1999 (when Georgia ratified the European Convention) sheds light on the judicial trend in applying the case-law of the European Court in interpreting the rights and freedoms of the Convention.[42]

In one of its cases the Regional Court of Tbilisi invoked the case-law of the European Court along with the European Convention and pointed out that the case-law of the Court sheds light on the standards of the Convention.[43] This pronouncement of the Court highlighted the need to apply the case-law of the European Court to interpret the standards of the Convention.

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[40] K. Korkelia, The Role of the Case-Law of the European Court of Human Rights in the Practice of the Georgian Courts, in: Protection of Human Rights in National and International Law, K. Korkelia (Ed.), 2002, 54-55.

[41] *Ibid*., 58-62.

[42] The Supreme Court: Decision of 22 June 2001, in: Leading Human Rights Cases (2001), 2002, 78; Decision N3K/376-01, 18 July 2001; Decision N3K/754-01, 5 December 2001; Decision N3K/390-02, 4 July 2002; Decision N3K/337-02, 25 June 2002; Decision N3G/AD-131-K-02, 4 October 2002; Tbilisi Regional Court: Decision N2/A-176, 18 December 2001; Decision N2/A-83-2001, 21 December 2001; Decision N2/A-25-2002, 3 July 2002; District Courts: Tchiatura District Court Decision N2/64, 3 April 2002.

[43] The Collegium of Civil Cases; Decision N2/a-25-2002, 3 July 2002.

Although at present there are only a few cases applying the case-law of the European Court in the practice of the Georgian courts, it may be suggested that additional measures aimed at promoting application of the case-law of the Court (along with the text of the Convention) by Georgian courts would improve the situation. The Supreme Court of Georgia should play a pivotal role in this regard. Unlike the rules previously in existence under which the Supreme Court of Georgia could adopt a legally binding decree on interpretation of the legislative act or its particular provision addressed to the other courts, no such possibility exists under the current legislation.[44] Although the Supreme Court is not authorised to adopt such an act, the Scientific-Consultative Council of the Supreme Court set up to promote correct judicial practice may play a significant role in this respect.

Adoption of guidance by the Council, albeit in a recommendatory form, which would deal with, *inter alia*, the role of the case-law of the Court in the interpretation of the Convention and the principles of interpretation of the rights and freedoms stated in the Convention by the Georgian courts will positively influence the practice of applying the human rights standards of the Convention by the Georgian courts.

1.3. Awareness-Raising and Training on the European Convention on Human Rights

It is clear that the application of the European Convention and the case-law of the European Court at the national level greatly depends on the training of members of legal professions involved in court cases.

The importance of the availability of information on the European Convention and the work of the European Court has been emphasised by the Committee of Ministers of the Council of Europe. Along with the availability of the text of the Convention, it drawn attention to the importance of ensuring that judgments and decisions which constitute relevant case-law developments are rapidly and widely published in their entirety or at least in the form of substantial summaries or excerpts in the language(s) of the country, in particular in official gazettes, information bulletins from competent ministries, law journals and other media generally used by the legal community. The Recommendation of the Committee of Ministers mentions various measures to be taken by States to promote awareness on the European Convention. They include the regular production of textbooks and other publications, in the language(s) of the country, facilitating knowledge on the Convention system and the main case-law of the Court, ensuring that the judiciary has copies of relevant case-law in paper and/or electronic form, as well as ensuring, where necessary, the rapid dissemination to public bodies such as courts, police authorities, prison administrations or social authorities, as well as, where appropriate, to non-State entities such as bar associations, professional associations etc., of those judgments and decisions which may be of specific relevance for their activities, where appropriate together with an explanatory note or a circular.[45]

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[44] Such practice is established in Russia. See G. Danilenko, International Law in the Russian Legal System, American Society of International Law, Proceedings of the 91st Annual Meeting 1997, (1998), 297.

[45] Recommendation Rec(2002)13 of the Committee of Ministers to Member States on the Publication and Dissemination in the Member States of the Text of the European Convention on Human Rights and of the Case-Law of the European Court of Human Rights, 18 December 2002, paras. i-vii.

Steps have already been taken to introduce international human rights law, including the European Convention system into the training programmes of members of legal professions.

Under the Law of Georgia on Courts of General Jurisdiction everybody shall take a qualifying examination in order to take up the position of a judge. Under the same Law, candidate judges are to take an examination in international human rights law and international treaties of Georgia - one of the seven areas of law covered by the examination programme.[46] The programme covers both UN and Council of Europe human rights instruments.

A similar examination on, *inter alia*, international human rights instruments is taken by assistants to judges.[47] As in the case of judges the qualifying examination programme prepared for the assistants to judges provides for an examination on international human rights instruments.

The Law of Georgia on the Bar (20 June 2000) also states that to be qualified as an advocate a person should take a test on, *inter alia*, international law of human rights. It should be mentioned that training courses for the candidate-advocates were organised at the Judicial Training Centre, the Training Centre of the Ministry of Justice and the Georgian Young Lawyers' Association.

The programmes for examination (test) elaborated for judges, assistants to judges and advocates are almost identical. The general remark equally applicable to all of them is that many of the topics are theoretical and general in nature rather than practice oriented. Many of the topics covered by examination programmes are of no direct relevance for the members of legal professions concerned. It is fair to note that the topics should be more focused on substantive rights (for example, standards established under the Court's case-law with regard to Article 6 of the Convention) rather than on the institutional mechanisms set up under the United Nations or Council of Europe. The general conclusion with regard to the examination programmes would be that they should be further improved. Apart from that, it seems that not all representatives of the legal professions concerned, realise the role played by the case-law of the European Court. The training programmes should also deal with the role of the case-law of the European Court in interpreting the provisions of the Convention and its protocols.

In general, it may be mentioned that international law, including international human rights law, was not among priority disciplines in legal *curricula*, which caused the wrong impression that it is only an abstract subject of no use for legal practitioners. Due to this the training programmes on international human rights law, in particular on the European Convention system, should be elaborated in such a way that the significance of this subject for their daily work is explained to trainees. The importance of applying human rights treaties including the European Convention on Human Rights should also be explained to

[46] Other areas are as follows: constitutional law, criminal law, law of criminal procedure, civil law, law of civil procedure, administrative law and procedure. See Article 68 of the Law on Court of Common Jurisdiction.

[47] Training Programme for the Candidates of Assistants to Judges, 2002.

representatives of legal professions. This training should make clear the advantages of applying the Convention and its protocols.

The study of the situation with regard to the training of representatives of the legal professions has shown that it is of great importance at the outset to provide training for those training others on the methodology of training, given that the European Convention human rights system is a relatively new field of law for Georgian lawyers.

As for the prosecutors, it is to be pointed out that although international human rights instruments are equally important to them, the Organic Law on Prosecutor's Office does not provide for the examination of its staff on the international human rights standards.[48] It may be argued that the programme of examination of the staff of prosecutors should have included international human rights standards, including those of the Convention (for example, Articles 3, 5 and 6).

Apart from the training to enter an appropriate legal profession, it is necessary to establish training programmes for serving judges, assistants to judges and advocates. Although the Judicial Training Centre of the Council of Justice organises various training courses and seminars for judges, assistants to judges and advocates, they are not of regular character. Therefore, it would be reasonable to suggest that regular training courses be organised (for instance every 2/3 years) to keep them updated on the legal developments, including case-law developments of the European Court of Human Rights. Training methodology should take into consideration the specifics of each of the legal profession.

Needless to note that application of the European Convention and its protocols greatly depends on an effective information policy about the Convention human rights standards. Awareness of both the general public and the members of legal professions about the European human rights system should be raised, though the latter seems to be of particular importance. The representatives of the legal professions should not only be aware of the Convention rights, including case-law and institutional machinery, but should also be able to follow case-law developments of the European Court for which they should be provided with regular information on important cases decided by the European Court. There are certain positive steps taken in publishing either full texts of important judgments of the European Court or their summaries. Both the Constitutional Court and the Supreme Court have published cases of the European Court. This is also done by non-governmental organisations.

It should also be mentioned that there is a discussion in Georgia about the establishment of a High School of Justice to train the members of the staff of the judiciary.[49] In this respect it is very important to provide for a special course on international human rights law with particular emphasis on the European Convention and the case-law of the European Court in the curriculum of the School.

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[48] See the Organic Law of Georgia on the Amendments and Modifications to the Organic Law of Georgia, 21 June 2002.

[49] See the Report of the Council of Justice of Georgia on the Work Done During the Year 2000. Available on the internet-site of the Council: [www.coj.gov.ge].

One of the issues which arises under Article 1 of the European Convention is the problem of corruption. There is no doubt that it is difficult, if possible at all, to ensure effective protection of human rights if there is a widespread corruption in the country. It has been recognised that the phenomenon of corruption is endemic in Georgia.[50] Although the Georgian authorities take some measures to fight corruption, such measures are clearly less than sufficient.[51]

A detailed analysis of the measures taken to fight corruption in the judiciary is made in the context of the examination of Georgian legislation under Article 6 of the European Convention.

1.4. Conclusions and Recommendations

a) The European Convention on Human Rights plays an important role in the legislation of Georgia. It is part of Georgian legislation. It stands lower than the Constitution of Georgia and the Constitutional Agreement, but higher than other normative legal acts such as organic laws, laws, presidential decrees, etc;

b) The official translation of the European Convention on Human Rights is generally regarded as unsatisfactory. Given the particular role of the Convention in Georgian legislation and its direct applicability, immediate measures should be taken to improve the translation of the Georgian text of the Convention;

c) High quality translations of Protocols 1, 4, 6, 7 and 12, and 13 should be provided and immediately published in the Official Gazette;

d) Although there are an increasing number of cases in which the national courts directly refer to the European Convention on Human Rights, such cases are still exceptional. The courts of second instance (appeal courts) and the court of cassation are particularly active in applying the Convention;

As far as the application of the case-law of the European Convention is concerned, a majority of the national courts seems reluctant to apply the jurisprudence of the European Court of Human Rights. It seems that the majority of Georgian judges misunderstand the role to be given to the case-law of the European Court.

Since the human rights standards of the Convention and its protocols are expressed both in the text of the Convention and in the European Court's case-law established on the basis of the rights of the Convention, the Georgian courts should apply not only the text of the European Convention, but also the case-law of the European Court of Human Rights.

Adoption of guidance by the Scientific-Consultative Council of the Supreme Court of Georgia on, *inter alia*, the role of the case-law of the European Court in the interpretation

[50] Para. 7, Evaluation Report on Georgia, Adopted by the GRECO at its 5th Plenary Meeting, 11-15 June 2001. The Report is available on the Internet-site of the Group of States Against Corruption: [www.greco.coe.int].

[51] For the overview of the measures taken by the authorities against corruption see Evaluation Report on Georgia, Adopted by the GRECO at its 5th Plenary Meeting, 11-15 June 2001, *ibid*.

of the Convention would contribute to the practice of applying the human rights standards of the Convention by the Georgian courts;

e) Training of members of legal professions is undoubtedly a precondition for effective application of the European Convention at the national level. Some positive steps have already been taken in this field. Georgian legislation provides that judges, assistants to judges and advocates are to take an examination (a test) on, *inter alia*, international human rights instruments, which includes the European Convention.

The State should take effective measures to promote awareness on the European Convention on Human Rights. Along with the availability of the text of the Convention, it is important to ensure that judgments and decisions which constitute relevant case-law developments are rapidly and widely published in their entirety or at least in the form of substantial summaries or excerpts in the language(s) of the country. The measures aimed at promoting awareness on the Convention should include the regular production of textbooks and other publications, in the language(s) of the country, ensuring that the judiciary has copies of relevant case-law, as well as ensuring the rapid dissemination to public bodies such as courts, police authorities, prison administrations or social authorities, as well as, where appropriate, to non-State entities such as bar associations, professional associations etc., of those judgments and decisions which may be of specific relevance for their activities, where appropriate together with an explanatory note or a circular;

f) The programmes for the examination (test) elaborated for judges, assistants to judges and advocates are almost identical. The general remark that can be made with regard to all of them is that many of the topics are theoretical and general in nature rather than practice-oriented. The examination topics should be focused more on substantive rights rather than on institutional mechanisms. The general conclusion with regard to the examination programme would be that they should be improved;

g) Apart from the training to enter an appropriate legal profession, it is necessary to establish regular training programmes for serving judges, assistants to judges and advocates. It is suggested that regular training courses be organised (for instance every 2/3 years) to keep representatives of the legal profession updated on legal developments, including case-law developments of the European Court of Human Rights. Training methodology should take into consideration the specifics of each of the legal profession;

h) Application of the European Convention and its protocols greatly depends on an effective information policy on the Convention human rights standards. The representatives of legal professions should be provided with regular information on important cases decided by the European Court. Certain positive steps are already taken in publishing either full texts of important judgments of the European Court or summaries of them.

2. ARTICLE 2 - RIGHT TO LIFE

2.1. The European Convention and its Interpretation

Under Article 2 of the European Convention:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
> a. in defence of any person from unlawful violence;
> b. in order to effect a lawful arrest or to prevent the escape of person lawfully detained;
> c. in action lawfully taken for the purpose of quelling a riot or insurrection."

It should be noted at the outset that Georgia signed Protocol 6 on the abolition of the death penalty in time of peace on 17 June 1999. It entered into force for Georgia on 1 May 2000. On 3 May 2002 Georgia signed Protocol 13 on the abolition of the death penalty in time of war. It entered into force for Georgia on 1 September 2003. Besides, on 22 March 1999 Georgia acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights abolishing the death penalty. The latter entered into force for Georgia on 22 June 1999.

The right to life is the main human right, which is a logical prerequisite to all other rights. Article 2 provides for immediate protection against actions of the State, but not by individuals. The essence of Article 2 is to protect an individual against arbitrary deprivation of life on the part of the State. The Article can also be applied when one deals with "commission by omission", for which the State authorities are responsible, e.g. where legal remedies that the State authorities are expected to provide are unavailable. At the same time, the European Commission of Human Rights considers that (a) States are obliged to take relevant steps to protect life[52] and so (b) Article 2 gives rise to positive obligations on the part of the State .[53]

The importance of this Article has been underlined in the case-law of the European Court of Human Rights, which "accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention […]. It safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory."[54]

It should also be mentioned that Article 2, although its text expressly regulates the deliberate or intended use of lethal force by State agents, has been interpreted as covering not only intentional killing, but also situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life.

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[52] No. 7154/75, Dec. 12.7.78. D.R. 14, p. 31 (32-33).
[53] No. 9348/81, Dec. 28.2.83. D.R. 32, p. 190 (199-200).
[54] *Pretty* v. *the United Kingdom*, 29 April 2002, ECHR 2002-III, para. 37.

Another important point to mention is that Article 2, paragraph 1 of the European Convention puts an obligation on the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of persons within its jurisdiction. Article 2 thus imposes not only negative, but also positive obligations on States. They are required in particular, to put "in place effective criminal law provisions to deter the commission of offences, backed up by a law-enforcement machinery for the prevention, suppression and sanctioning of breaches. These positive obligations include the obligation to effectively investigate when a person was killed and in well-defined circumstances a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual". That may be the case also when prisoners have to be protected, in particular when they are mentally ill and "disclose signs of being a suicide risk."[55]

It is to be mentioned that the death penalty was abolished in Georgia in 1997. Detailed information in this regard may be found in the framework of analysis of Protocols 6 and 13 of the Study.

2.2. Georgian Legislation

2.2.1. The Constitution of Georgia

Under Article 15 of the Constitution:

> "1. Life is an inviolable human right and it is protected by law.
> 2. Until such time as it is fully abolished, the death penalty, as an exceptional form of punishment, may be imposed under organic law for the commission of particularly heinous crimes against life […]".

Paragraph 2 of the above Article has become something of an anachronism, since the Georgian Law on the Abolition of Death Penalty as an extreme form of punishment has put an end to the practice of the "lawful taking of life" in present-day Georgia. The Law in question entered into force on 11 October 1997. The death penalty was last carried out in Georgia in February 1995. The current Criminal Code provides for life imprisonment as the most severe form of punishment (Article 40, paragraph (k)); for minors up to the age of 16 the most severe punishment is deprivation of liberty for a period of up to 10 years, and for minors aged 16-18 the most severe punishment for the commission of particularly serious crimes is deprivation of liberty for periods between 10 and 15 years (Article 88, paragraphs 1 and 2)).

2.2.2. Protection against Arbitrary Deprivation of Life

The Criminal Code of Georgia contains a section on crimes against the person, which includes chapters on crimes against life (Articles 108-116) and threats against the life and health of the person (Articles 127-136). The Code classifies as criminal offences acts of violence against individuals and prescribes appropriate penalties for such offences.

[55] *Ibid*, para. 38.

Homicide, either premeditated or committed in aggravating circumstances, is ranked as one of the most serious crimes. Custodial sentences of various lengths are prescribed for such crimes as premeditated murder committed in a state of sudden extreme mental agitation, premeditated murder by a mother of her newly born child, the causing of death through negligence and driving a person to suicide.

According to the State Department for Statistics of Georgia, 292 premeditated murders were committed in the country in 2002, out of which approximately 75% were solved. In comparison with 2001, in 2002 the number of premeditated murders in Georgia increased by 11%.

Under the legislation, in any case of murder a thorough and effective investigation is to be performed. Pursuant to Georgian legislation, it is the Prosecutor-General's Office (not the bodies of the Ministry of Internal Affairs) that must investigate cases linked to murders.

2.2.3. Mitigation of the Threat of War and of Associated Crimes against Life

Georgia's military policy rests firmly on the principles of a democratic and peace-loving State, which is committed to the prevention of war and protection of the country from possible aggression. The military policy incorporates, in particular, the generally recognised principles and norms of international law, support for the joint efforts of the international community to prevent wars and armed conflicts, and a renunciation of the production, deployment and transfer of nuclear arms in or through the territory of Georgia.

The Criminal Code of Georgia categorizes as criminal offences: the preparation or conduct of a war of aggression (Article 404); incitement to wage a war of aggression (Article 405); the production, acquisition or sale of weapons of mass destruction (Article 406); genocide (Article 407); and crimes against humanity (Article 408).

Articles 411-413 of the Criminal Code also prescribe extremely severe penalties for violations of the rules of international humanitarian law.

Under the Criminal Code, the preparation of nuclear weapons or other nuclear explosive devices is a criminal offence (Article 232).

Georgia abides by the policy of peaceful coexistence with all countries in the world and firmly supports the principle of resolving all conflicts, whether domestic or inter-State, by exclusively peaceful means.

In this context, war crimes committed during the conflicts on the territory of Georgia should be mentioned. Criminal proceedings have been instituted with respect to these crimes. The Prosecutor-General's Office of Georgia has already obtained a lot of material, evidence and testimonies of witnesses. Nevertheless, no data is available to the author on specific criminal charges brought against any person.

2.2.4. Measures to Safeguard the Inalienable Right to Life

One of the key problems facing the Georgian State in the immediate future is overcoming poverty. In this context, it should be noted that in January 2000 the Government of Georgia adopted a document entitled "Blueprint for Social Development", which lays the foundations for a new, long-term programme for the transformation of Georgian society.

The programme has the following strategic goals:

- Major improvement in the living conditions and material status of the population;
- Effective job placement and job creation measures and improvements in the quality and competitiveness of the workforce;
- Measures to uphold constitutional guarantees in the domains of employment, social welfare, education, health care and culture;
- Shift of emphasis in social policy to the family and measures to give effect to the rights and social guarantees of the family, women, children and young people;
- Improvement in the demographic situation and upgrading of social infrastructure.

With regard to measures to protect the health and life of children, the following more extensive information is provided.

State medical programmes in obstetrics and paediatric care have been developed and set in operation in Georgia and these are run on an insurance basis. A special commission has been set up within the Ministry of Labour, Health and Social Protection to explore effective ways of tackling mother and child mortality.

By order of the Minister of Labour, Health and Social Protection, a referral system has been set in operation in Tbilisi and adjacent districts for pregnant, parturient and post-partum women and their newly born aimed at reducing the number of birth-related complications, providing medical treatment for women in pregnancy, parturition and post-partum with health risks and reducing the probability of the birth of infirm and premature children, as well as providing treatment for such children.

In January 1997 the President of Georgia issued a Decree setting up a managed system for the feeding of newborn infants. A national breastfeeding committee was set up and this committee has conducted a number of training courses for health workers on such issues as breastfeeding, the child-friendly hospital initiative and the International Code of Marketing of Breast Milk Substitutes. Together with the United Nations Children's Fund (UNICEF) and the non-governmental organization "Caritas", the Ministry of Health has adopted a number of measures relating to this issue. In particular, a procedure has been set up in eight regions of the country to monitor implementation of the International Code of Marketing of Breast Milk Substitutes. The report on the outcome of this exercise was recognized as one of the best and submitted to the World Health Organisation.

In September 1999 the Parliament of Georgia adopted the Law on Protection and Promotion of the Natural Feeding of Children and on the Use of Artificial Foods based on the principles of the International Code of Marketing of Breast Milk Substitutes. In addition, a national standard has been elaborated and approved for formula 1 infant food.

State medical programmes on safe motherhood and child survival have been in operation since 1995. These have as their purpose the monitoring of pregnant women, prevention of

pregnancy complications, measures to ensure safe deliveries, and also, where necessary, the provision of medical assistance.

New arrangements introduced in 1999 for the management and funding of the health-care system have necessitated the formulation of a uniform State health insurance programme for children which incorporates the following sub-programmes:

- State medical assistance programme for children up to the age of three;
- State programme for the management of cases of acute morbidity in children up to the age of three in Tbilisi;
- State assistance programme for children's heart surgery;
- State medical assistance programme for very young children deprived of parental care;
- State medical assistance programme for children deprived of parental care and for children requiring constant medical treatment.

The programme in which 255 medical establishments are involved runs on a budget of 10.6 million GEL.

The Ministry of Labour, Health and Social Protection has approved and started implementing the World Health Organization (WHO) Integrated Management of Childhood Illness (IMCI) initiative and, in that context, in December 1999 work was launched with UNICEF assistance on drafting an appropriate adapted national programme. A working group has been set up to prepare the adaptation plan and the programme for the conduct of IMCI training courses.

Georgia has submitted the initial and second periodic reports to the relevant treaty bodies on the implementation of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. The treaty bodies have already examined the initial reports under these instruments in April and May 2000 and June 1999 respectively.

2.2.5. Medical Treatment Issues within the Georgian Penitentiary Facilities

According to the Ministry of Justice, in 2000 the number of outpatients' visits made was 4,800 (total number of the persons imprisoned-8,703). 3,000 patients took medical treatment. 144 surgical operations were carried out at the prison hospital. In 2001 the number of outpatients' visits amounted to 5,000 (total number of the persons imprisoned-7,708). 3,300 patients took medical treatment. 150 surgical operations were carried out in 2001.

By 1 February 2003 1696 patients have been taking medical treatment at the prison medical facilities. The total number of outpatients' visits made was 39 415.

Since 1998 mortality rate among the persons imprisoned has tended to decrease steadily. In 1996 the number of the persons imprisoned who died because of various illnesses was 78 (0,8% of their total number). In 1997 92 prisoners died (0,9%). In 1998 85 prisoners died

(0,8%). In 1999 59 prisoners died (0,6%). In 2000 62 prisoners died (0,5%). In 2001 52 prisoners died (0,5%). In 2002 39 prisoners died (0,45%).

2.2.6. Number and Reasons of Deaths in Prisons

The following information has been obtained from the Ministry of Justice of Georgia.

Total number of deaths in prisons by 1 January 2001-52. Reasons for deaths: TB-23; heart diseases-14; suicide-6; trauma with intoxication-5; murder-3; liver cancer-2; electric trauma-3; respiratory disease-3; sepsis-1; body injuries-1; acute intestinal disease-1.

Total number of deaths in prisons by 1 January 2002-31. Reasons for deaths: TB-13; heart diseases-6; accidents-5; liver cancer-2; brain inflammation-2; sepsis-1; body injuries-1; acute intestinal disease-1.

Total number of deaths in prisons by 1 January 2003-39. Reasons for deaths: acute heart diseases-17; TB-6; murder-5; suicide-4; acute cerebral thrombosis-2; lung cancer-1; dystrophy-1; acute brain inflammation-1; accident-1; disease related to brain circulation of blood-1.

In this context, it should be noted that the Georgian Law on Imprisonment (22 July 1999) contains no provisions aimed at preventing possible suicides among persons under pre-trial detention and convicts. This gap should be filled, even though this is a matter of the person's free will to decide whether to live or die.

After the CPT country report on Georgia was published (in Georgian, as well as English), the Ministry of Justice of Georgia took certain steps to alleviate the situation within the penitentiary. In particular, the Minister of Justice approved temporary charters of the prison medical facilities in compliance with which medical services have finally been separated from the Department for the Execution of Punishment. Departmental programmes have been adopted to protect the prisoners' health, in particular, against HIV/AIDS and sexually transmitted diseases. The Ministry of Justice in cooperation with the Ministry of Labour, Health and Social Protection are going to transfer psychiatric medical examinations from a prisoners' medical facility to regular clinics. Besides, medical units have been equipped at the correctional facility for adolescent prisoners and at one of the regular penitentiary facilities; four wards have been renovated at the women's penitentiary facility; ten cell-wards were renovated for prisoners suffering from tuberculosis.

In the context of the issue of tuberculosis it is significant to mention that in 2002, in cooperation with ICRC, 6142 prisoners have undergone medical examination to find signs of tuberculosis. 473 of them had tuberculosis (in 2001 - 586). All the sick prisoners have been involved in the DOTS programme. 353 prisoners have been transferred to the special prison medical facility and the others have taken relevant medical treatment at their penitentiary facilities.

2.2.7. Actions Performed in Self-Defence

Under Article 28 of the Criminal Code, even if there is *prima facie* evidence of a crime against an individual, actions performed in self-defence are not deemed to be unlawful. At the same time, homicide caused by actions which exceed the limits of self-defence, is punishable under law as a criminal offence (Article 114 of the Criminal Code).

Under Article 29, paragraph 1, of the Criminal Code, actions undertaken to apprehend a criminal and involving no measures excessive for that purpose, with a view to handing such a criminal over to the authorities, are not deemed to be unlawful. At the same time, Article 114 of the Code categorises as a criminal offence homicide caused as a result of excessive measures to detain a criminal.

2.2.8. Euthanasia

According to Article 148 of the Law on Healthcare, a capable patient who is able to make conscious decisions has the right, at the terminal stage, to refuse reanimation, life-maintaining or palliative treatment. At the terminal stage and if such a patient is unconscious, his/her relative or legal representative has the right to refuse reanimation, life-maintaining or palliative treatment, taking into account the patient's personal convictions and the need to protect the dying person's human dignity.

Nevertheless, even if a patient is unconscious, appropriate medical treatment shall be continued, provided that previously, when the patient was able to make conscious decisions, he/she did not refuse reanimation, life-maintaining or palliative treatment (Article 149).

In compliance with Article 151 of the Law under review, neither medical personnel, nor any other individuals are allowed to implement or participate in the act of euthanasia.

Provisions of the same contents are also envisaged in the Law on the Patient's Rights (Article 24).

In the Georgian legal system homicide is not permitted, even at the victim's wish. Under Article 110 of the Criminal Code, euthanasia (defined as the taking of a victim's life at his or her insistent request and in accordance with his or her will, performed with a view to releasing a dying person from severe physical pain) is treated on a par with murder and is punishable by deprivation of liberty for a term of up to 3 years.

2.2.9. Abortion

Under Georgian legislation human life is considered to begin at the moment of the birth when the child separates from the mother's womb. Accordingly, homicide can only be said to occur from the moment when the foetus is at least partially separated from the mother's womb, even if it is not yet breathing. For that reason, the law does not criminalise the artificial termination of pregnancy, provided the necessary legal conditions have been observed.

At the same time the Criminal Code establishes fairly severe penalties, including the deprivation of liberty, for the performance of illicit abortions. In May 2000, the Georgian Parliament adopted the Law on Abortions, drafted in accordance with the requirements of the international human rights instruments to which Georgia is a State party.

2.2.10. The Use of Firearms

Issues relating to the use of firearms by law-enforcement personnel are governed by Article 13 of the Law on Police which prohibits the use of firearms in places where injury may be caused to third persons, or against women with visible signs of pregnancy, minors, disabled persons and the elderly, except where such persons are putting up armed resistance or conducting group attacks, placing at risk the life of citizens or law-enforcement personnel. Comparable provisions are contained in Article 11 of the Law on State Security Service. In addition, both these laws prohibit the unwarranted use of firearms, the use of weapons that cause unwarranted injury or present an unwarranted risk and are prohibited under international legal instruments.

According to the Ministry of Internal Affairs over the period 1996-2000 there were eight registered cases of the unwarranted use of firearms by police officers. In 2001 four cases of such kind took place. In all cases, the relevant bodies of the Ministry made official inquiries and the Prosecutor-General's Office conducted due investigations. As a result, six criminal prosecutions were brought before the courts and appropriate convictions handed down. In one case, the police officer was discharged and various disciplinary measures were taken against his immediate superiors.

To prevent such occurrences, recently the Minister for Internal Affairs has ordered the conduct of regular training for police officers on issues of combat and service readiness, in which particular attention is given to studying the Law on Police, which clearly identifies all instances in which police officials are permitted to use firearms.

Over the past several years there have been no recorded instances of the unwarranted use of firearms by officials of the security services.

2.2.11. Involuntary Disappearances

Measures to prevent the disappearance of individuals are of particular importance in the context of the obligation to avoid the arbitrary deprivation of life.

Reports of the unexplained absence of individuals are fielded by the internal affairs authorities, both in writing and orally, including over the telephone, and must be logged immediately. On receiving such a report, the following steps are taken forthwith: the time and circumstances of the person's disappearance are ascertained, as well as his or her appearance and clothing, and efforts are made to locate the missing person while the trail is still "hot". Information about the disappearance is broadcast by television and published in other media, and photographs and descriptions of the missing person are circulated to the relevant authorities. In addition, steps are taken to identify unclaimed bodies, checks are made of establishments in the Ministry of Labour, Health and Social Protection system,

instructions are issued to the State Border Defence Department to detain the missing person at the State border, and so forth. If the person is not traced within a period of five days, a judicial investigation is ordered. A detailed list of the steps that must be taken with a view to locating missing persons is established by order of the Minister of Internal Affairs.

If, in the course of a judicial investigation, it becomes evident that the missing person has been the victim of a criminal offence, criminal proceedings are instituted by the prosecutor's office. The search for a missing person is terminated in two cases: if that person's whereabouts are established or if the person is declared legally dead.

Neither the State authorities nor the Office of the Public Defender of Georgia (Ombudsman) received any reports of disappearances in regard to which there were grounds to suspect the involvement of the law-enforcement authorities or the security forces.

2.3. Conclusions and Recommendations

a) It may be concluded that the right to life is adequately protected in Georgia, in particular, in the sense of the elimination of capital punishment.

b) The Government of Georgia is encouraged to reinforce its efforts to overcome poverty, to extend and fully implement health-related State programmes, with particular attention to women, children and other vulnerable groups, bearing in the mind the purpose of promoting and protecting the right to life.

c) As the Law on Imprisonment contains no provisions aimed at preventing possible suicides among persons under pre-trial detention and convicts, it is considered necessary that this Law be amended to include such clauses.

d) Necessary steps should be taken to implement the following recommendation of the UN Human Rights Committee: "The State party should take urgent measures to protect the right to life and health of all detained persons as provided for in Articles 6 and 7 of the Covenant (ICCPR)."

e) It should also be ensured that every case of death during detention is promptly investigated by an independent agency. The respective recommendations of the CPT set forth in its 2001 report on Georgia should also be taken into account in this respect.[56]

[56] See document CPT/Inf(2002)14.

3. ARTICLE 3 – PROHIBITION OF TORTURE

3.1. The European Convention and its Interpretation

Under Article 3 of the European Convention: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 3 is one of the non-derogable Articles of the Convention.[57] While its scope of application is rather broad in horizontal dimension, the threshold for a treatment or a punishment to constitute a violation of Article 3 is high. While the Court extends the application of Article 3 to various issues discussed below, a treatment or punishment must attain a minimum level of severity in order to reach the threshold set by the case-law. The assessment of this minimum is, in the nature of things, relative. It depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and, in some cases, the gender, age and state of health of the victim.[58]

The Court has constantly reiterated that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, and its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.[59] The obligation on member States under Article 1 taken together with Article 3 of the European Convention "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture … including such ill-treatment administered by private individuals … These measures should provide effective protection, in particular, of children and other vulnerable persons …"[60]

In the Greek case in 1969, the Commission described the difference between the severity of the concepts contained in Article 3.[61]

- Torture: inhuman treatment that is aimed at the obtaining of information or at making the victim admit things, or to give a punishment.
- Inhuman treatment or punishment: treatment that intentionally causes grave mental or physical suffering and that in this special situation cannot be justified.
- Humiliating treatment or punishment: treatment that openly humiliates the individual in front of another person or persons or that obliges him to act against his conscience.

Subsequently the Court made the following change to these definitions:

- Torture: deliberate inhuman treatment causing very serious and cruel suffering.

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[57] Article 15, para. 2 of the European Convention.
[58] See, *inter alia, Kalashnikov* v. *Russia*, 15 July 2002, para. 95.
[59] See, *inter alia, Ahmed* v. *Austria,* 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, para. 38; *Chahal* v. *the United Kingdom*, 15 November 1996, *Reports* 1996-V, paras. 73-74.
[60] *Z. and Others* v. *the United Kingdom,* 10 May 2001, ECHR 2001-V para.73.
[61] *Denmark, Norway, Sweden and Netherlands* v. *Greece*, 12 YB 134.

- Inhuman treatment of punishment: the infliction of intense physical or mental sufferings.
- Degrading treatment: ill-treatment designed to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[62]

In its judgment of 1999 on the *Selmouni* v. *France*[63] case the European Court stated:

> "… certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in future. … the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[64]

The European Court has recognised that there is an inherent procedural obligation under Article 3 to carry out, following allegations of ill-treatment contrary to Article 3, an effective investigation, namely, one which is thorough, timely and capable of affording the complainant effective access to the investigatory procedure.[65]

Concerning conditions of detention, it was held in the case of *Eggs* v. *Switzerland*[66] that the fact that the conditions of detention did not comply with the 1973 Council of Europe Standard Minimum Rules for the Treatment of Prisoners (now replaced by the 1987 European Prison Rules) did not necessarily mean that there was a breach of Article 3, nor is there equivalence between the standards of Article 3 and the European Convention on Prevention of Torture. One of the examples, where a claim under Article 3, which relied upon a CPT report, was unsuccessful, was the *Delazarus* case.[67] In the *B.* v. *the United Kingdom* case,[68] it was held that "deplorable overcrowding" and sanitary conditions in certain places were "less than unsatisfactory", although a violation of Article 3 was not established.

It does not, however, mean that detention conditions may not by themselves entail violation of Article 3. In the early Greek case, referred to above, the conditions in which political detainees were kept were held to be inhuman treatment by reference to overcrowding and to inadequate heating, toilets, sleeping arrangements, food, recreation and contacts with outside world. Also, in the recent case of *Kalashnikov* v. *Russia*,[69] the detention conditions amounted to the breach of Article 3.

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[62] *Ireland* v. *the United Kingdom*, 18 January 1978, Series A no. 25, para. 162.
[63] 28 July 1999, application no. 25803/94.
[64] Para. 101.
[65] See, *Assenov* v. *Bulgaria*, 28 October 1998, *Reports* 1998 and *Labita* v. *Italy*, [GC], 26772/95. In the case of *Koceri Kurt* v. *Turkey* (25 May 1998, *Reports* 1998-III) the Court held that the applicant was a victim of inhuman and degrading treatment on account of her son's disappearance at the hands of the authorities and the absence of an effective investigation.
[66] Application no. 7341/76, 6 DR 170 (1976).
[67] Application no. 17525/90 (1993).
[68] Application no. 6870/75, 32 DR 5 (1981). Com. rep., 29-30.
[69] Application no. 47095/99, 15 July 2002.

In relation to execution of punishment, in the cases of *Hussain and Singh* v. *the United Kingdom*[70] the Court suggested that a life-sentence with no possibility of early release, which was imposed on a juvenile, might raise issues under Article 3.

In the context of health protection in the places of deprivation of liberty, the European Commission has often stated that failure to provide adequate medical treatment may be contrary to Article 3.[71]

There is no right under the European Convention to enter, reside or remain in a particular country,[72] nor is there an express right to asylum. As it has been held by the European Court, States are entitled to control who leaves and enters their borders.[73] However, decisions about admission or expulsion from a State must not violate any of the Convention rights, including Article 3. Under the established case-law, a person's deportation[74] or extradition[75] may give rise to an issue under Article 3 of the Convention where there are serious reasons to believe that the individual will be subjected in the receiving State to treatment contrary to that Article. This principle was applied also to expulsion.[76]

Article 3 has been more commonly applied by the European Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities or non-State bodies in the receiving country.[77] But in the light of the fundamental importance of Article 3 it may apply in other contexts. The source of the risk of proscribed treatment in the receiving country may stem from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. All the circumstances surrounding the case, especially the applicant's personal situation in the expelling State must be taken into consideration.[78]

In the context of Article 3, a focus has been on discrimination in relation to admission and expulsion policy and practice. In certain circumstances institutional discrimination is capable of reaching even the high threshold of Article 3:

> "A special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race

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[70] *Hussain* v. *the United Kingdom*, 21 February 1996, Reports of Judgments and Decisions 1996-I. *Singh* v. *the United Kingdom,* 21 February 1996, *Reports* 1996-I.
[71] See, *inter alia, Kotälla* v. *Netherlands,* 14 DR 238 (1988); *Chartier* v. *Itally*, no. 9044/80, 33 DR 41 (1982); *Herzegfalvy* v. *Austria*. Series A no. 244 (1992).
[72] *Soering* v. *the United Kingdom*, 7 July 1989, Series A no. 161, para. 85.
[73] *Chahal* v. *the United Kingdom*, 15 November 1996, *Reports* 1996-V, para. 73.
[74] *Chahal* v. *the United Kingdom*, 15 November 1996, *Reports* 1996-V.
[75] *Soering* v. *the United Kingdom*, 7 July 1989, Series A no. 161.
[76] *Cruz Varas* v. *Sweden*, 20 March 1991, Series A no. 201,
[77] *Ahmed* v. *Austria*, 17 December 1996, *Reports of Judgments and Decisions* 1996-VI.
[78] *Inter alia Ahmed v. Austria*, 17 December 1996, *Reports of Judgments and Decisions* 1996-VI; *Bensaid* v. *the United Kingdom*, 44599/98, 6 February 2001.

> might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question."[79]

Not any differential treatment may be found in breach of Article 3. The focus is on dignity and respect.[80] The discrimination question is capable of raising an issue under Article 3, where the treatment denotes contempt or lack of respect designed to humiliate or debase a person.[81]

The use of force in respect of children has been recognised by the European Court as giving rise to particular problems of compliance with Article 3.[82] Article 1 taken together with Article 3 of the European Convention "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture … including such ill-treatment administered by private individuals … These measures should provide effective protection, in particular, of children and other vulnerable persons …".[83]

Medical and biological issues may also give rise to Article 3 violations.

3.2. Georgian Legislation

3.2.1. Constitutional Guarantees and International Obligations

Article 17 of the Constitution provides:

> "1. Honour and dignity of an individual is inviolable.
> 2. Torture, inhuman, cruel[84] treatment and punishment or treatment and punishment infringing upon the honour and dignity shall be impermissible".

Article 18, para. 4 of the Constitution reads as follows:

> "Physical or mental coercion of an arrested person or of a person otherwise restricted in his/her liberty shall be impermissible".

Given the place, the right not to be tortured and not to be subjected to inhuman or degrading treatment or punishment occupies in the hierarchy of human rights, a relatively moderate reference to such a treatment or punishment as "impermissible" fails to impart comprehensively the importance of this right. Moreover, the conjunction "and" in Article

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[79] *East African Asians* case, para 207.
[80] *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom*, 28 May 1985, Series A no. 94, para. 91.
[81] *Cyprus* v. *Greece*, 20 May 2001, ECHR 2001-IV paras. 305, 311.
[82] *Inter alia, A v. the United Kingdom*, *Tyrer* v. *the United Kingdom*, 25 April 1978, Series A no. 26,; *Campbell and Cosans v. the United Kingdom*, 25 February 1982, Series A no. 48.
[83] *Z and Others* v. *the United Kingdom.* 10 May 2001, ECHR 2001-V para.73.
[84] According to the *travaux préparatoires*, the word "cruel" was deleted, for reasons which are not recorded, from the initial wording of Article 3 of the Convention. The Court makes use of the definition in Article 1 of the UN Convention against Torture (see the judgment in the *Aksoy* v. *Turkey* case of 18.12.1996, ECHR 1996-IV No. 64). By containing the word "cruel", the Constitution of Georgia bears more resemblance to Article 5 of the UDHR, Article 7 of the ICCPR, Article 5 of the ACHR and Article 5 of ACHPR.

17, para. 2 alludes to the necessity of cumulative presence of both treatment and punishment in terms of impermissibility.[85]

In time of war or a state emergency, under the first paragraph of Article 46 of the Constitution, the President of Georgia is authorised to restrict certain constitutional rights and freedoms enumerated in the article. Article 17 is not on the list of those articles restriction of which is allowed. Article 46 does provide though for the restriction of the Article 18 rights thereby legalising acts potentially amounting to the violation of Article 3 of the Convention in time of war or a state emergency.[86]

The UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment (1984) came into force in respect of Georgia on 22 December 1994. Georgia recognised the competence of the Committee under Articles 21 and 22 of the Convention on 7 July 2002.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) entered into force for Georgia on 1 October 2000.[87] Protocols N 1 and 2 have been in force with respect to Georgia since 1 March 2002.

3.2.2. Criminalisation of Torture, Inhuman and Degrading Treatment

The Criminal Code of Georgia,[88] in its Section VII, under the title "crime against the individual", does not use the terms of Article 3 of the Convention, although it defines a number of offences which would amount to the treatment contrary to Article 3. These offences cover both physical and mental suffering.

[85] See, Conclusions and Recommendations, 3.3.a).
[86] See, Conclusions and Recommendations, 3.3.b).
[87] The Government of Georgia made a Declaration that "it will not be responsible for violations of the provisions of the Convention on the territories of Abkhazia and the Tskhinvali region until the territorial integrity of Georgia is restored and full and effective control over these territories is exercised by the legitimate authorities".
[88] Adopted on 22 July 1999 and in force since 1 June 2000.

In particular, the Criminal Code covers: intentional grave injury to health involving life-threatening injury, or injury resulting in loss of eyesight, hearing or speech, in loss of an organ or its function, in mental disease, miscarriage, in irreversible disfigurement of the face; other injury to health, which is life-threatening and is related to established loss of at least one third of general working capacity; and knowingly causing full loss of professional working capacity (Article 117, part 1[89]). The Criminal Code also criminalises: intentional less grave injury to health (Article 118); deadly injury to health (Article 120); and intentional minor injury to health (Article 119); as well as beating or other coercion causing physical anguish (Article 125).

Article 126 ("torture") comprises two parts. The first part criminalises systematic beating or other coercion causing physical or mental suffering, which has not resulted in the outcomes provided for by Articles 117 and 118 of the Criminal Code. Part 2 criminalises the same action committed in aggravated circumstances (*inter alia,* knowingly against a pregnant woman, a minor, a person in a helpless situation, or a person depended on an offender in a pecuniary or other way, or on the basis of racial, religious, national or ethnic intolerance, or using official capacity). The gap between the scope of "torture" under the Criminal Code and the case-law evolved by the European Court is obvious in that that even though the infliction of physical suffering may be covered by the preceding articles, but the Georgian concept of mental suffering does not correspond to the definition of inhuman and degrading treatment as interpreted by the European Court.

The elements of inhuman and degrading treatment are referred to in Article 115, which criminalises causing anybody to commit suicide or attempt suicide, by means of threats or cruel treatment or systematic debasement of his/her honour or dignity. While Article 115 contains the mixture of elements of inhuman and degrading treatment as it has been interpreted by the Court's case-law, it obviously fails to penalise those actions of debasement of an individual's honour or dignity, which do not lead to suicide or attempted suicide.[90]

Article 39, which defines the objectives of punishments, provides that "[a] punishment shall not aim at inflicting physical suffering to an individual or debasement of his/her dignity".

Although it is clear that the Criminal Code manages to cover certain elements that have been interpreted in the Court's case-law as contrary to Article 3 of the Convention, there are still gaps that leave out important concepts identified by the case-law. The constitutional provision cited above cannot be a remedy of the situation as the Criminal Code is a *lex specialis*, which is to provide for a comprehensive mechanism for deterrence of actions prohibited by the Convention. Discrepancies both in the terminology and the scope of application preclude Georgian legislation from attaining this aim.[91]

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[89] Part 2 of Article 117 criminalises the same actions committed in aggravated circumstances, *inter alia,* with especial cruelty, knowingly against a pregnant woman, on the basis of racial, religious, national or ethnic intolerance, with the view of transplantation or otherwise use of an organ or a tissue of the victim.

[90] Article 115 falls within Chapter XIX under the title "crime against life", while Articles 117-126 are contained in Chapter XX under the title "crimes against health".

[91] See, Conclusions and Recommendations, 3.3.c).

3.2.3. Criminal Procedure

According to Article 6 of the Code of Criminal Procedure of Georgia[92] the general principles of lawfulness, physical security of the individual, respect for his/her dignity, humanism, democracy, fairness and equality constitute the basis of criminal procedure.

Application of methods dangerous for life and health, as well as of methods infringing upon the dignity and honour of the participants to the criminal procedure or other persons is impermissible (Article 12, part 5). An investigative or judicial action which affects the physical security of an individual may only be conducted if it is expressly provided for by law (*ibid*., part 6).

While conducting investigative or judicial actions it is prohibited to apply the methods of inquisition, threat, blackmail, torture, or other methods of physical or mental coercion. Carrying out of medical experiments, deprivation of sleep, water, food, or limitation of these beyond the admitted limit, placement in conditions adversely affecting health and infringing upon an arrested or detained person is inadmissible (*ibid*. part 12).

Limitation of the rights and freedoms of an individual with a view to establishing the truth in the criminal case is impermissible save on the ground and procedure established by law (Article 14, part 2).

Under Article 19, part 3 the confession of the accused, unless corroborated by other evidence, is not sufficient for convicting the person concerned.

Under Article 119 of the Code of Criminal Procedure, the use of physical or psychological coercion for the obtaining of evidence is prohibited.

Under Article 42, para. 7 of the Constitution and Article 7, part 6 of the Code of Criminal Procedure "Evidence obtained in contravention of the law shall have no legal force".

The Code of Criminal Procedure provides for four types of prosecution: public prosecution, subsidiary prosecution, private-public prosecution and private prosecution.

Public prosecution is conducted with regard to all crimes of all categories. It is conducted by a body of inquiry, an investigator, or a prosecutor, on the basis of applications of individuals and legal entities, notifications of State bodies and NGOs, as well as on the basis of news imparted by the mass media. While conducting the public prosecution, a body of inquiry, an investigator, or a prosecutor are not bound by the stand taken by the victim of the crime or that of other persons. In each case of revealing signs of a crime, a body of inquiry, investigator, or prosecutor concerned are obliged to institute public prosecution *ex officio*, to take measures within their competence for discovery of the perpetrator, and to prevent from the imposition of criminal liability on an innocent person (Article 24).

Subsidiary prosecution means that a victim and his/her representative are entitled to support the prosecution. If a prosecutor declines to continue a prosecution or alter the initial charges, a victim or his/her representative is entitled to pursue the original prosecution in

[92] Adopted on 20 February 1998 and in force since 15 May 1999.

the court. In such a case proceedings are not discontinued and the prosecutor is no longer entitled to take part in the further consideration of the matter (Article 25).

Private-public prosecution may be instituted only on the basis of an application of a victim of a certain category of a crime (rape, sexual abuse, coercion to sexual intercourse or other action of a sexual character, infringement upon freedom of speech, infringement upon personal or family secrets, refusal to impart information or imparting false information, disclosure of a secret of adoption, infringement upon intellectual property). These proceedings may not be discontinued after the victim's reconciliation with an accused, unless the discontinuance may injure both the victim and the accused. If any of the above crimes carries special public importance and the victim, due to his/her helpless situation or dependence upon the accused, is not in the position to protect his/her rights and lawful interests, a prosecutor is entitled to institute proceedings in the absence of formal application, provided the victim has legal capacity and gives written consent for the prosecution (Article 26).

Private prosecution may be instituted only on the basis of a complaint lodged by a victim of intentional minor injury to health, beating or libel. The proceedings are to be discontinued if there is a reconciliation.

With regard to the preceding articles, the Code of Criminal Procedure is in compliance with the European Convention and the case-law adopted under it.

3.2.4. Article 3 in the Context of Forms of Deprivation of Liberty

3.2.4.1. Arrest in Police Stations and Preliminary Detention

Under the Code of Criminal Procedure, a suspect may be held by the police on their own authority for up to 48 hours; he/she must be interrogated within 24 hours.[93] This time is used by operational police officers (the "body of inquiry") and investigating officers to interrogate the suspect, perform other necessary investigative acts and decide whether or not to bring criminal charges. If it is decided to bring charges, a petition for the application of a preventive measure is sent to the judge who, within 24 hours, must decide whether the person concerned is to be remanded in custody, subjected to another preventive measure (e.g. home arrest, bail, etc.) or released.[94] Consequently, a suspect may, in principle, spend up to 72 hours in police custody. Persons remanded in custody are transferred to pre-trial establishments of the Ministry of Justice.

The norms of the Code of Criminal Procedure governing the official recognition of an arrested person as a suspect in a procedural sense, which used to come into effect within 12 hours from the delivery to the police station and only after which the person concerned was allowed the right for defence, were declared unconstitutional by the judgment of the Constitutional Court of 29 January 2003. Accordingly, an arrested person has the right to defence not 12 hours after the arrest, but immediately. Likewise, following the Constitutional Court's judgment, an arrested suspect is to be notified immediately of his

[93] Article 12 para. 3, Article 72 para. 2, and Article 310 para. 1 of the Code of Criminal Procedure.
[94] Articles 140 and 146 para. 7 of the Code of Criminal Procedure.

right to remain silent, the right not to incriminate him/herself, and the right to defence in accordance with Article 72, para. 3.[95]

Likewise, the right of a suspect to notify his/her relatives or other persons close to him/her of the place of detention under Article 73, part 1, subparagraph k) has become available to an arrested person from the moment of delivery to the police station.

Under Article 73, part 1, subparagraph f) of the Code of Criminal Procedure,[96] "a suspect after recognition as such, has the right to request a free medical examination and a corresponding written opinion as well as appointment of a medical expert for the examination of his/her state of health. The request shall immediately be met. Refusal to appoint an expertise may be contested on a single occasion before the court of the venue of the investigation. The complaint shall be considered within 24 hours after it is received".

The aforementioned provision was not contested before the Constitutional Court and the latter was not authorised to consider its constitutionality *ex officio*. It can be assumed that after the judgment of the Constitutional Court the formal recognition as a suspect is no longer required for the exercise of the rights defined in Article 73, part 1, subparagraph f), but nevertheless it calls for appropriate amendment to avoid ambiguity.[97]

Under Article 242, part 1, of the Code of Criminal Procedure, an action or a decision of an inquirer, a body of inquiry, an investigator and of a prosecutor, which in the opinion of a complainant is unlawful or *not sufficiently motivated*, may be appealed to a court. The Article, in particular, names two objects of appeal: a) a resolution of a body of inquiry, an investigator or a prosecutor to refuse to institute criminal proceedings; b) a resolution of a body of inquiry, an investigator or a prosecutor to discontinue the criminal proceedings.

The constitutionality of the above provision,[98] which exhaustively defines the grounds for applying to a court, has been raised before the Constitutional Court of Georgia in terms of violation of the right to access to a court in other circumstances not defined in the article. The Constitutional Court declined to consider the issue.

Numerus clausus wording of Article 242, part 1, of the Code of Criminal Procedure[99] may prevent a participant in the proceedings from applying to a court, e.g. with allegations of treatment contrary to Article 3 of the Convention to a court.[100]

3.2.4.2. Places of Execution of Punishment

[95] See also below, as concerns the issue of procedural guarantees for arrested and detained persons in terms of compatibility with Article 5.
[96] As amended on 20 June 2001.
[97] See, Conclusions and Recommendations 3.3.d).
[98] Under Article 42 para. 1 "[e]veryone has the right to apply to a court for the protection of his/her rights and freedoms".
[99] See also below, as concerns the issue of the right to a court in terms of compatibility with Article 6.
[100] See, Conclusions and Recommendations, 3.3.e)

The Law on Imprisonment,[101] which governs the relations related to the execution of punishment, determines the system and structure of the bodies of serving imprisonment, the principles and procedure of execution of punishment, and the guarantees of social and legal protection of the prisoners, is, in principle, in conformity with Article 3 requirements. The only issue which may be questioned, is solitary confinement, which in the early decisions and judgments of the European Commission and the Court were held not to be in breach of the Convention.[102]

Under Article 77 of the Law on Imprisonment, life-sentenced prisoners are to be kept under constant visual control in day and night imprisonment cells equipped with one bunk. The life-sentenced prisoners are entitled to two short-term (up to three hours) and two long-term (up to three days) visits in a special area of the prison per year. It is worth mentioning that under Article 47, para 2 of the law, the complete isolation of a convict is prohibited and under para. 3 the supervision of convicts must be carried out without infringing upon his/her honour and dignity.

According to the CPT report, no form of work or other activity was provided to life-sentenced prisoners. It also notes that sentenced inmates on strict regime at Prison N1 were entitled to three short-term and one long-term (up to three days) visits per year, which was clearly insufficient.[103]

The Report prepared by the Directorate of Strategic Planning (DSP) of the Council of Europe, has noted the progress achieved on the basis of, *inter alia,* recommendations made by the CPT. In particular, detainees have been transferred from institutions in which living conditions were found to be unacceptable and specific prisons/colonies have and are being built for juveniles and for women.[104]

Life imprisonment is not on the list of punishments which can be imposed upon a minor in accordance with Article 82 of the Criminal Code of Georgia.

3.2.4.3. Psychiatric Establishments

The psychiatric establishments under the authority of the Ministry of Health[105] provide treatment to persons found to be criminally irresponsible, who have committed a particularly dangerous punishable act and have been committed by a court decision to undergo psychiatric treatment. Remand prisoners who develop a psychiatric problem during custody may also be treated at such establishments.

Under Article 13 of the Law on Psychiatric Assistance,[106] physical restraint may be applied to a patient for a limited period of time if a doctor concludes that this is the only way to

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[101] Adopted on 22 July 1999
[102] *R*. v. *Denmark*, *Hilton* v. *the United Kingdom*, 1978.
[103] See also below, as concerns the CPT standards applied in the jurisprudence of the Commission and the Court.
[104] Information Documents SG/Inf (2003)1 17 January 2003.
[105] Security staff is provided by the Ministry of Justice.
[106] Adopted on 25 March 1995.

provide care to the patient concerned or ensure the protection of others. There are no detailed guidelines provided by the legislation concerning the methods of physical restraint, which leaves room for ill-treatment as found by the CPT during its visit to the Strict Regime Psychiatric Hospital in Poti from 6 to 18 May 2001.[107]

3.2.4.4. Armed Forces

There are no specific regulations concerning disciplinary procedures in the armed forces of Georgia.[108] A serviceman charged with a disciplinary offence is not given a hearing before the sanction is imposed and has no right of appeal. Further, the standard form on the basis of which servicemen are admitted to the guardhouse specifies the length of detention but not the precise charge.[109]

3.2.5. General Detention Conditions

During the CPT visit to Georgia from 6 to 18 May 2001 the detention conditions have been found by the CPT to be unsatisfactory and in number of cases appalling.[110]

3.2.6. Inspection of Places of Deprivation of Liberty

Under Article 91, para. 1 of the Constitution, the Prosecutor's Office of Georgia, which is an institution of the judiciary, *inter alia*, supervises criminal inquiries and execution of punishment.

The Organic Law on the Prosecutor's Office, *inter alia*, requires the Office to supervise the precise and homogenous application of the law on the serving a punishment by a convict, execution of other measures of coercion, as well as in places of arrest, preliminary detention and other places of restriction of liberty. A prosecutor's office is, *inter alia*, guided by the principle of protection of and respect for an individual's rights and freedoms. The legal bases for the activity of the prosecutor's office are the Constitution, international treaties and legislation of Georgia.

Within the system of the Procuratura, the prosecutor's office of the penitentiary establishments is a specialised office which, *inter alia*, supervises compliance with the rules and conditions established by law in places of arrest, preliminary detention and other places of restriction of liberty. For this function, the office is entitled to conduct examinations of these places. Prosecutors are under an obligation to visit all police detention facilities on a regular basis. In the course of such visits, they are required to verify the legality and length of detention of persons in custody and monitor the progress of the inquiry/preliminary investigation, and to consider any complaints lodged by detained persons.

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[107] See, Conclusions and Recommendations, 3.3.f).
[108] See, compatibility of the Disciplinary Statute of the Armed Forces of Georgia with Articles 5 and 7, Article 2 of Protocol No. 7 below.
[109] See, Conclusions and Recommendations, 3.3.g).
[110] See, Conclusions and Recommendations, 3.3..h).

The penitentiary establishments in Georgia are visited by supervisory prosecutors, an inspectorate established within the Ministry of Justice, the National Security Council set up under the auspices of the President of Georgia, the Parliamentary Committee on Human Rights, the Public Defender, and a monitoring board composed of representatives from various non-governmental organisations.

Under Article 26, para. 1, subparagraph b) of the Law on Imprisonment prisoners are entitled to lodge complaints with the director of the establishment, a supervising prosecutor, a court, or the Public Defender.

Article 3, para 2 of the Law on Psychiatric Assistance[111] provides for the right of patients to complain to the "judicial and State bodies and public organisations". The patients may also complain to the supervising prosecutor.

As for military detention facilities, the district military prosecutor - who exercises supervision over military custody - carries out bimonthly visits to the "guardhouse". In addition, periodic sanitary inspections are performed by the local sanitary authorities. The facilities are also visited by non-governmental organisations, on the basis of a special agreement with the Ministry of Defence.

3.2.7. Health Protection in the Places of Deprivation of Liberty

Under the Law on the Protection of Health, a principle of State policy in the field is, *inter alia*, protection against discrimination of patients in penitentiary establishments (Article 4, para. d)).[112] Discrimination against a patient kept in a penitentiary establishment while administering medical assistance is impermissible (Article 6, para. 2).

Administration of medical assistance to a person in a penitentiary establishment, *inter alia*, while being on a hunger strike, is permissible only in the case of his/her informed consent. Assistance must be provided in accordance with the norms set out by the Law on the Protection of Health (Article 13).

A doctor is obliged to administer medical assistance to a person in a penitentiary establishment only after having received his/her informed consent save in exceptional life-threatening conditions, when receiving of consent is impossible due to the serious condition of the patient.

3.2.8. Training of the Staff of Penitentiary Establishments

The Training Centre of the Ministry of Justice set up within the system of the Ministry of Justice and having the status of an entity of public law of the Ministry has been in charge of organising periodical training courses for the staff of penitentiary establishments. The courses are being financed by the GTZ (German Society for Technical Co-operation) and

[111] Adopted on 25 March 1995.

[112] See also below as concerns compatibility with Article 2 of the Convention - Medical Treatment Issues within the Georgian Penitentiary Facilities.

include human rights courses covering the relevant articles of the European Convention on Human Rights and the case-law under the Convention, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its additional Protocols, the European Prison Rules and other Recommendations of the Committee of Ministers and the CPT Report. Since July 2002 the courses took place three times and were attended by 150 employees of the central department of execution of punishments of the Ministry of Justice and penitentiary establishments.

3.2.9. Extradition/deportation/expulsion in the Context of Article 3

3.2.9.1. Ill-treatment in the Receiving Country

The relevant part of Article 47 of the Constitution reads as follows:

> "2. In accordance with universally recognised rules of international law and the procedure established by law, Georgia shall grant asylum to foreign citizens and stateless persons.
> 3. It shall be inadmissible to extradite/transfer an individual seeking refuge, who is being persecuted for his/her political beliefs or prosecuted for an action not considered a crime under the legislation of Georgia."

The Criminal Code of Georgia[113] which permits transfer of a foreign citizen or a stateless person, who has committed a crime, to another State for the purpose of imposition of a criminal sanction or to serve a punishment, prohibits transfer of those having committed a crime and seeking refuge, who are persecuted for their political beliefs as well as of those who have committed an action not considered a crime under the legislation of Georgia, or if the crime is punishable by death in the receiving country. Criminal responsibility of such persons must be resolved in accordance with the procedure provided for by international law.

It is clear that neither the Constitution nor the Criminal Code stands in the way of extradition/deportation/expulsion of a person to a third country under circumstances which may entail violation of Article 3.

Immigration decisions that split up families or prevent their reunification (whether through expulsion or refusal to entry) may entail the violation of Article 3. There is no relevant provision in Georgian legislation obliging the immigration officials to take into account the Article 3 requirements in this regard.[114]

3.2.9.2. Discrimination

Under Article 14 of the Constitution of Georgia, everyone is born free and is equal before the law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, or place of residence.

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[113] Adopted on 22 July 1999.
[114] See, Conclusions and Recommendations, 3.3.i).

Under the Law on the Legal Status of Foreigners,[115] foreigners[116] in Georgia have all rights and freedoms, as well as all obligations on an equal basis with Georgian citizens, unless otherwise provided for by legislation. Foreigners are equal before the law regardless of origin, social and economic status, race, national belonging, sex, education, language, religion, political and other opinions, field of activity or other circumstances. Georgia protects the life, personal integrity, rights and freedoms of foreigners who are on its territory (Article 3, paras. 1-3). Foreigners in Georgia are entitled to apply to a court and other State bodies for the protection of their property rights, personal non-property and other rights. Foreigners are entitled to exercise their procedural rights on an equal basis with Georgian citizens. Every foreign citizen and stateless person being temporarily in Georgia may apply to the diplomatic or consular representation of the country he/she is a citizen of or where he/she permanently resides (Article 20).

The Law requires for travel documentation to be presented upon entry into Georgia (Article 23, para. 1). The Law provides for the cases in which a foreigner may be denied entry into the country. These grounds for refusal are common to everyone. A person may be denied entry into Georgia if: he/she has committed a crime against peace and humanity; he/she has committed a grave criminal offence in the last 5 years; he/she is involved in activities against Georgia; he/she while previously being in Georgia, violated Georgian legislation; he/she submitted false documentation when applying for entry into Georgia; the interests of maintenance of state security or public order are at stake; it is necessary for the protection of the rights and lawful interests of Georgian citizens and other persons; it is in the interests of the protection of health of the population; or in other cases provided for by legislation (Article 23, para. 3).

Foreign citizens as well as stateless persons being temporarily in Georgia may be expelled from the country in the following cases provided for by the Law on the Legal Status of Foreigners:

a) if the ground for their being in Georgia no longer exist;
b) if they entered or are unlawfully in Georgia;
c) if their being in Georgia is against the interests of State security and protection of public order;
d) if it is necessary for the protection of health, rights and lawful interests of Georgian citizens and other persons being in Georgia;
e) if they intentionally and systematically violate the laws of Georgia;
f) in other cases provided for by legislation.

A decision concerning expulsion of foreigners may be appealed to a court (Article 29, para. 4).

The Law provides for an exception. Stateless persons permanently residing in Georgia may not be expelled from the country. With regard to them other measures of responsibility provided for by legislation must be applied (Article 31).

[115] 3 June 1993.
[116] Under Article 1 of the law citizens of foreign countries and stateless persons are considered foreigners.

Article 33 provides for the priority of the norms of international treaties over the procedure established by the law.

Under Article 5, para. 3 of the Law on Immigration, a foreigner who obtained residence permission is obliged to undergo passport control, during which he/she must produce their residence permit, entry visa, passport or other travel document and fill in a immigration card. When taking up residence in Georgia every foreigner must undergo an obligatory medical examination. There is no legislative basis governing the carrying out of this examination in a manner which ensures respect for human dignity and honour. Other than for failure to produce the required papers, a foreigner may be refused entry into the country on the grounds provided for by law, which are similar to Article 23, para. 3 grounds of the Law on the Legal Status of Foreigners.

The Law provides for an annual immigration quota to be determined by the Ministry of Justice and approved by the President. Upon submission of the President, Parliament may restrict the quota in accordance with the State-, political- and social-economic interests (Article 11).

The Law on Immigration does not provide for the prohibition of discrimination. This deficiency cannot be redeemed by Article 2, para. 1 of the Law under which "immigration is governed by the Law on the Legal Status of Foreigners, the present Law and other legislative acts of Georgia".[117]

3.2.9.3. Remedies Available to Suspend a Decision to Extradition

The Constitution provides for the possibility of an appeal to a court from a decision concerning surrender of a citizen of Georgia. Under Article 42, para. 1, everyone has the right to apply to a court for the protection of his/her rights and freedoms. Article 47, para. 1 states that foreign citizens and stateless persons residing in Georgia have rights and obligations equal to the rights and obligations of citizens of Georgia subject only to the exceptions envisaged by the Constitution and other laws. Under Article 259, part 4 of the Code of Criminal Procedure, a person to be surrendered is entitled to apply to a court for protection.

The Code of Criminal Procedure does not provide for a procedure of appeal from a decision concerning extradition. In practice,[118] this gap is redressed by analogy. A decision concerning extradition may be appealed invoking Article 242 of the Code of Criminal Procedure. Article 242 provides for a procedure of appeal against any action or decision of

[117] See, Conclusions and Recommendations, 33.j).

[118] On 28 October 2002 the Chamber of Criminal Law Affairs of the Supreme Court of Georgia considered a Russian citizen's application not to be extradited to Russia following a decision of the Office of the Prosecutor General. Having invoked Article 42 para. 1 of the Constitution, Article 259 part 4 of the Code of Criminal Procedure and Article 13 of the European Convention, the Chamber stated that the applicant was entitled to apply to a court for protection against extradition and had the right to an effective remedy. The Chamber resolved the absence of any procedure of appeal of a decision of extradition by virtue of Article 7 part 4 of the Code of Criminal Procedure (See further below, as concerns the compatibility of the Code of Criminal Procedure with Article 7 of the Convention below) and extended the application of Article 242 of the Code of Criminal Procedure to the case.

an inquirer, an investigator or a prosecutor. A complaint may be lodged with a court of the venue of the investigation within 15 days after the complainant becomes aware of an impugned action or decision, which he/she considers either unlawful or insufficiently motivated. The court is entitled to extend the deadline for an appeal, if the deadline is missed due to a good reason. The court must issue a resolution either upholding or rejecting the appeal. The resolution rendered by the court may be appealed to the Chamber of Cassation of the Supreme Court in accordance with the procedure established by the Code of Criminal Procedure. The usual procedural guarantees are available to the appellant.[119]

3.2.10. Corporal Punishment

The Law on Education[120] sets out the right of parents (legal representatives) to request protection of the rights of children as well as the obligation to care for their physical and mental health.

There is no explicit prohibition of corporal punishment of children in the legislation. However, physical injury is deterred by the Criminal Code criminalising infliction of intentional grave injury to health of a minor (Article 117, part 2, subparagraph d) and "systematic beating and other violence entailing physical and mental suffering of a victim", (Article 126 - "torture"), which may apply to a child as well.

While these two provisions may be satisfactory in terms of prohibition of domestic violence, as was the case in *A*. v. *the United Kingdom*,[121] the Criminal Code fails to embrace other circumstances which may violate Article 3. Here is again the issue of discrepancy between the implications of torture under national legislation and the case-law of the European Court. In the *Tyrer* v. *the United Kingdom* case the judicial corporal punishment administered against the applicant was not of a systematic character and the applicant did not suffer any severe or long-lasting physical effects, but his punishment - whereby he was treated as an object in the power of the authorities – was found by the European Court[122] as having constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity.[123]

3.2.11. Medical-ethical Issues

Medical and biological issues may give rise to Article 3 violations.

The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine) and its Additional Protocol on the Prohibition of Cloning Human Beings entered into force with respect to Georgia on 1 March 2001.

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[119] See, Conclusions and Recommendations, 3.3.k).
[120] 27 June 1997.
[121] 23 September 1999.
[122] In *Tyrer* v. *the United Kingdom*, 25 April 1978, Series A no. 26, para. 33.
[123] See, Conclusions and Recommendations, 33.l).

The Law on Protection of Health contains detailed articles on medical-biological research, which must be carried out in accordance with the legislation of Georgia and international treaties to which Georgia is a party (Article 105). The Law guarantees the priority of the interests of human beings over the interests of science or society (Article 108). Genetic therapy is only allowed in the cases consistent with Article 13 of the Convention (Article 52). Cloning of a human being using methods of genetic engineering is prohibited (Article 142). The Law contains further detailed provisions, including provisions relating to persons who cannot give their consent to medical-biological research (Articles 110-111). Other provisions containing prohibitions concerning regenerative organs, and exceptions to these prohibitions are similar to those of the Convention.

While carrying out medical activity, medical personnel must be guided by ethical values - principles recognising the honour and dignity of the individual, fairness and compassion as well as norms of professional ethics (Article 30).

Article 25 of the Convention on Human Rights and Biomedicine requires introduction of appropriate sanctions, to be applied in the event of infringement of the provisions contained in the Convention.

The Criminal Code of Georgia criminalises coercion to give an organ for medical treatment, transplantation, experiment or creation of a medical preparation (Article 134) and genetic manipulation, which is defined as the creation of a creature analogous to a human being (Article 136). The Code of Administrative Violations,[124] as amended on 6 November 2002, provides for an administrative penalty for the violation of the rules of taking and using an organ, or of part of an organ, of a human being (Article 46^1).[125]

3.2.11.1. Discrimination

Although the Law on Protection of Health prohibits discrimination of patients on grounds of race, colour, language, sex, religion, political or other opinion, national ethnic background, origin, property and title, place of residence, disease, sexual orientation or personal negative attitude,[126] there is no formal clause in Chapter XIX of the Law, which governs these matters prohibiting discrimination in connection with medical and biological issues. Moreover, although the Law generally refers to “a human being”, “a woman”, “an individual”, there are provisions which set out certain guarantees confined to “the citizens of Georgia” (for example, Article 115 concerning the right to give consent or object to removal of organs and Article 136 of Chapter XXIII on “family planning”, providing the right to determine the number of children and time of their birth.)

The Law on Transplantation of Organs of the Human Being (23 February 2000) does not contain a prohibition of discrimination in this field.[127]

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[124] 15 December 1984.
[125] See further Conclusions and Recommendations, 3.3.m).
[126] See, also above, regarding inadmissibility of discrimination in places of preliminary detention and penitentiary establishments.
[127] See, Conclusions and Recommendations, 3.3.n).

3.3. Conclusions and Recommendations

It may be concluded that the legislation of Georgia is to a great extent compatible with Article 3 of the Convention. The following recommendations may be made:

a) It is recommended to replace the word “impermissible” with “prohibited” in Article 17, para. 2 and Article 18, para. 4 of the Constitution and to replace the conjunction “and” with the conjunction “or” in the wording of Article 17, para. 2 of the Constitution.

b) It is recommended to exclude from Article 46 of the Constitution reference to Article 18, para. 4.

c) It is recommended to redraft Chapter XX (including the bringing of the terminology into line with the European Convention) in the light of actual interpretation of Article 3 by the European Court of Human Rights so as to cover all the issues arising under that provision.

d) It is recommended to delete the words “after recognition as such” from Article 73, part 1, subparagraph f) of the Code of Criminal Procedure.

e) It is recommended to recast the exhaustive character of the grounds for the applying to a court as provided for by Article 242, part 1, of the Code of Criminal Procedure in order to enable an individual to complain to a court about ill-treatment during arrest or detention.

f) In accordance with the CPT recommendations, it is recommended that detailed instructions on the use of means of restraint be drawn up. Such instructions should make clear that initial attempts to restrain aggressive behaviour should, as far as possible, be non-physical (e.g. verbal instruction) and that where physical restraint is necessary, it should in principle be limited to manual control. Instruments of restraint should only be used as a last resort, and removed at the earliest opportunity; they should never be applied, or their application prolonged, as a punishment.

g) Pursuant with the CPT recommendations, it is recommended to enact specific regulations concerning placement in a guardhouse. The regulations should specify, *inter alia*, the procedures to be followed (including an oral hearing of the soldier concerned on the subject of the offence he is alleged to have committed, a written statement of the exact charge and a possibility to appeal against sanctions imposed); the maximum periods of detention; and the treatment regime.

h) In accordance with the CPT recommendations, it is recommended that the Government take decisive steps towards improvement of the detention conditions in the places of deprivation of liberty.

During the CPT visit, a number of grave facts of ill-treatment in the places of deprivation of liberty have been revealed. The CPT elaborated recommendations to the Georgian authorities concerning training programmes to be provided in the places of deprivation of liberty. In accordance with the CPT proposals it is recommended to provide:

- professional training for police officers of all ranks and categories, including training in modern investigation techniques. Experts not belonging to the police force should be involved in this training. An aptitude for interpersonal communication should be a major factor in recruiting police officers and during their training, considerable emphasis should be placed on acquiring and developing interpersonal communication skills;
- initial prison staff training, in which considerable emphasis should be placed on adherence to official policies, practices and regulations of the prison service. The development of interpersonal communication skills should also have a prominent part in this training; building sound and constructive relations with prisoners should be recognised as a key feature of a prison officer's professional role;
- appropriate training for prison doctors and written instructions concerning new approaches to tuberculosis control;
- qualified (initial and ongoing) training in psychiatry for nursing staff; adequate training for orderlies before being assigned to ward duties, bearing in mind the challenging nature of their work. It is of crucial importance that security staff in a psychiatric hospital be carefully selected and that they receive appropriate training before taking up their duties, as well as in-service courses. Further, during the performance of their tasks, they should be closely supervised by - and subject to the authority of - qualified health-care staff.

i) It is recommended to amend the legislation so as to disallow extradition, deportation and expulsion of a person to a third country where there are serious reasons to believe that the individual will be subjected to torture, inhuman or degrading treatment or punishment or where this would entail such grave violation of Article 8 rights as to amount to the violation of Article 3. It is also recommended to provide training courses covering these issues for immigration officials, prosecutor's office staff and judges.

j) The Law on Immigration is *lex specialis* with regard to admission and expulsion of immigrants and should provide for an express prohibition of discrimination; it should additionally exclude possible discriminatory restrictions of immigration quota by the misapplication of Article 11. It is recommended to provide in the Law on Inspection of Migrants[128] that the carrying out of the medical examination of immigrants upon their entry into the country shall take place with due respect for their dignity and honour..

k) Although the use by analogy of Article 242 of the Code of Criminal Procedure enables an individual to have an extradition decision reviewed by a court, it is recommended that this gap in the Code of Criminal Procedure be filled.

l) It is recommended to provide for the protection of children against corporal punishment in the Criminal Code, in accordance with the European Court's case-law.

m) It is recommended to introduce in the legislation the conditions and procedure for compensation of those having suffered from undue damage resulting from intervention as provided for by Article 24 of the Convention.

[128] Adopted on 27 June 1996.

n) The reference to “the citizens of Georgia” in the Law on Protection of Health is in violation of Articles 3 and 14 of the European Convention. It is recommended to make the amendments to the relevant articles so that the guarantees be provided for “everyone”. The prohibition of discrimination should be provided for by the Law on Protection of Health in terms of medical-biological researches and by the Law on Transplantation of Organs of the Human Being.

4. ARTICLE 4 - PROHIBITION OF SLAVERY AND FORCED LABOUR

4.1. The European Convention and its Interpretation

Article 4 of the Convention states:

> "1. No one shall be held in slavery or servitude.
> 2. No one shall be required to perform forced or compulsory labour.
> 3. For the purpose of this article the term "forced or compulsory labour" shall not include:
>
> a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
> b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
> c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
> d. any work or service which forms part of normal civic obligations."

While giving no definition to the notion of "slavery", Article 4, paragraph 1 states that "No one shall be held in slavery or servitude." This provision has mainly been referred to by persons under detention, with respect to their duty to work during the term of detention. As the European Commission of Human Rights noted, the terms "slavery" or "servitude" are not applicable to the situation in which convicts are in most countries of the world, and which is recognized by the Convention in the context of the prohibition of "forced or compulsory labour", in paragraph 3(a) of Article 4.

The Strasbourg bodies have never given a definition of "forced or compulsory labour". In the European Commission's opinion, such labour exists when (a) the worker is involved in labour activities or service against his/her will and (b) the requirements for performing labour or service are unfair or despotic, or the service entails avoidable burdens.

The notions of "forced or compulsory labour" refer to obligations laid down by the State, not by private actors. These notions are not out-dated at all. On the contrary, mass forcible labour activities may become part of any totalitarian regime. This prohibition is much more difficult to define. Paragraph 3 of Article 4, stating that forced or compulsory labour does not include certain categories of necessary work or service, is an eloquent confirmation of the above thesis. The case of *Van der Mussele* v. *Belgium* can be mentioned in this respect: it concerned the obligation of defence lawyers to provide legal assistance free of charge.[129]

The four categories specified in paragraph 3 of Article 4 deal with situations in which some work or service may be prescribed by the State or by law in other's interests, without being caught by the prohibitive norm contained in paragraph 2 of Article 4. As a basic rule, this restriction has been introduced due to the 1930 ILO Convention on Forced and Compulsory Labour

[129] 23 November 1983, Series A no. 70, paras. 36-38.

The first category is labour in which persons deprived of liberty are involved. This means that generally compulsory work in prisons and similar facilities is not prohibited.

The second category is about military service or other kinds of service in which conscientious objectors may be involved (in the countries that recognize them). In the European Commission's opinion the same is true of voluntary military service.

The third category occurs when an emergency situation or calamity threatens the life or well-being of the entire community. In this case "service" may be prescribed in a compulsory manner.[130]

The fourth category includes any work or service comprising a part of "normal civic obligations". The scope of this exception is clear, except for specific duties which are natural for some professions (physicians, pharmacists, lawyers). Under these circumstances Strasbourg bodies have attached particular attention to the question whether or not the required work or service constitutes part of ordinary professional activities. If it does, then the requirement of "unfairness" or "excessive burdens" are not met.

4.2. Georgian Legislation

4.2.1. The Constitution of Georgia

The Constitution states that everybody is free from birth (Article 14). Slavery has never existed in the history of Georgia and the country has never practiced the slave trade.

It should also be noted that under the Constitution labour in Georgia is free (Article 30, paragraph 1). The Criminal Code contains a provision (Article 150) on coercion, under which the physical or mental coercion of any person to perform any action or to abstain from performing any action which that person is entitled to perform is deemed to be a criminal offence. Since persons under the jurisdiction of Georgia enjoy the right to freedom of labour, under the existing legislation no one may be required to perform forced labour.

4.2.2. Forms of Possible Servitude

A form of servitude might occur in a situation where a person, by force of circumstances, becomes dependent on another person. Such situations might include sexual exploitation or drug trafficking. In this context it will be useful to describe the relevant provisions of Georgian criminal legislation.

With regard to the problem of sexual exploitation, the following actions are regarded as punishable offences: inducing persons to engage in prostitution through the use or threat of the use of force; organising or running establishments of ill repute for the conduct of prostitution; inducing minors to engage in prostitution or other sexually abusive practices

[130] *Iversen* v. *Norway*, 1468/62, Dec. 17.12.63. Yearbook 6, p. 278 (330).

(Articles 253, 254 and 171, paragraph 1, of the Criminal Code). As for drug trafficking, the following are deemed to be punishable criminal offences: the obtaining and sale of narcotic substances, analogues and precursors, as well as psychotropic substances and their analogues or other hard drugs; the unlawful import, export and carriage through Georgia of narcotic substances, their analogues or precursors and also of psychotropic substances; and inducing others to use narcotic substances (Articles 260-263 and 272 of the Criminal Code).

In addition, Georgian legislation has criminalised such actions as the buying or selling of minors or the conduct of other unlawful transactions involving minors, including with a view to the unlawful transport of the minor across the frontier (Article 172, paragraphs 2 and 3).

The Criminal Code prescribes different types of penalties for the commission of specific crimes (Article 40). These penalties include such measures as socially useful work and attachment of earnings. Under the Code socially useful work is defined as the conduct of socially useful tasks by convicted persons in their free time and without remuneration. The amount of such work varies between 20 and 400 hours and it must be performed over periods not exceeding four hours per day. Category I and II disabled persons, pregnant women and mothers with children aged seven and under, old-age pensioners and military personnel on fixed-term service may not be sentenced to perform socially useful work (Article 44). Attachment of earnings may be imposed for periods of between one month and two years and is carried out at the workplace of the convicted person. Deductions are made from the convicted person's earnings and retained by the State at a level established in the sentence handed down by the court, within the limits of 5-20 per cent of those earnings (Article 45).

In case convicted persons refuse to perform or persistently evade socially useful work or persistently evade attachment of earnings, these forms of punishment may be replaced by restrictions on their freedom, short-term rigorous imprisonment or deprivation of liberty.

At the same time it should be emphasised that for the time being neither the Criminal Code of Georgia nor the other legal acts provide for, as specific *corpus delicti*, "Trafficking in Human Beings" (regardless of its form - sexual exploitation or other offences).

In May 2002 the President of Georgia issued Decree N240 "About the Measures on Strengthening Protection of Human Rights in Georgia". Under the Decree the Ministry of Justice was instructed to "elaborate draft amendments to the Criminal Code of Georgia on recognizing trafficking in persons as a crime, and envisaging corresponding sanctions for the commission of this crime". In March 2003 the Government of Georgia approved amendments to the Criminal Code drafted by the Ministry of Justice, pursuant to which two new articles (143^1 - "Trafficking in Human Beings" and 172^1 - "Trafficking in Minors") should be added to the Criminal Code of Georgia. Now it is the Parliament that will make a final decision as to the adoption of the amendments under review.

It is reasonable to point out in this context that in January 2003 the President of Georgia signed Decree N15 "On the Approval of the Plan of Action against Trafficking". In accordance with this Plan concrete measures will be taken by various governmental bodies in order to:

- elaborate new legal proposals and efficiently enforce existing laws with a view to ensuring protection of rights and legitimate interests of victims of trafficking;
- prevent the crime of trafficking through launching awareness-raising and informational campaigns among both adults and minors;
- render legal assistance to and promote social, psychological and medical rehabilitation of victims, with the participation of local and international NGOs;
- prosecute and punish persons who committed trafficking-related crimes.

The very first step to achieve the goals provided for in this Plan has already been taken – a special unit to combat trafficking was established within the Ministry of Internal Affairs at the end of January 2003. Nevertheless, much more work under the Plan is still to be done.

4.2.3. Labour Activities of Convicts

The labour activities of convicts are governed by the Law on Imprisonment and carried out in accordance with the procedures established by labour legislation. The labour of convicts is organised, as a rule, within the territory of the facility where their sentence is being served. Convicts have the right to select their form of labour from a range of tasks presented to them by the facility administration. Convicts may not be compelled to perform labour which is an affront to personal honour and dignity. Convicted minors perform their labour during after-study hours and the combined length of their work and study may not exceed eight hours per day. Convicts may only perform overtime work or work on holidays or non-working days with their own consent. Their working day may not exceed eight hours in length.

When suggested by the facility administration and on an exceptional basis, the use of convict labour outside the facility where such convicts are serving their sentence may be permitted in the event of a natural disaster, for the purpose of averting or eliminating breakdowns in production facilities, or for preventing accidents, and also to improve the grounds, buildings and amenities of their penitentiary facility. Convicts may only carry out these tasks with their own consent and on condition that they are conducive to attainment of the purposes of their punishment.

A total of 50% of the payment disbursed for the labour of convicts is paid out to the convicts themselves for their personal needs, 15 % is transferred to the State budget, 10 % paid to the penitentiary facility in question, to cover its expenses, and 25 % may be retained by writ of execution in the manner prescribed by law. If there is no such arrangement, the corresponding amount is paid into the (deposit) account of the convicts and made available to them upon their release.

The administration of penitentiary facilities is responsible for ensuring working conditions which are safe for life and health. If, during the serving of their sentences, convicts are rendered disabled as a result of their production activities, they are entitled, after their release, to pensions and the payment of compensation for the damage caused in their cases according to a procedure prescribed by law.

The above clauses are contained in Articles 53-56 of the Law on Imprisonment and make no provision for the forced labour of convicts. Neither, however, does the Law stipulate the right of a convict not to work at all. On the contrary, under Article 27, paragraph 1(a) convicts are obliged to perform their labour in working areas set aside by the administration of the penitentiary facility under conditions established by the Law and by the facility's own internal regulations. In this way, the compulsory nature of the labour of convicts is prescribed by law, irrespective of the convicts' own wishes; this appears to be in contradiction with both Article 4 of the European Convention and with the Constitution.

Unfortunately, inadequate information is available as to the application in practice of these legal provisions. Under the conditions of widespread unemployment in Georgia, one could hardly imagine that special jobs might be created for convicts. Jobs for convicts are only available in one or two penitentiary facilities and working conditions leave much to be desired.[131]

With regard to the issue of suspended sentences, in such cases the courts are entitled to sentence the convicted persons to additional forms of punishment or to impose the performance of other duties conducive to their correction (Articles 63 and 65 of the Criminal Code). These provisions are in conformity with the requirements of the European Convention.

4.2.4. Military and Alternative Service

The following periods of military service are established for military personnel in Georgia:

a) Military personnel called up for the performance of their fixed-term military service: 18 months;
b) Military personnel with higher education called up for the performance of their fixed-term military service: 12 months;
c) Officers of the military reserve: 24 months;
d) Regular officers: not less than 10 years.

As laid down by the Law on the Status of Military Servicemen, military service represents a particular form of State service and has as its goal ensuring the defence of Georgia (Article 10, paragraph 1). Military personnel may not be assigned to do work which is not directly connected with their service, except in cases provided by law.

The Law on Non-Military, Alternative Service was adopted in October 1997. Regulations have been adopted on the performance of alternative service and on the alternative service department to be established within the Ministry of Labour, Health and Social Protection. In this way the requirement that alternative service should be strictly civilian in nature has been duly observed.

In conformity with the above Law, in peacetime a citizen who is liable for military service but refuses to serve it because of his religious belief or other convictions shall be called up for non-military (alternative) service (Article 4). This service, by its nature, has to equate to the difficulties existing in military service and its duration must exceed the term of military

[131] See CPT report on Georgia, CPT/Inf(2002)14, paragraphs 89, 90 and 94.

service (Article 3, Paragraph 2). The Law in question rules that the term of non-military (alternative) service is 36 months (Article 6). A local enlistment commission shall consider the personal dossiers of a man due for call-up in order to make sure that the latter's arguments are correct (Article 8, Paragraph 1). The local enlistment commission shall reach its conclusion within 20 days. Within a month, this conclusion and the citizen's application shall be sent to the State Commission on Non-Military (Alternative) Service which makes a final decision (Article 8, paragraphs 3, 4 and 6) and submits it with a copy to the Ministry of Labour, Health and Social Protection. This decision may be appealed to a court within 10 days after it was made (Article 11). The State Commission shall compile the list of jobs where a person can serve non-military service (e.g. medical facilities, municipal services, agriculture, etc.).

In May 2001 the President of Georgia issued Decree N170 "On the Approval of the Statute for the State Commission on Non-Military, Alternative Service". The Minister of Labour, Health and Social Protection presides over sittings of the Commission. In December 2001 the President of Georgia approved composition of the State Commission on Non-Military, Alternative Service (Ordinance N1260). It should also be noted that a special department on non-military (alternative) service has been established within the Ministry of Labour, Health and Social Protection.

The State Commission on Non-Military (Alternative) Service started working during the spring call-up of 2002.

According to the most recent data provided by the Department on Non-Military (Alternative) Service of the Ministry of Labour, Health and Social Protection, at present the total number of persons who expressed a wish to serve non-military (alternative) service and filed the respective application amounted to 140. Generally, these are the representatives of the Jehovah's Witnesses. Taking into account that relevant bodies (call-up units within the local authorities) are only allowed to receive and consider applications from such persons during the given call-up session, for the time being 76 applications were received, out of which 74 ones have been approved. In two cases conscientious objectors made use of the Law on Dues for Deferment of Compulsory Military Service by paying the sum of money established by law, in order to obtain a one-year deferment.

It should be stressed that if the State Commission on Non-Military (Alternative) Service refuses an application the conscientious objector is entitled to appeal this decision to the court.

Successful applicants for alternative service have been and are being employed at the Tbilisi psychiatric hospital, city sanitation services, etc. It should be noted that since 1 October 2002, in the capital of Georgia 94 vacant jobs of this kind have been available to those wishing to serve non-military (alternative) service.

4.2.5. Work Performed in a State of Emergency

In October 1997, the Law on the State of Emergency and the Law on Martial Law were adopted and entered into force. The acts contain identical provisions to the effect that, in a

state of emergency or under martial law, the supreme authorities of the Georgian executive are entitled to:

- prohibit temporarily the workers and office employees of enterprises and organisations of strategic and vital importance from resigning from their jobs (except where there are compelling grounds for such resignation);
- ban the organisation of strikes;
- recruit able-bodied citizens to work in such enterprises, establishments and organisations (at an average level of remuneration), as well as to assist in cleaning up after a state of emergency or period of martial law, while at the same time taking steps to ensure their occupational safety.

In addition, during a state of emergency and under martial law, those in charge of enterprises, establishments and organizations are entitled, where necessary, to transfer their workers and office employees without their consent on a temporary basis to jobs which are not covered by their labour contracts.

The above provisions of Articles 4 and 6 of both laws are probably not inconsistent with the conditions of the Article under review.

In 1997 by Presidential Decree the Department of Emergency Situations and Civil Defence was created within the Ministry of Internal Affairs. A standing interdepartmental commission on emergency situations and civil defence was set up under the National Security Council and this body effectively serves as the lead organisation in matters of public protection during emergencies. A bill on protecting the population and different areas of the country from emergencies has been prepared and, once it has been passed, a definitive decision will be taken to identify the body of the executive which will be responsible for tackling issues arising during emergencies.

It should be noted that all the legal provisions discussed above are to be implemented on a non-discriminatory basis and are consistent with other requirements of the European Convention.

4.2.6. The Right to Strike

Article 33 of the Constitution of Georgia recognises the right to strike, but stipulates that the procedure for the exercise of this right shall be determined by law. Under the Constitution, the law also provides guarantees for the operation of vital services. It is the Law on the Procedure to Settle Collective Labour Disputes that governs the procedure for the organisation and conduct of strikes.

The right to organize or participate in strikes is withheld from members of the police (Article 21 of the Law on Police), the prosecutor's offices (Article 31 of the Law on the Prosecutor's Bodies) and the State Security Service (Article 2 of the Law on the State Security Service). It seems that these restrictions do not exceed the bounds established by Article 4 of the Convention.

In addition, it should be stressed that workers employed in various spheres of the national economy have widely exercised their right to strike. For instance, lately schoolteachers and power stations workers went on strike in order to have arrears in wages paid.

4.3. Conclusions and Recommendations

a) In general, Georgian legislation is in line with the requirements of Article 4 of the Convention. At the same time, there are some shortcomings therein that should be corrected in order to bring the legislation fully into conformity with the requirements of Article 4.

b) Amendments to the Criminal Code of Georgia should be adopted in order to recognise trafficking in persons as a crime and to create appropriate sanctions for the commission of this crime.

c) Article 27, paragraph 1(a), of the Law on Imprisonment should be revised to avoid the possibility of conflicting interpretation of voluntary or compulsory nature of convicts' labour activities.

d) The most recent amendments to the Law on Non-Military, Alternative Service, which were made in accordance with the UN Human Rights Committee recommendation concerning the duration of the above service, should be welcomed. Under the Law of 18 May 2002, the term of alternative service has been reduced from 18 to 24 months.

5. ARTICLE 5 – RIGHT TO LIBERTY AND SECURITY

a) The European Convention and its Interpretation: *in General*

Under Article 5 of the European Convention:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> f. the lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

The right enshrined in Article 5 of the Convention is of fundamental value and a prerequisite for the full exercise of many other rights and freedoms in a democratic society. Statistically, Article 5 ranks second only to Article 6 in terms of the number of cases before the Convention institutions.

Article 5 refers to deprivation of liberty, arrest and detention. These terms have an autonomous Convention meaning and corresponding notions in the municipal law should be identified in the light of the interpretation given by the case-law.

By "liberty" is meant physical liberty of a person;[132] personal liberty in the sense of Article 5 is the absence of arrest or detention. "Security" is a "guarantee against arbitrariness in the matter of arrest and detention".[133] Under the Court's case-law: "Any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness … what is at stake here is not only the "right to liberty" but also the "right to security of person".[134]

On numerous occasions the European Commission held that the right to security did not oblige Governments to secure an absolute protection from private agents.[135] But if the national legislation fails to prescribe the punishment for illegal confinement, this may lead to a violation of Article 5 in conjunction with Article 1.[136]

A restriction upon freedom of movement[137] may come within the ambit of Article 5, when it is serious enough given the degree of intensity and regard being had to "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question".[138] Article 5 applies even though the detained person surrenders himself for detention.[139] Article 5 may extend to the arrest or detention of a person by a State's agents outside of its territory.[140] Military disciplinary sanctions may become subject of scrutiny in terms of Article 5.[141] Conditions of detention are not regulated by Article 5,[142] nor was the placement of a child in a hospital by the exercise of parental rights considered as a deprivation of liberty contrary to Article 5, but coming within the ambit of Article 8.[143]

Article 5, para. 4, has incorporated a specific guarantee of prompt and effective judicial control of the lawfulness of detention, going beyond the requirement imposed by Article 13 on the national authorities to provide an effective remedy to those who have an arguable claim of being victims of a violation of their rights under the Convention.[144]

It is of course possible to link Article 5 with Article 14 as well.[145] Article 5 is not immune to derogation in times of war or other public emergencies, which threaten the life of the nation.[146] It is worth mentioning though that, as the Court has held in *Lawless* v. *Ireland*,[147]

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[132] *Engel* v. *Netherlands*, 1976, Series A no. 22, para. 58.
[133] *Arrowsmith* v. *the United Kingdom*, DR (1980), para. 64.
[134] *Bozano* v. *Italy*, 1986, Series A no. 111, paras. 54 and 60.
[135] *Inter alia, W*. v. *the United Kingdom*, 32 DR 190;.
[136] *Mutatis mutandis, X and Y* v. *Netherlands*, 1985, Series A no. 91.
[137] Regarding compatibility of Georgian legislation with Article 2 of Protocol 4, see, the Compatibility Report of February 2001, pp. 85-93.
[138] *Guzzardi* v. *Italy*, 1980, Series A no. 39, para. 92.
[139] *De wild, Ooms and Versyp* v. *Belgium,* Series A no. 12.
[140] *Reinette* v. *France,* Application no. 14009/88, 63 DR 189.
[141] *Engel* v. *Netherlands,* 1976, Series A no. 22.
[142] *Ashingdane* v. *the United Kingdom*, Series A no. 93, para. 41.
[143] *Nielsen* v. *Denmark,* Series A no. 144
[144] Regarding compatibility of Georgian legislation with Article 13, see the Compatibility Report of February 2001, pp. 44-63.
[145] Regarding compatibility of Georgian legislation with Article 14, see the Compatibility Report of February 2001, pp. 64-69.
[146] Regarding compatibility of Georgian legislation with Article 15, see the Compatibility Report of February 2001, pp. 71-74.
[147] Series A no. 3, para. 67.

Article 17 can never be invoked to justify a deprivation of liberty.[148] The requirement of Article 18 of the Convention is incorporated in Article 5, para. 1.

b) Georgian Legislation: *in General*

It should be mentioned at the outset that Georgian legislation does not provide for the right to *habeas corpus* proceedings. The lack of possibility of applying for prompt and effective judicial control over the lawfulness of deprivation of liberty may render other procedural guarantees futile. The recommendation of paramount importance therefore is to amend the legislation to this effect.

The Constitution recognises the inviolability of liberty of the individual and provides for the inadmissibility of any restriction upon the personal liberty without a court decision. It delegates subordinate legislation to determine the cases, in which the arrest of an individual is permissible. The reference to arrest places the emphasis on the initial stage of deprivation of liberty. The Constitution provides for instance of single judicial review of the legality of an arrest and other restrictions of liberty. The Constitution provides for the inadmissibility of either physical or mental coercion of those arrested or otherwise restricted in their liberty. The Constitution provides for guarantees to be afforded to an arrested and detained person, and stipulates the maximum duration of arrest and preliminary detention. Under the Constitution, violations of constitutional provisions are punishable by law. The Constitution vests those being illegally arrested or detained with the right to claim compensation (Article 18).

In time of war or a state emergency, under the first paragraph of Article 46 of the Constitution, the President of Georgia is authorised to restrict certain constitutional rights and freedoms enumerated in the article. Article 18 is on the list of those articles restriction of which is allowed.[149]

The following statutes provide for deprivation of liberty in certain circumstances.

The Criminal Code of Georgia prescribes four types of punishment related to the deprivation of liberty: restriction of liberty, strict confinement, deprivation of liberty for a specified term and life imprisonment (Article 40). The Criminal Code provides for the placement of a minor in a specialised instructional or medical-instructional establishment (Articles 91 and 96) and for the application of coercive measure of a medical character (Chapter XVIII).

The Code of Administrative Violations provides for administrative detention, which may not exceed 30 days.

Article 12, part 1 of the Code of Criminal Procedure reads as follows:

> "Everyone has the right to the protection of his/her liberty, personal security…"

[148] Regarding compatibility of Georgian legislation with Article 17, see the Compatibility Report of February 2001, p. 75.

[149] See also above, as concerns compatibility with Article 3.

The Code of Criminal Procedure provides for arrest, preventive measures (detention, home arrest, police supervision, leave on recognisance, supervision over a minor, supervision over a serviceman) and other measures of coercion (delivery, placement in a medical establishment with the purpose of undergoing forensic examination) related to deprivation of liberty. Some of these measures, although they entail restriction upon personal liberty or freedom of movement, are not considered to come within the ambit of Article 5 and are not dealt with in this report (police supervision, leave on recognisance supervision over a serviceman[150]). The compatibility of other measures with Article 5 is discussed below.

The Disciplinary Statute of the Armed Forces of Georgia provides for, *inter alia*, confinement to a guardhouse up to ten days as a disciplinary punishment for disciplinary offences committed by servicemen.

Under the Law on Education[151] special instructional-educational establishments are created for those pupils characterised with behaviour unacceptable for society and which deviates from normal conduct.

The Rule of the Regime of the State Border and Border Protection[152] provides for the temporary stopping of movement in case of danger of spreading dangerous infectious diseases, or for the announcement of quarantine on the State border, in accordance with the decision of the President of Georgia.

In accordance with the Criminal Code of Georgia, a coercive measure of a medical character may be applied by a court to drug addicts and people of unsound mind.

The Law on the Legal Status of Foreigners allows arrest or detention of a foreigner.

The Code of Administrative Violations of Georgia provides for administrative detention on account of administrative violations (Article 32, part 32). Apart from administrative detention, which constitutes a penalty, the Code provides for administrative arrest, which may not last for more than 3 hours. An individual having violated the boundary regime in frontier areas may be arrested and detained for up to 3 hours with the view of drawing up a report concerning the violation, and if need be for up to 3 days for the purpose of identification and establishing the circumstances of the violation. This term may be extended by a prosecutor for up to 10 days if the violator does not have an identification card (Article 247, part 2). The Code of Administrative Violations also allows for the delivery of the detainee to the police station or to the headquarters of public militia (Article 243).

Deprivations of liberty which have no legal basis are criminalised by the Criminal Code of Georgia; they may constitute in particular, an illegal deprivation of liberty (Article 143) and hostage-taking (Article 144).

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[150] A serviceman is subjected to surveillance of superiors and is not allowed to leave the military unit. The legislative formulation of the restriction of freedom of movement does not amount to the extent of the deprivation of liberty to come within the ambit of Article 5.

[151] Adopted on 27 June 1997.

[152] Approved by the Ordinance of the President of Georgia of 20 December 1999.

5.1. Article 5, para. 1.a

5.1.1. The European Convention and its Interpretation

Under Article 5, para. 1.a of the European Convention on Human Rights:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;"

The post-conviction exception to the right to liberty only applies where the conviction results from a court decision. Detention after conviction but pending appeal is permitted where the time spent in custody during the appeal proceedings can count towards the final sentence.[153]

5.1.2. Georgian Legislation

Under Article 18, para. 2 of the Constitution of Georgia, deprivation of liberty or other restriction of personal liberty without a court decision is impermissible. Similarly, the Code of Criminal Procedure in its Article 8, part 6, states that only a court is entitled to convict an individual and impose a punishment. Any changes to a sentence or other court judgment may only be made in accordance with judicial procedure.[154] The Criminal Code provides for an exhaustive list of punishments out of which four types are related to the deprivation of liberty: restriction of liberty, strict confinement, deprivation of liberty for a specified term and life imprisonment. The Criminal Code defines each type of punishment, the circle of those to whom and on which ground the punishment may be applied and the minimum and maximum terms of each punishment with the exception of life imprisonment.

When a person is acquitted he/she is immediately released even if an appeal is lodged against his/her acquittal. Where a person is convicted and sentenced to imprisonment, if the period spent in detention prior to that conviction amounts to the length of the sentence imposed he/she is immediately released (Article 513, subparagraph g).

The Code of Administrative Violations provides for administrative detention, which may not exceed 30 days. Administrative detention may be imposed in exceptional cases for administrative violations defined in the Code. This penalty is imposed by a judge of a district (city) court, an administrative judge (Article 32, part 32).

The Disciplinary Statute of the Armed Forces of Georgia[155] provides for, *inter alia*, confinement to a guardhouse of up to ten days as a disciplinary punishment for disciplinary offences committed by servicemen.[156] The punishment is imposed by a commander and not by "a court". The only context, in which "a court" is referred to in the Statute, is "a court of honour". This is not an independent and impartial court within the meaning of Article 6

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[153] *Wemhoff* v. *Germany*, 27 June 1968, Series A no. 7.

[154] Other requirements of impartiality, independence and procedural guarantees under Article 6 are discussed below.

[155] Approved by the Ordinance of 2 September of 1994 of the Head of State of Georgia.

[156] See also below, as concerns compliance with Articles 7 of the Convention, Article 2 of Protocol No. 7.

adjudicating upon the guilt of an individual in the commission of a disciplinary offence and providing him/her with procedural guarantees. Instead, reference to the "court of honour" arises on the initiative of a commanding officer, with a view to condemning a serviceman, who has been found responsible for the commission of the disciplinary offence. Imposition of a disciplinary sanction and committal to the "court of honour" for the same offence is prohibited under the Statute. Thus, committal to the "court of honour" constitutes a disciplinary sanction *per se*. The Statute seems to fail to comply with in requirements of both the Constitution and the Convention.[157]

5.2. Article 5, para. 1.b

5.2.1. The European Convention and its Interpretation

Under Article 5, para. 1.b of the European Convention:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;"

Article 5, para. 1 (b) authorises the detention of a person who has failed to comply with a court order already made against him.

In its first judgment the European Court has held that Article 5, para. 1 (b) does not contemplate arrest or detention for the prevention of offences against public peace and public order or against the security of the State but for securing the execution of specific obligations imposed by law.[158] Article 5, para. 1 (b) does not extend to an obligation to comply with the law generally.[159] There must be an unfulfilled obligation incumbent on the person concerned and the arrest and detention must be for the purpose of securing its fulfilment and not punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5, para. 1 (b) ceases to exist.[160] A balance will be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty. The duration of detention may also be a relevant factor in drawing such a balance.[161] Examples of such obligations, which must be consistent in their nature with the Convention,[162] include an obligation to do military or substitute civilian service; to carry an identity card and submit to an identity check; to make a customs or tax return; or to live in a designated locality.

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[157] See, Conclusions and Recommendations, 5.11.a).
[158] *Lawless* v. *Ireland*, Series A no. 3, para. 9.
[159] *Ibid*.
[160] *Inter alia*, *Nowicka* v. *Poland,,* para. 60
[161] *McVeigh and Others* v. *the United Kingdom*, Applications nos. 8022/77, 8025/77, 8027/77.
[162] *Johansen* v. *Norway*, Application no. 10600/83, 44 DR 155 (1985).

5.2.2. Georgian Legislation

The Code of Criminal Procedure imposes an obligation on persons summoned in accordance with the procedure provided for by law, to appear in due time before an inquirer, an investigator, a prosecutor, or a judge in relation to criminal proceedings. In the case of non-appearance without a good reason, the participants to the proceedings[163] may be delivered by force, but this may only be effected on the basis of a reasoned resolution of the body conducting the proceedings and for the purpose of ensuring their participation in an investigative action or, where appropriate, in a court hearing (Article 173).

Under the Code of Criminal Procedure the delivery of persons under 14, pregnant women, and those seriously ill is, usually, inadmissible (Article 174, part 4).

Under Article 94, part 1 a witness is obliged to appear following a summons by an inquirer, investigator, prosecutor, or court; to impart correctly the information about the case and to answer the questions put to him/her; to reveal the factual circumstances of the case known to him/her; to keep order during the investigation and the court hearing; and not to leave the courtroom without the permission of the president of the court.

If a witness fails to appear without a good reason, he/she may be delivered by force in accordance with the procedure established by law.[164]

The Code of Criminal Procedure[165] provides for analogous provisions with regard to the victim.

The Code of Criminal Procedure provides for the placement of an accused or an untried person in a medical establishment by an investigator or a prosecutor, on the basis of a court order, if while arranging for or conducting either a forensic-medical or a forensic-psychiatric examination, there is a need for supervision as an in-patient of the person concerned (Article 177, part 1).

A person may be placed in a psychiatric establishment for the purpose of undergoing an examination while his/her mental state excludes imposition of criminal liability as an accused and bringing charges against him/her, provided that there are sufficient evidences that he/she has committed an unlawful action (*ibid*. part 2).

If a person's mental state prevents charging him/her or negates his/her criminal responsibility although there is sufficient evidence that she/he behaved unlawfully, he/she may be placed in a psychiatric establishment for the purpose of examination.

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[163] A suspect, an accused, an untried person, a victim, or a witness (Article 174, part 1).

[164] The legislation also provides for punitive measures for the failure to fulfill these obligations, which fall outside the scope of Article 5, para. 1(b). In particular, a pecuniary penalty may be imposed on a witness on account of non-appearance, failure to comply with the orders of the president of the court, breach of the order during the investigation or court hearing or contempt of court (Article 94, part 2); For giving false testimony or refusing to testify a witness may be held liable in accordance with Articles 370 and 371 of the Criminal Code of Georgia providing, *inter alia,* for punishments involving deprivation of liberty.

[165] And the Criminal Code.

5.3. Article 5, para. 1.

5.3.1. The European Convention and its Interpretation

Under Article 5, para. 1.c of the European Convention:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"

Under the case-law of the European Court, Article 5, para 1(c) requires "reasonable" not only *bona fide* suspicion and the Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.[166] If the reasonable suspicion that precipitated the arrest or detention ceases to exist, any further detention will be contrary to the Convention unless other grounds exist. Detention under Article 5, para 1(c) is intended to secure the presence of the accused at the trial, to avoid interference with the course of justice,[167] to prevent committing of a concrete and specific offence.[168] Detention on remand may also be applied in the context of the protection of public interest in certain cases,[169] e.g. in the context of the protection of environment or where the accused's being at large may cause a civil disturbance. Article 5, para 1(c) cannot justify detention where it is feared that the person concerned might evade other preventive measures, which do not constitute a deprivation of liberty.[170] There is no violation of the Convention if the person concerned is not actually brought before a judge provided he/she was released "promptly" or the investigation is discontinued as long as the deprivation of liberty was ordered in "good faith".[171]

The wording "or" separating the three categories listed clearly indicates that this enumeration is not cumulative and that it is sufficient if an arrested person falls under one of the above categories.[172] However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph.[173]

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[166] *Fox, Campbell and Hartley* v. *the United Kingdom*, Series A no. 182, para. 34.
[167] Article 3 of the Recommendation No. R (80) 11 of the Council of Europe's Committee of Ministers to Member States Concerning Custody Pending Trial.
[168] *Guzzardi* v. *Italy*, 1980, Series A no. 39.
[169] CM Recommendation, Article 4.
[170] *Ciulla* v. *Italy*, 1989, Series A no. 148, para. 40.
[171] *Brogan and Others* v. *the United Kingdom*, 1988, Series A no. 145-B, para. 53.
[172] Report of 11 October 1982, Series A no. 77. In its judgment of 22 May 1984, Series A no. 77, the Court did not dissociate itself from this interpretation.
[173] *Inter alia*, *X* v. *the United Kingdom*, 5 November 1981, paras. 36-39.

5.3.2. Georgian Legislation

Under Article 18, para. 3 of the Constitution of Georgia, an arrest of an individual shall be permissible by a specially authorised official in the cases determined by law. Everyone arrested or otherwise restricted in his/her liberty shall be brought before a competent court no later than 48 hours.

The Code of Criminal Procedure provides for arrest which is defined as a short deprivation of liberty applied where there is a sufficient ground to suspect that a person has committed an offence punishable by imprisonment for the purpose of prevention from his/her criminal activity, flight, hiding or from avoiding tampering with evidence (Article 141).

The discrepancy of terminology used in the Code of Criminal Procedure ("a sufficient ground to suspect", "criminal activity") and the Convention may give rise to practice potentially contrary to Article 5.[174]

The Code of Criminal Procedure provides for exhaustive grounds for arrest in Article 142, part 1. On 29 January 2003 the Constitutional Court declared as unconstitutional Article 142, part 2, which used to authorise arrest "on the basis of other data giving ground for the arrest" having considered the clause to be legalising arbitrariness.

A preventive measure is to be applied in order to prevent an accused from evading preliminary investigation and court trial, from his/her further criminal activity, or to secure the proper administration of justice and execution of punishment. A preventive measure is applied if the evidence in the file give sufficient ground for a suspicion that it is necessary to secure any of the aforementioned objectives (Article 151, parts 1-2).

Under Article 151, part 3, a ground for the application of detention as a preventive measure may be a reasoned presumption that the accused will flee from the court, will obstruct the establishment of the truth in a criminal case and/or if a grave or especially grave crime has been committed.

Pursuant to Article 153, when a court decides on a preventive measure and on the specific type of its application, the court must take into consideration the gravity of a charge, the accused's personality, his/her activity, state of health, the family and family situation and other circumstances. An inquiry officer, investigator, or prosecutor applying for such a measure must take the same matters into account.

Article 151 part 3, which provides that the fact that a grave or especially grave crime has been committed is in itself a sufficient ground for the application of detention as a preventive measure, seems to fail to comply with Article 5 1.c which does not stipulate such a ground. The aforementioned precondition makes preliminary detention the rule and not the exception, contrary to the case-law of the Strasbourg organs and Recommendation N R (80) 11.[175]

[174] See, Conclusions and Recommendations, 5.11.b).
[175] See, Conclusions and Recommendations, 5.11.c).

The Code of Criminal Procedure provides for an extension of the term of detention after the expiry of the initial term of 3 months. The extension by the judge for a month is allowed in the case of a failure to comply with a more lenient preventive measure applied after the expiry of the term of 3 months or if more grievous charges are brought against the accused (Article 162, part 2). This latter ground for extension seems to fail to comply with Article 5.1(c) on account of the same reasons.[176]

The Constitutional Court was also called upon to judge the constitutionality of the legal status of an arrested person under the Code of Criminal Procedure and his/her right to defence. Under Article 18, para. 5 of the Constitution "... an arrested or detained person may request for the assistance of a lawyer upon his/her arrest or detention. The request shall be met." There is no definition of the legal status of an arrested person in the Code of Criminal Procedure. The moment from which an arrested person was guaranteed procedural rights used to be when he/she was formally identified as a suspect by drawing up a resolution which was to be done within 12 hours from his/her delivery to the police station. The Constitutional Court declared those norms of the Code of Criminal Procedure governing a formal recognition of an arrested person as a suspect to be unconstitutional, thus enabling a person deprived of his/her liberty to exercise the right to defence upon his/her arrest as a suspect. The Constitutional Court declared as unconstitutional the provision limiting the duration of a suspect's and an accused's meeting with his/her lawyer to one hour. Likewise, following the Constitutional Court judgment, an arrested suspect is to be immediately notified of his right to remain silent, the right not to incriminate him/herself and the right to defence in accordance with Article 72, para. 3.

The right of a suspect to notify his/her relatives or other persons close to him/her of the place or location of detention under Article 73, part 1, subparagraph k.) has also become available to an arrested person from the moment of delivery to the police station.

A person arrested on suspicion must be interrogated in the police station or other body of inquiry within 24 hours from delivery. Interrogation must be conducted in accordance with the procedure provided by the Code of Criminal Procedure. Before the interrogation, the identity of the person concerned must be verified. An official conducting an interrogation is obliged to make sure that the person being interviewed has command of the language of the proceedings otherwise an interpreter is to be requested. Interrogation must not last more than 4 hours. It is permitted to interrogate an individual more than once a day with no less than one hour breaks. The overall duration of interrogation must not exceed 8 hours a day. An arrested person, upon his request, must be examined by a doctor and a formal report must be drawn up (Article 146, part 6).[177]

Under Recommendation 1245 of the Parliamentary Assembly on the Detention of Persons Pending Trial, minors may not be placed in custody unless it is absolutely necessary.

While minors are not specifically mentioned in Article 159, part 3 of the Code of Criminal Procedure, which enumerates those categories of individuals against whom detention as a preventive measure is not as a rule to be applied, under Article 652, detention must be applied against a minor only where there is a ground as provided by Article 151, the minor

[176] See, Conclusions and Recommendations, 5.11.d).
[177] See, also with regard to compatibility with Article 3.

is charged with an offence punishable by imprisonment and where another preventive measure has failed to ensure his/her proper conduct, except for cases in which the minor has already breached another more lenient preventive measure.[178]

5.4. Article 5, para. 1.d

5.4.1. The European Convention and its Interpretation

Under Article 5, para. 1.d of the European Convention:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;"

As the European Court has held in the case of *X.* v. *Switzerland* the term "minor" has an autonomous Convention meaning. All persons under 18 can be considered to be minors. Resolution (72) 29 of the Committee of Ministers of the Council of Europe recommends fixing this age at eighteen.

5.4.2. Georgian Legislation

With regard to the minors who have committed a less grievous offence for the first time the Criminal Code provides for discharge from criminal responsibility by the court if the latter is satisfied that rehabilitation of the offender is expedient by means of application of coercive measures of an instructional character (Article 90). Such a measure is, *inter alia*, the placement of the minor in a specialised instructional or medical-instructional establishment. The term of placement in such an establishment may not exceed the maximum term prescribed for the offence concerned.

Under the Law on Education[179] special instructional-educational establishments are created for those pupils showing unacceptable deviant behaviour to society. In such establishments, special pedagogical methods are applied to support the pupils' education and instruction, workmanship and/or basic professional training, and conditions favourable for self-development are created. Pupils may be sent to the aforementioned establishments only following a court judgment after having attained the age of 11 (Article 41, para. 3).

Article 651 of the Code of Criminal Procedure provides for the placement of an accused minor in a special closed establishment for juveniles, where due to their living and education conditions it is impossible to leave them in their previous place of residence. The placement must be based on a court decision.

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[178] See, Conclusions and Recommendations, 5.11.e).
[179] 27 June 1997.

The Code of Criminal Procedure provides for committing of a minor into the care of parents**,** a guardian, a trustee or a closed establishment for juveniles, with the purpose that any of these aforementioned commit themselves to a written undertaking to ensure the appearance of the minor being charged with the commission of an offence before an investigator, or, where appropriate, a prosecutor, or a court, and his/her appropriate conduct (Article 171, part 1). This measure constitutes a special category of preventive measures provided for by the Code of Criminal Procedure (Article 152, part 1).

5.5. Article 5, para. 1.e

5.5.1. The European Convention and its Interpretation

Under Article 5, para. 1.e of the European Convention:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;"

In *Winterwerp* v. *Netherlands*[180] and in a series of subsequent cases the European Court laid down a number of requirements to be satisfied to consider detention of persons of unsound mind lawful within the meaning of the Convention, including:

a) The mental disorder must be reliably established by objective medical examination.
b) The nature or degree of the disorder must be sufficiently extreme to justify the detention.
c) The detention should only last as long as the medical disorder (and its required severity) persists.
d) If the detention is potentially indefinite, there must be a system of periodic reviews by a tribunal that has power to discharge the patient.
e) The detention must be in a hospital, clinic or other appropriate institution authorised for the detention of such persons.

5.5.2. Georgian Legislation

5.5.2.1. Infectious Diseases

Under Article 30 of the Rules on the Regime of the State Border and Protection,[181] in the case of danger of spreading dangerous infectious diseases, movement can temporarily be stopped (restricted) or a quarantine announced on the State border in accordance with the decision of the President of Georgia.

[180] *Winterwerp* v. *Netherlands,* 24 October 1979, Series A no. 33.
[181] Approved by the Ordinance of the President of Georgia of 20 December 1999.

Under Article 166, part 1, of the Code of Criminal Procedure, home arrest as a preventive measure may be applied to a person whose overall isolation is not necessary and, *inter alia*, refers to a person suffering from an infectious disease.

5.5.2.2. Persons of Unsound Mind

In accordance with the Criminal Code of Georgia a coercive measure of a medical character may be applied by a court, if

a) an individual committed an unlawful act defined by the Code in a state of *non compos mentis*;
b) an offence is committed in a state of diminished responsibility;
c) after the commission of a crime an offender fell sick with a mental disease which makes it impossible to impose or execute the punishment;

The Criminal Code differentiates between four types of coercive measures of a medical character: psychiatric treatment as an out-patient, placement in a psychiatric hospital under normal supervision; placement in a psychiatric hospital under advanced supervision; and placement in a psychiatric hospital under strict supervision.

The Court decides on the application of a coercive measure of a medical character on the basis of the conclusion of a doctor-psychiatrists' commission (Article 107). A coercive measure of a medical character is only applied where the mental state of the person concerned threatens him/herself or carries other substantial danger (Article 101, part 2). The person against whom the coercive measure of a medical character is applied must be examined by the doctor-psychiatrists' commission within 6 months if there is a ground for lodging a submission with the court for discontinuation or alteration of the measure. If there is no such ground, the medical establishment in charge of the treatment must submit to the court a conclusion concerning continuation of coercive treatment. Such continuation may take place on the first occasion after the expiry of six month from the moment of execution of the treatment and subsequently annually (Article 105).[182]

The Law on Psychiatric Assistance, which was adopted before the enactment of the Criminal Code on 21 March 1995, secures the medical and social assistance of the mentally ill, protects their rights and interests and society from socially dangerous actions of those suffering from mental diseases. It provides for the rights and protection guarantees for such persons, *inter alia*, for the right to legal assistance and the right to file a complaint or an application with a court or other bodies (Article 3 para. 2).

The Law provides for assistance to be provided to in-patients when it is impossible to administer medical assistance to them as out-patients. Assistance to be provided to in-

[182] The CPT report refers to re-examination at least once in every 6 months after the first examination at para 168. There appears no legal basis for this statement. Article 10 of the Law on Psychiatric Assistance, which governs forced treatment in psychiatric stationary establishment, stipulates that the articles of the Criminal Code apply to the given type of treatment.

patients implies the placement into a psychiatric establishment. The patient has the right, *inter alia*, to meet his/her lawyer in private (Article 7).

Voluntary treatment is administered in a psychiatric hospital of ordinary regime or in another open establishment. The doctors' commission must examine the patient within 48 hours and reach the final decision. If the voluntary patient declines to continue treatment, but the commission concludes that the mental condition is aggravated so that it meets the criteria of urgent treatment as an in-patient, the treatment must be continued regardless of the patient's or his/her parents' or a guardian's consent (Article 8).

Article 9 sets out the criteria for urgent assistance to in-patients. In such cases the commission must inspect the mental state of the patient within 48 hours and reach a final decision about the continuation of treatment as an in-patient. The commission must notify the prosecutor within 48 hours in case it decides on the continuation of the treatment without the consent of the patient (Article 9).

The Law provides for the compulsory treatment in psychiatric establishments. This may be ordered by a court on the basis of a conclusion adopted by the forensic-psychiatric commission.[183] The Court decides about discontinuation of treatment or replacement of the regime on the basis of the conclusion adopted by the commission. Compulsory medical treatment of those having committed an unlawful action while in the state of *non compos mentis*, must be conducted in accordance with the relevant articles of the Criminal Code (Article 10).[184]

5.5.2.3. Drug Addicts and Alcoholics

Under the Criminal Code of Georgia a court may apply coercive measures of a medical character if an individual needs recovery from alcoholism or drug addiction (Article 101, part 1). Placement in a specialised narcological-prophylactic establishment under advanced surveillance constitutes the coercive measure to be applied against such individuals. In contrast with the position under Article 101, which requires a connection between the state of mind of the person concerned and their unlawful act, persons affected by alcohol or drug-addiction have no similar protection.

5.5.2.4. Vagrants

Vagrancy is not an offence under Georgian legislation. In accordance with Article 234 of the Criminal Code of the Soviet Socialist Republic of Georgia,[185] vagrancy used to be punishable up to two years' imprisonment. The Article was deleted by the Decree of the State Council of Georgia on 3 August 1992.

5.6. Article 5, para. 1.f

[183] The Law refers to Articles 58 and 59 of the Criminal Code which are the relevant articles of the previous Criminal Code in force until 1 June 2000. This Article 101 of the Present Criminal Code.
[184] See, Conclusions and Recommendations, 5.11.f).
[185] Adopted in 1960 and in force with changes and amendments until 1 June 2000.

5.6.1. The European Convention and its Interpretation

Under Article 5, para. 1.f of the European Convention:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> f. the lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

5.6.2. Georgian Legislation

Article 17, para. 2 of the Law on the Legal Status of Foreigners (3 June 1993) reads as follows:

> "An arrest or detention of a foreigner being in Georgia shall be impermissible save in the cases, when:
>
> a) he or she is trying to cross the state border of Georgia;
> b) he or she is illegally in Georgia;
> c) he or she has committed a crime or other violation, on account of which arrest or detention may be ordered;
> d) a sentence of conviction has been rendered against him/her and he/she has been sentenced to deprivation of liberty by a court, where he/she has fled from the place of deprivation of liberty and evades serving the punishment."

The diplomatic or consular representation of the respective State must be notified about the arrest or detention of the foreigner by the prosecutor's office within 48 hours and in case of arrest or detention of a stateless person temporarily residing in Georgia, the diplomatic or consular representation of the State where he/she permanently resides must be notified (Article 17, para. 3).

Article 24, para. 2 provides for the obligation of a foreigner to produce the required papers to the relevant bodies. Article 25, para. 2 allows the arrest of a foreigner permanently residing in Georgia by the bodies of border and migration control when they are leaving the country and his/her transfer to the law-enforcement bodies of Georgia.

Under Article 66, part 2, subparagraph d) of the Code of Criminal Procedure the Department of Protection of the State Border is a body of inquiry with regard to cases of transgression of the State border and the boundary regime. Under Article 35, para. 1, subparagraph i) of the Law on the State Border of Georgia (17 July 1998) the Department of Protection of the State Border is authorised to uncover and arrest people who violate the State border. Under para. 1, subparagraph u) of the same article the Department is authorised to arrest and hold in a place of temporary detention those who have violated the legislation of Georgia entailing administrative or criminal responsibility.

Under Article 4, para. 6 of the Rule on the Regime of the State Border and Border Protection[186] foreigners who do not have passports and entry visas are declined the right to entry and are to be handed to the representatives of the air company to be returned to the country from which the aircraft arrived.

While protecting the State border, the frontier forces of the Department of Protection of the State Border are guided by the legislation of Georgia and by international treaties to which Georgia is a party (Article 32, para. 3 of the Law on the State Border of Georgia).

Unlawful entry into the frontier zone of Georgia and violation of the rules of residence and registration are prohibited by Article 190 of the Code of Administrative Violations. Article 190^1 prohibits unlawful crossing of State border, but adds that this Article does not apply to a foreign national or a stateless person applying to the authorities for asylum in accordance with the Constitution of Georgia provided there are no other elements of crime in his/her action. Article 190^2 prohibits violation of the regime in the border areas.

Pursuant to Article 246, subparagraph b) an administrative arrest of an administrative perpetrator may be affected by frontier forces in cases of violations of Articles 190, 190^1, or 190^2. There is no criminal responsibility provided for by the Criminal Code of Georgia for border offences.

An individual who has violated the boundary regime in border areas may be arrested for the purpose of drawing up a report and kept for up to 3 hours and if need be up to 3 days for the purpose of identification and establishing the circumstances of the violation. A prosecutor must be notified in writing about the arrest within 24 hours from arrest. The prosecutor is entitled to extend the period of detention to up to 10 days if the violator does not have an identification card (Article 247, part 2). The Article does not provide for any judicial control of the arrest or detention. The provision seems to be in contravention of both Article 18, paras. 2 and 5 of the Constitution and Articles 5.1.(f) and 5, para. 4 of the Convention.[187]

5.7. Article 5, para. 2

5.7.1. The European Convention and its Interpretation

Under Article 5, para. 2 of the European Convention:

> "2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

Paragraph 2 sets out a specific right that is guaranteed to all persons deprived of their liberty. The restrictive reference to arrest only is to be understood as emphasising the initial phase of any deprivation of liberty.

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[186] Approved by the Ordinance of the President of Georgia of 20 December 1999.
[187] See, Conclusions and Recommendations, 5.11.g).

5.7.2. Georgian Legislation

Article 18, para. 5 of the Constitution of Georgia guarantees the right of an arrested or detained person to be informed about his/her rights and the grounds for the restriction of his/her liberty upon his/her arrest or detention.

Likewise under Article 12 para. 2 of the Code of Criminal Procedure "[a]n arrested or detained person shall immediately be notified about the reason, or ground of his/her arrest or detention and of the offence, of the commission of which he is suspected or with which he/she is charged."

Under Article 17 para 3. of the Law on the Legal Status of Foreigners, in the case of an arrest of a foreigner, he/she shall immediately be notified about the reasons of the arrest and the charges brought in a language understandable to him/her, and at the same time he/she is to be given an explanation of his/her procedural rights and obligations.

5.8. Article 5, para. 3

5.8.1. The European Convention and its Interpretation

Under Article 5, para. 3 of the European Convention:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

5.8.1.1. To Be Brought before a Judge

The guarantee enshrined in Article 5, para. 3 is the most important in those countries where there is a potential danger of police brutality or torture. It is one of the safeguards within the whole system established by Article 5, which aims at protecting an individual against arbitrary interferences by the State with his/her liberty. The person concerned must physically be brought before a judge.[188] Under the case-law developed with regard to Article 5, para. 3, during the first interview the representative of the judiciary will have to make a *prima facie* evaluation of whether the conditions for detention under para 1(c) and domestic law are fulfilled. The circumstances militating for or against the detention must be reviewed and it must be decided by reference to legal criteria, whether there are reasons to justify detention.[189] The judicial authority must have the power to release.[190] The other officer authorised by law to exercise judicial power does not mean a public prosecutor[191]

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[188] *Schiesser* v. *Switzerland*, 1979, Series A no. 34, para. 31.
[189] *Ibid*.
[190] *IRE* v. *the United Kingdom*, Series A no. 25, para. 199.
[191] *Huber* v. *Switzerland,,* 1997, Series A no. 188, para. 26.

while a military court satisfied the requirements of Article 5, para. 3.[192] There is no fixed time limit under the notion "promptly". The basic idea is that a person must be brought before judge without any undue delay. Paragraph 3 sets out specific safeguards which only apply to one specific exception, namely that of para. 1(c).

5.8.1.2. The Right to Trial within a Reasonable Time

The right to trial within a reasonable time inevitably runs counter to the interests of effective investigation of crime. The guarantee overlaps with that in Article 6, para. 1, which applies to all accused persons whether in detention or not. The guarantee in Article 5, para. 3 requires that in respect of a detained person the authorities show "special diligence in the conduct of the proceedings".[193]

Article 5 para. 3 does not set any maximum length of pre-trial detention. Regarding the right to trial within a reasonable time the European Court pronounced the following on the *Stögmüller* v. *Austria* case:

"It is admitted on all sides that it is not feasible to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence".[194]

Under the Court's case-law established since then, in deciding on pre-trial detention or its continuation, the national judicial authorities must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against a departure from the rule in Article 5 that, if possible, a person should be released pending trial; and must set them out in their decisions on the applications for release. The persistence of reasonable suspicion that the person arrested has committed an offence is a *conditio sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. There must be other grounds to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the national authorities are required to display "special diligence" in the conduct of the proceedings.[195] There are three factors of crucial importance: complexity of the case, the conduct of the detainee and the efficiency of the authorities. The likelihood that the defendant will receive a custodial sentence cannot be a ground justifying his/her continued detention.

In the *Toth* v. *Austria* case a period of two years and a month was found to exceed the reasonable time limit.[196]

In *Wemhoff* v. *Germany*[197] the Court has held that Article 5, para. 3, of the Convention covers the period from the arrest of the accused on suspicion of having committed a criminal offence to his final acquittal or conviction by the trial court.

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[192] *D*. v. *Netherlands,* 42 DR 242.
[193] Among many other authorities*, Herczegfalvy* v. *Austria, 1992,* Series A no. 244, para. 71.
[194] Judgment of 1969, Series A no. 9.
[195] Among many other authorities *Kudla* v. *Poland*, [GC], no. 30210/96, para. 164, ECHR 2000-XI.
[196] 12 December 1991, Series A no. 224.
[197] 27 June 1968, Series A no. 7.

5.8.1.3. Bail

Article 5, para. 3 guarantees the right to bail and contains a strong presumption in favour of bail pending trial. The presumption grows stronger if the trial is delayed. The refusal of bail may only be justified under one of the following grounds identified by the Court: danger of flight, interference with the course of justice, prevention of crime and preservation of public order.

Bail aims at ensuring the attendance of an accused at the hearing and accordingly its amount must also correspond to this aim. In *Neumeister* v. *Austria,*[198] where the domestic authorities calculated the amount of bail solely in relation to the loss imputed to the applicant, the Court found this contrary to Article 5, para. 3, holding that the guarantee of bail needs to ensure the presence of the person accused to the hearing and not the reparation of the loss caused by the accused. The guarantee asked for release must not impose on the accused a burden heavier than required for a reasonable degree of security. The nature and the amount of the security measure designated to ensure the accused's attendance at the trial must be related to and follow from the grounds which justified pre-trial detention. While a financial guarantee may be required to this end,[199] its amount must be calculated by reference to the accused, his or her assets and the relationship with the person providing the security. The accused must make available information related to his or her assets while the domestic authorities are under a duty to carefully assess this information for a proper assessment of the security to be calculated. The setting of an amount which is more than sufficient to reach the purpose of ensuring a "sufficient deterrent to dispel any wish on the defendant's part to abscond", would violate the right to bail.[200] Guarantees other than monetary, such as the surrender of a passport, can also be required to the same end of ensuring the accused's presence at the trial.[201]

5.8.2. Georgian Legislation

5.8.2.1. To Be Brought before a Judge

The only relevant provision of the Constitution in the context of Article 5, para. 3 is defined in Article 18, para. 5, which, out of the three components of the Convention provision, refers to judicial control of arrest and detention: "Everyone arrested or otherwise restricted in his/her liberty shall be brought before a competent court not later than 48 hours. If, within the next 24 hours, the court fails to adjudicate upon the detention or another type of restriction of liberty, the individual shall immediately be released."

Further to the constitutional provision, under the Code of Criminal Procedure,[202] an investigator or, where appropriate, a prosecutor, having brought charges against an

[198] 7 May 1974, Series A no. 17.
[199] *Wemhoff* v. *Federal Republic of Germany,* 27, June 1968, Series A no. 7.
[200] *Neumeister* v. *Austria,* 7 May 1974, Series A no. 17.
[201] *Stögmuller* v. *Austria,* 10 November 1969 , Series A no. 9.
[202] Article 160, para. 1.

interrogated person, is entitled to file with a judge a petition concerning the application of detention as a preventive measure. The accused may be kept in detention for no more than 24 hours until the judge reaches a decision.

As regards procedural guarantees in the proceedings, according to Article 140, part 6, an accused has the right to attend the hearing on an application of a preventive measure against him/her. Under Article 146, part 7, of the Code of Criminal Procedure, "the period of detention until the bringing of a charge shall not exceed 48 hours from the moment of the delivery of the arrested person to the body of inquiry. If within the next 24 hours a court fails to take a decision on the application of detention or another type of preventive measure, the arrested shall immediately be released".

There is no explicit reference to the obligation of actually bringing an accused before a judge in either articles of the Code of Criminal Procedure above. Under Article 160 (which defines the procedure for the application of a preventive measure) the accused must be brought by the administration of the place of arrest before the judge following a written order of an investigator or, where appropriate, of a prosecutor. It can be deducted from the wording of the above provisions that an accused is to be brought before a judge, when he/she wishes so and Article 160 sets out the procedure for this. According to the information gathered during the CPT visit to Georgia from 6 to 18 May 2001,[203] "the judge usually took his decision in the absence of the person concerned."[204]

Under Article 160, part 2, a petition on the application of detention as a preventive measure may be filed with a judge also in the case where a person has absconded, if the evidence against the latter have been gathered and a resolution formally designating the person as an accused has been rendered. In such a case, the accused must be brought before the judge having issued the order on detention within 48 hours after delivery to the place of investigation or, in case of absence of the judge, before another judge of the court of the venue of the investigation. The bringing of the person before the court may be delayed in case of force-majeure for no more than 15 days, and if an accused is brought from another country for no more than 48 hours after his/her delivery to the place of investigation.

Article 160, part 2, and the Code of Criminal Procedure in general, remain silent regarding the obligations to be fulfilled by the judge while reaching decision on the application of a preventive measure. Under part 2, the judge listens to the explanations of an arrested accused and his/her lawyer and to those of an investigator and a prosecutor. Meanwhile, Article 146, part 8, entitles the official in charge of the inquiry or, where appropriate, the investigator, to conduct investigative actions with a view to, *inter alia*, examining the legality of the arrest, throughout the period of initial detention. Otherwise the Code of Criminal Procedure meets the requirements about the competence of the judge to release an arrested person.[205]

The Constitution and the Code of Criminal Procedure are in compliance with the requirement of "promptness" in that that they provide for a short time-limit. But, as usually happens in practice, the prosecution tends to put off bringing an arrested person before the

[203] Report to the Georgian Government on the visit to Georgia carried out by the CPT, para. 28.
[204] See, Conclusions and Recommendations, 5.11.h).
[205] See, Conclusions and Recommendations, 5.11.i).

judge until the last possible moment (and according to the CPT report this delay often exceeds even the fixed terms and may amount to seven days in the interests of the investigation[206]). The actual wording of both the Constitution and the Code of Criminal Procedure leaves room for such undue delay.[207]

5.8.2.2. The Right to Trial within a Reasonable Time

The right to trial within a reasonable time within the meaning of the Article 5, para. 3 and the case-law thereon is not stipulated in either the Constitution or the Code of Criminal Procedure, although both of them provide for the maximum terms of deprivation of liberty.

Under Article 18, para. 6 "the period of initial detention of a suspect in the commission of a crime shall not exceed 72 hours and the period of detention on remand of an accused shall not exceed 9 months".

The Code of Criminal Procedure reiterates the maximum periods provided for by the Constitution concerning arrest and detention (Article 12, part 3; Article 146, part 7; Article 152, part 4) and also covers custody pending trial Article 162, parts 8-9]).[208]

Under the Code of Criminal Procedure, the period of deprivation of liberty starts from the delivery of a suspect to the police station or other body of inquiry, or if there has been no such delivery, from the moment of the execution of an order concerning the application of detention (Article 162, part 1).

The initial period of detention under investigation is fixed at 3 months from the moment of a person's arrest or detention. The running of the term terminates on the day when the prosecutor in charge of the case commits the case-file to the court (Article 162, part 2).

The above provision does not allow a judge applying detention as a preventive measure to specify a reasonable period of deprivation of liberty in the light of the specific circumstances of each particular case. The judge is obliged to automatically apply the fixed period of three months. The same applies to the subsequent extension of the term of detention by the judge for a fixed term of a month in the case of the accused's failure to comply with a more lenient preventive measure applied after the expiry of the term of 3 months, or when more serious charges are brought against the accused.

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[206] CPT report, para. 18

[207] See, Conclusions and Recommendations, 5.11.j).

[208] Constitutionality of Article 162 parts 8-9 has been questioned before the Constitutional Court by the Public Defender. The applicant claimed that given the Constitution provides only for the term of detention i.e. 9 months and states nothing in relation to the custody pending trial, the Code of Criminal Procedure is in breach of the Constitution by means of introduction of a notion of "an untried person" and providing for the custody pending trial, Article 162, parts 8-9 setting the terms thereof. The Constitutional Court has declined to uphold the constitutional claim stating that the procedural status of an accused and that of an untried are different and while the Constitution refers only to the former and remains silent about the latter, it does not mean that the Code of Criminal Procedure introducing a procedural notion not mentioned in the Constitution is in breach of it (judgment of the Constitutional Court of 29 January 2003).

A further extension is permitted for another month if the case is returned for additional investigation (Article 162, part 3).

Extension of up to 6 months can be ordered by the judge at the request of the investigator and with the consent of the prosecutor "due to the impossibility of completing the investigation on account of the complexity of the case" (*ibid*.).

Subsequent extension of detention for up to 8 months can be ordered by the judge at the request of the investigator and with the consent of the prosecutor "due to the impossibility of completing the investigation on account of the special complexity of the case" (*ibid*.).

In an extraordinary case, as an exception, at the request of the investigator and with the consent of the Prosecutor General, a judge of the Board of Criminal Cases of the Supreme Court of Georgia is entitled to extend the term of detention up to 9 months. After the expiry of this term the accused must immediately be released (*ibid*.).

The maximum period for which an untried person's detention pending trial may be ordered by a district (town) court, from committal to the court for trial until the rendering of a sentence, must not exceed 12 months. In exceptional cases, this term may be extended by a further 6 months, at the request of the court hearing the case, by the President of the Supreme Court of Georgia. Further extension of the detention pending trial is inadmissible (Article 162, part 8).

The total term of detention of an untried person pending trial by the Supreme Court of Georgia, the Higher Courts of the Autonomous Republics of Abkhazia and Ajara and the Regional Courts of Tbilisi and Kutaisi as first instance courts, and during appeal and cassation proceedings until the entry into force of the judgment must not exceed 24 months. In special circumstances, at the request of the court hearing the case; the terms may be extended for another 6 months by the President of the Supreme Court of Georgia. Further extension of the detention pending trial is inadmissible (Article 162, part 9).

It is clear from the articles above that the interests of investigation prevail over the presumption of innocence, in that departure from that presumption is justified on account of the impossibility to complete an investigation due to either the complexity or special complexity of the case. It is no remedy of the situation that the rank of the judge authorised under the Code of Criminal Procedure to extend the detention and that of the prosecutor to give consent to an investigator's submission on extension is gradually increasing under the articles above, which end up with the President of the Supreme Court and the Prosecutor General. The Code of Criminal Procedure provides for fixed time-limits which are to be applied in different circumstances on an equal basis. Moreover, in decisions about extensions of detention the judges still refer to the existence of charges concerning the commission of a grievous crime which served as a ground at the time of the initial application of detention, and other grounds which are though in compliance with Article 5, para. 1(c), but which can no longer justify further detention under Article 5, para. 3.

Article 5, para. 3, requires an evaluation of the appropriateness of the duration of a detention. A fixed period of 3 months or subsequent fixed terms fails to comply with this requirement of Article 5, para. 3.

The Code of Criminal Procedure fails to provide for any effective guarantees for the carrying out of the proceedings in an expeditious manner. The only safeguard it contains is the stipulation that the causes for the delay in an investigation be set out in the petition concerning the extension of the term of the detention, supported by the prosecutor and filed with the judge (Article 163, part 1). There is no further elaboration as to the ensuing measures to be taken to prevent further delay.

At other points the Code of Criminal Procedure provides for measures to expedite the proceedings at the expense of the rights of the detainee. In particular, the prosecution is entitled to refuse the replacement of a defence lawyer if the defendant intends to delay the proceedings thereby (Article 78, part 6; Article 82, part 7). Under Article 406, part 2, if a participant to the proceedings while studying the case-file delays the proceedings on purpose, the prosecution is entitled to set reasonable and sufficient terms for the study of the case-file.

The issue of reasonable time proceedings has been brought before the Constitutional Court of Georgia by the Public Defender. The applicant alleged the unconstitutionality of Article 162, part 7, and Article 406, part 4, of the Code of Criminal Procedure, under which the period of study of the case-file by an accused and his/her defence counsel is not included within the term of preliminary investigation and detention defined by law. The constitutional claim has been admitted for the consideration on the merits.

Moreover, according to the practice of the bodies of investigation, in cases, involving more than one accused, the beginning of the study of the case-file by one accused stays the running of the term of detention with regard to other co-accused persons, even though they have not started the study of the case-file yet. This practice is justified on the grounds that such cases are usually voluminous and it is impossible to arrange for the simultaneous study of the case-file by all accused persons involved in the case.[209]

5.8.2.3. Bail

The Code of Criminal Procedure provides for bail and other guarantees to appear before the body of investigation or the court hearing the case or to ensure a defendant's proper conduct. Bail (as well as other guarantees) is referred to in the Code of Criminal Procedure as a preventive measure. The amount of bail is fixed taking into account the gravity of the crime committed and the financial situation of the person (Article 168).

The Code of Criminal Procedure does not share the strong presumption of the Convention and the European Court of Human Rights in favour of bail and other guarantees to appear for trial. The norms governing the application of a preventive measure and defining the purpose and ground for such an application are common to the stage of preliminary investigation and committal of an accused for trial. Under Article 417, part 3, at the stage of committal for trial, a judge (a court) decides the issue of a preventive measure in accordance with the procedure established by the Code. A preventive measure is applied with the purpose that an accused do not avoid court, to prevent him/her from further criminal activity, to ensure that he/she does not obstruct establishing the truth in a criminal

[209] See, Conclusions and Recommendations, 5.11.k).

case, or to secure the execution of a judgment. A ground for the application of detention as a preventive measure may be a reasonable presumption that the accused will flee from the court, will obstruct establishing the truth in a criminal case and/or if a grave or especially grave crime has been committed (Article 151). The Code of Criminal Procedure provides for replacement or annulment of a preventive measure by the judiciary in Article 155, part 2, but only on condition that the ground for the application of the preventive measure no longer exists. Thus, on the ground of existence of a grave or especially grave crime a person may further be kept in detention pending trial despite evidence militating for or against his connection with the crime. Petitions of the defence concerning the replacement or annulment of detention as a preventive measure are automatically rejected in practice, when the offence allegedly committed is qualified as a grave or especially grave crime under the Criminal Code.[210]

5.9. Article 5, para. 4

5.9.1. The European Convention and its Interpretation

Under Article 5, para. 4 of the European Convention:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The right to habeas corpus must be granted even in a case of lawful detention. The right may only be invoked retrospectively to verify the lawfulness of a deprivation of liberty in relation to the complaint that the decision concerning release was not taken "speedily".[211] The right to apply for judicial control of the lawfulness of any deprivation of liberty arises instantaneously with the arrest and no delay can be justified.[212] In cases of detention on remand under para 1(c), para. 4 becomes operative before an arrested person has been brought before a judge or other officer in compliance with para. 3 of which para. 4 is fully independent, and it may be of particular practical importance when the requirements of para. 3 are not complied with. Paragraph 4 sets out a specific right that is guaranteed to all persons deprived of their liberty with the exception of Article 5, para. 1(a) where the review required is incorporated in the judgment of the court at the end of judicial proceedings.[213] This latter case has its exception where there is an ensuing period of detention in which new issues affecting the lawfulness of the detention might arise and this period is no longer covered by the initial conviction.[214] Article 5, para. 4, refers to autonomous Convention terms: "speedily", "lawfulness", "court"[215] and "at reasonable intervals".[216]

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[210] See, Conclusions and Recommendations, 5.11.l).

[211] Report of 11 October 1983, *Zamir*, DR 40. *The Van Der Leer* case, Series A no. 170, para. 35.

[212] The Court found a violation of para. 4 due to the fact that Dutch conscientious objectors had to wait six, seven and thirteen days for referral before they could challenge the legality of their detention before a court.

[213] *Engel* v. *Netherlands*, 1976, Series A no. 22.

[214] For example, the placing of a recidivist at the disposal of the government; the continuing detention of a person sentenced to an "indeterminate" or discretionary life sentence, which is not the case in Georgia.

[215] The term denotes the bodies exhibiting not only common fundamental features of which the most important is independence of the executive and of the parties to the case, hut also guarantees of a judicial procedure and the body in question must have the competence to decide the "lawfulness" of the detention and to order release if it is unlawful.

5.9.2. Georgian Legislation

The Constitution does not guarantee any right to habeas corpus proceedings. Article 18 which stipulates the rights of an individual in relation to his/her liberty and security remains silent about the right to apply for review of either arrest or detention. Article 42, which refers to due process rights, provides for a general principle that "[e]veryone has the right to apply to court for the protection of his/her rights and freedoms", but this can hardly make up for the absence of a specific habeas corpus guarantee.

Likewise the Code of Criminal Procedure does not provide for any procedure whereby an arrested person or his/her lawyer[217] can make an urgent application for release from custody on the basis that a deprivation of liberty is unlawful.

As regards detention, pursuant to the Code of Criminal Procedure a first instance court may apply, replace or annul the preventive measure on the basis of a petition of a party. Complaints concerning allegedly unlawful actions involving a restriction of constitutional rights, and concerning the application of coercive measures by an inquirer, an investigator, or a prosecutor, or concerning petitions rejected by the aforementioned officials and bodies, are to be considered by a court[218] of the venue of the inquiry or investigation (Article 48, part 5).

The Code of Criminal Procedure provides for the right of parties to the proceeding and, accordingly, *inter alia*, to the defence, to file a petition requesting commutation of a preventive measure applied to the accused to a milder one or annulment of this measure. The petition must be filed before the announcement of the conclusion of the investigation with the court, a judge of which has issued the order of application of the preventive measure, or with a court of the venue of the investigation. The parties are entitled to apply to a judge concerning commutation of the preventive measure applied against the accused to a milder one or annulment of this measure only if there is a new substantial circumstance, which was not known to the judge while issuing the order and which also makes it necessary to review the reasonableness of the preventive measure applied. It is impermissible to lodge the petition repeatedly on the same ground (Article 140, part 17).

Whereas Article 140, in its parts 1-16, provides for an elaborated procedure for the consideration of petitions lodged with the court by an investigator or a prosecutor concerning the application or replacement of preventive measures, etc (and the Article itself is entitled "a judicial procedure of application of criminal procedural coercive measures"), there is no procedure defined for the consideration of the petitions lodged under part 17.

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[216] Under the Court's established case-law, the nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration, because its raison d'être is essentially related to the requirements of an investigation which is to be conducted with expedition (e.g. in the *Bazicheri* case an interval of one month was not considered unreasonable).

[217] Since the enforcement of the Constitutional Court judgment of 29 January 2003, a person has the right to a defence counsel from the moment of his/her arrest - that is the delivery to the place of arrest.

[218] Compatibility with the requirements of Article 6 is discussed bellow.

Under part 2 of Article 160, which governs the procedure for the application of detention as a preventive measure, after the measure is applied, the detained accused and his/her lawyer are entitled to challenge the detention before a superior court, in accordance with the procedure established by the Code of Criminal Procedure. They are also entitled to apply to the judge, who imposed detention, to request commutation of detention to a milder preventive measure. The application must be considered by the judge in accordance with the procedure defined in Article 140. Even if by virtue of Article 160, part 2, parts 1-16 of Article 140 may be extended to the procedure under part 17, this does not provide the defence with the procedural guarantees required by Article 5, para 4,[219] given that parts 1-16 are drafted as to allow for the prosecution, but not the defence, to apply to the court about the terms of the application of a preventive measure or its replacement.

Pursuant to Article 157, a preventive measure may be applied, replaced or annulled at the stage of an accused's committal to a court by a reasoned resolution (decision) of a judge (a court). Article 417, which governs committal of an accused to a court for trial, provides that a judge at an administrative hearing, *inter alia*, decides the issue of a preventive measure in accordance with the procedure provided for by the Code of Criminal Procedure.

There is no automatic periodic review of a judicial character provided for by the Code of Criminal Procedure. There is no reference in the Code of Criminal Procedure to the starting moment from which exactly the defence may request for commutation or annulment of the detention applied as a preventive measure, nor to at what intervals this right may be exercised - notwithstanding that it may be concluded from Article 160 that this can be done after the application of the preventive measure and according to Article 140 before the announcement of the conclusion of investigation. It may be concluded from the wording of Article 140, part 17, that the burden of proof that there are new circumstances which necessitates the review of detention is on the defence, while the habeas corpus proceedings imply that it suffices for the person applying for a review to establish a prima facie case for release and that the burden of proof will then be on the respondent authorities to justify the legality of the decision to detain.[220]

There is no provision in Georgian legislation to secure the right to habeas corpus proceedings for those arrested or detained in alleged compliance with the requirements of Article 5, para 1.[221]

5.10. Article 5, para. 5

5.10.1. The European Convention and its Interpretation

Under Article 5, para. 2 of the European Convention:

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[219] See, *inter alia*, *Lamy* v. *Belgium*, 1989, Series A no. 151.

[220] As was mentioned above, the commission of a grave or especially grave crime is a sufficient ground for the application of detention as a preventive measure under Article 151, part 3, and, additionally, pursuant to Article 155 part 3, the preventive measure may be annulled by an act of the judge or of a court if the grounds prescribed for the application of the preventive measure no longer exist.

[221] See, Conclusions and Recommendations, 5.11.m).

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

Paragraph 5 deals with the consequences of arrest and detention which is not in conformity with the provisions of preceding paras. 1-4 and the concerned person's ensuing enforceable right to compensation. As these articles refer to the lawfulness of the deprivation of liberty, and the term lawful implies compliance both with the municipal law and the European Convention, a violation of domestic legislation concurrently amounting to a violation of Article 5 leads to the right under Article 5, para. 5. The national legislation is compatible with Article 5, para. 5 when it provides for a remedy for those alleging a violation of Article 5 provisions either directly invoking the European Convention or through the municipal law in question.[222]

In the case of *Brogan and Others* v. *the United Kingdom* the European Court, like the Commission, observed that a restrictive interpretation is incompatible with the terms of paragraph 5.[223]

In the *Wassink* v. *Netherlands* case, the Court pronounced itself about the notion of "compensation" stating:

> "…paragraph 5 of Article 5 (Article 5-5) is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (Article 5-1, Article 5-2, Article 5-3, Article 5-4). It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 § 5 (Article 5-5), as for that of Article 25 (Article 25) (see, *inter alia*, the Huvig judgment of 24 April 1990, Series A no. 176-B, pp. 56-57, § 35), the status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate…"[224]

Article 5, para. 5 gives a right to compensation for material and moral damages. The compensation in practice is normally a financial one.

5.10.2. Georgian Legislation

Article 18, para. 7 of the Constitution provides for the right to receive compensation for damages without specifying whether this is for material or moral damage:

> "A person illegally arrested or detained shall have the right to receive compensation."

The Code of Criminal Procedure provides for the mechanism of compensation for wrongful conviction.[225]

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[222] *Mutatis mutandis*, *Ciulla* v. *Italy*, 1989, Series A no. 148, paras. 43-45.
[223] Series A no. 145-B, para. 67.
[224] Series A no. 185-A, para. 38.
[225] See, the Compatibility report of February 2001, pp. 148-149.

Under Article 12, part 4, of the Code of Criminal Procedure, a person restricted in his/her liberty illegally and ill-founded manner has a right to full compensation for the damage caused to him/her.

Article 73, part 1, subparagraph m) provides for the right of a suspect to receive compensation for damages suffered as a result of, *inter alia*, an illegal arrest. The same right is guaranteed to an accused for damages caused as a result of illegal or ill-founded detention (Article 76, part 2). Full compensation for damages caused as a result of illegal or ill-founded arrest must be afforded from the state budget, irrespective of a subsequent conviction or acquittal of the arrested person (Article 150, part 4).

Article 165 of the Code of Criminal Procedure reads as follows:

> "1. An individual shall be fully compensated for pecuniary damage if it is established that his/her arrest or detention was either illegal or ill-founded. The damage shall be compensated if a judgment of acquittal has been rendered or the case has been discontinued on the basis of Article 28, part 1, subparagraphs "a"[226] and "e".[227]
> 2. Physical damage shall be compensated by means of the State paying for the costs of medical treatment, or for loss or decrease of labour capacity, if the illness has been caused by a breach of the regime for keeping detainees in places of deprivation of liberty.
> 3. Moral damage shall be compensated by means of an apology announced in the press or other mass media, and/or by means of financial compensation."

Article 160, part 1, seems to be in breach of the European Convention in that it says that compensation must be afforded only in the case of acquittal of the person. This norm is in conflict with another provision of the Code of Criminal Procedure as well, namely, that of Article 150, part 4. Further, while the Code of Criminal Procedure provides for rehabilitation that the restoration of the rights of a person being convicted, accused or forcibly placed in a medical establishment illegally or unjustifiably due to his/her acquittal or unreasonableness of the placement in the medical establishment (Article 219, part 1), a different rule applies to compensation for an illegal or insufficiently motivated arrest, detention or placement in a medical establishment. Under Article 221 the damage in the latter case must be compensated irrespective of the outcome of the case.

The Code of Criminal Procedure covers deprivation of liberty under all subparagraphs of Article 5, para. 1, except for detention of persons for the prevention of the spreading of infectious diseases. It also covers the issues that can arise in terms of paras. 2-4 of Article 5. However, the above provisions clearly indicate that Georgian legislation links the issue of compensation only with the justification of the deprivation of liberty. Moreover, it cannot be concluded from the articles above that a person is entitled to claim compensation if he/she was not notified of the charges in compliance with Article 5, para. 2, or was not afforded the habeas corpus guarantee, or the term of his/her detention was not reasonable within the meaning of Article 5, para. 3.[228]

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[226] The criminal proceedings are discontinued on account of the absence of an act criminalised in the criminal code.

[227] The criminal proceedings are discontinued due to the fact that the person concerned has not attained the age from which the responsibility for the criminalised acts may arise.

[228] See, Conclusions and Recommendations, 5.11.n)-p).

5.11. Conclusions and Recommendations

a) It is recommended to amend the disciplinary law of the armed forces to the effect that the issue of imposition of deprivation of liberty of serviceman be determined by a court by due process.

b) It is recommended to bring the wording of Article 141 in line with the Convention and the case-law. In particular, the words "a sufficient ground to suspect" should be replaced with the words "reasonable suspicion", and the words "criminal activity" with the words "commission of a criminal offence".[229]

c) It is recommended to remove the fact of commission of a grave or especially grave crime from the enumeration of grounds for the application of detention as a preventive measure as provided for by Article 151, part 3 of the Code of Criminal Procedure.

d) It is recommended to exclude permission to extend detention as provided for by Article 162, part 2.

e) It is recommended to rule out the reference to being "charged with an offence punishable by imprisonment for more than 3 years" from Article 652, part 1.

f) With regard to the forced continuation of the initially voluntary treatment as an in-patient without a patient's consent, urgent treatments, as an in-patient and forced treatment in a psychiatric establishment of those having committed an unlawful act, it is recommended to provide for the notification to and confirmation by a judge instead of the prosecutor in the Law on Psychiatric Assistance. It is also recommended to bring the Law up to date in terms of the Criminal Code of 22 July 1999.

g) It is recommended that prompt and effective judicial control be introduced with regard to the detention of any person suspected of having violated the boundary regime under the Code of Administrative Violations.

h) It is recommended to amend the Code of Criminal Procedure to the effect that it provide for an obligation to bring an accused before a judge for deciding the application of a preventive measure.

i) In view of the case-law of the European Court,[230] it is recommended that the Code of Criminal Procedure should provide for the express obligation of the judge to review the circumstances militating for or against detention, and to decide by reference to legal criteria, whether there are reasons to justify detention.

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[229] *Inter alia,* in the Guzzardi and Giulla cases the Court found it against Article 5.1.c. to apply detention on the generalised belief that the person concerned is a recidivist. The Code of Criminal Procedure term "criminal activity" alludes to this suggestion.

[230] *Inter alia, Schiesser* v. *Switzerland*, 1979, Series A no. 34, para. 31

j) It is recommended to amend the wording of the constitutional provision and the relevant articles of the Code of Criminal Procedure to provide for an obligation to bring an arrested or detained person before a judge promptly, not later than 48 hours.

k) It is recommended that the period of study of the case-file by an accused and his/her defence counsel be included within the calculation of the periods of preliminary investigation and detention defined by law.

l) It is recommended to give priority to bail instead of to preliminary detention as a preventive measure in the practice of law-enforcement bodies.

m) In view of the above deficiencies, it is recommended to provide for the right to habeas corpus with respect to both arrest and detention in the Constitution, the Code of Criminal Procedure and other relevant legal acts in compliance with Article 5, para. 4 requirements and the case-law of the European Court.

n) It is recommended to amend the Code of Criminal Procedure so as to provide for a right to enforceable compensation in cases in which either the substantive or the procedural aspects of arrest or detention are violated, thus covering all the issues covered by Article 5, paras. 1-4 of the Convention.

o) It is recommended to amend Article 160, part 1, of the Code of Criminal Procedure so as to guarantee the right to compensation irrespective of eventual acquittal or conviction.

p) It is recommended to provide for an enforceable right to compensation with respect to [wrongful] deprivation of liberty of persons for the prevention of the spreading of infectious diseases.

6. RIGHT TO A FAIR TRIAL

I. The Problem of Corruption and the Fight against it

Before analysing the compatibility of Georgian legislation and practice with the requirements of Article 6 of the European Convention, the problem of corruption in the country will be discussed. The strengthening of democratic institutions and the development of the rule of law and human rights will remain fragile until decisive steps are taken by the State authorities in the fight against corruption.

The Group of States against Corruption of the Council of Europe (GRECO) first evaluation report on Georgia stressed the extreme danger that corruption phenomenon poses for the future development of a young State facing tremendous economic and social difficulties.[231] The problem of corruption has remained a central point of the Reports prepared in connection with the CoE Secretariat's Information and Assistance Missions to Georgia.[232] The Report of the visit of the Chairperson of the Committee of Ministers to Georgia and the South Caucasus region in July 2002 stressed the need to combat corruption effectively in Georgia and noted with concern the destabilising effect widespread corruption was having on domestic security. This view would appear to confirm the comments of the UN Committee on Economic, Social and Cultural Rights which also noted widespread and rampant corruption in 2002.[233]

According to the Report prepared by the CoE Directorate of Strategic Planning (DSP) subsequent to the Secretariat Delegation visit to Tbilisi on 8-11 December 2002, the problem of corruption still remains endemic in Georgia. The report notes that major reforms of law-enforcement and security bodies are underway.[234] With regard to the steps taken as part of the fight against corruption, the Report mentioned that Georgia signed the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime on 30 April 2002. The Criminal Law Convention on Corruption and the Civil Law Convention on Corruption had been signed by Georgia on 27 January 1999 and on 4 November 1999, respectively. The draft laws on money laundering and on the Anti-Corruption Bureau were to be submitted for CoE assessment. The report stressed that little progress had been achieved on the implementation of the GRECO recommendations and corruption remained a problem endemic in most institutions. There appeared to be very few prosecutions for crimes related to corruption.[235] The report referred to the problem of corruption as systemic and endemic in all spheres of society.[236]

Under the Presidential Ordinance of 13 April 2001 the Anti-Corruption Council was set up and entrusted with the function of co-ordination of anti-corruption policy. The Council is a consultative body of the President of Georgia. According to the Report, a number of

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[231] Doc. Greco Eval I Rep (2001) 5E Final of June 2001.
[232] See, Report of the Secretariat's Information and Assistance Mission to Georgia-Information Doc. SG/Inf (2001) 45 of 19 December 2001, paras. 31, 45, 46, Doc. Honouring of obligations and commitments by Georgia-Doc. "Honouring"-Doc. 9191 of 13 September 2001, p. 3 para. 5, p. 17, para. 60, p. 18, para. 71 and p. 21, para. 86- 92.
[233] See doc. E/C.12/1/Add.83, dated 19 November 2002.
[234] SG/Inf (2003)1 17 January 2003.
[235] B. Rule of Law, i.
[236] III General political context, I.

observers based in Tbilisi consider the Council not to be very effective: programmes are good, but there is an absence of political will to make them work properly.[237] The Anti-corruption Bureau was set up as a public law entity under the Presidential Ordinance of 8 May 2001 with the aim of providing informational-analytical and logistical support to the Anti-corruption Council.[238] According to the assessment given in the Report, the primary role of the Bureau has been to propose anti-corruption initiatives to the Council and to co-ordinate activities and now it is trying to involve itself in investigating cases of corruption.[239] Action to fight corruption has been proposed as part of a possible new joint EC/CoE initiative for Georgia, including co-operation with the country's Anti-corruption Bureau.

According to the Report,[240] no cases of corruption have been brought to light in 2002 in the Prosecutor General's Office, but 67 prosecutors have been subjected to different forms of disciplinary sanctions;[241] within the last three years 14 judges have been dismissed and about 50 have had disciplinary charges brought against them; in 2002 147 persons were dismissed from the police with criminal charges being brought against approximately 50 of them. As to allegations of impunity, the General Prosecutor's Office follows up all reported illegal acts, based on information obtained from victims or from the media. In 2002, the General Prosecutor's Office (excluding the regional branches) considered more than 100 such cases transmitted to it by the General Inspection of the Ministry of the Interior.

In the context of the reform in the fight against corruption the report referred to the participation of Georgian experts in a regional seminar for the Caucasian countries organised by the Council of Europe in Strasbourg on 16-20 December 2002, where discussions covered criminal law conventions, including those relating to combating corruption. According to the report, the seminar contributed to improvement in regional co-operation against crime in line with the Council of Europe standards; it also helped to increase awareness on the Council of Europe criminal law conventions and their implementation as well as to promote the ratification of those instruments.[242] A seminar took place in Tbilisi in June 2002 on "political corruption" (financing of political parties, trading of influence).

As to the present situation, the draft law on money laundering is being processed in Parliament. The CoE conventions in the field of the fight against corruption that were signed by Georgia, have not been ratified yet. It is noteworthy that the fact of ratification of the above CoE Conventions will not constitute an effective measure in the fight against corruption *per se*, given that the Conventions are not self-executing and require from the Parties the adoption of such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to therein. Another group of obligations stemming from the Conventions against corruption is related to the adoption

[237] SG/Inf. (2003)1, 17 January 2003, para. 47.
[238] Article 3 of the Statute approved by the Presidential Ordinance.
[239] SG/Inf (2003)1, 17 January 2003.
[240] *Ibid*, para 48.
[241] According to the information obtained from the Prosecutor General's Office, as a result of disciplinary proceedings 7 prosecutors have been dismissed from the office in 2001. In 2002 3 prosecutors were dismissed as a consequence of disciplinary proceedings.
[242] Para. 35.

of such legislative and other measures as may be necessary to enable these Parties to confiscate instrumentalities and proceeds or property.

Under Article 6 of the Constitution of Georgia, an international treaty or agreement of Georgia takes precedence over domestic normative acts unless it contradicts the Constitution of Georgia, or the Constitutional Agreement. Accordingly, amendments and addenda must be adopted to the legislation if need be. In the present case, the delay of the ratification of the CoE Conventions in the field of corruption has been due to the inconsistencies between the Conventions and national legislation. These are the following: The Criminal Code does not include confiscation in the list of penalties, which is required by the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The Criminal Code, although it criminalises bribery, fails to cover all the types of conduct requested to be prevented by the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption. Article 18 of the Criminal Law Convention provides for corporate liability while under the Criminal Code of Georgia only an individual may be a subject to criminal responsibility.

In 1999, the Criminal Law Sub-commission of the State Commission for Legal Reforms, set up within the Ministry of Justice was charged with bringing Georgian legislation in line with the CoE Conventions. The work in the Commission is still underway.

a) Remuneration and Social Protection

Decent remuneration and social protection of judges constitutes a substantial guarantee against corruption within the judiciary. Under the Law on the Guarantees of Social and Legal Protection of Judges,[243] the State is obliged to secure appropriate living and working conditions for judges in order to ensure their independence (Article 3). Salary, fees and allowances constitute the remuneration of the work of a judge. The salary and material advantages of a judge may not be less than those of a member of Parliament. The Law provides for guarantees of social and legal protection of a judge. If the life and health of a judge is endangered, on the basis of his/her application and under resolution of the President, the relevant State bodies must ensure the security of the judge and of his/her family members (Article 8, para 2). The analogous norms governing the social protection of the members of the Supreme Court and the Constitutional Court of Georgia are contained in the Law on the Guarantees of Social Protection of the Members of the Supreme Court of Georgia[244] and the Law on the Guarantees of Social Protection of the Members of the Constitutional Court of Georgia.[245] These acts additionally state that the monthly salary and fees of the Presidents of these courts must not be less than those of the President of the Parliament.[246]

[243] Adopted on 3 December 2002, has come into force on 1 January 2004 except for, *inter alia*, the article securing the guarantee to provide a judge with housing in a residential area, which has been in force since 1 January 2003.
[244] Adopted on 25 June 1996.
[245] Adopted on 25 June 1996.
[246] Articles 2-2.

The salaries of the judges of the courts of general jurisdiction are defined by the Ordinance of the President of Georgia of 8 April 2002.[247] The monthly salaries range from GEL 500 (a judge of a district court) to GEL 630 (the Presidents of the Higher Courts of the Autonomous Republics of Ajara and Abkhazia). Under the Law on the Remuneration of the Work of the Members of the Supreme Court of Georgia,[248] the monthly salaries of the Supreme Court of Georgia range from GEL 595 (a judge) to GEL 700 (the President).

The issue of the remuneration of the judges of the Constitutional Court is governed by the Law on the Remuneration of the Work of the Members of the Constitutional Court of Georgia,[249] according to which the monthly salaries range from GEL 595 (a judge) to GEL 700 (the President).The fees are calculated according to the duration of the service.

The remuneration of the work of the judges in Georgia may be regarded as a considerable guarantee of independence of the judiciary and against the problem of corruption within it, given that the minimal wage has been set at GEL 20 in an Ordinance of the President of Georgia.[250] According to information obtained from the Department of Logistical Services of the Courts of General Jurisdiction set up within the Supreme Court of Georgia, the payment of salaries of judges of general jurisdiction courts is effected on a regular basis and there has been no considerable delay since 2001. The same is true for the Constitutional Court.

A recent Ordinance of 13 March 2003 of the President of Georgia repealed the Presidential Ordinance of 29 April 2000 concerning remuneration of the officials of the Prosecutor's Office of Georgia and provided for a new rate of increased salaries to be paid to prosecutors. Under the Ordinance, the salaries range from GEL 630 (Prosecutor General) to GEL 425 (Assistant Prosecutor). Under the Law on Guarantees of Social Protection of the Officials of the Prosecutor's Office (3 December 2002)[251], salary, fees and allowances constitute the remuneration of the work of a prosecutor. The salary and material privileges of a prosecutor may not be less than 85% or more than 95% than that of a judge of a court of the same level. The Law provides for other allowances according to the length of service,[252] vacations and paid leave,[253] and pensions.

b) Conclusions and Recommendations

Recommendations made by the GRECO to devise a global strategy based on prevention, education and the application of appropriate sanctions, have not yet been implemented, even though a number of measures have already been taken.

a) In accordance with the Secretariat delegation's concerns and proposals, the fight against corruption must be given top priority.

[247] Adopted on 8 April 2002.
[248] Adopted on 20 September 1996.
[249] Adopted on 20 September 1996.
[250] Adopted on 4 June 1999.
[251] In force since 1 April 2003.
[252] The provision is to be enforced from 1 January 2004.
[253] The provision is to be enforced from 1 January 2004.

b) It is recommended to expedite ratification of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption and to provide for the necessary amendments and addenda in the legislation.

II. The Developments since the Compatibility Study 2001

The Compatibility Study of the Georgian Law with the Requirements of the European Convention has dealt with the basic issues of the judiciary and the legal system, *inter alia*, in terms of the compatibility of the legislation with Article 13 of the European Convention (the right to an effective remedy). The information given below provides a summary of the developments having taken place since 2001.

Since the drafting the Compatibility Study of 2001 the court system of Georgia[254] has undergone a number of changes. The changes concerned the Supreme Court of Georgia and the Constitutional Court of Georgia.

a) The Constitutional Court

The European Court has held on numerous occasions that proceedings come within the scope of Article 6, para. 1, of the Convention, if their outcome is decisive for civil rights and obligations, even if they are conducted before a Constitutional Court.[255]

General information about the Constitutional Court of Georgia as the body of constitutional review is contained in the Compatibility Study of 2001.[256] On 12 February 2002 Parliament adopted the Organic Law of Georgia and the Law of Georgia on the amendments and addenda to the Organic Law on the Constitutional Court of Georgia and the Law on Constitutional Legal Proceedings.[257] These laws made substantial changes to the activity of the Constitutional Court.

By virtue of these amendments the principle of continuity has been abolished. Under the principle, a judge participating in the consideration of a case would not be allowed to take part in the consideration of another case until the end of the postponed or suspended proceedings. The principle had caused an accumulation of dormant cases.[258] Before the legislative amendments 33 constitutional claims were awaiting consideration, among them 3 claims that had been lodged in 1999, 14 claims dating from 2000 and 16 claims from 2001. According to the present statistics, all the cases that had been held over from previous years have been adjudicated upon.

Along with the abolition of the principle of continuity, different terms have been set for constitutional proceedings. Under the existing legislation, a claimant/author of a

[254] See, Compatibility Report of 2001, chart on p. 49.
[255] See, *inter alia, Deumeland* v. *Germany*, 29 May 1986, Series A no. 100; *Ruiz-Mateos* v. *Spain,* 23 June 1993, Series A no. 262; *Süßmann* v. *Germany,* 16 September 1996.
[256] See, pp. 17-18, 51-53.
[257] The Organic Law and the Law on amendments and addenda entered into force on 5 March 2002.
[258] See, the chart, Annex 1.

constitutional submission has to be given an answer within 10 days as to whether the Constitutional Court admits the constitutional claim/constitutional submission for consideration of the merits or not. In order to avoid an undue workload of the Constitutional Court, under the existing legislation, the maximum term for consideration of the merits is 6 months. In exceptional circumstances, the President of the Court is entitled to extend this term (Article 22, para. 1 of the Organic Law).

The scope of acts which may be challenged before the Constitutional Court has been extended. The normative resolutions of the Parliament of Georgia have been added to the list which until now was limited to laws and regulations of the Parliament of Georgia and the normative acts of the President of Georgia and those of the higher State bodies of Abkhazia[259] and the Autonomous Republic of Ajara (Article 19, para 1, subparagraph a) of the Organic Law).

The circle of those entitled to apply to the Constitutional Court has also been widened in that the right has been conferred on legal entities as well (Article 39, para 1, subparagraph a) of the Organic Law).

Under the previous legislation, an individual had the right to apply to the Constitutional Court only where he/she could claim that his/her constitutional right had actually been violated. Under the present provision, "citizens of Georgia, other individuals residing in Georgia and legal entities of Georgia, if they believe that their rights and freedoms recognised by Chapter Two of the Constitution of Georgia are infringed or may directly be infringed upon" are entitled to apply to the court.

Under the previous legislation, repeal of an impugned norm pending proceedings would entail the discontinuation of the proceedings before the Constitutional Court. This provision would infringe upon the authority of the Constitutional Court and deprived the claimant of a legal remedy before the court. Under the current wording, after a case is admitted by the Constitutional Court for consideration on the merits, annulment or invalidation of an impugned act does not result in termination of the constitutional legal proceedings before the Constitutional Court, if the case concerns human rights and freedoms recognised in Chapter Two of the Constitution of Georgia (Article 13, para. 6 of the Law on Constitutional Legal Proceedings).

The amendments and addenda adopted to the legislative acts on the Constitutional Court made the constitutional legal proceedings more streamlined, simple and expeditious.

b) The Supreme Court

Under the Organic Law of 16 March 2001, amendments were adopted to the Organic Law on the Supreme Court of Georgia.[260] The Supervisory Chamber, which considered complaints of parties concerning final judgments of the courts of general jurisdiction in the light of new legal circumstances, was abolished. The function of review of final judgments

[259] The status of Abkhazia as of an Autonomous Republic has been defined by the Constitutional Law of 10 October 2002.
[260] Adopted on 12 May 1999, in force since 15 May 1999.

of the courts of general jurisdiction in the light of new legal circumstances and newly discovered facts was instead vested in the three Chambers of the Supreme Court acting as Courts of Cassation.[261]

The Organic Law on the Supreme Court of Georgia was subsequently amended by the Organic Law of Georgia of 8 June 2001, which provided for the Grand Chamber to act as a Court of Cassation in addition to three Chambers referred above.

The Grand Chamber adjudicates upon the most complex cases. Unlike the three Chambers which sit with three judges, the Grand Chamber sits with nine judges. The Grand Chamber consists of the President of the Supreme Court, the Presidents of the Chambers and of 12 judges elected by the Plenum for a term of 2 years from the ordinary members of the Chambers. The Grand Chamber considers cases referred to it by a Chamber of the Supreme Court in the three following instances:

a) consideration of and adjudication upon the case has a special significance for the establishment of a common jurisprudence;
b) because of the complexity of the case, the decision of the case raises the question of a new interpretation of a norm;
c) the case raises a rare legal issue.

The Compatibility Study of 2001 stressed the importance of enacting a law governing disciplinary responsibility of judges. On 23 February 2000 the Law on Disciplinary Responsibility of Judges of the Courts of General Jurisdiction and Disciplinary Proceedings was adopted. The Law provides for sanctions to be applied, *inter alia*, against the President of the Supreme Court[262]. The absence of such sanctions was identified in the Study of 2001 as a shortcoming of the then existing legislation.

According to statistics obtained from the disciplinary council of the courts of general jurisdiction, in 2001 the disciplinary council considered 107 cases and 6 judges were dismissed from office. 51 judges were subjected to disciplinary proceedings in 2002, as a result of which 5 judges were dismissed from office.

c) The Bar

Adoption of a Law on the Bar was identified by the Compatibility Study of 2001 as a key priority. The Law was adopted on 20 June 2001.

In accordance with the Law, a lawyer (advocate) is an individual belonging to an independent profession, which is only subjected to the law and to norms of professional ethics, entered on the General List of the lawyers (advocates) of Georgia (Article 1). Legal practice includes the providing of legal advice to a person (client); representation of a client before a court in constitutional, criminal, civil or administrative proceedings, also in bodies of preliminary detention, inquiry and investigation; preparation of legal documents for use in cases involving third persons and presentation of any such documents on behalf of a

[261] Compatibility Report of 2001, chart on p. 49.
[262] Article 4, para. 2, subparagraph b).

client; and providing a client with legal assistance which is not related to representation towards third persons (Article 2).

The Law defines the principles of legal activity, which are as follows: legitimacy; independence and freedom of legal practice; non-discrimination and equality of lawyers (advocates); non-interference in advocate's activities; respect for and protection of rights and freedoms of a client by an advocate; prohibition of refusal by an advocate to protect a client except in the cases determined by law; protection of professional secrecy by an advocate; protection of norms of professional ethics by an advocate (Article 3). The Law secures the rights and obligations of a lawyer and prevents a conflict of interests (Chapter II). Under the Law, an individual may act as a lawyer (advocate) if: he/she has a higher legal education; has passed the advocates' examinations in accordance with the Law; has taken the oath of an advocate in accordance with the Law; and has working experience of at least one year as a lawyer or intern of an advocate. A lawyer (advocate) may not be an individual who has been convicted for a deliberate grave crime unless the conviction is annulled or quashed in accordance with Georgian legislation (Article 10). The examinations shall take place twice a year. The date, rules, programme and regulations of the qualification commission is submitted by the Executive Council of the Georgian Bar Association and approved by the General Meeting of the Georgian Bar Association not later than two months before the examinations (Article 11). Those who have not passed the examinations have been prohibited from practising law from 1 June 2003 (Article 40, part 4).

The issue of examinations of lawyers is a central problem in the field at present. Some lawyers, invoking the article in the Law on the Bar which defines the profession of a lawyer as an independent one, refuse to take examinations. The remedy to the situation can be either an amendment of the Law before 1 June 2003 or organisation of the examinations before that date. The decision on these alternatives has not been taken yet.

d) The Public Defender

The basic information about the Public Defender's Office is given in the Study of 2001.[263] No amendments or addenda have been adopted to the Organic Law on the Public Defender of 16 May 1996 since the drafting of that Compatibility Study. The institution of the Ombudsman should however no longer be appraised as an inefficient one,[264] given the many significant reforms which have been accomplished due to the initiative of the Public Defender. Constitutional complaints concerning alleged unconstitutionality of provisions of the Code of Criminal Procedure with respect to delays in access to legal assistance and the lack of a provision allowing an accused and his/her lawyer to get acquainted with evidence brought against him (compatibility of Articles 145(2) and 162(6) of the Code with Article 18 of the Constitution) have been lodged with the Constitutional Court by the Public Defender, as have complaints concerning the alleged unconstitutionality of the Disciplinary Statute. A 'hot line' system, operated by a "Rapid Reaction Group" to prevent human rights violations in places of pre-trial detention, was set up with the assistance of the ODIHR and is considered a success. The objective of this project is to decrease human rights violations

[263] Pp. 61-62.
[264] See, the Compatibility Report of 2001, p. 61.

and to increase the transparency and efficiency of police activity. According to the CoE Secretariat's Information and Assistance Missions to Georgia[265] the institution of Public Defender is becoming significant and its work deserves additional support and that the Public Defender is, undoubtedly, an institution which has the potential to play a significant role in the protection of human rights in Georgia.[266]

e) Legislative Initiatives

e.a. The Draft Code of Administrative Violations

The Compatibility Study of 2001 noted inconsistencies between the present Code of Administrative Violations of Georgia[267] and modern requirements and stressed the need for a new Code.[268] Under the Order of 13 February 2003 of the Minister of Justice of Georgia a Commission for Preparation of the Draft Code of Administrative Violations has been set up. The Commission has been instructed to analyse the legislation governing administrative violations and prepare proposals and recommendations concerning its improvement; to elaborate a new Code of Administrative Violations; and to define the major directions of legislation governing administrative violations in Georgian legislation and in legislation of foreign countries. The Ministry of Justice has been entrusted with the task of informational-analytical and logistical assistance. The deadline for the completion of the work has not been specified.

e.b. The Draft Code of Criminal Procedure

A new draft Code of Criminal Procedure has been prepared with CoE expert assistance within the Inter-agency Commission on the Elaboration of Proposals for Institutional Reforms within Security and Law-enforcement Agencies under the Chairmanship of the President of the Supreme Court. The Commission has been set up by the President of Georgia. Submission of the Code to the President is imminent.

The Inter-agency Commission on the Elaboration of Proposals for Institutional Reforms with the assistance of CoE experts has issued a "Concept" for reform. Apart from the Draft Code of Criminal Procedure, the Commission is dealing with the following issues:

- the preliminary investigation phase ("investigation and operative services"), including reform of the Prosecutor General's Office;
- three new legislative texts concerning the police;
- replacement of the Ministry of State Security by a "Security Service";
- reform of legal education of judges and prosecutors (including establishment of a new High School of Justice);
- training centres for the police, security service and others; and

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[265] *See,* SG/Inf (2003)1 17 January 2003.
[266] *Ibid*. para. 60.
[267] Adopted on 15 December 1984, in force since 1 June 1985.
[268] Compatibility Report of February 2001, p. 59 and 63.

- establishment of an institution of "Inspector General" (to counter corruption and maintain internal control).

Concerning the present Code of Criminal Procedure,[269] which has undergone numerous amendments and modifications since its enforcement, in 2002 the Constitutional Court was asked by the Public Defender of Georgia and individuals acting through human rights NGOs to rule on some aspects of the Code; in particular, the delay in having access to legal assistance and aspects of detention on remand were questioned. The Constitutional Court's judgment in this regard is discussed in the relevant parts of the present study. The judgment of the Constitutional Court on the constitutionality of the impugned provisions of the Code has been in force since its public delivery at the hearing that is since 30 January 2003 and the Parliament of Georgia has been requested to move the relevant amendments and addenda to the Code before 1 May 2003. The judgment of the Constitutional Court is final and not subject to appeal or revision.

A. The European Convention and its Interpretation: *in General*

Under Article 6 of the European Convention on Human Rights:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b. to have adequate time and facilities for the preparation of his defence;
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Article 6 guarantees the right to an independent and impartial court established by law, the right of effective access to it and the right to a fair and public hearing within a reasonable

[269] Adopted on 20 February 1998 and in force since 15 May 1999.

time. The provisions of Article 6 have been interpreted broadly by the European Commission and the European Court. In the *Delcourt* v. *Belgium* case[270] the Court stated:

"In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 would not correspond to the aim and the purpose of that provision."[271]

Article 6, para. 1, applies to civil and criminal proceedings. The interpretation of what is and what is not a civil right or obligation has been progressive. Matters which were once considered outside the scope of Article 6, such as social security, now generally fall within the remit of what are civil rights and obligations. In ascertaining whether a case concerns the determination of a civil right and obligation only the character of the right and obligation at issue is relevant.[272] The key point is whether the outcome of the proceedings is decisive for private law rights and obligations.[273] The existence of a European consensus as to the nature of the right should also be taken into consideration.[274] And finally, even though the concept of civil rights and obligations is autonomous, the legislation of the state concerned is not without importance.[275]

In the *Deweer* v. *Belgium* case,[276] the Court has noted that the concept "criminal charge" also has an autonomous meaning and that a substantive conception of the expression is to be preferred. The Court held that "charge" could be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, or where the situation of the suspect was substantially affected.[277]

The term "criminal" has an autonomous meaning too. The Convention is not opposed to the domestic legislation creating or maintaining a distinction between criminal law and disciplinary law, but the European Court retains the right to subject to scrutiny this classification in order to avoid exclusion of the operation of the fundamental clauses of Article 6 and 7 by classifying an offence as disciplinary instead of criminal under the national legislation.[278] In seeking to ascertain the nature of a violation, the Court will take into account "the way in which it is described in domestic law, its nature, the degree of severity of the penalty and its purpose."[279]

The second and third paragraphs of Article 6 state that they apply only to criminal proceedings. Under the interpretation of the Convention organs, these provisions may under certain circumstances apply to disciplinary proceedings as well.

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[270] January 1970, Series A no. 11.
[271] Para. 25.
[272] *König* v. *Germany*, 28 June 1978, Series A no. 27, para. 90.
[273] *Inter alia, H.* v. *France,* 24 October 1989, Series A no. 162, para. 90.
[274] *Feldbrugge* v. *Netherlands*, Series A no. 99, 29 May 1986, para. 29.
[275] *König* v. *Germany*, 28 June 1978, Series A no. 27, para. 89.
[276] 27 February 1980, Series A no. 35.
[277] Paras. 42, 44 and 46.
[278] *Inter alia, Campbell and Fell* v. *the United Kingdom,* 28 June 1984, Series A no. 80, para. 68.
[279] *Engel and Others* v. *Netherlands*, 8 June 1976, Series A no. 22. Para. 82.

6.1. Article 6, para. 1

6.1.1. *The European Convention and its Interpretation*

Under Article 6, para. 1 of the European Convention:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

6.1.1.1. *The Right to a Court*

6.1.1.1.1. The Right of Access

In the *Golder* v. *the United Kingdom* case,[280] the European Court has made a fundamental point concerning the scope of the right to have a case heard before a tribunal in relation to a dispute over civil rights. The Court has stated that the right of access to a court constitutes an element which is inherent in the right stated by Article 6, para. 1. The Court has reached the conclusion that Article 6, para. 1, secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes only one aspect.[281]

The Court, however, has observed that the right of access is not absolute, that there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.[282] In the *Ashingdane* v. *the United Kingdom* case,[283] the Court has however held that the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore the limitation will not be compatible with Article 6, para. 1, if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[284]

6.1.1.1.2. The Right to the Execution of a Judgment

In the *Hornsby* v. *Greece* case,[285] the European Court has held that the "right to a court" would be illusory if a domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6

[280] 21 February 1975, Series A no. 18.
[281] Para. 36.
[282] *Ibid*. para. 38.
[283] May 1985, Series A no. 93.
[284] Para. 57.
[285] 19 March 1997, Reports of Judgments and Decisions 1997-II.

should describe in detail procedural guarantees afforded to litigants without protecting the implementation of judicial decisions. To construe Article 6 as being concerned exclusively with access to a court and the conduct of the proceedings would be likely to lead to situations incompatible with the rule of law, which the States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of "trial" for the purpose of Article 6.[286]

In the field of implementation of judgments, different kinds of obligations are incumbent on States. On the one hand, a public authority which is itself a party to the proceedings must show respect for the final and binding decision of the court and comply with it within a reasonable time.[287] On the other hand, there must be an effective enforcement mechanism in place for the parties seeking the execution of a judgment against an unwilling party.[288]

6.1.1.1.3. The Effective Right of Access

The right of access to a court must not only exist, but also be effective. The mere existence of a right of access is not sufficient.

In the *Airey* v. *Ireland* case,[289] the European Court held that States must guarantee effective access to the courts. In the case, the applicant, in the absence of legal aid and not being in a financial position to meet herself the costs involved was unable to find a solicitor willing to act for her. The European Court did not regard the possibility to go before the High Court without the assistance of a lawyer of itself as conclusive of the matter. The Court has reiterated the intention of the Convention to guarantee not rights that are theoretical and illusory, but that are practical and effective and held that this was particularly true of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.[290] The European Court eventually found that there had been a violation of Article 6, para. 1.

6.1.1.2 The Right to a Fair Hearing

6.1.1.2.1. Presence at the Proceedings

The European Court has held that the accused in criminal proceedings must be present at the trial hearing.[291] Exceptions are allowed where the authorities have acted diligently but not been able to notify the relevant persons of the hearing[292] and also in the interests of justice in some cases of illness. Also a party may waive the right to be present at an oral hearing, but only if the waiver is unequivocal and "attended by minimum safeguards

[286] Para. 40.
[287] *Hornsby* v. *Greece*, 19 March 1997, Reports 1997-II,.
[288] *Immobiliare Staffi* v. *Italy*, 28 July 1999.
[289] 9 October 1979, Series A no. 32.
[290] Para. 24.
[291] *Ekbatani* v. *Sweden,*26 May 1988, Series A no. 134.
[292] *Colozza* v. *Italy,* 12 February 1985, Series A no. 89.

commensurate to its importance".[293] However, if an accused in a criminal case waives this right, he/she must still be permitted legal representation.

While a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first instance trial hearing, the personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing. Even where an appellate court has full jurisdiction to review the case on questions both of fact and law, Article 6 does not always entail right to a public hearing and to be present in person. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant.[294]

6.1.1.2.2. Equality of Arms and Adversarial Proceedings

The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial.[295] The principle of equality of arms implies that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent. A fair balance must be struck between the parties.[296] The right to adversarial proceedings means the opportunity for parties to a criminal or civil trial to have knowledge of and comment on all the evidence adduced or observations filed. Compatibility with these principles must be considered in the context of both criminal and civil proceedings.

Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision at first instance. A State is required to ensure also before courts of appeal that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6.[297]

6.1.1.2.3. Admissibility of Evidence

The European Court has developed some important guidelines concerning the admissibility of evidence.

The admission of unlawfully obtained evidence does not in itself violate Article 6, but it can give rise to unfairness on the facts of a particular case, namely, where there is no

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[293] *Poitrimol* v. *France,* 23 November 1993, Series A no. 277-A.
[294] See, *inter alia*, *Belziuk* v. *Poland*, 25 March 1998, *Reports of Judgments and Decisions* 1998-II, para. 37 (ii).
[295] See, *inter alia*, *Brandstetter* v. *Austria*, 28 August 1991, Series A no. 211, paras. 66–67 and *Lobo Machado* v. *Portugal,* 20 February 1996, Reports 1996-I, para. 31.
[296] See, *inter alia*, *De Haes and Gijsels,* 24 February 1997, Reports of Judgments and Decisions 1997-I.
[297] See, *inter alia*, *Monnell and Morris* v. *the United Kingdom,* 2 March 1987, Series A no. 115, para. 54; and *Ekbatani* v. *Sweden*, 26 May 1988, Series A no. 134, para. 24.

possibility of challenging the use of such evidence and there is no other evidence supporting the conviction of an accused.[298]

Regarding "agents provocateurs" the Court has had the opportunity to hold that the general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence from the most straightforward to the most complex and the public interest in combating crime cannot justify the use of the evidence obtained as a result of police incitement.[299]

The admission of hearsay evidence does not in principle violate Article 6, para. 1, requirements on the fairness of proceedings. But if there is no opportunity to cross-examine, this may render the trial unfair if the conviction is based wholly or mainly on such evidence.[300]

The Court has recognised the necessity for measures to protect witnesses from reprisals or identification in certain circumstances but nonetheless has held with regard to the admissibility of evidence given by an anonymous witness that an accused must have the opportunity to challenge and question the witness at some stage of the proceedings.[301]

6.1.1.2.4. Right to be Silent and not Incriminate Oneself

Although not specifically mentioned in Article 6 of the Convention, the right to remain silent and the privilege against self-incrimination are generally recognised as international standards which lie at the heart of the notion of a fair procedure under Article 6, para. 1, of the Convention. The right not to incriminate oneself in particular presupposes that the authorities seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the person charged. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and securing the aims of Article 6.[302]

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the States parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers, but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath-, blood- and urine-samples and bodily tissue for the purpose of DNA testing.[303]

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[298] These requirements were met in *Schenk* v. *Switzerland*, 12 July 1988, Series A no. 140.
[299] *Teixero de Castro* v. *Portugal*, 9 June 1998.
[300] *Unterpretinger* v. *Austria,* 24 November 1986, Series A no. 110.
[301] *Kostovksi* v. *Netherlands*, 20 November 1989, Series A no. 166.
[302] *J.B.* v. *Switzerland*, 3 May 2001, no. 31827/96, para. 64.
[303] *Saunders* v. *the United Kingdom*, 17 December 1996, para. 69.

6.1.1.2.5. Reasoned Judgment

Article 6, para. 1, requires that the domestic courts give reasons for their judgments in both civil and criminal proceedings. However, it is not necessary for the court to deal with every point raised in argument[304] unless the argument would, if accepted, be decisive for the outcome of the case.[305] In the case of *Hadjianastassiou* v. *Greece,*[306] the European Court has held that the requirement that rulings of national courts have to be reasoned and give sufficient ground for its judgment aims at enabling the person concerned to exercise the right to appeal available to him. Further justifications for the need for a reasoned judgment in criminal cases, are the interest of a party to the case in knowing the reasons for any judgment concerning him and of the public in a democratic society in knowing the reasons given for the judicial decisions in its name. These further justifications suggest that the right to a reasoned judgment applies to final appeal proceedings as well.[307]

6.1.1.2.6. Children Proceedings

In the case of *Nortier* v. *Netherlands*,[308] the European Commission has held that any suggestion that children who are tried for criminal offences should not benefit from the fair trial guarantees of Article 6, was unacceptable.[309]

In the cases of *T and V* v. *the United Kingdom*,[310] which concerned two ten years old boys charged with a grave crime, the European Court agreed with the Commission and, *inter alia*, stated that "it is essential that a child charged with an offence is dealt with in a manner which takes a full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition."[311]

Resolution (72) 29 of the Committee of Ministers of the Council of Europe recommends fixing the age of minors at eighteen.

6.1.1.3. Public Nature of the Proceedings and Public Pronouncement of a Judgment

The public character of proceedings before the judicial bodies referred to in Article 6, para. 1, protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the

[304] *Van der Hurk* v. *Netherlands*, 19 April 1994, Series A no. 288, para. 61.
[305] *Hiro Balani* v. *Spain,* 9 December 1994, Series A no. 303 B, para. 28.
[306] 1992, Series A no. 252.
[307] *X* v. *FRG*, No. 8769/79, 1981.
[308] 9 July 1992, Application no. 13924/88.
[309] Para. 60.
[310] Both Judgments of 16 December, 1999.
[311] *V* v. *the United Kingdom,* paras. 86-87.

achievement of the aim of Article 6, para. 1, namely, a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.[312]

Article 6, para. 1, permits restriction exclusively with respect to the public nature of the proceedings and not with respect to the judgment. In order to consider possible restrictions of the latter, it should be borne in mind that although the Strasbourg organs may appear to be willing to leave the national authorities a certain margin of appreciation, they may not be prepared to accept simply a developed practice, but require that it be stated specifically for each case which ground of restriction is invoked.

6.1.1.4. The Right to Trial within Reasonable Time

Article 6 guarantees to everyone a hearing within a reasonable time, which aims at protecting "all parties to court proceedings … against excessive procedural delays."[313] The guarantee further "underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility."[314]

When assessing the reasonableness of the length of proceedings the European Court takes into account the following factors: complexity of the case, conduct of an applicant, conduct of judicial and administrative authorities of the State and what is at stake for the applicant.

6.1.1.5. Independent and Impartial Tribunal Established by Law

In the *Belilos* v. *Switzerland* case[315] the European Court has set out the criteria to be used to determine whether the institution in question is a "tribunal" within the meaning of Article 6. The criteria of independence of a tribunal developed by the Court are the following:

- the manner of appointment of its members;
- the duration of their office; and
- the existence of guarantees against outside pressures.[316]

Under the case-law on Article 6, para. 1, impartiality normally denotes absence of prejudice or bias, the existence of which is tested by subjective and objective approaches.

Under Article 6, para. 1, an independent and impartial tribunal must also take "decisions". In the *Bentham* v. *Netherlands* case,[317] the Court has observed that a power of decision is inherent in the very notion of "tribunal" within the meaning of the Convention.[318] At least

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[312] See *Golder* v. *the United Kingdom*, 21 February 1975, Series A no. 18, para. 36, and also the *Lawless* v. *Ireland*, 14 November 1960, Series A no. 1.
[313] *Stögmüller* v. *Austria,* 10 November 1959, Series A no. 9, para. 5.
[314] *H* v. *France*, 24 October 1989, Series A no. 162, para. 58.
[315] 29 April 1988, Series A no. 132.
[316] Para. 78.
[317] 23 October 1985, Series A no. 97.
[318] Para. 40.

one "tribunal" must be competent to examine and determine questions of fact and of law;[319] there is no decision until the definitive settlement of the dispute.[320] In the *Hiro Balani* v. *Spain* case[321] the Court has reiterated that Article 6, para 1, obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument raised by the parties.[322]

6.2. Georgian Legislation

6.2.1. The Right to a Court

6.2.1.1. The Right of Access

Under Article 42, para 1 of the Constitution "everyone has the right to apply to a court for the protection of his/her rights and freedoms".

The Code of Civil Procedure secures for everyone the protection of the rights by the judiciary. The consideration before the court starts on the basis of the application of a person who applies to the court for the protection of his/her right or lawful interest provided for by law. The court is entitled to decline to accept the application and consider the case only on the basis and in accordance with the procedure provided for by law (Article 2, parts 2-3).

The Code of Civil Procedure secures for third parties the right to apply to a court on a general basis. Any persons having a separate actionable claim in the initial subject of the dispute or in a part thereof is entitled to apply to the court until the judgment is rendered. The claim must be admitted and considered in accordance with the normal provisions. The claim of the third party and of the initial claimant must be adjudicated upon simultaneously (Article 88). The Code provides for the possibility of a third party not having a separate actionable claim to join either party, where the outcome of the proceedings may affect his/her rights or obligations (Article 89).

In case of the discontinuation of the proceedings (e.g. if the claim falls within the competence of another body or if the claimant has waived his claim …[323]), applying to the court on the basis of the same claim and ground between the same parties is inadmissible (Article 273, part 2). If the case has been left unresolved (e.g. if there are proceedings pending between the same parties on the same dispute and ground in the same or another court …[324]), a person who has an interest in the outcome of the case is entitled to apply to a court repeatedly, if the reasons for the rejection of their earlier requests no longer exist.

The Civil Code of Georgia provides for prescription, i.e. for a period of limitation to the right to demand from another person that he/she perform a certain action or that he/she refrain from an action. A period of limitation does not apply to personal non-property

[319] *Albert de Le Compte* v. *Belgium*, 10 February 1983, Series A no. 58, para. 29.
[320] *Eckle* v. *Germany,* 15 July 1982, Series A no. 51, para. 77.
[321] 9 December 1994, Series A no. 303-B.
[322] Para. 27.
[323] Article 272.
[324] Article 275.

rights, unless otherwise prescribed by law, demands of depositors for deposits made with a bank or other credit institutions. The Code defines 10 years as the general period of limitation (Article 128).

The period of limitation on contractual claims is three years and the period with respect to contractual claims regarding immovable property - six years. The period of limitation on claims arising out of obligations subject to periodic performance is three years (Article 129).

Under Article 430 the period of limitation begins to run from the moment at which the claim arises. The claim is deemed to have arisen from the moment at which the person detected or ought to have detected the violation of the right.

Under Article 426 of the Code of Civil Procedure the lodging of an application requesting the re-opening of proceedings due to the repeal of a judgment or to newly discovered facts is impermissible after the expiry of 5 years from the entry into force of the judgment. The question whether such a limitation of the right to access to a court complies with Article 42, para 1, of the Constitution was recently raised before the Constitutional Court of Georgia. The Constitutional Court in its judgment of 30 April 2003 declined to uphold the constitutional claim and declared the impugned norm to be constitutional.

Under Article 242, part 1 of the Code of Criminal Procedure an action or a decision of an inquirer, a body of inquirer, an investigator or a prosecutor, which in the opinion of a complainant is unlawful or unreasonable may be appealed to the court. The Article names two grounds of appeal, in particular: a) a resolution of a body of inquiry, an investigator or a prosecutor not to institute criminal proceedings; b) a resolution of a body of inquiry, an investigator or a prosecutor to discontinue criminal proceedings. The wording of Article 242, part 1, of the Code of Criminal Procedure, which exhaustively defines the grounds for applying to a court, seems to fail to comply with the requirements of access to court incorporated in Article 6, para 1, of the Convention.[325]

6.2.1.2. The Right to the Execution of a Judgment

Under the Constitution of Georgia, acts of courts shall be binding on all State bodies and persons throughout the whole territory of the country and a court shall adopt a judgment in the name of Georgia (Article 82, parts 2 and 4).

Neither the parties nor successors in title have the right to bring the same claims before the court on the same ground or question the facts and legal relations established by a judgment in other proceedings after the entry into legal force of the judgment (Article 266 of the Code of Civil Procedure). The Code of Civil Procedure provides that a judgment in civil matters may only be enforced coercively after the entry into legal force of the judgment (Article 267). Enforcement of judgments is governed by the Law on Enforcement Proceedings.[326] The Law has been reviewed by CoE experts in 1999.

[325] See, Conclusions and Recommendations, 6.9.a).
[326] Adopted on 16 April 1999, in force since 5 June 1999.

The Compatibility Study of 2001 noted difficulties connected with the enforcement of judgments.[327] On 5 December 2000 amendments were adopted to the Law on Enforcement Proceedings and at present the Enforcement Department is an integral part of the Ministry of Justice. In order to facilitate the fight against corruption and to improve efficiency, financial incentives were given to bailiffs and the enforcement of court judgments against institutions financed by the State budget was allowed. The Study identified the lack of police support in coercive enforcement of court judgments as a significant obstacle. In response to these criticism, a new, amended Chapter III[1] of the Law on Enforcement Proceedings was adopted. It provides for enforcement police as a structural unit of the Enforcement Department designated to protect and assist bailiffs while enforcing court judgments. The amended Law provides for the right of an enforcement policeman to use force and means of restraint. The budgetary issue indicated in the report remains problematic. Under the present situation, according to the information obtained from the Ministry of Justice, out of 24 561 court judgments in civil matters 23 672 that is 96% have been enforced since 2000.

Under the Organic Law on the Constitutional Court of Georgia all State bodies, legal entities and individuals, political and public associations of citizens and the local self-government bodies are obliged to observe the requirements of, or flowing from rulings of the Constitutional Court (Article 24). A judgment of the Constitutional Court shall be final and failure to observe it is punishable by law. A normative act or a part thereof recognised as unconstitutional ceases to have legal effect from the moment of the promulgation of the relevant judgment of the Constitutional Court, unless otherwise provided for by the law in question. An act of the Constitutional Court shall immediately be enforced after its promulgation, unless otherwise provided for in the act. After the Constitutional Court recognises a normative act or a part thereof as unconstitutional it is impermissible to adopt/enact a legal act which contains the norms analogous to those declared unconstitutional (Article 25).

6.2.1.3. The Effective Right of Access

The right to legal aid is discussed in details bellow at 6.6.2. For the effective exercise of this right the Law on the Bar provides for the enactment of the Law on Public (Treasury) Lawyers (Advocates) before 1 June 2002. Until enactment of the Law, legal aid must be provided by the Office of Public (treasury) Lawyer, which is an entity of public law set up by the Ministry of Justice in accordance with the Law on an Entity of Public Law (Article 45).

At present, the law has not yet been enacted and legal aid is provided under the transitory provisions of Article 45.[328]

[327] p. 61.
[328] See, Conclusions and Recommendations, 6.9.b).

6.2.2. The Right to a Fair Hearing

6.2.2.1. Presence at the Proceedings

The Code of Criminal Procedure provides in express terms for the participation of the untried[329] person in the court hearing. The non-appearance of the untried person results in the postponement of the hearing save in exhaustively enumerated cases: when an untried person is abroad and evades appearance before the court; when an untried person, who is charged with an offence punishable up to three years of imprisonment, asks that his trial be held *in absentia* and the court considers that trial *in absentia* will not preclude an all-round, thorough and objective examination of the circumstances of the case. If a case involves two or more untried persons, and any one of the defendants fails to appear, the court is entitled to continue the hearing with regard to the others, unless it infringes upon the interests of the untried person who has not appeared, and affects the administration of justice. The Court must ensure that the untried person Georgian: is made conversant with the records of the proceedings conducted without his/her participation. In case of non-appearance of an untried person without good reason, he/she may be delivered by force following a court order. An untried person delivered to the court is entitled not to take part in the court hearing.

At the appeal proceedings a convict who is detained must attend the appeal hearing unless he/she does not wish so. A convict who is not detained, and his/her representative, must be summoned to appear before the court of appeal and their non-appearance does not prevent the court from considering the case unless the appeal has been brought by them, in which case the hearing must be postponed. In the case of repeated non-appearance, the case will be heard *in absentia* (Article 531).

Under Article 563, consideration of a case *in absentia*, in circumstances in which the presence of the accused was obligatory under the law, is considered an essential breach of criminal proceedings. In the case of the establishment of this fact, the judgment must be declared null and void in the cassation proceedings.

Article 655 of the Code of Criminal Procedure entitles the court, after having heard the parties' observations, to remove from the courtroom an untried person who is a minor, for the purpose of considering *in absentia* any circumstances which can adversely affect his/her interests. After the return of the defendant, the president is obliged to bring him/her up to date concerning the contents of the consideration having taken place *in absentia* and must enable him/her to put questions to any person questioned without his/her participation.

Under Article 619 of the Code of Criminal Procedure, the issue of execution of a sentence rendered against a citizen of Georgia in a foreign country is considered *in absentia* (part 2).

The Code of Civil Procedure contains a chapter, Chapter XXVI with the title "judgment in default". The Code sets out elaborate provisions concerning the effects of non-appearance of a claimant or a respondent or of both of them, at the main hearing, in cases in which due

[329] The term is taken from the European Prison Rules, Recommendation N R(87)3, adopted by the Committee of Ministers of the Council of European on 12 February 1987.

notification was sent to the parties in accordance with the procedure established by the Code.

In case of non-appearance of a claimant the court is entitled to render a judgment in default rejecting the claim on the basis of the respondent's petition. If the respondent does not seek judgment in default, the court must strike out the claim. If the respondent objects to the striking out of the claim, the hearing must be postponed. In cases of repeated non-appearance of the claimant the court must render a judgment in default (Article 229).

Where the respondent fails to appear and the claimant petitions the rendering of a judgment in default, the factual circumstances alleged in the claim must be deemed proven. If these circumstances support the claim, it must be upheld, otherwise the court must reject it (Article 230).

Non-appearance of both parties entails the rendering of a judgment in default concerning the discontinuation of the consideration of the claim (Article 231).

If a party's appears before the court in time, but refuses to take part in the consideration of the case, this is deemed to constitute non-appearance under Article 232.

The Code of Civil Procedure provides for instances in which delivery of a default judgment is inadmissible, and sets out the requirements which must be met if the contents of a judgment are to be compatible with the rules established by the Code, as well as requirements concerning the sending of the judgment to the parties and the possibility of appeal (Articles 233-235).

Under the Law on Constitutional Legal Proceedings, participants to constitutional legal proceedings shall be: a) parties - individuals and bodies who are deemed to be either claimants or respondents; b) representatives of the parties – persons who the parties to the proceedings have authorised to act on their behalf in accordance with the procedure prescribed by law; it is obligatory to appoint a representative before the Constitutional Court if the number of claimants or those having lodged a constitutional submission, is more than two; c) defenders of the parties' interests - lawyers or other persons who have higher legal education, who may participate in the legal proceedings only together with the parties or their representatives. The parties to the proceedings as well as their representatives are entitled to appoint such defenders. The Constitutional Court must notify a claimant or an author of the constitutional submission or their representatives in advance of the date of holding an admissibility hearing. The Plenum or a Board of the Constitutional Court is authorised and, if asked to do so in writing by a claimant or author of a constitutional submission or their representatives, obliged to invite the claimant, or author of the constitutional submission, their representatives and the defenders of their interests to the admissibility hearing and hear their clarifications (Article 20 of the Law on the Constitutional Legal Proceedings).

Under Article 19, para. 2 of the Organic Law, if a court of general jurisdiction concludes, while considering a particular case, that there is reason to believe that a law or other normative act to be applied by the court while adjudicating upon the case, is wholly or partially incompatible with the Constitution, the court must suspend its consideration of the

case and refer the issue to the Constitutional Court. The parties before the court of general jurisdiction are not entitled to take part in these constitutional legal proceedings.

6.2.2.2. Equality of Arms and Adversarial Proceedings

The Constitution and the Code of Criminal Procedure provide for the principle of equality of arms and the guarantees of adversarial proceedings.

Under Article 85, para. 3 of the Constitution the legal proceedings must be carried out on the basis of equality of arms and must respect the adversarial nature of the proceedings.

Likewise, equality of arms and the principle of the adversarial nature of the proceedings constitute the basis for the criminal procedure under Article 6, part 1, and Article 15, part 1, of the Code of Criminal Procedure.

Everyone is equal before the law and the courts regardless of race, citizenship, language, sex, social origin, economic or official status, place of residence, religion, belief or any other circumstances (Article 9, part 1). The parties to any legal proceedings are entitled to adduce evidence and to take part in their examination, file petitions and declare recusal, express their views concerning any question arising in the criminal case at hand, on the basis of absolute equality (Article 15, part 3). During the court hearing equality of arms is ensured by the judge presiding the court session (Article 437). Equality of arms and the adversarial nature of the proceedings are to be observed at the appeal stage as well (Article 518, part 2).

The petitions of the prosecution and the defence must be considered with equal attention (Article 232, part 2).

Article 439 of the Code of Criminal Procedure provides for the guarantees of the proceedings before the court to be held in an adversarial manner.

The Code of Civil Procedure also incorporates the principle of equality of arms. Under Article 5, justice in civil cases is to be administered by the courts strictly on the basis of the principle of equality of everyone before the law and the courts.

Constitutional legal proceedings must also be conducted on the basis of equality of the parties before the Constitution and the courts and must be adversarial in nature.[330]

6.2.2.3. Admissibility of Evidence

The legislation of Georgia raises no problems: with regard to the fair proceedings under the head of admissibility of evidence.

[330] Article 2 of the Organic Law on Constitutional Legal Proceedings and Article 1, para. 1, of the Law on Constitutional Legal Proceedings.

Under Article 42, para. 7, of the Constitution and Article 7, part 6, of the Code of Criminal Procedure "evidence obtained in contravention of the law shall have no legal force".

In accordance with the Code of Criminal Procedure, no evidence shall have a pre-determined legal effect.[331] The bodies conducting the criminal proceedings assess the evidence based on their intimate conviction. All evidence must be assessed for its relevance, whether the procedural law was followed in the course of its collection, for its authenticity and sufficiency. An admission of guilt by an accused, is not sufficient for a finding of guilt in the commission of the crime concerned, unless it is confirmed by other evidence. A sentence can only be based on a body of evidence which is not internally contradictory (Article 19). The resolution formally designating a person as an accused,[332] the bill of indictment, and the judgment must be based on established facts (Article 10, part 3).

Article 111 provides for the preconditions under which specific kinds of evidence must be rejected. In particular, evidence is to be rejected if it is obtained:

a) by an unauthorised official or body;
b) in contravention of a procedure stipulated by law, or by coercion, menace, deceit, blackmail, debasement or other unlawful means;
c) from a person who has violated the law or who is unable to indicate the source, place and date of the obtaining of the evidence.

The burden of proof of the admissibility of any evidence tendered by the prosecution and the inadmissibility of any evidence tendered by the defence rests with the prosecution. Evidence of the prosecution rejected by the court may be admitted at the request of the defence (*ibid*. parts 2 and 5).

The prosecutor is obliged to end a prosecution wholly or partially if the evidence collected fails to prove the charges brought. The decision to end the prosecution must be reasoned (Article 57, part 2).

The person with regard to whom a resolution concerning the application of security measures is adopted is not exempted from the obligation to give testimony during the preliminary investigation and before the court, to answer questions and to participate in a confrontation with the accused.

If the person concerned is a undercover employee of the police, the Ministry of State Security, the State Department of Intelligence, another law-enforcement State body, or an informer, his/her identity shall only be revealed if the defence claims that revelation of his/her identity is capable of proving the falsehood of the testimony given and the innocence of the accused. Refusal of this request renders the testimony inadmissible as evidence given by the undercover officer or an informer (Article 109, parts 4-5).

[331] The same rule applies to civil proceedings (Article 105, part 1).
[332] Article 75, part 2 says that a person may be formally designated an accused if there is evidence to show that it is highly likely that he/she has committed the crime in question.

“Evidence”, in law, consists of any information obtained from the sources provided for by law and in accordance with the procedure provided by law, on the basis of which the parties defend their rights and lawful interests and the inquirer, investigator, prosecutor and court establish whether an action or event on account of which the criminal proceedings are being conducted actually occurred, whether the action is committed by the person concerned, and whether he/she is guilty or not, as well as other circumstances having importance to the reaching of a correct decision in the case.

The following are admitted as evidence in criminal proceedings: formal written statements of a suspect, accused, untried person, victim, witness, expert, material evidence, records of investigative actions, judicial acts and judicial decisions, and other documents. Only admitted evidence may be used in the court disputes and court judgments.

In accordance with the requirements of law, data obtained through operative-investigative measures may constitute the contents of the procedural sources and the fact (except for a document) and may be admitted as evidence only in this exceptional circumstance (Article 110).

Under Article 563, a judgment must be declared invalid in cassation proceedings if the sentence is based on evidence obtained in contravention of law.

Information obtained by overhearing the conversation of a suspect, an accused, or a person held in a medical establishment for undergoing expertise, as well as using recording and other prohibited means may not be admitted as evidence (Article 136, part 7).

Under the Code of Criminal Procedure, the inspection of an apartment and other possessions against the will of a possessor as well as any search, or seizure, inspection and seizure of correspondence via mail or telegraph, seizure of property may only be carried out in accordance with the order of a judge or a court decision (ruling). In urgent situations provided for by law, the inspection of an apartment or other possession against the will of the possessors, search and seizure may be carried out without the order of a judge, but their lawfulness and reasonableness of these actions must be examined by the judge within 24 hours after the submission of any seized materials to the investigation or the court. The judge must examine the admissibility of the evidence thus obtained (Article 13, part 2).

6.2.2.4. Right to be Silent and not to Incriminate Oneself

Under Article 42, para 8, of the Constitution, “no one shall be obliged to testify against himself/herself or against those relatives whose circle shall be determined by law”.

Under Article 73, part 1, subparagraph b) and Article 76, part 2, of the Code of Criminal Procedure, a suspect and an accused have the right to give or not to give evidence. Likewise, under Article 114, part 2, subparagraph b) and Article 115, part 2 of the Code of Criminal Procedure a suspect and an accused have the right, but are not obliged, to give testimony. A waiver of the right to give evidence by a suspect or an accused must not be understood or interpreted as evidence establishing his/her guilt (Article 73, part 1, subparagraph n) and Article 76, part 2).

Testimony must always be obtained without coercion. The use of any physical or mental coercion, deceit, promise, blackmail, or inducement is prohibited. Evidence obtained in such a manner is inadmissible (Article 119).

Under the Code of Criminal Procedure, the silence of a suspect, an accused or an untried person "shall mean that he/she does not deem him/herself guilty."[333]

The Code of Criminal Procedure provides for a suspect, an accused, and an untried person to be notified of the guarantees of the right to silence in due course and manner.[334] The president of the court session is obliged to explain to the untried person that he/she is not obliged to answer any question put to him/her and that refusal to answer a question cannot be used against him/her (Article 476, part 1).

Although a witness is obliged to give testimony and may be held responsible for a refusal to give testimony and for perjury in accordance with Articles 370-371 of the Criminal Code, he/she is not obliged to give any evidence incriminating him/herself or his/her close relatives (Article 94, parts 3-4). The witness must be informed of this right before giving his/her testimony (Article 348, part 2).

It should appear from the provisions above, that Georgian legislation is generally compatible with the European Convention. The only problem in the legislation with regard to the right to remain silent and the right not to incriminate oneself is raised by the stipulation in the Code of Criminal Procedure that parties must inform an inquirer, an investigator or, where appropriate, a prosecutor of the commissioning of an expert report and of the issues addressed by the expert, where the expertise is being conducted on the initiative of the parties and at their expense. The prosecution is to be provided with the results of the expertise immediately after its completion (Article 357, part 3).

Article 364 provides for an alternative expertise - that is, one conducted by a party on its own initiative and expense with a view to establishing facts which in its opinion are capable of furthering the defence interests. The party is obliged to immediately notify the prosecution about commissioning of an alternative expert's report and of the issues addressed in it. If the party asks for this, the expert's conclusion must be attached to the case-file and must be assessed along with other evidence.

Where the Code of Criminal Procedure refers to a party which must notify the prosecution about the conducting of an alternative expertise and the issue addressed in it, this of course includes the defence. Where the Code of Criminal Procedure refers to the request of the party to attach the expert's conclusion to the case-file, the prosecution is to be regarded as the "party". It seems clear in any event that the prosecution must be provided with the conclusion of any expertise conducted on the initiative and at the expense of the defence, even if the expertise reveals circumstances incriminating the accused. Accordingly, the proceeding cannot be deemed fair within the meaning of Article 6 of the Convention.[335]

[333] Article 310, part 5, Article 311, part 11, Article 472, part 2.
[334] Article 72, para. 3, Article 310, part 5, Article 311, part 9.
[335] See, Conclusions and Recommendations, 6.9.c).

6.2.2.5. Reasoned Judgment

Under the Code of Civil Procedure, a judgment must be delivered immediately after the consideration of the merits. In exceptional circumstances, in especially complex cases, the delivery of a reasoned judgment may be postponed but for no more than 14 days. The resolutive part of the judgment must be delivered without delay at the same sitting at which the consideration of the merits was finished. At the same time, the court is obliged to announce when the parties and their representatives will be provided with the reasoned judgment (Article 257).

Article 258 provides for the procedure for the pronouncement of a judgment. After having signed the judgment the judges must return to the courtroom and the president or a judge announces the decision. Then the president or the judge must explain the contents of the judgment, the procedure and any right to appeal.

In accordance with the Code of Criminal Procedure, a ruling must, *inter alia*, be reasoned. A judgement is reasoned if it is supported by evidence adduced at the trial and established as true beyond reasonable doubt, and which suffices to establish the truth (Article 496).[336] One of the grounds for the consideration of a case by the court of appeal is a complaint that the judgment's is not, or insufficiently reasoned (Article 522).

Under Article 43, para. 7, of the Organic Law on the Constitutional Court of Georgia, all judgments, rulings and conclusions of the Constitutional Court, too, must be reasoned.[337]

6.2.2.6. Children Proceedings

Under Article 33 of the Criminal Code, an unlawful act envisaged by the Code cannot be imputed to an individual who was under the age of 14 at the moment of the committing of the act. According to Article 80, in the context of determining the criminal liability of a person or his/her exemption from such liability, persons who attained the age of 14 but are under 18 are considered minors.

Under Article 44, part 37, of the Code of Criminal Procedure, a minor is a person under the age of 18. The Code of Criminal Procedure provides for sufficient guarantees for proceedings involving juveniles to be deemed fair within the meaning of Article 6.

Under Article 16 of the Code of Criminal Procedure, while the consideration of a case before a court is normally public, at the request of a party, a case of a crime attributed to an individual under the age of 16 may be dealt with in wholly or partially closed proceedings (Article 655, part 4).

Article 655 of the Code of Criminal Procedure entitles the court, after having heard the parties' observations, to remove from the courtroom an untried person, who is a minor, for the purpose of considering *in absentia* any circumstances which can adversely affect the untried person. After the return of the latter, the president is obliged to bring him/her up to

[336] Regarding other requirements of a judgment see compatibility with Article 2 of Protocol No. 7.
[337] The same guarantee is enshrined in Article 30 of the Law on Constitutional Legal Proceedings.

date concerning the contents of the proceedings which took place *in absentia* and enable him/her to put questions to those who were questioned without his/her participation.

Other provisions in the Code of Criminal Procedure also contain fair trial guarantees for juveniles. In particular, if a victim of the crime is a minor, participation of a lawyer in the proceedings is obligatory (Article 72, part 2).

A body conducting criminal proceedings is not entitled to accept a refusal of a suspect, an accused or an untried person concerning the nomination of a lawyer if the suspect, accused or untried person is a minor. Likewise, where a coercive measure of a medical character is to be imposed upon a minor, a refusal by the latter or his/her legal representative concerning the nomination of a lawyer may not be accepted (Article 81, part 1, subparagraph a). Any inquirer, investigator, or prosecutor is obliged to ensure participation of a lawyer in the case from the very first interrogation of a minor. To this end, it has to be explained to the minor and his/her legal representatives that they have the right to choose a lawyer of their own choice. If this right has not been exercised, the inquirer or the investigator is obliged to ensure the participation of a lawyer in the case of his/her own motion (Article 645).

An investigator, prosecutor or court is entitled to separate a case from the criminal proceedings if an accused is a minor and involved in the case along with adult accused persons, provided this does not affect the investigation and consideration before the court (Article 246, part 1, subparagraph d; Article 640).

The participation of a prosecutor in the interrogation of an accused, who is a minor, is obligatory in pursuance to Article 284, part 3. If an under-age accused is interrogated, a prosecutor must be present, according to Article 284, part 3.

The Code of Criminal Procedure provides for a detailed procedure for the interrogation of a witness who is a minor. Interrogation of a minor under 16 is to be conducted in the presence of a pedagogue or a legal representative of the minor. Interrogations of a minor under 7 are only permissible with the consent of a parent or in the case of absence of such, with the consent of a guardian or other legal representative. These persons must to be told about their right to attend the interrogation, express their opinion and, with the permission of the investigator, put questions. The investigator is entitled to discard the questions which are not pertinent or are suggestive, but they must be entered into the record. A witness under 14 must be told of his/her obligation to tell the truth, but are not to be warned about the imposition of criminal responsibility for providing a false statement or refusing to make a statement (Article 306). Likewise, under Article 480, a witness under 14 is not warned about the imposition of criminal responsibility for providing a false statement or refusing or avoidance to make a statement to the court. He/she must make a promise to tell only the truth about which a record must be made. A witness under 16 must leave a courtroom immediately after the end of questioning unless the court either at the motion of the parties or of its own motion considers it necessary he/she stay.

When committing a case for trial, a judge is obliged to hold an administering hearing when a minor is involved (Article 417, part 2).

A defence counsel and a representative of a convict are authorised to lodge an appeal with the court of appeal only with the consent of the convict, unless the convict is a minor (Article 518, part 4).

6.2.3. Public Nature of Trial and Public Pronouncement of a Judgment

According to Article 85, para. 1, of the Constitution of Georgia, cases before a court must be considered at an open sitting. The consideration of a case at a closed sitting is permissible only under the circumstances provided for by law. Court judgments must be delivered publicly.

Under the Code of Civil Procedure all civil cases must be considered at an open sitting unless it contravenes the interests of the protection of State secret. A hearing *in camera* is permissible in the cases provided for by law on the basis of a reasoned petition of a party. The holding of a hearing *in camera* must be authorised by a reasoned ruling of the court (Article 9).

The Code of Criminal Procedure provides for exceptions to the principle of public consideration of criminal cases, which is stipulated for all courts in Article 16, part 1. Both participants in proceedings and other persons are entitled to take notes in shorthand, use audio-, or other recording equipment unless they interfere with the consideration of the case. Photographic-, cinema-, video- and audio-recording of the process as well as radio and TV broadcasting may only be forbidden by a reasoned decision of the court (*ibid*. part 2). Under the ruling (resolution) of the court (the judge), a hearing may be wholly or partially closed to the public for the following reasons: for the protection of a state, official or commercial secret; while considering a private correspondence or telegraphic message, if the person concerned is against making it public; at the stage of committal of the person for trial. At the request of a party, a case must also be considered in proceedings wholly or partially closed to the public: where the crime is attributed to an individual under the age of 16; if the case involves sexual abuse; and in other cases, in order not to make public the secrets of the intimate or private life of those participating in the case; also where it is in the interests of the protection of the personal security of those participating in the proceedings or that of their family members or close relatives (*ibid*. part 4).

A submission of an investigative body concerning the application of a coercive measure of a medical character must also be considered in camera (*ibid*. part 5).

Cases are also considered at open sittings in the Constitutional Court. On the initiative of the Constitutional Court or upon the petition of the parties a sitting of the Constitutional Court or a part thereof may be closed to the public for the protection of personal, professional, commercial or State secrets. Witnesses, experts and interpreters may be allowed to be present at a closed sitting, at the discretion of the Court. Upon the petition of the parties, the Constitutional Court may allow other persons to attend a closed sitting as well. All judgments of the Constitutional Court are delivered publicly.

Under the Code of Civil Procedure, a decision of a court must be delivered publicly by the judge or, where appropriate, by the president of the session. The judge or, as the case may be, the president of the session who has delivered the judgment is obliged to explain its

contents, as well as the procedure and terms for the lodging of an appeal. The parties upon their request are to be handed copies of the judgment within 3 days of applying (Articles 258-259). Legal rulings adopted on the basis of an oral hearing, in which the rules on publicity have been violated, are unlawful and therefore invalid (Article 394, part 1, subparagraph d of the Code of Civil Procedure).

Hearings *in camera* must be conducted in accordance with all procedural norms (Article 16, para. 6).

Under Article 351, part 1 of the Code of Civil Procedure a decision may not be delivered publicly on the basis of an applicant in the cases of adoption.

The provision is apparently aimed at protecting the Article 8 right to respect for private and family life. In the light of the case-law of the Strasbourg organs discussed above, the automatic prohibition of a public delivering of a judgment where the proceedings concern adoption matters seems to contravene the requirements of Article 6, para. 1.[338]

6.2.4. The Right to Trial within Reasonable Time

The Code of Civil Procedure stipulates that the courts of general jurisdiction must consider civil cases within 2 months from the day of receiving an application. This term may be extended in especially complex cases by a decision of the court to no more than 5 months save in cases concerning the payment of alimony, compensation for damage caused by mayhem or for other injury to health, for damage caused by the death of the head of a family, or for cases concerning requests stemming from labour relations, which must be heard within a month. All procedural acts must be completed within the time-limits provided for by law. If there is no procedural time-limit it must be fixed by the court. While determining the length of terms, the court must bear in mind the possibility of completing the procedural act (Article 59[339]).

The Code of Criminal Procedure does not provide for time-limits for proceedings before the first instance court. However, it does provide for time-limits for proceedings before the court of appeal and the court of cassation, which may be considered reasonable. The first instance court must send all the relevant materials to the Court of Appeal within a month (from rendering judgment) and the latter is obliged to consider the appeal within a month after receiving it. The President of the Court of Appeal is entitled to extend the time-limit for the consideration of complex and voluminous cases for another 15 days (Article 528). The same applies to the cassation proceedings (Article 550).

The legislation provides for certain mechanisms to avoid excessive workloads for judges and, thus, delay of the proceedings. Under the Organic Law on the Supreme Court of Georgia cases are allocated to boards according to the date on which they were logged with the court and the sequences of judges. The President of the Supreme Court is entitled to periodically re-allocate cases to judges with lesser workload. The Presidents of lower

[338] See, Conclusions and Recommendations, 6.9.d).
[339] As amended by the Law of Georgia of 28 July 2000.

instance courts are likewise responsible for the organisation of the work of the respective courts.

Delay in the proceedings is not deemed to be a procedural breach and the procedural legislation does not provide for a right of appeal against it. The Law on Disciplinary Responsibility of Judges of the Courts of General Jurisdiction and Disciplinary Proceedings provides for disciplinary proceedings to be instituted on the ground of undue delay in the consideration of cases.[340]

The Organic Law on the Constitutional Court of Georgia provides for a maximum term for constitutional legal proceedings. Consideration of a constitutional claim or a constitutional submission must not exceed six months from admission of the case by the Constitutional Court for consideration of the merits. In exceptional circumstances, the time-limit for the consideration of application may be prolonged by the President of the Constitutional Court (Article 22, para. 1[341]).

A constitutional claim or constitutional submission must be referred to the President of the Constitutional Court immediately after being registered. If the case falls under the jurisdiction of a Board, it must be referred to a Board within three days with a view to deciding on the admissibility of the case for consideration of the merits. If the case falls under the jurisdiction of the Plenum, the President of the Constitutional Court must designate a judge-rapporteur for the admissibility hearing and must refer the case-file to him/her within the same time-limit. While referring cases to the Boards, the principle of equal allocation of cases must be respected. Upon receipt of the case, the President of the Board must appoint a judge-rapporteur from among the members of the Board for the admissibility hearing and pass the case on to him/her. Within seven days of referring the case to the Plenum or a Board, the latter must decide about the admissibility of a constitutional claim or a constitutional submission for consideration of the merits.

Before the amendments made to the legal acts on the Constitutional Court, constitutional complaints awaited consideration of the merits for several years. Although the Law provided for a maximum term for consideration of the merits of one month, there was no time-limit concerning the admissibility stage. Under the present legislation, a judge of the Constitutional Court participating in the consideration of a case must be allowed to take part also in the consideration of another case before termination of the consideration of a postponed or a suspended case. This was previously not possible.

6.2.5. Independent and Impartial Tribunal Established by Law

6.2.5.1. Constitutional Guarantees

The relevant articles of the Constitution concerning the independence and impartiality of the courts are the following:

Article 82, para. 3

The judiciary shall be independent and exercised exclusively by courts.

[340] See, Conclusions and Recommendations, 6.9.e).
[341] As amended on 12 February 2002.

Article 83, paras. 3-4

3. Introduction of a court martial shall be permissible at war and exclusively within the system of the courts of general jurisdiction.
4. Creation of either extraordinary or special courts shall be prohibited.

Article 84

1. A judge shall be independent in his/her activity and shall be subject only to the Constitution and law.[342] Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law.
2. The removal of a judge from the consideration of a case, his/her pre-term dismissal or transfer to another position shall be permissible only in the circumstances determined by law.
3. No one shall have the right to demand from a judge an account as to a particular case.
4. All acts restricting the independence of a judge shall be annulled.
5. Only a court shall be authorised to repeal, change or suspend a court judgment in accordance with a procedure determined by law.

Article 86

1. A judge shall be a citizen of Georgia who has attained the age of 30, and has the higher legal education and at least five years experience in the practice of law.
2. A judge shall be designated on the position for a period of not less than ten years. The selection, appointment or dismissal procedure of a judge shall be determined by law.
3. The position of a judge shall be incompatible with any other occupation and remunerative activity, except for a pedagogical activity. A judge shall not be a member of a political party or participate in a political activity.

Article 87

1. A judge shall enjoy personal immunity. Criminal proceeding of a judge, his/her arrest or detention, the search of his/her apartment, car, workplace or his/her person shall be permissible by the consent of the President of the Supreme Court of Georgia, except when he/she is caught *flagrante delicto*, which shall immediately be notified to the President of the Supreme Court of Georgia. Unless the President of the Supreme Court gives his/her consent to the arrest or detention, the arrested or detained judge shall immediately be released.
2. The State shall ensure the security of a judge and his/her family.

Article 88

1. The Constitutional Court of Georgia shall exercise the judicial power by virtue of the constitutional legal proceedings.
2. The Constitutional Court of Georgia shall consist of nine judges - the members of the Constitutional Court. Three members of the Constitutional Court shall be

[342] Article 7 para. 1 of the Organic Law on the Courts of General Jurisdiction and Article 1, para. 2 of the Organic Law on the Supreme Court of Georgia additionally refer to international treaties and agreements.

appointed by the President of Georgia, three members shall be elected by the Parliament by not less than three fifths of the number of the members of the Parliament on the current nominal list, three members shall be appointed by the Supreme Court. The term of office of the members of the Constitutional Court shall be ten years …

3. A member of the Constitutional Court shall not be a person who has held this position before.

4 A member of the Constitutional Court may be a citizen of Georgia who has attained the age of 35 and has the higher legal education. The selection, appointment and election procedure and the issue of termination of the office of the members of the Constitutional Court as well as other issues of the constitutional legal proceeding and the activity of the Constitutional Court shall be determined by law.

5. A member of the Constitutional Court shall enjoy personal immunity. A member of the Constitutional Court shall not be proceeded, arrested or detained, nor shall his/her apartment, car, workplace or his/her person be subject to search without the consent of the Constitutional Court, except when he/she is caught *flagrante delicto*, which shall immediately be notified to the Constitutional Court. Unless the Constitutional Court gives its consent to the arrest or detention, an arrested or detained member shall immediately be released.

Article 89

1. The Constitutional Court of Georgia on the basis of a constitutional claim or a submission of the President of Georgia, not less than one fifth of the members of the Parliament, a court, the higher representative bodies of Abkhazia and the Autonomous Republic of Ajara, the Public Defender or a citizen in accordance with a procedure established by the Organic Law shall:

…

f. consider on the basis of a constitutional claim of a citizen constitutionality of normative acts in terms of the issues of Chapter Two of the Constitution;

…

2. The judgment of the Constitutional Court shall be final. A normative act or a part thereof recognised as unconstitutional shall cease to have legal effect from the moment of the promulgation of the respective judgment of the Constitutional Court.

Article 90

1. In accordance with the established procedure, the Supreme Court of Georgia shall supervise the administration of justice in the courts of general jurisdiction of Georgia, shall consider the cases as determined by law acting as a first instance court.
2. The President and the judges of the Supreme Court of Georgia shall be elected for a period of not less than ten years by the Parliament by the majority of the number of the members of Parliament on the current nominal list upon the submission of the President of Georgia.
3. The authority, organisation of the Supreme Court of Georgia and the procedure of activity and of the pre-term termination of the office of the judges of the Supreme Court shall be determined by law.

4. The President and the members of the Supreme Court of Georgia shall enjoy personal immunity. Criminal proceeding of the President or a judge of the Supreme Court, their arrest or detention, the search of their apartment, car, workplace or person shall be permissible only by the consent of the Parliament, except when the President or a judge is caught *flagrante delicto*, which shall immediately be notified to the Parliament. Unless the Parliament gives its consent, the arrested or detained shall immediately be released.

The Organic Law on the Courts of General Jurisdiction,[343] the Organic Law on the Supreme Court of Georgia,[344] the Organic Law on the Constitutional Court of Georgia,[345] the Code of Civil Procedure of Georgia[346] and the Code of Criminal Procedure of Georgia[347] all contain analogous guarantees of independence and impartiality.

6.2.5.2. Terms of Office

Concerning the judge's terms of office, the Constitutional Court has been called upon to rule on the constitutionality of the provision in the Organic Law on the Courts of General Jurisdiction setting out the terms of office for judges in these courts,[348] namely, Article 85^2, para. 1, governing the appointment in certain circumstances of a judge of a district (city) court or a regional court by resolution of the President for a term of 18 months.[349]

The Constitutional Court held, *inter alia*, that vesting judicial power for a limited period adversely affected the independence of a judge, while appointment for either a long period or for life-time was a factor strengthening independence. The Constitutional Court also took into account the fact that the officer exercising judicial power on the above basis enjoyed less social protection than did those appointed for a term of 10 years. In the course of its consideration of the merits the Constitutional Court revealed that the appointment of the judges for a term of 10 years was in practice decided on the basis of their conduct during the initial 18 months. By its judgment of 26 February 2003, the Constitutional Court of Georgia declared Article 85^2, para. 1 to be unconstitutional.[350]

6.2.5.3. Criminalisation of Actions against the Judiciary

Unlawful interference in the activity of a court with a view to influencing the administration of justice (Article 364, part 1); threatening a member of the Constitutional Court, a judge, a lay-judge or their close relatives in relation to the consideration of a case

[343] Articles 1, 4, 5, 7, 8, 9.
[344] Articles 1, 2, 3, 4.
[345] Articles 4, 6, 7, 8, 15, 17.
[346] Article 6.
[347] Article 8.
[348] 13 June 1997.
[349] In pursuance with Article 85^2, until present 116 persons have been vested with the judicial power for a term of 18 months.[349] Out of this number 47 persons were subsequently appointed for the constitutional term of 10 years and 52 still exercise judicial power temporarily.
[350] The impugned norm is invalidated from the moment of the promulgation of the judgment.

before the court (Article 365, part 1); and disclosure of secrets relating to their security (Article 367), are punishable under the Criminal Code of Georgia.

6.2.5.4. Impartiality

The guarantees of impartiality contained in the legislation raise no issues of compliance with the European Convention. The Code of Civil Procedure, the Code of Criminal Procedure, and the Organic Law on the Constitutional Court of Georgia all provide for grounds for recusal or withdrawal of a judge which are compatible with the requirements of the European Convention.

Under Article 29 of the Code of Civil Procedure, a judge who has participated in the first instance consideration of a case may not take part in the considerations of a case before the court of appeal or the court of cassation. A judge participating in the consideration of the case before the court of appeal may not participate in the consideration of the same case before the first instance court and/or before the court of cassation. A judge participating in cassation proceedings may not take part in the consideration of the same case by the court of appeal and/or the first instance court.

Article 30 stipulates that judges may not sit in cases if they are close relatives to a party to a case before the court.

Other grounds for recusal in civil proceedings are the following: the judge being a party to the proceedings him/herself; the judge having otherwise been previously involved in the case; the judge being related to any of the parties, or having any other personal, direct or indirect, interest in the outcome of the case; or the presence of any other circumstance raising a doubt as to the judge's impartiality) (Article 31); The Code stipulates that a judge must withdraw from the consideration of a case where there are such grounds for recusal (Article 32).

The Code provides for a mechanism of inquiry into allegations that grounds for recusal exist. Under Article 34, the court must hear the parties as well as the person against whom the application for recusal has been lodged. The issue is decided either on the spot or in a deliberations room. If an application for recusal has been lodged, in a court in which a single judge is considering a case, the application is considered by this judge.[351] Where the recusal is upheld or the judge withdraws, the case is submitted to the president of the court and the latter refers the case to another judge. If there is no other judge specialised in civil law the president of the court must refer the case to the Regional Court. Where an application concerning recusal is lodged against a judge considering a case collegially with other judges, the issue is put to the vote and decided by the other judges *in the absence* of the judge concerned. If an application on recusal is lodged against the whole bench or its majority, the issue is decided by the whole bench by a majority of votes. If the application is upheld the case is submitted to the President of the Regional Court, which refers it to another bench for consideration. In case of recusal of a whole bench of the chambers of the Supreme Court of Georgia or the Higher Courts of the Autonomous Republics or Regional

[351] Concerning individual and collegial consideration of cases in different instances, see compatibility report of 2001, p. 50.

Courts, the case is to be submitted to the President of the relevant court and referred by the latter to another bench.

Under the Code of Criminal Procedure, a judge who was previously formally involved in the same case, or who is related to any of the participants in the proceedings, or with regard to whom there are other circumstances which raise doubts as to his/her impartiality, may not participate in the consideration of the merits (Article 105).

The Code of Criminal Procedure stipulates that a judge must withdraw from the consideration of a case, if there are grounds for recusal (Article 108).

The Code provides for a mechanism of inquiry into allegations that there are grounds for recusal, which is analogous to the mechanism under the Code of Civil Procedure, discussed above. The difference is that the Code of Criminal Procedure sets out a term of 5 days within which the President of the Regional Court or of the Supreme Court respectively must refer the case concerned to another court in case the application for recusal is upheld.

Both the Code of Civil Procedure and the Code of Criminal Procedure stipulate that, if it is established that the composition of a court which rendered a judgment was contrary to the law, that judgement must be declared unlawful and lust be set aside.[352]

Under the Law on Constitutional Legal Proceedings a party shall have the right to claim before the Constitutional Court, when it is considering the case, the recusal of a member of the Constitutional Court, if the member of the Constitutional Court is a close relative either of a party or its representative, or if the member of the Constitutional Court is directly or indirectly interested in the outcome of the case, or if there are other circumstances which raise doubt as to the impartiality of the member of the Constitutional Court. The Law also stipulates that a member of the Court must withdraw of his own motion if such grounds exist. While inquiring into allegations that there are grounds for recusal and when deciding the issue, the Constitutional Court applies the procedural provisions applicable to all courts, discussed above (Article 25).

6.2.5.5. Prosecutor's Office

Recommendation (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, adopted on 6 October 2000, suggests that the Member States base their legislation and practices concerning the role of public prosecution in the criminal justice system on the common principles enumerated in the document.

Under Article 91, para. 1, of the Constitution, the Prosecutor's Office of Georgia is an institution of the judiciary, charged with conducting criminal prosecutions, supervising pre-trial inquiries and the execution of punishment, and supporting public prosecutions. The Prosecutor's Office is no longer responsible for the general supervision of legality.

[352] Article 394, para. a) of the Code of Civil Procedure, Article 563, part 1, subparagraph k) of the Code of Criminal Procedure.

The duties, organisation and guarantees of the Public Prosecutor's Office are more specifically defined in the Organic Law on the Prosecutor's Office.[353] According to the Law, the Public Prosecutor's Office co-ordinates the prevention of and the fight against criminality, conducts public prosecutions before courts, supervises the lawfulness of inquiries conducted by the police and other authorised agencies and supervises the execution of sentences (Article 2).

The Public Prosecutor's Office is a hierarchically centralised system with the following structure: the General Prosecutor's Office, the Military Prosecutor's Office competent for prosecution of persons employed in military, security and intelligence bodies, the Transport Prosecutor's Office prosecuting cases related to traffic offences, the Prosecutor's Offices of the Autonomous Republics of Ajara and Abkhazia and of Tbilisi and District Prosecutor's Offices, Regional Military and Transport Prosecutor's Offices, City Prosecutor's Offices and the Prosecutor's Offices for the penitentiary system (Article 6). Within the structure of the General Prosecutor's Office there is a department dealing exclusively with corruption related cases. There is an investigative department in the Prosecutor's Office. The General Prosecutor is empowered to create specialised units if needed.

The General Prosecutor is appointed for a period of five years by Parliament upon the proposal of the President of Georgia, by a simple majority of the total number of deputies, with the possibility of a single re-election. The General Prosecutor has the obligation to present general information on his office's activities to Parliament. He/she has the same obligation *vis-à-vis* the President of Georgia (Head of the Executive) (Article 91, para 2 and Article 7 of the Organic Law).

Within the structure of the General Prosecutor's Office, there is a consultative board to the General Prosecutor. The head of the board is the General Prosecutor empowered, in case of disagreement between the General Prosecutor and the board, to make the final decision. The main task of this body is to discuss issues concerning "the struggle against crime, disciplinary decisions, personnel questions, etc." The Ministry of Internal Affairs and the Ministry of State Security also participate in the discussions and decisions of the board if needs be (Article 8 of the Organic Law).

The political neutrality of the office is stipulated by the Organic Law. Under the Constitution and the Organic Law, membership of prosecutors in political parties is prohibited. Public prosecutors have no right to perform any other kind of pecuniary activities besides scientific, artistic and pedagogical ones. Any undue interference with the public prosecutor's activity is, by law, a criminal offence, although, according to the GRECO report of 2001[354] such cases occur very seldom in practice.

The Prosecutor General is vested with specific procedural powers to initiate criminal proceedings in case of commission of a crime by the President of Georgia, members of Parliament, the Public Defender, a judge, a prosecutor, or an Ambassador of Georgia - after the immunity from investigation which these persons enjoy has been lifted. Such proceedings are conducted solely by the Prosecutor General (Article 38, para. 4 of the Organic Law).

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[353] 21 November 1997.

[354] Evaluation Report on Georgia, Greco Eval I Rep (2001) 5E Final, Strasbourg, 15 June 2001, para 47.

If a criminal procedure is initiated against a prosecutor, he/she must be suspended from his/her position by decision of the Prosecutor General until the final decision of the relevant authority (Article 38, para. 5 of the Law).

Article 34 of the Organic Law contains rules for the dismissal of prosecutors. The GRECO evaluation report has identified certain deficiencies of the procedure. In particular, although a disciplinary decision is subject to judicial review (Article 37 of the Organic Law), there are no legal provisions providing for, e.g., the necessity to conduct an internal disciplinary procedure before the disciplinary decision is issued. Despite the fact that Article 8 of the Organic Law provides that a disciplinary decision is to be discussed by the Board of the General Prosecutor's Office, the report has stressed that there is no internal, independent disciplinary court or other body with the competence to make decisions on disciplinary issues. Neither does the Law provide for a satisfactory internal grievance procedure.[355]

Regarding the recommendation on furthering direct contacts between public prosecutors of different countries in the context of international judicial co-operation, Article 47 of the Organic Law provides for the right of the Prosecutor's Office to maintain contacts with relevant bodies of other countries and international organisations.

The Public Prosecutor's Office has full control over its own budget, the amount of which is set by Parliament.

6.3. Article 6, para. 2

6.3.1. The European Convention and its Interpretation

Under Article 6, para. 2, of the European Convention:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 6, para. 2, requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.[356]

6.3.2. Georgian Legislation

Article 40 of the Constitution reads as follows:

> "1. An individual shall be presumed innocent until the commission of an offence by him/her is proved in accordance with the procedure prescribed by law and by a final judgment of conviction.
> 2. No one shall be obliged to prove his innocence. The burden of proof shall rest with the prosecutor.

[355] *Ibid*. para. 50.
[356] *Barberà, Messegué and Jabardo* v. *Spain*, 6 December 1988, Series A no. 146, paras. 67-68 and 77.

3. A resolution formally designating a person as an accused, an indictment and a judgment containing a conviction shall be based only on evidence which has been established beyond reasonable doubt. An accused shall always be given the benefit of doubt"

Article 10, part 1, of the Code of Criminal Procedure reiterates Article 40, para. 1, of the Constitution, but refers to "an accused" instead of "an individual" to be considered innocent. This means that an individual may not benefit from the presumption of innocence until he/she is recognised as an accused in accordance with the procedure established by the Code of Criminal Procedure. Part 2 repeats the Article 40, para. 2, guarantee and adds that the prosecution is entitled to discontinue pursuing the prosecution. The rest of Article 10 repeats the constitutional provisions without changes.[357]

Article 439, part 5 of the Code of Criminal Procedure stipulates that the presumption of innocence must be adhered to by a judge during the consideration of a case. Until the rendering of a sentence or other conclusive judgment, a judge has no right to pronounce himself/herself upon the guilt of an untried person.

The mass media are entitled to broadcast criminal proceedings and their outcomes without any impediments, although they must be guided by the principle of presumption of innocence (Article 16, part 3).

The principle of presumption of innocence must be observed by the investigator or where appropriate by the prosecutor in deciding whether to make any materials obtained in the case of the inquiry and preliminary investigation public (Article 16, part 8).

6.4. Article 6, para. 3.a

6.4.1. The European Convention and its Interpretation

Under Article 6, para 3.a of the European Convention:

"3. Everyone charged with a criminal offence has the following minimum rights:
a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;"

The three major requirements incorporated in Article 6, para. 3.a, are the following: the accused must be informed of the charge against him at the time the charge is brought[358] or at the commencement of the proceedings; the information about the charge must be given in a language that the accused can understand; and the offence of which a person is convicted must be one with which he was charged.

6.4.2. Georgian Legislation

[357] See, Conclusions and Recommendations, 6.9.f).
[358] Within the Convention meaning.

The Code of Criminal Procedure is compatible with Article 6, para. 3.a. It requires the charges to be set out in the resolution formally designating a person as an accused and stipulates that the defence must be notified of the resolution.

In particular, *inter alia*, the following must be stated in the reasoned resolution adopted by the investigator or, where appropriate, by the prosecutor in accordance with the procedure provided for by the Code of Criminal Procedure: the terms of the accusation, i.e. a description of the incriminated act, with reference to the place, date, method or facility and means of its commission, as well as the results of the act; the evidence, which must be sufficient to support a reasonable presumption that the act has been committed by the person concerned; and the article, part and subparagraph of the article of the Criminal Code which defines the act as a crime. Where more than one crime defined in different articles, different parts or different subparagraphs of an Article, have been committed, the qualification of each of these crimes must be separately explained (Article 282, parts 1-2).

After having issued the resolution, the investigator or, where appropriate, the prosecutor must specify the time and place of the bringing of the charge. The charge must be brought no later than 48 hours from the adoption of the resolution and in case of non-appearance of the accused in due time, no later than 24 hours from his/her discovery. Where the person has been arrested as a suspect, the prosecution is obliged to issue the resolution, bring the charges and interrogate him/her as an accused no later than 48 hours from drawing up the report on the arrest. The prosecution is obliged to ensure the participation of defence counsel when bringing the charges (Article 283).

Article 284 governs the procedure for bringing the charges. The investigator or, where appropriate, the prosecutor is obliged to inform the person who has been summoned and his/her defence counsel of the resolution formally designating the person as an accused. The summoned person and his/her lawyer must attest in writing that they that they have been provided with a copy of the resolution. A copy of the resolution together with the list of the rights and duties of an accused are handed by the investigator or a prosecutor to the accused and his/her lawyer. Moreover, the investigator or, where appropriate, the prosecutor, must explain to the accused his/her rights and duties in the presence of the defence counsel (*ibid*. part 1).

The aforementioned articles do not provide for the obligation to ensure interpretation or translation. The general obligation is incorporated in Article 100 of the Code of Criminal Procedure [359] under which an interpreter must be invited whenever either a suspect, an accused or a defence counsel does not have, or has a poor, command of the language of the proceedings and when there is a need of translation of a written text (part 1, subparagraphs b-c).[360] Article 284, part 1, clearly requires that the defence actually understands the charges that are brought against the untried person; it follows from this that the help of an interpreter/translator will be necessary in case the defence does not command the language used in the resolution. This provision is augmented by Article 76, part 2, of the Code of Criminal Procedure under which an accused must be handed a copy of the resolution translated in his/her native language or in one he/she can understand.

[359] See also below as concerns compatibility with Article 6.3.e.

[360] The rules concerning an interpreter are also applied to a person mastering sign language being invited to take part in the proceedings (Article 100, part 3 of the Code of Criminal Procedure).

The Code of Criminal Procedure also incorporates the third requirement of Article 6, para. 3.a mentioned above. Under Article 285, part 1, in case of either the alteration or completing of the charges brought during the preliminary investigation, the investigator is obliged to issue a fresh resolution formally designating the person as an accused in accordance with Articles 283-284.

Article 472 of the Code of Criminal Procedure governs the procedure under which the gist of the charges is to be explained by the judge to the untried person at the beginning of the judicial investigation. The president of the court session is obliged to explain the qualification of the act and the penalty prescribed for it, and the basis and amount of any civil action brought against the untried person. If there is more than one accused involved in the case, the explanation must be given to each of them.

6.5. Article 6, para. 3.b

6.5.1. The European Convention and its Interpretation

Under Article 6, para. 3.b of the Convention:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> …
> b. to have adequate time and facilities for the preparation of his defence;"

The right enshrined in Article 6, para. 3.b, implies that a defence lawyer must be appointed in sufficient time to allow proper preparation to take place.[361] A defendant's meeting with his/her lawyer must be unrestricted and confidential and no prior authorisation from either a judge or a prosecutor should be needed. A judge must explain this right to an untried person when authorising pre-trial detention. As for the prison authorities, they must ensure adequate facilities to enable legal visits to take place in confidence and out of hearing of the prison authorities. The free communication of a defendant with his/her lawyer is regarded as absolutely central to the concept of a fair trial and where there are allegations that adequate facilities have not been provided the judge must decide whether the trial can go on without violating Article 6, para. 3.b.[362]

6.5.2. Georgian Legislation

The Constitution of Georgia does not provide for the guarantee enshrined in Article 6, para. 3.b. It secures the right to defence: "the right to defence shall be guaranteed"[363] and "the arrested or detained person is entitled to request the assistance of a defender upon his/her arrest or detention. The request shall be met."[364] These articles have nonetheless been invoked before the Constitutional Court in a case in which the claimant alleged that certain norms of the Code of Criminal Procedure affecting the modalities of the right to defence

[361] Decision of the Commission in the case of *X and Y* v. *Austria*. 15 DR 160.
[362] *Campbell and Fell* v. *the United Kingdom,* 28 June 1984, Series A no. 80.
[363] Article 42, para. 3.
[364] Article 18, para. 5.

were unconstitutional. The Constitutional Court has read the right to have adequate time and facilities for the preparation of one's defence into the constitutional provisions guaranteeing the right to defence and ruled upon the constitutionality of the impugned norms. In particular, in its judgment of 29 January 2003, the Constitutional Court declared as unconstitutional the norms limiting the duration of meetings of a suspect or an accused and their defence counsel to one hour.[365]

The Code of Criminal Procedure provides for the right of an accused to appeal against the charges brought, and to have sufficient time and facilities for the preparation of his defence. The Code of Criminal Procedure provides for a right to unimpeded legal visits. A person arrested or detained or placed in a medical establishment for undergoing a medical expertise must have the possibility to meet his/her lawyer in private without any limitation as to the number and duration of the visits, unless otherwise provided for by the Code of Criminal Procedure, to have access to legislative acts and juridical literature, and to have access to paper and other stationary for drawing up complaints, petitions and other documentation (Article 136, part 6).

The Code of Criminal Procedure provides for the right of defence counsel to unimpeded meetings with the defendant in private and without any surveillance, without any limitation as to the number and duration of legal visits by the administration of the place of deprivation of liberty and the body of investigation, save in the exceptional cases provided for by Article 73, part 1, subparagraph d) and Article 84, part 2, subparagraph b).

As for the procedural obligation of the administration of the place of arrest and detention, in accordance with Article 137, part 1, of the Code of Criminal Procedure, the administration is obliged to ensure that legal visits can take place in private, after defence counsel has produced an order issued by the Bar and his/her ID. The meeting with a lawyer must take place without any limitation as to the number and duration save in the exceptional cases provided for by Article 73, part 1, subparagraph d).

In its judgment of 29 January 2003, the Constitutional Court refused to rule on the constitutionality of the reference in Article 84, part 2, subparagraph b) and Article 137, part 1 to the exceptions set out in Article 73, part 1, subparagraph d) on account of them being so called technical norms.[366]

The Regulations on Remand Detention,[367] which govern the procedure for keeping the accused and the untried (referred to as the prisoners) in places of remand detention and the conditions in such places, are compatible with the Article 6, para. 3.b requirements. Under Article 19, para. 9, a prisoner is entitled to unlimited meetings with his/her defence counsel as regulated by the Code of Criminal Procedure. Legal visits are to be conducted without any separating barrier and without any limitation as to number or duration. A prison officer is entitled to observe the meeting visually, without overhearing.

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[365] Article 73, part 1, subparagraph d), last provision ("no more than one hour"); Article 284 part 2, last provision ("the meeting with the defence counsel shall not exceed 1 hour").
[366] See, Conclusions and Recommendations, 6.9.g).
[367] Approved by Order of the Minister of Justice of 28 December 1999.

Article 13 of the Regulations on the Remand Detention governs the sending and receiving of letters by a prisoner. Under para. 8, letters must be sent within 3 days from being handed to the administration, which is compatible with the case-law on Article 6, para. 3.c.[368] What seems to fail to be compatible with the Convention is the provision that states that correspondence must be censored, which does not provide for any exception with regard to correspondence between a prisoner and his/her defence counsel (*ibid.* para. 2).

The Court has held that an interference will contravene Article 8 unless it is "in accordance with law", pursues one or more of the legitimate aims referred to in paragraph 2 of that article and, furthermore, is "necessary in a democratic society" in order to achieve them.[369] These requirements seem not to be provided for by Article 13 of the Regulations.[370]

As to the compatibility with the requirement that a defence lawyer must be appointed in sufficient time to allow proper preparation to take place, Article 83, part 2 of the Code of Criminal Procedure reads as follows:

"If a suspect or an accused is arrested he/she shall be given no less than 3 hours to decide on and invite a lawyer chosen by him/her. If the defence counsel chosen by the suspect or accused fails to appear within the given term, an inquirer, an investigator or, where appropriate, a prosecutor shall be obliged to offer the suspect and accused the services of appointed lawyer. A suspect or accused who has declined the offer of an appointed lawyer shall be entitled to exercise the right to defence in person until the appearance of the lawyer chosen by them. If, while arresting the suspect or accused, a circumstance provided for by Article 81[371] of the present Code is revealed, the inquirer, investigator or prosecutor shall not be entitled to accept the refusal of the arrested suspect or accused to accept an appointed lawyer and shall appoint one after the expiry of this term."

The above provision has been contested before the Constitutional Court as allegedly infringing upon the right to defence guaranteed by the Constitution.

Regarding the first two sentences of the provision, the Constitutional Court in its judgment[372] held that the provision refers to the minimum and not to the maximum term within which an accused is obliged to decide on and invite a defence counsel. The Court has stressed that the impugned norm has to be interpreted in practice as a reasonable term necessary for the effective exercise of the right to access to defence counsel.[373] Therefore, the court refused to uphold the request to declare this norm unconstitutional.

The Code of Criminal Procedure contains detailed provisions governing access to the case-file by an accused and his/her defence counsel.

Under the Code of Criminal Procedure studying of the case-file by the defence constitutes a right. All participants in the proceedings are entitled to request changes in the venue and dates for the study of the case-file determined by the prosecution after the end of the

[368] *Domenichini* v. *Italy,* 15 November 1996, *Reports* 1996-V.
[369] *Labita* v. *Italy* of 6 April 2000, ECHR 2000-IV para. 175-178.
[370] See, Conclusions and Recommendations, 6.9.h).
[371] The circumstances where the defence is mandatory, see bellow.
[372] 29 January 2003.
[373] With regard to the rest of the provision, see bellow.

preliminary investigation, to decline to study the case-file or to study only a part of it (Article 401, part 3).

The Code of Criminal Procedure allows for the photocopying of the case-file at the request of any participant in the proceedings and at his/her expense. All participants in the proceedings are also allowed to study the evidence, including phone-, photo-, cinema-, video-, and audio-documentation attached to the case (Article 402, part 2). An accused is entitled to study the case-file both individually and together with his/her defence counsel (Article 403, parts 1-3). At the motion of a participant in the proceeding, study of the case-file may be postponed if there is a good reason for no more than 7 days. If defence counsel fails to appear in due time, the accused is entitled to invite, or request the appointment of, another lawyer at the State's expense within 2 days (Article 404).

The Code of Criminal Procedure provides for the study of all volumes of the case-file by the participants to the proceedings at once or in sequence. The accused is entitled to get acquainted with the entire case-file, while a civil party may have access to the materials filed under the head of the civil claim (Article 405, parts 2-3). When there are several joined cases, each participant to the proceeding is entitled to study the materials pertaining to his/her charges. An accused and his/her defence counsel may study other materials as well if it is necessary for the preparation of the defence (*ibid*. part 5).

A person studying the case-file is entitled to make extracts and photocopies of any procedural document at his/her own expense (*ibid*. part 6). The Code of Criminal Procedure prohibits the limitation of the defence counsel to study the case-file due to the reason that it contains a State secret (Article 405, part 8).

Restriction of the time of study of the case-file or coercion of the participant to the proceedings to hasten the study of the case-file is inadmissible under the Code of Criminal Procedure unless otherwise provided by the Code. For the study of the case-file no less than 6 and no more than 8 hours per day must be afforded. If a participant to the proceedings intentionally prolongs the study of the case-file, the investigator is entitled to pass a resolution sanctioned by the prosecutor setting reasonable and sufficient time-limits fir the study (Article 406, parts 1-3).

Before the beginning of the consideration of a case by the court, an accused after his/her committal to the court for trial, is entitled to 5 days for additional study of the case-file and 10 days in complex cases. If a defence counsel participating in the trial did not take part in the preliminary investigation, or if an untried person did not study the case-file after the end of the preliminary investigation, they are entitled to study the case-file for up to 10 days and in complex cases up to 30 days before the beginning of the consideration of the case by the court, and to make relevant extracts and photocopies (Article 429).

The Court is obliged to give sufficient time for the study of the case-file to defence counsel chosen by the defendant or appointed by the court due to non-appearance of the lawyer for a period of more than 10 days (Article 445, part 2).

Under Article 563, the failure to secure for either an accused or his/her defence counsel the right to study all the materials in the file is considered an essential breach of criminal

procedure. If such a breach is established, the judgement must be declared invalid and set aside in cassation proceedings.

In proceedings against a person in respect of whom a coercive measure of a medical character may be applied, defence counsel is obliged to study the case-file after having being notified about the committal of the case to court (Article 669, part 1).

As for the requirement that the judge must inform an untried person of the Article 6, para. 3.b right when authorising pre-trial detention, Article 73, part 1, subparagraph m) of the Code of Criminal Procedure provides for the right of a suspect to be provided with an exhaustive explanation of his/her rights from an inquirer or an investigator. Under Article 76, part 2 an accused is entitled to all the rights of a suspect including the aforementioned right. An accused is also entitled to obtain notification of his/her rights and an explanation of them in writing from the body conducting the proceedings (Article 76, part 3). The Code of Criminal Procedure accordingly imposes an obligation on the bodies conducting criminal proceedings to explain these rights to the defendant and to ensure that they can be exercised (Article 146, part 5; Article 289, part 1; Article 467).

6.6. Article 6, para. 3.c

6.6.1. The European Convention and its Interoperation

Under Article 6, para. 3.c of the European Convention:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> …
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

6.6.2. Georgian Legislation

Under the Constitution of Georgia the right to defence shall be guaranteed (Article 42, para. 3) and an arrested or detained person is entitled to request the assistance of a defender upon his/her arrest or detention. The request must be met (Article 18, para. 5).

Under the Code of Criminal Procedure, the courts and any other officials in charge of the criminal proceedings are obliged to ensure that a suspect, accused or an untried person is guaranteed his/her right to defence. They must explain their rights to them, enable them to defend themselves with all means permitted by law, and protect their rights and freedoms. The right to defence must be guaranteed to a person with regard to whom proceedings concerning the application of a coercive measure of a medical character are pending as well as to a convict and an acquitted person in case of an appeal from the court decision. Participation of a defence counsel or a legal representative in the proceedings may not deprive the defendant of his/her right to defence (Article 11).

Article 44, which defines the terms referred to in the Code of Criminal Procedure, includes in the term "defence party": a suspect, an accused, a parent or other legal representative of

an accused, and a civil respondent and his/her representative (part 20). An appellant and a person who has lodged a cassation appeal are omitted from this list. While Article 6 does not guarantee the right to appeal, it requires that if appeal proceedings do take place, they must be in accordance with the European Convention standards. In the light of Article 11, the deficiency of Article 44, part 20, may be regarded only as a technical one. Nevertheless, it is recommended to make appropriate amendments.

The body conducting the criminal proceedings may not restrict a suspect or an accused in his/her choice of defence counsel (Article 78, part 3).

The Code of Criminal Procedure provides for two possibilities of providing a defendant with the right to defence: defence based on a contract and defence on the basis of appointment. Under the former procedure, a suspect, an accused (an untried person is not referred to), their relatives and other persons are entitled to conclude a contract with a lawyer (Article 79). Under the latter procedure, the body conducting the proceedings is obliged to assign a lawyer to the defendant, with his/her consent, at the State's expense if they are indigent. Such lack of means is to be confirmed by documentation issued by a body of Government or Self-government. If such documentation cannot be produced, the body conducting the proceedings must reach the decision on legal aid. Legal aid is financed from the State budget. Defence by appointment may only be resorted to if the suspect or accused has not hired a lawyer on a contract basis. The State body conducting the proceedings, as well as the bar association or another association of lawyers may exempt the suspect or accused from payment for legal assistance in other circumstances, which are not mentioned above. Where the defendant is exempt by the body conducting the criminal proceedings, the expenses must be borne by the State (Article 80).

At any stage of the proceedings, a suspect, an accused or an untried person is entitled to waive the right to have a lawyer appointed or to dismiss an appointed lawyer and to invite another lawyer of his/her own choosing or defend him/herself in person. Such a waiver is admissible only on the initiative of the defendant him/herself. The defendant is entitled to change his/her mind and request the appointment of a lawyer or hire a lawyer of his/her own choosing. The request of a defendant concerning the replacement of an appointed lawyer or the hiring of another one must be met unless the request is merely intended to prolong the proceedings or to preclude another participant in the proceeding from exercising his/her rights (Article 78).[374]

The Code of Criminal Procedure provides for mandatory defence in certain cases. This means that the body conducting criminal proceedings is not entitled to accept a refusal to appoint a lawyer, or to have a lawyer appointed, from a suspect, an accused or an untried person, or from a person upon whom a coercive measure of a medical character is to be imposed, or his/her legal representative. The grounds for mandatory defence are the following: if the defendant is a minor; if the defendant is physically or mentally handicapped to such a degree as to seriously hamper the right to defence; if the defendant is incapable of understanding the legal proceedings; if the defendant has committed a crime punishable by life-imprisonment; if the defendant has been ordered to undergo a forensic-psychiatric expert evaluation; if there is a conflict between the interests of the defendants

[374] See, Conclusions and Recommendations, 6.9.i).

and one of them has a lawyer; or if the interests of the victim or a civil claimant are defended by a representative (Article 81).

All defence counsels participating in a trial are entitled to exercise all of the rights vested in their client (Article 445, part 1).

Under Article 83, part 5 if a defence counsel (whether chosen by the defendant or appointed) is not able to participate in the proceedings on account of either illness, departure, or other good reason, the body conducting the proceedings is entitled to postpone any investigative act or hearing, in which the defence counsel was to participate, but for no more than 10 days. In case of non-appearance of the lawyer within this period, the investigator, or, where appropriate, the prosecutor or the court must ask the defendant to hire another lawyer; in case of refusal or non-appearance in due time, they are obliged to appoint one.

The words "is entitled" has been declared unconstitutional by the Constitutional Court in its judgment of 29 January 2003.

Article 445 of the Code of Criminal Procedure governs the same issue pending trial. In the case of a failure of defence counsel to appear before the court, the hearing must be postponed. The defence counsel may be replaced with the untried person's consent. If participation of a defence counsel hired by an untried person is impossible for a long period (more than 10 days), the court is obliged to postpone the hearing and offer the untried person the choice of another lawyer or appoint one itself. In deciding on the replacement of a defence counsel, the court is obliged to consider the reasonableness of the decision. If the case involves two or more untried persons, and at the stage of judicial investigation a defence counsel of one of them fails to appear, the court is entitled to continue hearing the case with regard to the rest of the untried persons, unless it infringes upon the interests of the untried persons and affects adversely the judicial investigation (*ibid*. parts 2-3).

Under Article 563, carrying on the proceedings without the participation of a defence counsel, in a case in which his/her participation was mandatory, is considered to be an essential breach of criminal procedure. If such a breach is established, the judgement must be declared invalid and set aside in cassation proceedings.

The Constitutional Court, in its judgment[375] has held that limiting number of a defence counsel an accused or a suspect are entitled to have at their disposal does not infringe upon the right to defence (Articles 73 and 76).

The Convention provides for the right to legal aid in criminal proceedings, but the Court has extended the right to free legal assistance to civil cases as well, where the interests of justice so require.[376]

Under the Code of Civil Procedure,[377] in case a party is not able to pay for legal assistance, the court is authorised at the motion of the party to invite a lawyer to act for that party at the

[375] 29 January 2003.
[376] *Airey* v. *Ireland,* 9 October 1979, Series A no. 32.
[377] 14 November 1997.

State's expense, if due to the importance or complexity of the case the participation of a lawyer in the proceedings is expedient. In such a case, the lawyer is to be paid 4 % of the worth of the subject of the dispute from the State budget (Article 47, part 2).

6.7. Article 6, para. 3.d

6.7.1. The European Convention and its Interpretation

Under Article 6, para. 3.d, of the European Convention:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> …
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

The general principle is that accused persons must be allowed to call and examine any witness whose testimony they consider relevant to their case and must be able to cross-examine any witness who is called, or whose evidence is relied on, by the prosecution. Article 6, para. 3.d, does not give an accused an absolute right to call witnesses or a right to force the domestic courts to hear a particular witness. Domestic legislation may lay down conditions for the admission of witnesses and the competent authorities may refuse to allow a witness to be called if it appears that the evidence will not be relevant.

6.7.2. Georgian Legislation

Under Article 42, para. 6, of the Constitution "the accused shall have the right to request summonsing and interrogation of his/her witnesses under the same conditions as the witnesses of the prosecution."

The Constitution does not refer to an untried person, whose status is different under the Code of Criminal Procedure:[378] an untried person is an accused committed to court for a trial.[379]

Under Article 110, para. 2, subparagraph e) of the Code of Criminal Procedure, witness testimony of a witness may be admitted as evidence. It is defined as information about factual circumstances, to be established in a criminal case. Information provided by a witness may not be admitted as evidence if he/she fails to indicate the source of the information or if it is established that due to mental disease or disorder, or because the witness is under 14 years of age, the witness is not able to perceive, memorise and recollect the facts correctly (Article 117). Furthermore, the Code of Criminal Procedure provides for the right of the parties, *inter alia*, to adduce evidence, take part in its examination, and express their views on any question arising in the criminal case at hand on the basis of absolute equality (Article 15, part 3). This principle applies both to the pre-trial stage and to

[378] Article 44, part 25.
[379] See, Conclusions and Recommendations, 6.9.j).

the proceedings before a court, including appeal proceedings. At the pre-trial stage, the Code of Criminal Procedure specifically mentions the right of an accused to request a confrontation with any person who testifies against him as having committed the crime (Article 76, part 3).

At the proceedings before the court, the equality of the parties is ensured by the president of the court session. Article 437 refers to the aforementioned as to a right and not as an obligation of the president of the court session, which may be considered as only a technical deficiency of drafting of the Code.[380]

In the context of the rights and duties of the parties, the Code of Criminal Procedure refers to a witness in general terms and does not differentiate between witnesses for the defence and for the prosecution. The latter is only done in connection with the procedure to be followed in the examination of witnesses. In accordance with the principle of adversarial proceeding, the prosecution or the defence first examines the witness called at their request, the other party then puts questions to the witness (cross-examination) and the party having requested the summonsing of the witness then examines him/her again (re-examination).[381] A witness summoned at the request of a party is to be examined first by the requesting person, then by the persons representing the party and finally by the representatives of the opposite party and the court. After this procedure the witness is re-examined by the person who requested the summonsing of the witness concerned. Witnesses summoned on the initiative of the court are to be examined in the first place by the court, then by the defence and finally by the prosecution (Article 479, parts 4-5).

Before the Court of Appeal, any witnesses must be summoned and examined who either the appellant or any other participant in the proceedings feels should be examined. This may include witnesses who were not examined at the trial of first instance. The parties may agree to limit the number of witnesses to be called, or to refrain from calling any witnesses (Article 531).

6.8. Article 6, para. 3.e

6.8.1. The European Convention and its Interpretation

Under Article 6, para. 3.e, of the Convention:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> …
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

The right embodied in para. 3.e was initially held to be absolute.[382] Subsequently, the Court stated the following in the *Kamasinski* v. *Austria* case:

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[380] See, Conclusions and Recommendations, 6.9.k).
[381] Article 475, para. 3.
[382] See, *Luedicke, Belkacem and Koç* v. *Germany*, 28 November 1978, Series A no. 29, paras. 40 and 48. *Croissant* v. *Germany*, 25 September 1992, para. 33.

> "paragraph 3 (e) (Article 6-3-e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events."[383]

6.8.2. Georgian Legislation

Under Article 85, para. 2, of the Constitution "legal proceedings shall be conducted in the State language. An individual not having a command of the State language shall be provided with an interpreter…"

The guarantee is elaborated on in the Code of Criminal Procedure. In accordance with Article 17, part 2, a participant to the proceeding who does not command or who has a poor command of the language in which the criminal proceedings are conducted,[384] is entitled to make statements, give evidence or explain matters, make submissions and recusals, lodge complaints, or otherwise act before the court in his/her native language or in any other language which he/she commands. In such cases, and in studying the case-file, the participant in the case is entitled to use the services of an interpreter. The investigative and court case-file, which must be handed to the accused or other participant to the proceeding in accordance with law, must be translated into his/her native language or into another language she/she commands. The body in charge of the proceedings is obliged to explain the aforementioned rights to the person concerned. The work of an interpreter participating in the proceedings is to be remunerated at the State's expense (*ibid*. parts 3-4).

Thus, the Code of Criminal Procedure refers explicitly to the remuneration of the work provided by the interpreter at the State expense. That translation is implied in the service of the interpreter can be inferred from Article 100, part 1, under which an interpreter is to be summoned where, *inter alia*, there is a need for translation of a written text. This can be the case both at the stage of the preliminary investigation and in the proceedings before the court.

The Code of Criminal Procedure sets out the obligations of an interpreter. These are, *inter alia*, the following: to appear before the body in charge of the proceedings; to translate exactly and fully a statement or written document; and to confirm the authenticity of the translation. The Code of Criminal Procedure provides for a pecuniary penalty to be imposed on the interpreter if he/she has evaded his/her duties. The interpreter is obliged to discontinue his/her participation in the case if he/she has insufficient knowledge of the language concerned (Article 101). The Criminal Code provides for criminal responsibility for intentionally incorrect interpretation/translation (Article 370). Interpreters are to be warned about this responsibility in accordance with Article 459, part 2, of the Code of Criminal Procedure. The defence is entitled to demand the recusal of an interpreter under the Code of Criminal Procedure and it must be informed of this right (Article 459, part 3).

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[383] Para. 74.
[384] Georgian, in Abkhazia also Abkhazian (Article 17, part 1).

The norms concerning an interpreter are also applied to a person mastering sign language who is invited to take part in the proceedings (Article 100, part 3 of the Code of Criminal Procedure).

6.9. Conclusions and Recommendations

Georgian legislation is mostly in compliance with the requirements of Article 6 of the Convention. However, the following recommendations may be made:

a) to amend Article 242, part 1, of the Code of Criminal Procedure so as to eliminate the exhaustive enumeration of instances in which an application to a court is permissible;

b) to accelerate enactment of the Law on Public (Treasury) Lawyers (Advocates);

c) to remove the obligation imposed on the defence by the Code of Criminal Procedure to submit the conclusions of any expert investigation conducted at its own initiative and expenses to the authorities;

d) to rephrase Article 351, part 1, of the Code of Criminal Procedure so as to provide for an obligation on the part of the court considering the matter of adoption to subject to scrutiny the issue of public delivery of the decision in every particular case in the light of other obligations under Article 8 of the European Convention;

e) to include in the procedural legislation provisions requiring the proceedings to be carried out within a reasonable time and allowing for a right to appeal against undue delay;

f) to replace the term “an accused” with “an individual” in Article 10, part 1, of the Code of Criminal Procedure in line with the constitutional provision;

g) to remove the one-hour limitation on legal visits contained in Article 84, part 2, subparagraph b) and Article 137, part 1 of the Code of Criminal Procedure;

h) to amend the Regulations on Remand Detention allowing censorship of the correspondence between a prisoner and his/her lawyer in the light of the Court’s case-law;

i) to rephrase the articles of the Code of Criminal Procedure concerning the right to defence so that they refer to a suspect, an accused and an untried person in all cases, thus guaranteeing the right to defence either by virtue of appointment or on a contractual basis;

j) to extend the Article 6, para. 3.c right, provided for in Article 42, para. 6 of the Constitution to untried persons;

k) to provide for an obligation instead of a right of the president of the court session to ensure the equality of the parties in Article 437, part 2.

7. ARTICLE 7 - NO PUNISHMENT WITHOUT LAW

7.1. The European Convention and its Interpretation

Under Article 7 of the European Convention:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

Article 7 intends to offer "essential safeguards against arbitrary prosecution, conviction and punishment."[385] It prohibits retrospective application of criminal law to an accused's disadvantage, but as has been held in the *Kokkinakis* v. *Greece* case,[386] Article 7 is not confined to this prohibition. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen*, *nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions make him criminally liable.[387] Although, unlike Article 15 of the International Covenant on Civil and Political Rights, there is no express obligation in Article 7 to apply a new law favourable to an accused, Article 7 does not prohibit such an application either.[388] In *Lawless* v. *Ireland*[389] the Court agreed with the Commission that Article 7 did not apply to preventive measures.[390]

As the European Court has held in the *Welch* v. *the United Kingdom* case,[391] the concept of a penalty has an autonomous Convention meaning and the Court is free to assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision. Likewise, although the Commission repeatedly held in early cases that offences defined as disciplinary by national legislation do not qualify as criminal offences within the meaning of Article 7, the approach has changed since then. In the *Engel* v. *Netherlands* case[392] it was established that disciplinary offences may qualify as criminal offences for the purpose of Article 6 of the Convention.

Under Article 15, para. 2 of the Convention, no derogation from Article 7 is allowed.

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[385] *S.W.* v. *the United Kingdom,* 22 November 1995, Series A no. 335-B.
[386] 25 May 1993, Series A no. 260-A.
[387] Para. 52.
[388] Application No. 1169/61 *X.* v. *FRG*, Yearbook VI (1963).
[389] 14 November 1960, Series A no. 1.
[390] Paras. 17, 48 (iii).
[391] 9 February 1995, Series A no. 307-A.
[392] 8 June 1976, Series A no. 22.

7.2. Georgian Legislation

7.2.1. *Compatibility with Article 7, para. 1*

Under Article 42, para. 5, of the Constitution of Georgia, no one may be held responsible for an act (under the notion of "an act" either an act or an omission is implied), which was not considered to be an offence at the time of its commission. A law which neither mitigates nor abrogates criminal responsibility, cannot be applied retrospectively.

Under the first paragraph of Article 46 of the Constitution, in time of war or a State emergency, the President of Georgia is authorised to restrict certain constitutional rights and freedoms enumerated in the article. The Article 42, para. 5 right is not on the list of rights, restriction of which is allowed.

The Criminal Code of Georgia[393] provides for a more elaborate prohibition of retrospective application of the criminal law. It states, in particular, that criminalisation and penalisation of an act (an act or an omission) must be defined by a law which was in force at the time of its commission. The time of the commission of an act is defined as the one when either a perpetrator or an accomplice was acting or was supposed to act. The moment of the actual effect of the act is of no significance (Article 2).

The Criminal Code provides for the retrospective application of any criminal-legal provisions, which either decriminalise an act or which reduce the penalty for it. Article 3, part 1, of the Criminal Code expressly stipulates, by contrast, that any criminal-legal provision, which makes an act criminal or which increases the penalty for it, shall not have retroactive effect.

If a new criminal-legal provision reduces the penalty for an act, for the commissioning of which an offender is serving a punishment, the punishment shall be reduced to within the scope of the new sanction provided for by the new provision (*ibid*. part 2).

Under Article 3, part 3, of the Criminal Code, if the criminal law has been modified more than once before a sentence is pronounced, the mildest law shall apply.

A compulsory measure directed towards rehabilitation by means of instruction and a compulsory measure of a medical character can only apply on the basis of the law in force at the time of the adjudication upon the case (*ibid*. part 4).

Until 1958, under the Soviet criminal law, a court was entitled to apply the law by analogy in exceptional situations. Analogy was abolished by the criminal legislation of the Soviet Union and the Union Republics. The present Criminal Code of Georgia does not provide for the prohibition of analogy to the detriment of an accused in express terms, but its very first article states that the Criminal Code of Georgia establishes the principle of legality. Moreover, Article 7 states that the ground for criminal responsibility is an offence, i.e. an unlawful act, combined with culpability, as provided for by the Criminal Code. Thus,

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[393] Adopted by the Parliament of Georgia on 22 July 1999 and in force since 1 June 2000.

analogy to the detriment of an accused is excluded in practice under the Criminal Code of Georgia.[394]

At the same time, extensive interpretation of the criminal law in favour of an accused is permissible.

The Code of Criminal Procedure provides for the application of the law of criminal procedure that is in force at the time of inquiry, preliminary investigation or court trial in question. Amendments made to the law of criminal procedure may entail the repeal or alteration of a procedural act rendered previously, if this is favourable to a suspect, an accused, an untried person or to a convict (Article 3). In pursuance to Article 7, para. 4, in the case of legislative gaps, a provision of criminal procedure may be applied by analogy unless it infringes upon human rights. Article 133, part 2, prohibits the use of analogy or extensive interpretation of the law in the application of a coercive measure of criminal procedure.

7.2.1.1 Offences that are not Classified as Crimes and Measures, which are not Defined as Penalties under the National Legislation

7.2.1.1.1. Administrative Law

The Code of Administrative Violations of Georgia, which was adopted by the Supreme Council of the Soviet Socialist Republic of Georgia on 15 December 1984 and has been in force since 1 June 1985, establishes administrative responsibility for administrative violations as defined by the Code. The administrative penalties are, *inter alia*, administrative imprisonment, corrective labour, deprivation of a special right (driving licence, right to hunting), and confiscation of an item used in the commissioning of an administrative violation (Article 24).

The Code of Administrative Violations is in compliance with the requirements of the first paragraph of Article 7 of the Convention in that that a perpetrator of an administrative violation must be held responsible on the basis of the legislation in force at the time and at the place of the commission of the violation (Article 9, part 1). Legal provisions revoking or mitigating responsibility for administrative violations have retroactive force and accordingly apply to violations committed before enactment of these provisions. In contrast, legal provisions introducing or aggravating responsibility for administrative violations may not apply retroactively (*ibid*. part 2). Part 3 of Article 9 provides that proceedings concerning administrative violations must be conducted on the basis of the legislation in force in the place and at the time of the commissioning of the violation.

The Code of Administrative Violations does not as such provide for the prohibition of analogy to the detriment of a perpetrator in express terms. But the Code defines which act or omission constitutes an administrative violation and which administrative penalty is to be imposed on an administrative offender, by which body (official) and in which proceeding (Article 1, part 2). No administrative measure may be applied to anyone save on the ground and in a procedure established by law (Article 8, part 1).

[394] See, Conclusions and Recommendations, 7.3.a)

The Code of Administrative Violations does not exclude the possibility of extensive interpretation of administrative law in favour of a perpetrator. For example, under Article 34, part 2, a body (official) that decides about the administrative violation is entitled to assume conditions not referred to in the legislation to be mitigating, and apply them.

7.2.1.1.2. Disciplinary Law

The Disciplinary Statute of the Armed Forces of Georgia approved by the Ordinance of 2 September of 1994 of the Head of State of Georgia provides for disciplinary punishments for the commissioning of disciplinary offences. The Statute contains general provisions concerning the obligations of servicemen and defines military discipline as the strict and precise observance of the order established by the laws and military statutes of Georgia, but the Statute remains silent as to the particular penalty to be imposed for this or another offence. Although the Statute contains elaborate provisions as to the circle of officers entitled to impose disciplinary penalties, the circle of those on whom the penalties may be imposed and as to the list of penalties, the Statute fails to give a clear indication what offences these penalties may be imposed for.

In particular, Articles 44-46, 56 of the Statute specify the disciplinary penalties, including placement in a guardhouse for up to 3 and 10 days to be imposed on servicemen in depending on their military rank. These provisions do not specify on account of which act or omission these penalties may be imposed. The ranks of superior officers entitled to impose certain disciplinary penalties are defined in Articles 48-55, 57-60, 63-66. These articles too do not specify the particular offences which may entail disciplinary punishment.

Under Article 75 “imprisonment shall be considered one of the most extreme means of punishment and as a rule shall be applied only in cases in which other measures taken by the commander (superior) fail to be effective”. Under article 6 of the Statute “the defence interests of the motherland oblige a commander to demand firmly and without hesitation observance of military discipline and order, and not to leave any occasion of a breach of military discipline and order by subordinates without due reaction”. What is the “due reaction”, a commander is free to determine on his own. In particular, Article 39 of the Statute reads as follows:

> “In case of a breach of military discipline and public order by a serviceman, the commander (superior) shall remind the latter of his official duties and, if need be, impose a disciplinary penalty on him. Moreover, he shall be entitled to apply any disciplinary penalty within his competence, which in his opinion is to have the most instructive influence on the serviceman who has violated the order.” The vague provisions of the Statute may serve as a ground for arbitrary application of disciplinary penalties including placement in a guardhouse up to 3 and 10 days.”

The Disciplinary Statute seems to be in breach of the Article 7, para. 1, requirements[395] by failing to specify clearly which conduct is punishable and which punishment applies to that conduct.[396]

[395] *Inter alia,* in the *Kokkinakis* v. *Greece* case, 25 May 1993, Series A no. 260-A. para. 52, the Court has held that an offence must be clearly defined in law.

7.2.1.2. Reference to "Criminal Offence under National or International Law"

Article 4, part 1 of the Criminal Code provides for the imposition of criminal responsibility on those who have committed an offence on the territory of Georgia as defined by the Criminal Code of Georgia. The Criminal Code stipulates that an offence is deemed to be committed on the territory of Georgia if it commenced, continued, ceased or terminated on the territory of Georgia (*ibid*. part 2).

Under the Criminal Code of Georgia, citizens of Georgia, as well as stateless persons, permanently resident in Georgia are criminally liable for acts committed abroad, if the act constitutes a criminal offence under both the Criminal Code of Georgia and the law of the State concerned (Article 5, part 1).

Criminal responsibility shall be imposed in accordance with the Criminal Code of Georgia on a citizen of Georgia, as well as on a stateless person, permanently residing in Georgia, for having committed an action abroad, while not a crime under the legislation of the state concerned, but is provided for by the Criminal Code of Georgia, if it is a grave or an especially grave offence[397] directed against the interests of Georgia and/or if criminal responsibility for this offence is provided by an international treaty to which Georgia is a party (*ibid*. part 2).

Criminal responsibility shall be imposed in accordance with the Criminal Code of Georgia on a foreign citizen, as well as on a stateless person who does not permanently reside in Georgia, for having committed an offence abroad, if it is a grave or an especially grave offence directed against the interests of Georgia and/or if criminal responsibility is provided for by an international treaty to which Georgia is a party (*ibid*. part 3).

International treaties of Georgia are part of the national law of Georgia and they are directly applicable within its legal order. While Chapter XLVII of the Criminal Code under the title "offences against humanity, peace, security and international humanitarian law" incorporated offences provided for by international treaties to which Georgia is a party, there are still other provisions which make reference to international treaties of Georgia, e.g. Article 406 prescribes a penalty for the production, purchase or disposal of a chemical, biological or other weapon of mass destruction prohibited by an international treaty of Georgia. Article 413 prescribes, *inter alia*, a penalty for the use of a means, material or other weapon of mass destruction prohibited by an international treaty of Georgia and for other war crimes which are provided for by an international treaty of Georgia and are not punishable by the relevant articles of the Criminal Code.

7.2.2. Compatibility with Article 7, para. 2

[396] See, Conclusions and Recommendations, 7.3 b).
[397] The Criminal Code defines the categories of grave and especially grave offences.

The Criminal Code of Georgia does not provide for the exception permitted under Article 7, para. 2.

7.3. Conclusions and Recommendations

It may be concluded that the legislation of Georgia is to a great extent compatible with Article 7 of the Convention. However, it is recommended:

a) to provide for an express prohibition of extensive interpretation (including extension by analogy) to the detriment of an individual in the Criminal Code and the Code of Administrative Violations;

b) to amend the disciplinary law of Georgia in the light of the above shortcomings which conflict with the requirements of Article 7.

8. ARTICLE 8 - RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

8.1. The European Convention and its Interpretation

Under Article 8 of the European Convention on Human Rights:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It is clear that Article 8 is divided into two paragraphs. Paragraph 1 sets forth the rights to be guaranteed to persons, while paragraph 2 states that public authorities may legitimately interfere with the rights under the conditions it provides. It determines three requirements for the interference to be regarded legitimate. Under para. 2 interference must:

a) be in accordance with the law;
b) pursue a legitimate aim (interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, etc);
c) be necessary in a democratic society.

As for the requirements of "law", two elements are of significance: accessibility and foreseeability. To meet accessibility requirement "the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case".[398] As for foreseeability requirement, it means that "a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[399]

To apply restrictions, there must exist a "pressing social need" and restrictions must be proportionate to the legitimate aim of the interference. The state must justify any restrictions of the right and prove that the restriction applied was proportionate to the aim provided for in para. 2.

Article 8 of the European Convention places an obligation upon States to respect four interests - private and family life, home and correspondence. Under the Convention, States have not only negative obligations - not to interfere with the rights provided for in Article 8(1), but also positive obligations - to secure the effective enjoyment of these rights.

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[398] *Silver and Others* v. *the United Kingdom*, 25 March 1983, Series A no. 61.
[399] *Andersson* v. *Sweden*, 25 February 1992, Series A no. 226, para. 75.

In the case of *X and Y* v. *Netherlands*,[400] the European Court held that the positive obligation of the state extended to private activities. In this case - which concerned a sexual assault on a 16-year-old mentally-disabled girl by an adult male - it has not been possible to bring a criminal charge against the man due to procedural flaw in the Dutch legislation. Although the respondent Government claimed that there were civil remedies available to the girl, the European Court held that the absence of an effective criminal remedy in these circumstances constituted a failure by the Dutch authorities to respect her right to private life. In this case the European Court held that:

"[Article 8] does not merely compel the state to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life ... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[401]

Similarly, in *Kroon* v. *Netherlands*, the European Court pointed out that the "essential object" of Article 8 is "… to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in 'effective' respect for family life [and the other Article 8(1) values]."[402]

It is important to note that the terms used in Article 8 (like the terms used in other provisions of the Convention) must be given an "autonomous" meaning. The European Court is not constrained by any interpretation of the terms by national institutions.

The European Court has avoided laying down rules of interpretation as concerns the meaning of the rights protected by Article 8. In no case has the Court attempted to give an exhaustive definition as to what is encompassed by the notions of private or family life, home or correspondence.

8.1.1. Private Life

As noted, the European Court does not give an exhaustive definition of private life. In the case of *Costello-Roberts* v. *the United Kingdom,* the European Court pointed out that private life is a broad concept which is "not susceptible to exhaustive definition".[403] In *Niemietz* v. *Germany* the European Court held:

"The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationship with other human beings."[404]

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[400] 26 March 1985, Series A no. 91, para. 27.
[401] *Ibid*, para. 23.
[402] 27 October 1994, Series A no. 297-C, para. 31. See also *Airey* v. *Ireland*, 9 October 1979, Series A no. 32, paras. 32-33.
[403] 25 March 1993, Series A no. 247-C, para. 36.
[404] 16 December 1992, Series A no. 251-B, para. 29.

Private life thus covers a wide range of issues.

8.1.1.1. Physical and Moral Integrity

The right to respect for private life is a concept which covers the physical and moral integrity of a person. In the already mentioned case of *X and Y* v. *Netherlands* the European Court made it clear that physical attack by one individual on another is capable of infringing the private life of that other person.[405]

At the same time, the European Court takes the view that while some interference with the moral or physical integrity of an individual may violate his private life, not all such actions will be regarded as a violation of the individual's private life. In the case of *Costello-Roberts* v. *the United Kingdom* which concerned corporal punishment inflicted on a pupil at a private school by a master, the Court took into account both the relatively slight nature of the punishment and its imposition in a formal school environment and considered that "the treatment complained of by the applicant did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8".[406]

8.1.1.2. Collection and Storage of Personal Data by the State

The collection of information by state officials about an individual without his consent will interfere with that person's right to respect for his private life. In *McVeigh and Others* v. *the United Kingdom* the applicants were questioned, searched, fingerprinted and photographed under anti-terrorism legislation, and they argued that the subsequent retention of relevant records constituted an interference with their private life. However, the European Commission accepted that the information was relevant for intelligence purposes, and that there was a pressing social need to fight terrorism which outweighed what it considered as only a minor infringement of the applicants' right.[407]

The European Court has accepted that in order to protect national security, States need to have laws granting the authorities the power to collect and store information in registers that are not accessible to the public.[408] The European Court has also accepted that the authorities should be able to use this information when assessing the suitability of candidates for employment in posts that are important for national security. It is the state's responsibility to identify those exceptional conditions and special jobs. Yet, the Court pointed out that States should provide in law minimum standards of protection in order to prevent the abuse of power by the state. The Court held that:

"There can be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power,

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[405] *X and Y* v. *Netherlands*, 26 March 1985, Series A no. 91, para. 22. See also *S.W.* v. *the United Kingdom,* 22 November 1995, Series A no. 335-B.
[406] 25 March 1993, Series A no. 247-C, para. 36.
[407] Report of the Commission, 25 D.R. 15, 18 March 1981.
[408] *Leander* v. *Sweden*, 26 March 1987, Series A no. 116, para. 59.

firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts important for national security. Admittedly, the contested interference adversely affected Mr. Leander's legitimate interests through the consequences it had on his possibilities of access to certain sensitive posts within the public service. On the other hand, the right of access to public services is not as such enshrined in the Convention ... and, apart from those consequences, the interference did not constitute an obstacle to his leading a private life of his own choosing."[409]

8.1.1.3. Access to Personal Information

The inability of access the state's records containing personal information may give rise to private life issues. The case of *Gaskin* v. *the United Kingdom* is particularly important in this regard.[410] The applicant had been in public foster-care as a child. The local authority maintained records about his care. When he was an adult, Gaskin wished to obtain access to the files held about him. The authorities refused to provide the information. The government emphasised the importance of confidential record-keeping for an effective system of child-care and argued that it had discharged its responsibility under the Convention by the measures the local authority had taken to obtain waivers of confidentiality. However, the European Court held:

> "… persons in the position of the application have a vital interest, protected by the Convention, in receiving the information necessary to know and understand their childhood and early development."[411]

The protection of personal data from disclosure to third parties or the public is of great important to a person's enjoyment of private life. In the case of *Z* v. *Finland* the European Court stated that confidentiality of health data should be respected.[412]

8.1.1.4. Sexual Privacy

Sexual relations fall within the sphere of private life. In *Dudgeon* v. *the United Kingdom,* which concerned consensual homosexual relationship between adult men in private, the Court described sexual life as being "a most intimate aspect" of private life.[413] In this case the Court held that the very existence of legislation which outlawed homosexual conduct affected the applicant's private life.

Gender reassignment has been regarded as falling within the scope of private life. In the case of *Rees* v. *the United Kingdom* (1986) the European Court held that the Government had not failed to respect the right to private life of a transsexual by refusing to amend the existing birth registration system to alter the recorded sex of the applicant. The Court has

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[409] Para. 60.
[410] 7 July 1989, Series A no 160.
[411] *Ibid*, para. 49.
[412] 25 February 1997.
[413] 22 October 1981, Series A no. 45, para. 52.

taken a similar approach in the case of *Cossey* v. *the United Kingdom* (1990).[414] Yet, in the case of *B* v. *France* the European Court held that the refusal of the state to allow the applicant to change her forename to a female one, coupled with the refusal of the state to amend the contemporary civil status register, created such difficulties for the applicant in her daily life that the state had not done enough to respect her private life under Article 8.[415]

8.1.1.5. Names

The right to choose a first name/surname falls within the scope of private and family life protected under Article 8 of the Convention as it constitutes a means of personal identification of individuals.[416]

8.1.2. Family Life

8.1.2.1. Unmarried Parents and the Status of Children

Taking into consideration the social and legal changes in States parties to the European Convention, the Strasbourg institutions' interpretation of family life has extended beyond formal relationships to also cover actual unions of partners.[417] Thus, if partners do not have a formal relationship, the answer to the question of whether or not such a relationship constitutes family life will depend on the actual situation. The European Commission pointed out in this respect that "[t]he question of the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties . . .".[418] In the case of *Kroon* v. *Netherlands*, the Court held:

"In any case, the Court recalls that the notion of 'family life' in Article 8 is not confined solely to marriage-based relationship and may encompass other *de facto* 'family ties' where parties are living together outside marriage. ... Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* 'family ties'; ... A child born of such a relationship is *ipso jure* part of that 'family unit' from the moment of its birth and by the very fact of it. …".[419]

Cohabitation of man and woman is thus not regarded a necessary precondition to constitute a family life.[420]

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[414] See also *Van Oosterwijk* v. *Belgium,* Commission Report, 1 March 1979, Series B no. 36, para. 52.
[415] 25 March 1992, Series A no. 232-C.
[416] *Stjerna* v. *Finland*, 25 November 1994, Series A no. 299-B; *Guillot* v. *France*, 24 October, 1996, RJD 1996-V, N19.
[417] *Johnston and Others* v. *Ireland*, 18 December 1986, Series A no. 112; *Marckx* v. *Belgium*, 13 June 1979, Series A no. 31 and *X, Y and Z* v. *the United Kingdom*, 22 April 1997, EHRR 1997-II.
[418] *K* v. *the United Kingdom*, No. 11468/85, 15 October 1986, 50 DR 199; *X, Y and Z* v. *the United Kingdom*, 22 April 1997, EHRR 1997-II, para. 36.
[419] 27 October 1994, Series A no. 297-C.
[420] *Kroon* v. *Netherlands*, Series A no. 297-C, para. 30; See also *Berrehab* v. *Netherlands*, 21 June 1988, Series A no. 138.

The case of *Marckx* v. *Belgium* concerned a complaint of an unmarried mother about the status under Belgian law of her child born out of wedlock.[421] Under the then existing Belgian law children born out of wedlock were only recognised as the children of their mother if the latter formally recognised their maternity. In that case, the European Court held that the biological link between mother and child creates family life in the sense of Article 8 also in the case of a mother and illegitimate child as the Convention does not make a distinction between 'legitimate' and 'illegitimate' children.[422]

In the case of *Johnston and Others* v. *Ireland,* the European Court went on to find that the normal development of natural family ties between unmarried parents and their children required that the latter be placed, legally and socially, in a position akin to that of a child whose parents were married. Different treatment of children by virtue of their parents' marital status is prohibited under Convention Article 8 read together with the non-discrimination provision of Article 14.[423]

Family life mainly concerns the relationship between husband and wife and parent and child, but it also covers the relationship between siblings,[424] between grandparents and grandchildren[425] and between adoptive parents and children,[426] as well as between a child and his/her foster parents.

8.1.2.2. Custody and Public Care

8.1.2.2.1. Custody

Since family life may involve a number of relationships, the termination of one of them (for example, by divorce) should not automatically mean the termination of all family relationships. In the case of *Berrehab* v. *Netherlands*, the European Court accepted that family life between father and daughter continued to exist despite the divorce between the father and the mother, since the father maintained a relationship with his daughter.[427]

If family life is found to exist between a father and a child, placement of the child for adoption without the father's consent or knowledge will constitute an interference with family life protected under Article 8. In the case of *Keegan* v. *Ireland,* which concerned the adoption legislation of Ireland, the European Court regarded the fact that the natural father had no standing in the adoption process a violation of the right to family life under Article 8.[428]

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[421] 13 June 1979, Series A no. 31.
[422] Paras. 31 and 45.
[423] 18 December 1986, Series A no. 112, paras. 74-76.
[424] *Olsson* v. *Sweden*, 24 March 1988, Series A no. 130, para. 81; *Moustaquim* v. *Belgium*, 18 February 1991, Series A no. 193, para. 56.
[425] *Marckx* v. *Belgium*, 13 June 1979, Series A no. 31, para. 45; *Price* v. *the United Kingdom*, No. 12402/86, 14 July 1988, 55 DR 224, 1988.
[426] *Söderbäck* v. *Sweden*, 28 October 1998, 29 EHRR 95, 1998-VII.
[427] 21 June 1988, Series A no. 138, para. 21.
[428] 26 May 1994, Series A no. 290, para. 55.

Article 8 does not contain a rule on the question of which parent has to be awarded custody of the children in case of divorce, thus leaving it to the national legislator. Although it is up to the national legislator to decide whether a mother or a father is to be awarded custody, the European Court, in the case of *Hoffman* v. *Austria* pointed out that Article 14 of the Convention on prohibition of discrimination is to be taken into account. The European Court found a violation of Article 8 of the European Convention because the decision of the national court to grant parental right to the father was made solely on the basis of the religion of the mother (a Jehovah-witness).[429]

Although the state may determine which parent should have custody of a child, the European Court maintains that the other parent has a right of access in order to preserve the right to family life under Article 8.[430] In the case of *Hokkanen* v. *Finland*, a father contested custody and access in respect of a child living with its grandparents. Although the father had a right of custody and access, the respondent government did not enforce these rights. The Court found a violation of Article 8 on the right of access to the child.[431]

8.1.2.2.2. Public Care

The European Court made it clear that parents should be involved in the decision-making process concerning the taking of their children into public care to a degree sufficient to provide them with the requisite protection of their interests. In the case of *B* v. *the United Kingdom* the European Court held that:

> "… what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been failure to respect their family life …".[432]

The maintenance of contacts between parents and children during the latter's placement into public care is an issue to which the European Court attaches great importance. Although the Court may find that the decision to put a child into public care is compatible with the Convention, it may also hold that a restriction or refusal of contact between parents and children does not meet Article 8 requirements.

Two interests are to be taken into consideration in this regard: restriction on communication between parent and child must be based, on the one hand, on relevant and sufficient reasons to protect the interests of the child and, on the other hand, on the need to seek re-unification of the family**.** The restriction on communication must be proportionate to the interests served by the restriction. In the case of *Andersson* v. *Sweden* a mother and her son complained that their right to visits and contacts by telephone or mail was severely restricted during eighteen months. The European Court found that the respondent state failed to justify the severe measures imposed, giving rise to a violation of Article 8.[433]

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[429] 23 June 1993, Series A no. 255-C.
[430] *Johnston and Others* v. *Ireland*, 18 December 1986, Series A no. 112, para. 57.
[431] 23 September 1994, Series A no. 299-A.
[432] 8 July 1987, para. 65.
[433] 25 February 1992, Series A no. 226.

In the case of *Johansen* v. *Norway* the applicant complained about the decision on the placement of her daughter in a foster home for adoption by the foster parents.[434] The Client and Patient Committee considered Mrs. Johansen to be physically and mentally unable to care for her daughter and decided to deprive the applicant of her parental responsibilities in respect of her daughter, to place the latter in a foster home with a view to adoption, and to deny the applicant access to her. The applicant alleged that depriving her of her parental rights over her daughter amounted to a violation of Article 8. The European Court held:

> "These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests ...".[435]

The case of *Olsson* v. *Sweden* concerned the decision of the Swedish authorities to take the applicants' three children (Stefan, Helena and Thomas) into public care.[436] Stefan was placed with foster parents about 100 km away from the applicants. Helena and Thomas were placed in separate foster homes about 100 km apart and 600 km from the applicants. The applicants complained to the Commission that the placement of their children so far away from them amounted to a violation of their right to respect for their family life. The European Court held:

> "… the Court would first observe that there appears to have been no question of the children being adopted. The care decision should therefore have been regarded as a temporary measure, to be discontinued as soon as circumstances permitted, and any measures of implementation should have been consistent with the ultimate aim of reuniting the Olsson family.
>
> In point of fact, the steps taken by the Swedish authorities ran counter to such an aim. The ties between members of a family and the prospects of their successful reunion will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other. Yet the very placement of Helena and Thomas at so great a distance from their parents and from Stefan must have adversely affected the possibility of contacts between them. . . ."[437]

Thus, the European Court made it clear that the decision to place children into public care should be taken in such a way as to provide easy and regular access of parents to children.

8.1.2.3. Aliens: Immigration and Expulsion

Article 8 of the Convention does not guarantee aliens the right to settle in a particular state. Although a state has the freedom to control the entry of aliens on its territory, the Convention placed some obligations on the state in the context of protection of family life.

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[434] 7 August 1996, 23 EHRR 33, 1996-III.
[435] See para. 78.
[436] 24 March 1988, Series A no. 130.
[437] Para. 81.

The case of *Moustaquim* v. *Belgium* concerned the deportation of the applicant to Morocco.[438] The applicant had arrived in Belgium aged 2, all his close relatives were there and had acquired Belgian nationality. He had received all his schooling in French and visited Morocco only twice on holiday. The European Court held that his deportation to Morocco was disproportionate to the aim pursued.

The European Court takes a different approach if an applicant retains some links with his/her country of origin. In the case of *Boughanemi* v. *France* the Court found it probable that the applicant had retained links with Tunisia; did not claim that he could not speak Arabic or that he had cut off ties with that country.[439] In deciding on the case the Court also took into account the seriousness of the offences the applicant had committed. The fact that the applicant had cohabited with a French woman and had a child with her only subsequent to the making of the deportation order was not regarded decisive by the Court.

The European Court puts emphasis on a number of factors to be taken into account when deciding on the deportation of a person. These factors are as follows: the age of the applicant when he committed the criminal offence in question, the number and nature of the crime(s), the frequency of the applicant's visits to his state of origin, the applicant's linguistic competence in the language of the national state, etc.

The fact that the family is able to return to join the child may also be a decisive consideration. The case of *Gül* v. *Switzerland* concerned a complaint of a Turkish father who lived in Switzerland and who had applied unsuccessfully for his 12-year-old son to be allowed to join him.[440] Since there were no obstacles for Mr. Gül preventing him from developing family life in Turkey while his son had always lived in Turkey, the Court concluded that Switzerland has not failed to fulfil the obligations arising under Article 8(1) and therefore, there was no violation of Article 8 by Switzerland.

In the case of *Ahmut* v. *Netherlands* the Court held that the refusal of the Dutch authorities to permit Mr. Ahmut's 15-year-old son to enter the country where he himself had resided there for some time did not violate Article 8.[441] The Court pointed out that the boy had lived most of his life in Morocco, with which he had strong linguistic and cultural links and where had had been brought up by other family members.

The European Court made it clear that Article 8 is not violated if spouses are able to be unified in some other country. A violation of Article 8 may be found in a case in which the countries of both spouses refuse to provide the other spouse with lawful residence.

8.1.3. Home

In general 'home' is the place where one lives on a settled basis. In the case of *Niemiets* v. *Germany* the European Court held that business premises may also be covered by the notion of 'home'.[442] The Court pointed out that given "activities which are related to a

[438] 18 February 1991, Series A no. 193.
[439] 24 April 1996.
[440] 19 February 1996.
[441] 28 November 1996.
[442] 16 December 1992, Series A no. 251-B, para. 30.

profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises", it "may not always be possible to draw precise distinction".[443]

The interests protected by 'home' include the peaceful enjoyment of residence. More specifically, it includes protection from wilful damage, nuisance and environmental nuisance.

8.1.3.1. Protection from Wilful Damage

Article 8 includes a right to have one's home protected from attacks by the state and its agents. In the case of *Akdivar and Others* v. *Turkey* the European Court having found that it established that the security forces were responsible for the burning of the applicants' houses, concluded that there had been a violation of Article 8.[444]

8.1.3.2. Protection from Nuisance

The concept of home includes the peaceful enjoyment of residence there. In *Powell and Rayner* v. *the United Kingdom* the applicant argued that the intensity and persistence of aircraft noise generated by the air traffic in and out of Heathrow airport interfered with his right to respect for his private life and home. Taking into account the balance to be struck between the competing interests of the individual and the community, the European Court held that there was no violation of Article 8 of the Convention.[445]

8.1.3.3. Protection from Environmental Nuisance

The concept of home also includes protection from environmental nuisance. The case of *López Ostra* v. *Spain* concerned a complaint to the effect that smells, noise and polluting fumes caused by a waste treatment plant situated near the applicant's home constituted an infringement of her right to respect for her home, private and family life.[446] Without requiring actual damage to health, the Court pointed out that: "[n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family health adversely without, however, seriously endangering their health."[447]

The case of *Guerra and Others* v. *Italy* was brought before the European Court by applicants who live approximately a kilometre away from a factory which, because of its production of fertilisers and caproic acid, was classified as posing a high risk.[448] In the course of its production cycle the factory released large quantities of inflammable gas and

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[443] 16 December 1992, Series A no. 251-B, para. 30.
[444] 16 September 1996, 1996-IV-1193, 1 BHRC 137; See also *Selcuk and Asker* v. *Turkey*, 24 April 1998, 26 EHRR 477, 1998-II.
[445] 21 February 1990, Series A no. 172, para. 45
[446] 9 December 1994, Series A no. 303-C.
[447] 9 December 1994, Series A no. 303-C, para. 51.
[448] 19 February 1998, EHHR 1998-1

other toxic substances. The activity of the factory, a frequent object of complaints by the population living in nearby villages, exposed human life and health to immediate danger. The Court concluded that the inactivity of the Italian Government to effectively investigate the complaints and to stop the dangerous activity of the factory amounted to a violation of the applicants' right under Article 8.

8.1.3.4. Searches of Homes

The right to respect for one's home includes protection against intrusion by state authorities in the form of search, seizure or inspection. The state must provide justification for such actions for the purposes stipulated in para. 2 of Article 8 of the Convention.

The European Court has noted that States may deem it necessary to take measures such as searches of homes to obtain evidence of certain criminal offences. Such measures are interference in the right to respect for private life or home and the state must therefore provide justification for such measures under para. 2 of Article 8, in that it must show that the measures are relevant and sufficient and not disproportionate to the aim pursued. States must also ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse.

In the case of *Camenzind* v. *Switzerland* which concerned the Swiss legislation on home searches and the safeguards against abuse, the European Court pointed out the following elements in this respect:[449]

1. A search may only be affected under a written warrant issued by a limited number of designated senior public servants and carried out by officials specially trained for the purpose.
2. These officials have an obligation to stand down if circumstances exist which could affect their impartiality.
3. Searches can only be carried out in dwellings and other premises if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of an offence are to be found there.
4 They cannot be conducted on Sundays, public holidays or at night "except in important cases or where there is imminent danger".
5. At the beginning of a search the investigating official must produce evidence of identity and inform the occupier of the promises of the purpose of the search and that person or a relative or other household member must be asked to attend.
6. In principle, there will also be a public officer present to ensure that the search does not deviate from its purpose.
7. A record of the search is drawn up immediately in the presence of the persons who attended and if they so request, they must be provided with a copy of the search warrant and of the record.
8. Searches for documents are subject to special restrictions.
9. Suspects are entitled to representation whatever the circumstances.
10. Anyone affected by an "investigative measure" who has "an interest worthy or protection in having the measure ... quashed or varied" may complain to the federal court.

[449] 16 December 1997.

11. A "suspect" who is found to have no case to answer may seek compensation for any loss sustained.[450]

Taking into account the safeguards provided in the Swiss legislation the European Court found that there had not been a violation of Article 8.

Although search warrants will generally require prior judicial authorisation if they are to be regarded as proportionate under Article 8, it was made clear in the case of *Niemietz* v. *Germany* the fact that a judicial warrant has been obtained will not always be sufficient to comply with Article 8, para. 2. When a search warrant is not issued such measure will only be compatible with Article 8 where the other legal rules governing the search contain sufficient protection for the applicant's rights under that provision.

8.1.4. Correspondence

The right to respect for one's correspondence is a right of uninterrupted and uncensored communication with others. The literal meaning of 'correspondence' has been expanded to include telephone communications[451] and teletext.[452] The development of new technologies may further extend interpretation of the right to respect for one's correspondence.

The interception of communications has generally been regarded as constituting an interference with more than one of the interests protected by Article 8, such as the right to respect for private life and correspondence. Two issues - intercepting correspondence and telephone - are of particular significance in this context.

8.1.4.1. Interception of Correspondence

The right to respect for one's correspondence is particularly important in the context of detained persons. In the case of *Golder* v. *the United Kingdom* the European Court held that the decision to prevent a prisoner from corresponding with his legal advisor violated Article 8.[453]

In the case of *Campbell* v. *the United Kingdom* the applicant complained that correspondence to and from his solicitor and the Commission was opened and read by the prison authorities. The European Court pointed out that correspondence of a prisoner with his lawyer is privileged under Article 8 and, therefore, any interference with this right required especially strong justification. The Court held:[454]

> "This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the

[450] *Ibid*, para. 46.
[451] *Klass* v. *Germany*, 6 September 1978, Series A no. 28, para. 41.
[452] *Christie* v. *the United Kingdom*, 27 June 1994, No. 21482/93, 78-A DR 119.
[453] 21 February 1975, Series A no. 18.
[454] 25 March 1992, Series A no. 233.

> prisoner. The reading of a prisoner's mail to an from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused.[455]

The case of *Niedbala* v. *Poland* concerned a complaint by a prisoner about the interception of his letter to the Ombudsman and its delay.[456] With regard to the law governing prisoner's correspondence the Court held the following:

a) There was an absence of legal provisions which could serve as a legal basis for effectively lodging a complaint against censorship of correspondence of persons detained on remand;
b) the law allowed for automatic censorship of prisoners' correspondence by the authorities conducting criminal proceedings;
c) the law did not draw any distinction between the different categories of persons with whom the prisoner could correspond and consequently, correspondence with the Ombudsman was also subject to censorship;
d) The relevant provisions had not laid down any principles governing the exercise of this censorship and in particular, they failed to specify the manner and the time-frame within which it should be affected;
f) As the censorship was automatic, the authorities were not obliged to give a reasoned decision specifying the grounds on which it had been affected.[457]

As regards correspondence of a non-legal nature, the European Commission and Court have allowed some state restrictions to be maintained on the right of prisoners to send and receive different types of correspondence. In the case of *Silver and Others* v. *the United Kingdom*, the Court found no violation of Article 8 in the prison authorities' censorship of letters. The Court found that such censorship is within the state's margin of appreciation "in the interests of public safety" and "for the prevention of disorder or crime".[458] Thus, the state is allowed a broad discretion to control prisoners' correspondence with private individuals, unlike the correspondence with legal professionals and judicial bodies.

8.1.4.2. Telephone Tapping

In the case of *Kruslin* v. *France,* which concerned telephone-tapping, the European Court held that:

> "Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed

[455] See para. 48.
[456] 4 July 2000.
[457] Para. 81.
[458] 25 March 1983, Series A no. 61, paras. 83-105.

> rules on the subject, especially as the technology available for use is continually becoming more sophisticated."[459]

The requirement that interference with private life and correspondence must be based on law means that the interference must have a legal basis and the law in question must be sufficiently precise and contain a measure of protection against arbitrariness by public authorities. In *Malone* v. *the United Kingdom* the government failed to convince the Court that its power to intercept phone conversation had a legal basis.[460] In the United Kingdom telephone-tapping was at the time regulated by administrative practice, the details of which were not published. The European Court held that there was insufficient clarity about the scope or the manner in which the discretion of the authorities to listen secretly to telephone conversations was exercised. The Court pointed out that because it was an administrative practice, it could be changed at any time.[461]

In the *Kruslin* v. *France* case the respondent Government relied on Articles 81 of the French Code of Criminal Procedure which states that:

> "The investigations judge shall, in accordance with the law, take all investigative measures which he deems useful for establishing the truth."[462]

Although the French law provided for the above provision, the European Court held that it was defective since the law did not provide guarantees against arbitrary use of the power it conferred, such as specific rules and procedures for telephone-tapping and guarantees against abuse. The Court pointed out in this regard that:

> "Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedures for drawing up the summary reports containing intercepted conversations. ... the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court."[463]

While the applicability of the law providing for telephone-tapping should generally be foreseeable, this should not be understood as an obligation on the part of the state to provide advance warning to a person whose telephone might be tapped.[464]

8.2. Georgian legislation

Several provisions of the Constitution of Georgia govern the rights covered by Article 8 of the European Convention.[465] The most important provision regulating the rights defined in Article 8 of the Convention is Article 20 of the Constitution which reads as follows:

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[459] Para. 33.
[460] 2 August 1984, Series A no. 31.
[461] Para. 79.
[462] 24 April 1990, Series A no. 176-A, para. 17.
[463] Para. 35. See also *Klass* v. *Germany*, 6 September 1978, Series A no. 28, para. 50.
[464] *Leander* v. *Sweden*, 26 March 1987, Series A no. 116, para. 51.

"1. Every person's private life, place of personal activity, personal records, correspondence, conversation by telephone and other kinds of technical means, and also notifications received by technical means are inviolable. Restriction of these rights is permitted by a decision of a court or without such a decision in case of urgent necessity as provided by law.
2. No one shall be entitled to enter into a home or other property against the will of their owners and to search without a court's decision or in cases of urgent necessity as provided by law."[466]

Although the above and the other relevant provisions of the Constitution will be dealt with in detail in the context of specific issues to be examined, a general remark may be made on the positive obligation with respect to the rights governed by Article 20(1). Article 20(1) points out that the rights provided in para. 1 "are inviolable". Since it is clear from both the wording of Article 8(1) of the European Convention and its interpretation by the Strasbourg institutions that not only negative, but also positive obligations should be derived from Article 8(1), it may be argued that the interpretation of para. 1 of Article 20 of the Constitution should be in line with the European Convention. It will certainly fall short of the Convention standards if Article 20(1) is interpreted narrowly i.e. only as an obligation of the state not to interfere with the rights protected.

The positive obligations in securing the rights covered by Article 8(1) will be examined in the context of the specific rights governed by Georgian legislation.

8.2.1. Private Life

8.2.1.1. Physical and Moral Integrity

Georgian legislation protects both the physical and moral integrity of persons. Issue of moral integrity is regulated at the constitutional level. Article 17(1) of the Constitution provides that "[a] person's honour and dignity are inviolable."

The Code of Criminal Procedure sets out the rules for the carrying out of a personal search.[467] Although, in general, there is a necessity that a warrant of a judge or a ruling of a court is issued for personal search and seizure, the Code provides that personal search and seizure may be carried out without them in cases prescribed by law.[468] Under the Code, personal search or seizure without a warrant of a judge or a ruling of a court may be carried out in the following cases:

a) if there are sufficient grounds for suspecting that a person has with him a weapon or if he attempts to get rid of evidence incriminating him in the commission of an offence;
b) in the course of drawing up a record after a suspect has been brought to the police or another body of inquiry;

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[465] Among others, see Articles 20, 36, 37(3, 5), 41.
[466] Author's translation. It should be noted that most of the English versions of the Constitution of Georgia do not contain para. 2 to Article 20.
[467] Article 325.
[468] Para. 3, Article 325.

c) when arresting the accused, provided there are sufficient grounds for suspecting that he has with him a weapon, item or document of evidential significance to the matter;
d) if there are sufficient grounds for suspecting that a person present at the place of search or seizure conceals the searched for item or document.[469]

The Code sets out rules, procedures and guarantees against abuse of individuals' rights by the authorities. The Code requires the participation of witnesses in cases of personal search,[470] provides for compensation for damage caused by any unlawful or unreasonable search,[471] and demands that a record be drawn up of each search.[472]

The issue of marital rape may be raised under Article 8 of the Convention. The Criminal Code does not specifically criminalise marital rape. However, Article 137 of the Criminal Code, which criminalises rape generally is applicable also to marital rape. No judicial practice has been identified in this regard.

Sexual harassment can be seen as a form of intrusion to one's private life. Sexual harassment is criminally punishable under the Criminal Code of Georgia.[473]

Issues of domestic violence may also be raised under Article 8 of the Convention. The Convention does not specifically provide criminal sanctions against domestic violence. However, two articles of the Code are relevant in this regard. Under Article 125 of the Code beating or other violence that causes physical pain to the injured person is criminally punishable. Article 126 sets forth the criminal sanctions for systematic beating or other violence that causes physical or psychological suffering on the part of the injured person.

Practical measures have also been taken to combat domestic violence. Along with other measures taken,[474] the President of Georgia has adopted a special Order on Approval of the Action Plan on Combating Violence Against Women for 2000-2002.[475] The Action Plan provides for measures to combat violence, including domestic violence, against women.

The Criminal Code of Georgia contains a number of provisions providing for criminal liability for violation of physical integrity in different contexts.[476]

As far as violence by parents against their children is concerned, it is to be pointed out that in addition to the general provision of the Civil Code of Georgia on the obligation of parents to take care of the physical, intellectual, spiritual and social development of their children taking into account the best interests of their children,[477] the Code expressly states

[469] Para. 3, Article 325.
[470] Article 321.
[471] Article 324.
[472] Articles 326 and 327.
[473] See Articles 138 and 139 of the Code.
[474] See Plan of Action for Improving Women's Conditions in Georgia for 1998-2000, approved by Order No308 of the President of Georgia, 18 June 1998; Order of the President of Georgia on Measures to Strengthen Protection of Women's Rights in Georgia, N511, 4 August 1999.
[475] 25 February 2000, N64. Although the Action Plan covers the years 2000-2002, it has been extended to 2003-2005 by the Presidential Order N14 of 17 January 2003.
[476] In particular, Articles 117, 118, 120, 125, 126, 137-140.
[477] Article 1198 of the Civil Code.

that the parents (or one of the parents) may be deprived of their parental rights if it is found, *inter alia*, that they (or one of them) abuses their parental rights i.e. by mistreating the children with cruelty.[478]

With regard to moral integrity the Civil Code of Georgia states that a person is entitled to demand in court the retraction of information which defames him/her or otherwise impinges on his/her honour or dignity, reveals confidential aspects of his/her private life, or impinges on his/her personal inviolability or business reputation, unless the person who has disseminated such information can prove that it corresponds to the true state of affairs.[479]

The interests referred to in this article [i.e. human values such as honour, dignity and privacy] must be exercised regardless of the culpability of the person who disseminated the information. But if the violation has been caused by culpable action, the injured person may claim damages (compensation for harm). Damages may be claimed in the form of the profit that accrued to the wrongdoer. In case of culpable violation, the injured person may also claim compensation for immaterial (moral) damage.[480]

8.2.1.2. Collection, Storage and Use of Personal Data by the State and Access to Personal Information

Article 41 of the Constitution provides that:

> "1. Every citizen of Georgia under rules determined by law has the right to know information about himself which exists in state institutions as well as official records existing there, if they do not contain state, professional or commercial secrets.
> 2. Information existing in official records connected with health, finances or other private matters of a person shall not be available to others without the consent of the affected individuals, except in cases determined by law, when it is necessary for state security or public safety, or for the protection of health, rights and freedoms of others."

The General Administrative Code of Georgia (25 June 1999) regulates, *inter alia*, issues relating to collection, storage and use of personal data and access to personal information.[481] Under the Code secret information means any information containing, *inter alia*, personal secret which is held by a public agency or was received, processed, created, or sent by a public agency or public servant in connection with official activities.[482]

Under Article 10(1) of the Code "[e]veryone has the right of access to public information kept by an administrative agency, and obtain a copy thereof, unless it contains … ."[483]

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[478] Para. 2, Article 1205.
[479] Para. 2, Article 18 of the Civil Code.
[480] Para. 6, Article 18 of the Civil Code.
[481] Under Article 3(4) of the General Administrative Code it does not affect activities of the Executive that are related to, *inter alia*, criminal prosecution and criminal proceeding against a person who committed a crime operative investigative activities.
[482] Article 2(1)(m).
[483] See also Article 28 of the Code.

Article 39 of the Code governs access to personal information. It states:

> "A person may not be denied access to public information, which allows his identification, and which shall not be accessible to other persons under this Code. A person may have access to any personal information on him that is held by a public agency, and may obtain copies of such information free of charge."

Under Article 40(1) a public agency must release public information immediately or not later than ten days in the cases prescribed by the Code.

The Code also regulates the rules on denial of access to public information. Under Article 41(1) a person applying for access [to information on him/her held by a public agency] must be informed immediately of the denial of the public agency concerned to release the public information. Further, the Code provides that if access to public information is denied, the agency must provide the applicant with information concerning his rights and the procedures for filing a complaint within three days after the decision to deny access is taken (para. 2).

The Code provides for a procedure for processing personal data. Under Article 43 a public agency must:

a) collect, process and store only such data as are expressly provided for by law and are necessary for the proper functioning of the agency;
b) not collect, process, store, or disclose of personal data relating to a person's affiliation with any religious, sexual, or ethnic group, or his political beliefs or world outlook;
c) develop and establish a programme for controlling the conformity of its collection, processing, and storage of personal data and of the content of the data, with the agency's statutory goals and terms;
d) destroy any data that are unrelated to the statutory goal when demanded by a person or required by a court's decision; destroy inaccurate, unreliable, incomplete and irrelevant data and replace them with accurate, reliable, updated and complete data;
e) store any amended data, indicating the date of their entry, together with the original data for the period of their existence, but no less than five years;
f) during the collection of personal information about any person, obtain information directly from that person, and obtain the data from other sources only if all possibilities of obtaining information from the primary source were exhausted, except as provided for in Article 28 of the Code, and only if the public agency is expressly authorised by law to collect, process and store personal data about persons of a certain defined category;
g) enter information about the collection and processing of personal data and about any request for data by a third person or a public agency into a public register; the register must list the date of any request and the name/title and address of the third person who made the request;
h) immediately notify a data subject at his current address of any request for his personal data by a third person or a public agency, except as provided for in Article 28 of the Code;
i) before transferring personal data to another person or public agency take all reasonable measures for double-checking whether those data are accurate, relevant, up to date and complete;

j) during the collection, processing and storage of personal data inform the data subject about the objectives and legal grounds for the processing of his/her personal data, about whether the person is required to provide the personal information, about the sources and categories of personal information and about any third persons who may gain access to the data.

The Code also provides for an obligation of the state not to disclose personal information. Under Article 44 "[n]o public agency shall disclose information constituting confidential personal information, except for personal data on officials (including candidates for official positions), without the consent of the data subject, or on the basis of a motivated decision that was rendered by a court pursuant to the law.

Under para. 3, a court may render the decision declassifying personal data only if it is impossible to prove facts which are essential to the case on the basis of other evidence, and if all possibilities of obtaining the information from other sources were exhausted.

The Code provides that personal data may be used for the scientific research, provided the identity of individuals concerned cannot be discovered.[484]

The Code establishes rules on correction or destruction of personal data. Article 46 of the Code provides that:

> "A person may demand the correction of data or the destruction of illegally obtained data. The burden of proof concerning the legality of any collection of personal data shall rest with a public agency. Pending the correction of any personal data held in a public register a person's statement concerning inaccuracy of that information shall constitute public information and shall be attached to the pubic information. A public agency or public servant shall render a decision on this matter within ten days."

Article 47 provides that a person may file a claim in a court demanding the nullification or amendment of the decision of a public agency or public servant and claim material or non-material damages for denying access to public information, the creation or and processing of incorrect public information, the illegal collection, processing, storage or dissemination of personal data, or illegal disclosing personal data to another person or public agency.

The Code also prescribes the term for keeping information classified. Under Article 31(1) confidential personal information shall be classified for the lifetime of the data subject, unless otherwise provided in relevant legislation.

A decision of an administrative agency on such matters may be appealed to a court under procedures prescribed by law.[485]

Under Article 11 of the Code:

> "A public servant involved in an administrative matter shall not disclose or use for unofficial purposes any confidential information that was obtained or created during

[484] Article 45.
[485] See in particular Article 177-184 of the Code.

the administrative matter. A person shall be held liable for disclosure or use of such information according to applicable legislation. …"

The Criminal Code of Georgia provides for criminal liability for refusal to provide access to personal information or official documents or a copy of the documents or material which directly concerns the data subject's rights and freedoms or to hinder access to such information, document or material.[486] In addition, the Criminal Code also provides for criminal liability for illegal collection, storage, use or disclosure of confidential private or family information. The latter is applicable not only to state authorities, but also to third parties.[487]

The collection and storage of personal information is also regulated by the Law on Conflict of Interests and Corruption in Public Service (17 October 1997) which requires public officials to submit a declaration of their economic situation. Although this may constitute an interference with the private life of public officials, it can be noted to be justified in the interests of the state's economic well-being.

Both criminal and civil legislation of Georgia allows closed judicial hearings if there is a risk of disclosure of intimate aspects of private and family life.[488]

The issue of lustration may be raised in the context of data protection and the right of access to information. Although the issue attracted some public attention during recent years and although a draft law on lustration has even been prepared, the Parliament of Georgia has not discussed it.[489]

8.2.1.3. Sexual Privacy

As noted, sexual relations fall within the sphere of private life. In accordance with the case-law of the European Court, consensual homosexual relationships between men are not considered a criminal offence by the Criminal Code of Georgia. The Criminal Code provides that non-consensual sexual relationships between men are criminally punishable (Article 138). The same applies to non-consensual relationship between women, to which Article 138 expressly refers. Article 138, para. 4, of the Criminal Code also provides that forced act of a sexual character inflicted upon a person who has not yet reached the age of 14 is considered a criminal offence. No difference in treatment in terms of age of under-age girls and boys - in homosexual, lesbian and heterosexual relationships - has been identified in Georgian legislation.[490]

There is no legislation in Georgia which regulates medical issues concerning a change of gender. However, the Law on Registration of Civil Acts[491] is of interest in the context of changes of names/surnames since the maintenance of a name not reflecting a person's

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[486] Article 167.
[487] Article 157.
[488] Article 16(4) of the Code of Criminal Procedure and Article 9 of Code of Civil Procedure.
[489] G. Papuashvili, Lustration in East European and Post-Communist Countries and Prospects of Its Introduction in Georgia, Georgian Law Review, N3/4, 2000, 28-30.
[490] *Euan Sutherland* v. *the United Kingdom*, 1 July 1997, N25186/94.
[491] 15 December 1998.

current status may be problematic for a person who has changed his/her gender. The Law provides that both the record of birth[492] and the birth certificate[493] contain data, *inter alia*, on the gender of a person. No such a data is included in either the record of a marriage,[494] or a marriage certificate.[495]

The Law governs the rules and procedure for changing names and surnames.[496] It lists the reasons for changing names and surnames, but the Law does not contain an indication of a change of gender as one of the reasons for change of a name/surname.[497] Yet, the Law points out that one of the reasons for change of name/surname may be its insulting character. Under the Law, a change of name or surname also entails a change in the relevant details on the personal identification card.

The Law also regulates modifications and amendments to records of civil acts. Although Article 104 of the Law (which relates to the legal basis for amendments and modifications of the records of civil acts) does not include a change of gender as a reason for a change of names/surnames, the Law elsewhere does expressly mention change of names/surnames as a result of change of gender (*see* Articles 106(1)(d) and 107(1)).

Article 14 of the Law states that information on registration of civil acts is confidential and its disclosure is prohibited, expect in the cases provided by law.

In general, it may be concluded that the Law on Registration of Civil Acts is very ambiguous with respect to the change of names/surnames as a result of a change of gender. Although the Law recognises the possibility of a change of names/surnames as a result of change of gender it contains procedural gaps and requires adjustments in order to adequately regulate the change of names/surnames caused by gender reassignment.

Although problems with regard to a change of names as a result of a change of gender have not up to now arisen in practice, there is a clear need to solve this issue in accordance with the case-law of the Strasbourg institutions.

Another aspect of sexual privacy is the right of homosexuals to be protected against restrictions of their rights based on their sexual orientation. In the light of the standards of the European Convention it is interesting to identify whether there are any occupations in both the public and private sectors, first of all in the armed forces, closed to homosexuals. In the case of *Smith and Grady* v. *the United Kingdom,* which concerned investigations into the applicants' homosexuality and their subsequent discharge from the Royal Air Force on the ground that they were homosexual, the European Court found a violation of Article 8 of the Convention.[498]

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[492] Article 25(1)(a).
[493] Article 36(a).
[494] Article 45.
[495] Article 47.
[496] See chapter 9 of the Law.
[497] Article 74.
[498] 27 September 1999, 29 EHRR 493, paras. 111 and 112.

The analysis of Georgian legislation has made it clear that neither the current labour legislation, nor the draft labour code[499] contains provisions discriminating against homosexuals in terms of occupying certain posts in the public or private sector. In a similar vein, the legislation governing military issues does not prohibit military service of homosexuals. The Law on the Status of Military Servants which regulates, *inter alia*, issues of dismissal from military service does not provide that homosexuality may be a ground for dismissals of a military servant from such service.[500] Similarly, the Law on Military Obligations and Military Service provides neither that homosexual may not be admitted to military service nor that they may be dismissed on the basis of their homosexuality.[501]

In practice, issues of refusal to perform military service or dismissal of military servants on the basis of their homosexuality have not arisen.

8.2.1.4. Names

The Law on Registration of Civil Acts regulates, *inter alia*, issues of registration of names and changes of names or surnames.[502] At birth, a child is registered in register of civil acts. Both the record of birth and the birth certificate include personal data such as name and surname. A child is given a name upon the mutual agreement of the parents.[503] A child is given the surname either of the father or the mother or a combined surname upon the mutual agreement of the parents.

The Law determines the rules and procedure for changing names and surnames.[504] Under Article 73 of the Law, citizens of Georgia may change their name and surname when they reach the age at which they may obtain a personal identification card (para. 1). Change of a name and/or surname is allowed with the consent of his/her parents or the parent with whom a child lives, or with the consent of a person *in loco parentis*.[505]

Under Article 74, a change of a name or a surname may be made for one of the following reasons:

a) the name or surname is difficult to pronounce, not well sounding or insulting;
b) an applicant wishes to receive or combine his/her surname with that of his/her spouse, if this is not already done at the time of registration of the marriage;
c) an applicant wishes to receive the surname of his/her actual carer;
d) an applicant wishes to return to the surname he/she had before marriage, if this is not already done at the time of registration of the divorce;
e) an applicant wishes to obtain the surname of a relative of lineal ascendant.

[499] For the text of the draft labour Code see Georgian Law Review, 5, N4, 2002. The Review is also available on the internet-site of the Georgian-European Policy and Legal Advice Centre: [www.geplac.org] .
[500] 25 June 1998, Article 21(2).
[501] 17 September 1997. See also the Disciplinary Statute of the Armed Forces of Georgia, 2 September 1994.
[502] 15 December 1998.
[503] Para. 1, Article 26.
[504] See chapter 9 of the Law.
[505] Para. 2, Article 73.

The decision on a change of name or surname is made by the Commission on Registration of Civil Acts within the Ministry of Justice of Georgia.[506] The Ministry of Justice notifies the relevant organs charged with the registration of civil acts and the applicant within a week.[507]

A change of name and/or surname also entails a change in the details on the personal identification card. The Law also sets forth the reasons for refusal of a change of name/surname, as follows:

a) there is a real danger to the interests of a third person;
b) an applicant's wish to choose pseudo name as his/her surname or to create new surname;
c) the applicant is suspected of having committed a crime;
d) the applicant has been convicted of a crime, unless the conviction is overturned.[508]

Some of the reasons for refusal to change a name or surname provided for in the Law, are formulated broadly and therefore, are not convincing. For example, it is unclear from the Law what is meant by "a real danger to the interests of a third person". From the Law it is difficult to see how the interests of a third person will be infringed if another persons wishes to change a name, even if a person wishes to choose the same or a similar name to the name which the third person has. Without further detail in the Law it will be difficult to justify the restrictions of the right under para. 2, Article 8 of the Convention.

The other reasons for a refusal to change names are also formulated quite broadly. For instance, an application for a change of name may be refused on the basis of an applicant's conviction, if the conviction is not overturned. Further clarification in the Law will be necessary to justify such a restriction.

8.2.2. Family Life

It should be noted at the outset that Article 20 of the Constitution of Georgia which contains a general constitutional provision covering the rights provided for by Article 8 of the Convention, does not mention "family life". Rather, the Constitution contains separate provisions on family life in Article 36. The relevant part of the Article, which is quite general and declaratory in nature, reads as follows:

"2. The state supports the well-being of the family.
3. The rights of mothers and children are protected by law."

8.2.2.1. Unmarried Parents and the Status of Children

The Civil Code of Georgia governs, *inter alia*, family law issues. Article 1106 of the Civil Code which defines 'marriage' for the purposes of the Civil Code, states that "[m]arriage is

[506] Para. 3, Article 78. See the Regulation of the Commission on Registration of Civil Acts, 26 June 2000, N128, Ministry of Justice.
[507] *Ibid*.
[508] Article 84.

the voluntary union of a woman and a man for the purpose of creating a family, which is registered with an agency of the State Register of Civil Status of Citizens."[509]

Although this Article does not expressly refer to 'family life', it may be inferred from the purpose of marriage ('creating a family') that a woman and a man may create a family if the marriage is registered with an agency of the State Register of Civil Status of Citizens. This interpretation is strengthened by Article 1151 of the Code (the Role of Registration of a Marriage) which states that "[o]nly a marriage registered with an office of the Register of Civil Status shall give rise to the marital rights and duties of spouses." The Civil Code of Georgia does not provide for the creation of a family in the legal sense unless a marriage is registered in the State Register.[510] In other words, in the eyes of the Civil Code the union of an unmarried man and woman who cohabit will not be considered a family for the purposes of Georgian legislation.

However, the Civil Code deals with the status of children born out of wedlock. Article 1190 of the Civil Code (Proof of Filiation Between a Child and Unmarried Parents) states:

> "1. Filiation between a child and parents not married to each other shall be determined by joint application of the parents, filed with an office of the Register of Civil Status.
> 2. If the parents do not make a joint application, then paternity may be established in court proceedings on the application of one of the parents, the guardian (curator) of the child or the person who provides maintenance for the child, as well as on the application of the child himself or herself, having attained the age of majority.
> 3. When establishing paternity, the court takes into account the facts of cohabitation and a jointly kept household of the mother and the putative father prior to the birth of a child, or the joint upbringing and maintenance of the child, or an evidentiary document that certifies the recognition of paternity by the defendant."

Para. 1 of Article 1190 makes it clear that filiation of a child and parents may be made by joint application of the parents - which does not cause legal problems. Under the Code, unmarried parents may apply to the Office of the Register of Civil Status to establish filiations between parents and a child.

However, the Code prescribes a special procedure for the establishment of paternity, if both parents do not make a joint application. In such cases, a court may decide on the establishment of paternity. In doing so, the facts of cohabitation and a jointly kept household of the mother and the putative father prior to the birth of a child, or the joint upbringing and maintenance of the child, or an evidentiary document that certifies the recognition of paternity by the defendant, are taken into consideration by the court deciding the matter.

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[509] The English version of the Civil Code of Georgia is available on the IRIS internet-site: [www.iris.ge].

[510] See para. 418, Second Periodic Report of Georgia Submitted under Article 40 of the International Covenant on Civil and Political Rights, CCPR/C/GEO/2000/2, 26 February 2001, 81.

A special procedure for the establishment of paternity is provided only for a father; no such procedure exists with regard to the establishment of maternity. In the case of *Marckx* v. *Belgium* (1979), the European Court held that which Belgium was in violation of the Convention because its legislation required the formal recognition by the mother of her maternity over her child. No such requirement exists in Georgian legislation.[511] Under the Civil Code, maternal affiliation is automatically established by the fact of giving birth to the child. The Civil Code of Georgia does not make a distinction between a child born in or out of wedlock with regard to maternity.

As for the recording of unmarried parents in the register of birth, Article 1192 of the Code stipulates that:

> "1. If the parents are not married to each other, then the record with respect to the mother of the child shall be made on the application of the mother, and the record with respect to the father, on the joint application of the spouses or by a court ruling.
> 2. If the mother has died, is declared legally incapable, is deprived of parental rights or her place of residence cannot be located, the details of the father of the child shall be recorded on the application of the father."

At the same time it should be noted that on 31 July 2002 Georgia became a party to the European Convention on the Legal Status of Children Born out of Wedlock (1975).[512] Having become part of Georgian legislation, this Convention is directly applicable at the national level. Under Article 2 of the Convention "[m]aternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child."

The equal treatment of children born in and out of wedlock is confirmed by various provisions of the Civil Code. Article 1190 deals with the establishment of paternity. Para. 4 of this Article states that [u]pon establishment of paternity … the children are entitled to the same rights and duties with respect to the parents and their relatives as are children born of married parents." Article 1198 on the duties of parents with respect to children does not make a distinction between children born in and out of wedlock.[513]

It may be concluded that Georgian legislation ensures equal treatment of children in and out of wedlock.

8.2.2.2. Custody and Public Care

8.2.2.2.1. Custody

The Civil Code of Georgia states that "parents shall have equal rights and duties with respect to their children."[514] This rule is applicable even if they are divorced.[515]

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[511] paras. 31 and 45.
[512] The text of the Convention is available on the internet-site of the Treaty Office of the Council of Europe: [http://conventions.coe.int].
[513] Under para. 1 of Article 1198, "[p]arents shall be entitled and obligated to rear their children, to take care of their physical, intellectual, spiritual and social development, and to raise them as decent members of society, taking into account the best interests of the children."
[514] Article 1197 of the Code.

The Civil Code also states that the "[i]f the parents live separate and apart because of divorce or some other reason, then the custody of an under-aged child shall be determined by their agreement."[516] However, "[i]n the event of disagreement between the parents, a court shall resolve the dispute taking into account the interests of the child."[517]

Further, Article 1202 provides that:

"1. A parent who lives separate and apart from his or her child shall have the right to have relations with the child and shall be required to participate in his or her upbringing. The parent with whom the child lives has no right to obstruct the other parent in having relations with the child and participating in the rearing of the child.
2. A court shall have the right to deprive the parent living separate and apart from the child of his or her right to have relations with the child for a specified period of time, if such relations impede the normal upbringing of the child and have a negative influence on the child."

The provisions of the Civil Code cited above made it clear that in case of divorce it is up to the parents of a child to decide on the custody of their child. However, in case of disagreement between the parents, a court decides to whom the right to custody is granted bearing in mind the interests of the child. Although the Code does not make specific provisions about the preferences to be given either to the mother or the father in terms of custody it may be assumed that such a decision will not be made on the basis of the religion followed by one of the parents which was found to be discriminatory under Article 8 read in conjunction with Article 14 of the European Convention (*Hoffmann* v. *Austria*, judgment of 23 June 1993).

Although a national court may grant a custody over a child to one of the parents, the Civil Code clearly takes into account the interests of the other parent. The Code provides the other parent with the right to have relations with the child and even prohibits the parent with whom the child lives from obstructing the other parent's relations with the child, in compliance with Article 8 of the Convention.[518] The Code even obliges the other parent to participate in the upbringing of his/her child.

However, the legislation takes into consideration the child's interests and rules to ensure that the right of access to a child is not abused. It makes it possible for the court to deprive the other parent temporarily of the right to have contact with his/her child.

It may be concluded that the provision of the Civil Code of Georgia are in line with the standards of the European Convention in these respects.

8.2.2.2.2. Public Care

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[515] Article 1199 of the Code.
[516] Para. 1, Article 1201.
[517] Para. 2, Article 1201.
[518] *Mutatis mutandis*, *Hokkanen* v. *Finland*, 23 September 1994, Series A no. 299-A.

The Civil Code of Georgia provides for the possibility of deprivation of parental rights. Article 1205(1) states that "[a]s an extraordinary measure, the deprivation of parental rights may be effected only by a court proceeding." In addition, the Code lists the reasons for which the parents or one of the parents may be deprived of their rights, namely "if it is found that they (or one of them) systematically evade performance of the duty of rearing the children or abuses the parental rights i.e. by mistreating the children with cruelty, having a negative influence on them by immoral behaviour, or if the parents are chronic alcoholics or drug addicts."[519]

If both parents are deprived of their parental rights, the child must be placed in the custody of a guardianship and curatorship agency.[520] Even in such cases, under the Code "[a] guardianship and curatorship agency may allow the parent deprived of parental rights to visit the child, unless this would negatively influence the child."[521]

Although under the Code a parent deprived of his or her parental rights loses all rights arising out of the relationship with the child with respect to whom he or she has been deprived of parental rights,[522] the Code gives a parent deprived of parental rights the possibility to restore his parental rights "only in court proceedings [initiated upon] the application of the child, one of the parents or a guardianship and curatorship agency."[523] Parental rights may be restored only if it is found that the behaviour and living conditions of the parent have changed, and he or she is able to rear the child, and also if the restoration of parental rights is in the interests of the child.[524]

Apart from providing for deprivation of parental rights for reasons attributable to the parents (so-called subjective reasons, described above)[525], Georgian legislation also deals with child care issues relating to matters not attributable to the parents (objective reasons). In this respect, the Civil Code provides for the removal of a child without deprivation of parental rights.[526] Article 1210(1) states:

"If leaving the child in the custody of one or both parents is prejudicial to the child for reasons beyond the control of the parents, a court by its ruling may remove the child from one of the parents or from both parents without deprivation of their parental rights and place the child in the custody of a guardianship and curatorship agency."

The Code also sets forth a rule of return of the child to the parent. Namely, "[i]f the grounds for removal of the child from the parents cease to exist, then on the application of the

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[519] Para. 2.
[520] Para. 3.
[521] Article 1208.
[522] Article 1207.
[523] Para. 1, Article 1209.
[524] Para. 2, Article 1209. In addition the Code states that "[i]f the child is ten years of age or older, the court shall take into account the child's preference as well."
[525] See Article 1205(2) "if it is found that they (or one of them) systematically evades performance of the duty of rearing the children or abuses the parental rights – e. g. by mistreating the children with cruelty, having a negative influence on them by immoral behaviour, or if the parents are chronic alcoholics or drug addicts.".
[526] Article 1210.

parent(s) the court may decide to return the child to the parent(s), taking into account the interests of the child."[527]

In addition the legislation of Georgia stipulates that "[t]he parent(s) whose rights have been limited by removal of the child may be allowed to have relations with the child, unless this would negatively influence the child."[528]

A number of conclusions may be drawn from the above examination of the civil legislation of Georgia. In line with the European Convention and the case-law of the Strasbourg institutions,[529] the Civil Code stipulates that deprivation of parental rights is "an exceptional measure". The Code clearly defines the circumstances in which parents may be deprived of their rights, and these set a high threshold in terms of danger to the upbringing of a child. So it may be assumed that this measure is proportionate to the legitimate aim (protection of the interests of a child, his/her health and morals). The legislation expressly refers to the interest of a child in making a decision on placement of a child into public care.

One of the most important issues in public care cases is the maintenance of contacts between parents and children during the latter's placement into public care. The purpose of the Civil Code is to strike a balance by stressing, on the one hand, the necessity to protect the interests of the child and furthering, on the other hand, the reunification of the family. However, it may be suggested that the negative wording of Article 1211 ("the parent(s) … may be allowed to have relations with the child …") may be misinterpreted in practice. It may be derived from case-law under the Convention that there is a presumption in favour of contacts between parents and children in public care which would serve the purpose of their subsequent reunification, provided that such contacts do not harm the interests of children.[530] The presumption in favour of a prohibition of contacts between parents and children in the Georgian law may be a disproportional restriction of this right.

One of the important principles established in the case-law under the Convention with regard to contacts between parents and children while the latter are in public care is that no practical impediments should be placed on easy and regular access between parents and children to maintain family ties. The case of *Olsson* v. *Sweden,* already examined, illustrates that placing of children in public care institutions too far from the place where the parents live creates practical difficulties for parents and children to maintain contacts. The Civil Code does not contain such a provision. Although enjoyment of this right greatly depends on judicial practice, it would still be important to include in the Civil Code a provision on easy and regular access between parents and children to promote enjoyment of family life and to further reunification of the family.

The Civil Code of Georgia also governs issues of adoption. Under Article 1239(1) "[a]doption shall be allowed only for the welfare and in the interests of an under-aged, if it is expected that a relationship of parent and child will be created between the adoptive parent and the adoptee." This general provision makes clear that an adoption is made only

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[527] Para. 2, Article 1210.
[528] Article 1211.
[529] Among others, see *Johansen* v. *Norway*, 7 August 1996, 23 EHRR 33, 1996-III, para. 78.
[530] *Andersson* v. *Sweden*, 25 February 1992, Series A no. 226.

for the purpose of the welfare and in the interests of a child. The decision about adoption is made by a court (Article 1242 of the Civil Code) and is to be registered in an office of the Register of the Civil Status (Article 1244(2)).

The rules governing adoption are amongst the most important issues in the context of family life. The Code regulates various types of situations in which adoption may be allowed. Article 1251 (Consent of the Parents to Adoption) of the Civil Code states that:

1. "Adoption of a child who has parents shall require the consent of the parents. The consent of the parents to the adoption shall be given in writing.
2. The parents may give their consent to adoption by specific person(s), or give their consent to placement for adoption without naming specific person(s), which means they entrust the selection of prospective adoptive parent(s) to a guardianship and curatorship agency.
3. If the consent to adoption names a specific person, then a guardianship and curatorship agency shall make an evaluation of whether this adoption is in the interests of the child."

The Civil Code also regulates adoption of children born out of wedlock. Under Article 1252: "[a]doption of a child born out of wedlock shall require the written consent of the mother, after at least 6 weeks from the date of the birth of the child. If the adoption of the child is sought by a third person, the decision on adoption shall not be made if the father has filed a petition for establishment of paternity, or for adoption of the child."[531]

The legislation of Georgia provides for a procedure for adoption of a child under guardianship (curatorship). Under Article 1253 of the Civil Code:

"1. The adoption of a child who is under guardianship (curatorship) shall require the written consent of the guardian (curator), if the child has no parents.
2. The administration of the child-care institution must ascertain, at the [time of] initial acceptance of the child, whether or not the parent agrees to place the child for adoption." [532]

The legislation also states the cases in which the consent of the parent(s) is not required for adoption. Such a consent is not required "if the parent is incapacitated or declared to be missing."[533]

It is important to note that the Civil Code sets forth a rule for adoption of a child whose parents are deprived of parental rights. Under para. 2 of Article 1254: "Adoption of a child whose parents have been deprived of parental rights shall be allowed after one year from the day of deprivation of these rights."

The Civil Code provides a guarantee for the return of any child adopted in violation of the established procedure. As noted, consent of parents is a precondition for placement of their child for adoption (Article 1251(1)). Interest of the parents are protected by the guarantee set forth in the Code under which "[u]pon petition filed by the [biological] parents, a court

[531] This Article of the Code was amended by the law on 9 June 1999. See Official Gazette of Georgia, I, 1999, N24(31).
[532] This Article of the Code was amended by the law on 9 June 1999. See Official Gazette of Georgia, I, 1999, N24(31).
[533] Article 1254(1) of the Civil Code.

may dissolve an adoption granted without the consent of the parents where such consent was required, if it finds that the return of the child to the [biological] parents is in the interests of the child."[534]

Although this might be quite a difficult situation as the child could have developed family ties with the adoptive parents during the procedurally incorrect adoption, the Code takes into consideration two elements. Firstly, the dissolution must be in the interests of the child and secondly, the consent of any adoptee who has reached ten years of age is necessary for the dissolution of the adoption (Article 1266).

The Criminal Code of Georgia provides for criminal liability for the disclosure of confidential information on adoption against the will of an adopted person.[535]

It is important to analyse the provisions of the Civil Code on adoption with a view to determine their compliance with Article 8 of the European Convention and its interpretation. The European Court attaches great importance to the decision-making process in the context of adoption. The Code requires consent of both parents for adoption to be given in writing. Therefore, if consent was not given by one of the parents, adoption may not take place which is in line with Article 8 of the Convention.

As regards the procedure for adoption of children born out of wedlock under the Civil Code, it may be suggested that it meets the Convention requirements, namely, those established in the already examined case of *Keegan* v. *Ireland* in which adoption of the child without the father's consent or knowledge was found to violate family life protected under Article 8.[536] The Code also meets the standards set in the case of *Johnston and Others* v. *Ireland*, in which the European Court held that a child of unmarried parents should be placed in a position akin to that of a child whose parents are married.[537] The Civil Code requires not only that written consent be given by the mother for adoption of her child, but also states that "the decision to allow adoption shall not be made if the father has filed a petition for establishment of paternity, or for adoption of the child." Under the Code even in the case of unmarried couples, adoption may not be made by the mother to a third party, if the father wishes to establish his paternity or adopt the child.

Similarly, the consent of the parents of a child is required for the child's adoption even if the child is under guardianship (curatorship). It stems from Article 1253(1) that adoption of a child under guardianship (curatorship) requires the written consent of the guardian (curator), if the child has no parents, but that if the child has parents, they are to give their consent for adoption. This interpretation is confirmed by para. 2 under which the administration of the child-care institution must ascertain, at the time of initial acceptance of the child, whether or not the parent(s) agree(s) to place the child for adoption. Thus, parents are involved in the decision-making process of their children's adoption.

8.2.2.3. Aliens: Immigration and Expulsion

[534] Article 1266; see also Article 1272(4).
[535] Article 175.
[536] *Keegan* v. *Ireland*, 26 May 1994, Series A no. 290, para. 55.
[537] 18 December 1986, Series A no. 112, paras. 74-76.

A number of laws govern the status of foreigners in Georgia. Under the Law on the Legal Status of Foreigners, foreigners are: 1) persons who are not citizens of Georgia and who have documents certifying citizenship of another state; and 2) persons who have neither citizenship of Georgia nor documents certifying citizenship of another state.[538]

Under Article 5(2) of the Law permission to live permanently is given to a foreigner if he/she is, *inter alia*: a) a parent, a spouse, an under-age son or daughter or a legally incapable son or daughter of full age of a citizen of Georgia; b) a parent, a spouse, an under-age son or daughter or a legally incapable son or daughter of full age of an immigrant living in Georgia; c) a person under guardianship or curatorship of a citizen of Georgia; d) a guardian or a curator of a citizen of Georgia;

The Law sets forth the following grounds, on the basis of which a foreigner may be refused entry into Georgia: a) if he has committed a crime against peace and humanity; b) if he has committed a serious criminal offence during the last 5 years; c) in the interest of national security or public safety; d) if it is necessary for the protection of the rights and legitimate interests of citizens of Georgia and other persons; e) if he has been convicted of actions against Georgia, or; f) if he has submitted false documents for entry into Georgia.[539]

The Law on the Legal Status of Foreigners states on circumstances in which foreigners may be expelled from Georgia, *inter alia*: a) if the legal grounds, on the basis of which they were allowed to stay in Georgia, no longer apply; b) if they illegally entered and stayed in the territory of Georgia; c) if their stay is contrary to the interests of national security and protection of public order; d) if they wilfully and systematically violate the existing legislation of Georgia.[540]

The decision on the expulsion of a foreigner is taken by the Minister of Justice on the basis of a submission by the Ministry of Internal Affairs, a court and Ministry of Foreign Affairs.[541] Foreigners are obliged to leave the state within the time indicated in the decision on expulsion. If they do not comply with the decision on expulsion, they will be forcibly expelled from Georgia.[542]

Under Article 29(4) a decision on the expulsion of a foreigner may be appealed to a court.

The status of foreigners is also governed by the Law on Immigration (16 October 1997). Under the Law on Immigration, an immigrant is a foreigner who under the rules established obtained the right to live permanently in Georgia.[543] The status of an immigrant may be granted, *inter alia*, to: a) the parents, a spouse, or an under-age son or daughter or a legally incapable son or daughter of full age, of a citizen of Georgia; b) a parent, a spouse, an under-age son or daughter or a legally incapable son or daughter of full age of an immigrant

[538] Para. 1, Article 1.
[539] Para. 3, Article 23.
[540] Para. 1, Article 29.
[541] Para. 2, Article 29. See also the Temporary Regulation on the Carrying out of the Competence of the Ministry of Justice in the Field of Expulsion of Foreigners from Georgia, Order of the Minister of Justice N3, August 2000.
[542] Para. 3, Article 29.
[543] Para. 1, Article 3.

living in Georgia; c) a person under guardianship or curatorship of a citizen of Georgia; d) a guardian or a curator of a citizen of Georgia;[544]

The Law on Immigration provides that a foreigner may be refused immigration to Georgia, *inter alia*: a) if he has committed a crime against peace and humanity; b) if he has committed a serious criminal offence during the last 5 years or a criminal case has been initiated against him; c) if his arrival will threaten state security of Georgia, or public order or if it will negatively affect the morals of the population; d) if he is HIV positive, has venereal disease or another disease on a list drawn up by the Ministry of Health, or if he is an alcoholic or a drug addict; e) if he has submitted false documents or documents lacking legal force in an attempt to obtain permission to live in Georgia and/or an entry visa; f) if he has already been expelled from Georgia; g) in the interest of national security or public safety; h) if it is necessary for the protection of the rights and legitimate interests of citizens of Georgia and other persons; i) if he has been convicted of actions against Georgia; j) if he has submitted false documents for the entry into Georgia.[545]

The Law on Immigration also sets out the reasons for expulsion of immigrants from Georgia; they are, *inter alia*, as follows: a) if it has been established that he obtained the right to live in Georgia by submission of false documents or documents lacking legal force; b) if he has committed a serious criminal offence; c) if he has wilfully and systematically violated the existing legislation of Georgia; d) if his stay is contrary to interests of national security.[546]

The decision on the expulsion of an immigrant is taken by the Minister of Justice on the basis of a submission of the Ministry of Internal Affairs, the Ministry of Health, the Ministry of Foreign Affairs, the Ministry of Refugees and Accommodation, judicial bodies and relevant organs of the Ministry of State Security.[547] The Minister may decide either to expel the foreigner from Georgia, or to refuse the expulsion, or to return the case file to the body concerned, if the material (evidence and documents) submitted are incomplete.[548]

Para. 3 of Article 7 states that in the cases provided under subparas. a), c) and d), the immigrant must be notified in writing of a decision to expel him, within 10 days from the date of its adoption. The immigrant is obliged to leave Georgia within 30 days of the moment of receipt of the decision.

The immigrant has the right to appeal to a court within 10 days against the decision to expel him. In such cases, the 30 day period within which the immigrant must leave the state is suspended. It will be resumed upon the entry into force of the decision of the court.[549]

Apart from the above, expulsion of foreigners is also regulated by the Instruction on the Temporary Rules of Expulsion of Foreigners from Georgia adopted by the Minister of

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[544] Para. 2, Article 3.
[545] Para. 3, Article 23.
[546] Para. 1, Article 7.
[547] Para. 2. Article 7. See also The Temporary Regulation on the Carrying out of the Competence of the Ministry of Justice in the Field of Expulsion of Foreigners from Georgia, Order of the Minister of Justice N3, August 2000.
[548] Para. 2, Article 12 of the Temporary Regulation.
[549] Para. 3. Article 7.

Internal Affairs of Georgia.[550] The Instruction governs mainly the procedures relating to expulsion. Under para. 11, within 24 hours of the receipt of an order of expulsion from the Minister of Justice, the head of the body for Internal Affairs must personally acquaint the foreigner with the decision to expel him from Georgia, explain his rights and duties and invite him to leave the territory of Georgia within 3 days voluntarily.

If the foreigner in question does not leave the state voluntarily within 3 days, he will be expelled by a special police unit.[551]

It should also be mentioned that under Article 25 of the Law on Citizenship of Georgia (15 October 1996) "[m]arriage or divorce of a citizen of Georgia with a foreign citizen or a person without citizenship does not in itself cause a change of citizenship of the spouses."

Some conclusions may be drawn on the basis of the legislation governing the status of foreigners in the context of immigration and expulsion. Under Article 8 of the European Convention, the right to family life is not violated if family members are able to be unified in some other country. The legislation of Georgia offers higher protection by granting the right to live permanently in Georgia to any foreigner who has a family member who is a citizen of Georgia or immigrant living in Georgia. The legislation also allows any person under the guardianship or curatorship of a citizen of Georgia or any guardian or curator of a citizen of Georgia to live permanently in Georgia.

As regards expulsion, although the state may justify the expulsion of foreigners by invoking interests of national security or public safety or the need to protect the rights and legitimate interests of others, the legislation of Georgia does not expressly point out that family ties and other factors such as linguistic and cultural links of a foreigner with the state of origin must be taken into consideration in any decision on expulsion.

Both laws governing issues of entry of foreigners into Georgia and their expulsion (the Law on Legal Status of Foreigners and the Law on Immigration) expressly state that a decision to expel a person may be appealed to a court. However, only the Law on Immigration provides that in case of appeal to a court the period within which the foreigner is to leave the country is suspended. This is particularly significant since the time accorded to a foreigner to leave is arguably too short to appeal to a court against the decision to expel him.[552]

It is important to note that recently a new draft law on the legal status of foreigners has been prepared and submitted to the Parliament of Georgia. The draft law passed its first reading in Parliament at the beginning of March 2003. The draft law provides that with its adoption a number of laws, *inter alia*, on Immigration and on the Legal Status of Foreigners will be annulled.[553]

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[550] 15 August 2000.
[551] Para. 14 of the Instruction.
[552] See para. 11 of the Instruction on the Temporary Rules of Expulsion of Foreigners from Georgia.
[553] Article 85 of the draft law.

The draft law seeks to regulate the entry into Georgia by foreigners, as well as their stay and departure; to provide the legal basis for the expulsion of foreigners from Georgia; and to specify the different types and procedures for expulsion.

The draft law establishes the principles on which it is based. Among other principles it provides that Georgian legislation on foreigners must respect and protect the principle of unity of the family and that a foreigner who was refused entry into country has the right to appeal against the decision to both the administrative and judicial organs.[554]

The draft law sets forth the conditions for refusal of entry into the country. Under Article 16 a foreigner may be refused entry into Georgia if:

a) he does not have the necessary documents for entry into the territory of Georgia;
b) it was established that he violated Georgian law during a previous stay, or that he was expelled from Georgia in the preceding year, or that he was forcibly removed from Georgia in the previous three years;
c) he has submitted false information or documents to obtain a visa for entry into Georgia;
d) he does not have sufficient material resources to stay or live in Georgia or to return to his country of origin;
e) his stay threatens the public order and security of Georgia, protection of health and rights and legitimate interests of citizens of Georgia and of persons living in Georgia.[555]

Under the draft law, a foreigner is to be given the reasons for any refusal of entry into Georgia in writing.

The draft law envisages two sorts of permission to stay in Georgia: a) temporary, with annual prolongation of the permission to stay; and b) immigration.[556]

Under the draft law, temporary permission to stay is to be given, *inter alia*, to any foreigner who is a member of the family of a foreigner who has the status of immigrant in Georgia.[557] Under the draft law, permission to immigrate to Georgia is given, *inter alia*, to any parent, spouse, under-age son or daughter or legally incapable son or daughter of full age of any citizen of Georgia[558]

The draft also provides for the termination of the stay of foreigner in Georgia. Under para. 4 of Article 28 the relevant state institution, while considering whether to terminate any permission to temporary live or the status of immigrant of a foreigner may take into consideration, *inter alia*, his personal links with Georgia and with his family members.[559]

Apart from the above, the draft law sets out the rules and procedures for the expulsion of foreigners. A foreigner may be expelled from Georgia, *inter alia*, if:

a) he has illegally entered or stayed in Georgia;

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[554] Article 3.
[555] Para 1, Article 16.
[556] Article 20.
[557] Article 21.
[558] Para. 2, Article 22.
[559] See also Articles 47 and 51 of the draft law.

b) there is no legal basis for his further stay in Georgia;
c) his stay is contrary to interests of national security and the protection of public order;
d) his expulsion is necessary for the protection of health, rights and legitimate interests of citizens of Georgia and other persons living in Georgia.
e) he systematically violates the existing legislation of Georgia;
f) he has obtained the rights to enter or stay in Georgia by submission of false documents or documents without legal force.[560]

The draft law also states that in deciding on the expulsion of a foreigner from Georgia, the State authorities must take into account, *inter alia*, the effects of his expulsion on any of his family members who are legally residing in Georgia.[561] A decision on expulsion may be appealed to a court.[562]

As to the procedure for expulsion, the draft law provides that a decision to expel a foreigner from Georgia is sent to the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Internal Affairs and the State Department for the Protection of the State Border within 24 hours of its adoption.[563] Within the next 24 hours, the Ministry of Justice working in cooperation with the Ministry of Internal Affairs must ensure that the foreigner in question is informed of the decision to expel him. It must be explained to him that he is obliged to leave the territory of Georgia voluntarily.[564]

Although the draft law may be amended in the process of parliamentary debates, it is clear that the current draft law is more specific not only in determining the rules and procedures for entry of foreigners into Georgia and issues of expulsion, but also in spelling out the factors to be taken into consideration in deciding on the entry and expulsion of foreigners.

8.2.3. Home

The Civil Code of Georgia determines what constitutes a "home". It states that "[t]he place where a natural person chooses his ordinary dwelling is deemed to be the place of residence of the person. A person may have several places of residence."[565]

However, based on a constitutional provision it may be argued that Georgian legislation does not interpret the notion of 'home' narrowly. Article 20 of the Constitution of Georgia, which governs issues of privacy refers not only to 'home or other property',[566] but also to 'place of personal activity'.[567] The latter is arguably wider than home and covers business premises. As was noted in the case of *Niemietz* v. *Germany,* "activities which are related to a profession or business may well be conducted from a person's private residence and

[560] Article 61.
[561] Para. 5(a), Article 65.
[562] Article 66.
[563] Para. 3, Article 67.
[564] Article 68.
[565] Para. 1 of Article 20 of the Code.
[566] Para. 2.
[567] Para. 1.

activities which are not so related may well be carried on in an office or commercial premises", it "may not always be possible to draw a precise distinction".[568]

Such a broad interpretation is supported by the rules in the Code of Criminal Procedure concerning the places where a search may be carried out. Under Article 332(3), a search may be carried out in a home or an office.

8.2.3.1. Protection from Wilful Damage

No legislation of Georgia has been found which allows wilful damage to homes by the state and its agents.

8.2.3.2. Protection from Nuisance

The Civil Code of Georgia governs the right to peaceful enjoyment of one's home. Under Article 174 of the Code "the owners of neighbouring tracts of land or other immovable properties are bound, in addition to the rights and duties prescribed by law, to hold each other in respect. All such tracts of land or other immovable properties between which a reciprocal nuisance may arise shall be deemed to be neighbouring ones."

In addition, the Code sets forth an obligation to tolerate certain nuisances caused by neighbours.[569] Under the Code "the owner of a tract of land or other immovable property may not prohibit gas, steam, smell, soot, smoke, noise, heat, vibrations or other similar incidents from invading his property from a neighbouring tract provided that they do not obstruct the owner in the use of his tract or impair his rights significantly."[570]

Along with the obligation to tolerate nuisance, the Code creates a right of the owner of a tract of land or other immovable property to claim compensation. Para. 3, Article 175 reads as follows: "if the owner is bound to tolerate such a nuisance, he may demand from the owner of the influencing tract of land the appropriate monetary compensation, where the nuisance exceeds the use regarded as ordinary at the given place and is beyond economically permissible limits."

The Code of Administrative Violations also regulates issues relating to protection from nuisance, though in a specific context. Article 80 of the Code provides for administrative sanctions the use of automobiles, airplanes, ships and other movable means or installations if their noise exceeds certain established standards.[571]

The analysis of Georgian legislation shows that although it regulates certain issues relating to protection from nuisance, not all areas are covered. It is obvious that the right to the peaceful enjoyment of one's home may be violated not only by neighbours or by the noise caused by the use of automobiles, airplanes, ships and other movable means or installations.

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[568] 16 December 1992, Series A no. 251-B, para. 30.
[569] Article 175.
[570] Para. 1, Article 175.
[571] See also Article 81 of the Code.

In the context of protection of persons from nuisances, the legislation should strike a fair balance between the competing interests of the individual and the community, including by providing compensation for nuisance caused.

8.2.3.3. Protection from Environmental Nuisance

In addition to Article 20 of the Constitution of Georgia which protects, *inter alia*, home in general, Article 37 of the Constitution deals more specifically with protection from environmental nuisance. Para. 3 of Article 37 states that "[e]veryone has the right to live in a healthy environment."

Para. 5 of Article 37 provides that "[i]ndividual has the right to complete, objective and timely information on the situation of his working and living environment."

Along with the Constitution the protection of persons from environmental nuisance is governed by the Law on Protection of the Environment.[572] The Law states that the purpose of the Law, *inter alia*, is protection of the fundamental human right to live in a healthy environment.[573] The Law also stipulates that one of the basic principles of protection of the environment is the principle of access by the general public to information on the state of the environment.[574]

The Law determines the rights of individuals in the field of protection of the environment. Along with the rights stipulated in the Article 37 of the Constitution (the right to live in a healthy environment and the right to complete, objective and timely information on the situation of one's working and living environment),[575] Article 6(g) of the Law on the Protection of the Environment provides that an individual has the right to obtain compensation for any damage caused by any failure to comply with the requirements of the legislation of Georgia on protection of the environment.[576]

In addition, Article 6(h) gives individuals the right to demand from a court a change in any decision concerning the allocation, projection, building, reconstruction and exploitation of any ecologically dangerous objects.[577]

The Criminal Code of Georgia provides for criminal responsibility for violation of the rules on protection of the environment, if the violation caused damage to the health of individuals.[578]

It may be concluded that Georgian legislation provides adequate safeguards for the protection of individuals from environmental nuisance.

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[572] 10 December 1996.
[573] Article 3(1)(b).
[574] Article 5(2)(l).
[575] Paras. a) and b), Article 6 of the Law on Protection of Environment.
[576] In this context see the case of *López Ostra* v. *Spain*, 9 December 1994, Series A no. 303-C, para. 51.
[577] *Guerra and Others* v. *Italy*, 19 February 1998, EHHR 1998-1.
[578] See in particular, Articles 287, 288 and 295 of the Criminal Code of Georgia.

8.2.3.4. Searches of Homes

The Constitution of Georgia expressly protects the sanctity of the home. Under Article 20(2) of the Constitution "[n]o one shall be entitled to enter into a home and other property against the will of their owners and to search without a court's decision, in cases of urgent necessity as provided by law."

The Constitution admits two situations when the inviolability of homes or other property may be restricted. Under Article 20(2), a restriction on the right to protection of the home is permitted only by a decision of a court, or in cases of urgent necessity, as provided by law.

The rules and procedures for searches of homes or other property are set out in the Code of Criminal Procedure.[579] Article 13(1) of the Code states that: "[t]he inviolability of a home or other property … is guaranteed by law."[580] Under para. 2 of the same Article:

"An inspection, search and seizure of homes or other property against the will of their owners … are only allowed by an order of a judge or a court ruling (decree). In case of urgent necessity, and as determined by law, an inspection, search or seizure may be carried out without an order of a judge, but the judge should examine their legality and justification within 24 hours from the moment of their submission of the report of the search and seizure operation. At the same time, the judge shall decide on the admissibility of any evidence obtained."

The Code guarantees non-disclosure of information relating to private life and of other information of a personal nature which the person whose home or property is being searched asks to be kept confidential. A body of inquiry, inquirer, investigator, prosecutor, or judge shall warn in writing a witness to the investigative or judicial act of the confidentiality of the data.[581]

Article 13(4) also provides that a person who has suffered from an unlawful disclosure of data on his private life is entitled to full compensation for any damage caused.

Article 290 of the Code of Criminal Procedure specifies the rules for carrying out the measures provided in Article 13. It states that "an investigative action associated with a restriction of the privacy of a home … shall be carried out by order of a judge."[582]

Para. 2 provides that in urgent cases seizure, search or inspection of homes or other property may be carried out without an order of a judge on the basis of a ruling of the inquirer, investigator or prosecutor. In this case, the judge in whose area of activity the investigative action was carried out shall be informed within 24 hours and provided with the materials in the criminal case which justified the investigative action. Within 24 hours of receiving the materials the judge, with the participation of the prosecutor, shall examine the legality of the investigative action which has been carried out without a decision of the court. The judge is competent to summon the inquirer, investigator of prosecutor to give

[579] 20 February 1998. See also Article 6(1)(d) of the Law on National Security Service of Georgia.
[580] Para 1.
[581] Para 3.
[582] Para. 1.

explanations to the persons who carried out the investigative action. Having examined the materials, the judge shall render a ruling to the effect that either:

a) the completed investigative action was legal; or
b) the completed investigative action was illegal, in which case he must exclude any obtained evidence as inadmissible and terminate the criminal case.

Although carrying out of any seizure, search and inspection against the will of their owners prior to the initiation of a criminal case requires an order of a judge, the Code provides that in urgent cases such actions may be taken by a motivated ruling rendered by a body of inquiry.

In such cases, the prosecutor must be immediately notified of the actions carried out. Once he has been able to study the ruling of the body of inquiry concerning the investigative action and with the records of the action and any factual evidence obtained, he must within 24 hours inform the judge within whose jurisdiction the investigative action was carried out and present the materials justifying the action prior to the initiation of criminal proceedings. The judge must, upon receipt of the prosecutor's motion, within the next 24 hours, with the prosecutor's participation, examine the legality of the investigative action. The judge is competent to summon the representative of the body of inquiry which carried out the investigative action prior to the initiation of a criminal case in order to seek explanations. Having considered the motion, the judge must take one of the following decisions:

a) declaring the investigative action carried out prior to the initiation of a criminal case legal; or
b) declaring the investigative action carried out prior to the initiation of a criminal case illegal, in which case he must declare any evidence obtained as a result of the search to be invalid and inadmissible.[583]

Article 293 sets out the requirements to be met by any order of a judge authorising the carrying out of any investigative action. Under para. 1, such an order of a judge shall indicate the date and place of its making, the judge's surname, and the body or official which or who requested the petitioned carrying out of the investigative act, with an accurate indication of its subject-matter and to whom it extends, the period of validity of the order, the official or body responsible for the execution of the order, and the judge's signature certified by the court's seal.

The Code determines what is meant by 'urgent' cases. Under para. 4 of Article 290 a case is urgent if there is a real danger of the destruction and loss of traces of crime or evidence; if a person has been caught in the act of committing a crime; if necessary for the case thing and if documents have been discovered while carrying out another investigative action (inspection on the spot, investigation experiment, examination), or if the order cannot be obtained due to the absence of a judge.

A decision of a judge is not subject to appeal.

The Code of Criminal Procedure sets forth the rules, procedures and guarantees against abuse with regard to searches of homes and other possessions.

[583] Para. 3, Article 290.

Article 315(1) of the Code determines the purpose of seizure and search. It states that seizure and search are carried out for the purpose of detection and the security of taking of an instrument of crime, an item bearing the traces of crime, items and values criminally obtained, and other items and documents necessary to ascertain the circumstances of the case. Articles 316 and 317 of the Code determine what constitutes grounds for seizure and search.[584]

The Code also governs the procedure for requesting a warrant of a judge for search and seizure. Para. 1 of Article 318 provides that if there is a ground for a search or seizure, an inquirer, investigator or prosecutor must file a reasoned application with a judge to obtain a warrant for the relevant investigative action.

Such a petitions must include the following information: where or against whom seizure or search shall be carried out; the individual or generic characteristics of the item or document regarded as essential for the criminal case that may be seized; the evidence showing the necessity of the seizure or search; the period required for the execution of the warrant; and the official or body entrusted with the execution of the warrant.[585]

The Code also regulates the procedure for hearing a petition for seizure and search by the judge. Under Article 319 the judge accept a petition of an inquirer, investigator or prosecutor for seizure or search and must authorize the carrying out of the investigative action if the legal grounds for it exist. The warrant must also indicate, *inter alia*, the premises where seizure or search has been allowed; the citizen, enterprise, institution or organization to whom the premises belong; the item or document being sought and its individual or generic characteristics.

The Code of Criminal Procedure also determines the places where seizure and search may be carried out. Under Article 322, seizures and searches may be conducted in offices, homes and other premises, means of transport or in other places where items or documents essential to the matter may reasonably be assumed to be (para. 3).

If during seizure or search the need arises for inspection of places or premises which are not indicated in the warrant or court ruling/decision, an additional warrant or ruling/decision extending the sphere of search shall be needed. In cases of urgency, seizure and search may be carried out without a warrant, but with subsequent notification of the judge, in accordance with the procedure specified in paras. 2 and 3 of Article 290 of the Code.[586]

The Code of Criminal Procedure determines the procedures for seizure and search. Under a seizure or search warrant of a judge or a court ruling (decision) an inquirer, investigator or

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[584] Under Article 316 (Grounds for Seizure): "[a]n inquirer, investigator or prosecutor is competent to seize any items and documents material to the case if the gathered evidence gives grounds for suspecting that they are kept in a specific place, with a definite person and do not need to be rearched" Article 317 (Grounds for Search) states: "[a] n inquirer, investigator or prosecutor is competent to carry out a search if the gathered evidence gives grounds for suspecting that the items and documents specified in Article 315 are kept at specific residential, office, or production premises, at such and such place, with such and such person which, according to the available data, the person is likely to refuse to surrender voluntarily."

[585] Para. 2, Article 318.

[586] Para. 3, Article 322.

prosecutor is entitled to enter a home (or other premises) for the purpose of finding and seizing an item or document of significance to the matter under investigation. In the case of resistance, the entry into a home (or other premises) may be affected forcibly.[587]

At the start of a seizure or search, the inquirer, investigator or prosecutor in charge is obliged to inform the person subjected to the seizure or search – or in his absence, one of the persons specified in section 3 of Article 321 – of the warrant or court ruling (decision). The person must confirm in writing that he has been so informed.[588]

Under para. 3 of Article 323 an inquirer, investigator or prosecutor is obliged to take measures to prevent disclosure of any details of personal life revealed in the course of seizure or search with a warrant, as well as during the conduct of the given investigative action.

Para. 5 of Article 323 states that upon presentation of a warrant or court ruling (decision), an inquirer, investigator or prosecutor must ask the person concerned to surrender the items or documents indicated in the warrant or court ruling (decision) voluntarily. In case of refusal, seizure shall be carried out by force. If the items or documents subject to seizure are not found in the place indicated in the warrant or ruling (decision) a search may only be affected in the same premises pursuant to the procedure prescribed by the Code. In the case of surrender, a record of the seizure must be drawn up; in the case of non-surrender or partial surrender, a search must be carried out.[589]

Under para. 7, items or documents indicated in the warrant or court ruling (decision) shall be identified and taken out when carrying out a search. Also removed shall be other items, documents or goods which are of evidential significance to the matter at hand or which expressly point to the commissioning of another offence, as well as any goods, the storage of which is prohibited by law. The inquirer, investigator or prosecutor in charge of the search must note in the record of search why the indicated items or documents were seized.

Under para. 8 of Article 323, all items and documents seized shall be presented to the witnesses and other persons present at the search, described in detail in the record and, if necessary, packed and sealed up. The date and the signatures of the witnesses and of those who carried out the search must be written on any sealed items. The unsealing of the packed and sealed item is only permissible in the presence of the witnesses.

The Code of Criminal Procedure also regulates the procedure aimed at protecting against abuse of rights by the authorities. Under Article 321 of the Code: “Seizure and search shall be attended by at least two witnesses. A person subjected to seizure or search may challenge a witness, if there are grounds to suspect that the witness will disclose information about his personal life or about the very fact that a search has been conducted.[590] Seizure or search may be carried out with the participation of a specialist or interpreter.[591] Furthermore, the Code states that seizure or search shall be carried out in the presence of the person whose premises are being searched or of at least one adult member

[587] Para. 1.
[588] Para. 2.
[589] Para. 6.
[590] Para. 1.
[591] Para. 2.

of his family. If their presence cannot be secured, the owner of the premises or a representative of the local administration or the executive self-government body must be invited.[592]

Seizure or search in the premises of an enterprise, institution or organization must be carried out in the presence of its manager or representative.

Under para. 5 of Article 321, a person whose premise is subjected to seizure or search, as well as a witness, specialist, manager or representative of an enterprise, institution or organization have the right to be present during all the acts of the inquirer, investigator or prosecutor, and to make a statement which is to be entered into the record.

The Code also deals with the procedure of making a record of seizure and search. A record of seizure or search must be drawn up by the inquirer, investigator or prosecutor in charge and certified by signatures of the person in charge of seizure or search, the witnesses, any specialist involved, and the person subjected to the search and seizure, or in his absence of one of the persons determined by Article 321(3).[593] The record must specify where and under what circumstances each item or document has been found and whether it was surrendered voluntarily or seized forcibly. All the seized items and documents must be noted in the record with an indication of their quantity, weight, value (where possible) and individual and generic features.[594]

The Code also requires the handing over of a copy of the record of seizure or search. Under Article 327(1) a copy of the record of seizure or search must be given, against a receipt, to the person subjected to the search or seizure, or to an adult member of his family, or to the owner of the house or the representative of the body of local administration or self-government who attended the seizure, in case of their absence. Similarly, if the seizure or search were carried out on premises belonging to an enterprise, institution or organization, a copy of the record must be given against a receipt, to the head of the relevant body.

The Code also regulates compensation for damage caused by any unlawful or insufficiently motivated seizure and search. Under Article 324(1), if an item or document of importance to the matter indicated in the search warrant is not found in the course of a seizure or search, the person subjected to these investigative actions must be offered an apology. The apology is made in writing if he so requires.

If as a result of seizure or search the searched for item or document is not found, the inquirer, investigator or prosecutor are obliged to ensure the restoration of order in the premises and to compensate for any damage caused to the citizen as a result of the search and seizure.[595]

Under para. 3, if in the course of seizure or search the procedure prescribed by law for carrying out the investigative action was violated, the seized item or document shall have no evidential effect and may not be used for substantiation of the charge or indictment.

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[592] Para. 3.
[593] Para. 1, Article 326.
[594] Para. 2, Article 326.
[595] Para. 2.

The Criminal Code of Georgia establishes criminal liability for violation of the inviolability of the home or other possessions. Under Article 160 of the Code, illegal entry into a home or other property against the will of its owner and/or any illegal search or other action which violates the inviolability of the home or other possessions is criminally punishable.

Criminal responsibility for illegal entry into a home or other property and illegal search applies not only the actions by state officials, but also to actions caused by private persons.

Analysis of the compatibility of Georgian legislation with the Convention and the case-law of the European Court shows that the former contains rules, procedures and guarantees against abuse formulated with sufficient precision. The legislation protects homes and other property against illegal intrusion, search and seizure. The legislation of Georgia clarifies the circumstances in which interferences are allowed, provide appropriate rules and procedures for searches of homes or other property, and affords adequate safeguards against abuse.

8.2.4. Correspondence

Under Article 20(1) of the Constitution of Georgia:

> "[e]very person's private life, … correspondence, conversation by telephone and other kinds of technical means, and also notifications received by technical means are inviolable. Restriction of these rights is permitted by a decision of a court or without such a decision in case of urgent necessity as provided by law."[596]

As has been noted, under the case-law of the Strasbourg institutions the literal meaning of 'correspondence' has been expanded to include telephone communications[597] and teletext.[598] However, it is clear that Article 20 of the Constitution of Georgia makes a distinction between 'correspondence' and 'conversation by telephone and other kinds of technical means'.

8.2.4.1. Interception of Correspondence

Article 20(1) of the Constitution of Georgia makes a distinction not only between 'correspondence' and 'conversation by telephone and other kinds of technical means', but also between 'correspondence' and 'notifications received by technical means'.

Although it is difficult to find out the intention of the legislator in making a distinction between 'correspondence' and 'notifications received by technical means' at the time of drafting of this provision, it seems reasonable to assume that the intention of the legislator was to cover all regular means of communication between persons. This may include regular correspondence, telefax, telex, electronic mail, etc.

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[596] Author's translation.
[597] *Klass* v. *Germany*, 6 September 1978, Series A no. 28, para. 41.
[598] *Christie* v. *the United Kingdom*, 27 June 1994, N21482/93, 78-A DR 119.

The Constitution of Georgia admits two situations when inviolability of correspondence may be restricted. Under Article 20(1), a restriction of the right to correspondence is permitted by a decision of a court or without such a decision in case of urgent necessity as provided by law.

The precise rules and procedures of, *inter alia*, interception of correspondence are governed by the Code of Criminal Procedure[599] and the Law on Operative Investigatory Activity of Georgia.[600] Article 13 (Inviolability of Personal Life) of the Code states that:

> "No one has the right to wilfully and unlawfully interfere with the private life of others. The inviolability of the home or other property, correspondence, parcels, personal records, telegraphic messages, telephone conversations, information of a personal nature transmitted or received by other technical means is guaranteed by law."[601]

The same Article states that a seizure of postal and telegraphic correspondence or parcels, and their inspection and withdrawal are only allowed by order of a judge or a court ruling (decree). In cases of urgent necessity prescribed by law a procedural action of this kind may be carried without the order of a judge, subject, however, to its lawfulness and necessity being checked by the judge within 24 hours from the moment of the action. At the same time, the judge must decide on the admissibility of any evidence obtained as a result of the action.[602] The Code guarantees non-disclosure of information relating to private life and information of a personal nature which the person subjected to the interception believes should be kept confidential. The relevant body of inquiry, inquirer, investigator, prosecutor or judge must warn each participant in the investigative or judicial act not to disclose such information. The persons must confirm in writing that they have been thus warned.[603] Personal correspondence and personal telegraphic notifications may be made public at a court hearing only subject to the consent of the person concerned. Where such consent is not given, the information must be examined in closed session.

Article 13(4) also provides that a person who has suffered from an unlawful disclosure of information about his private life is entitled to full compensation for any damage caused.

Article 290 of the Code of Criminal Procedure (Investigative Action Carried Out on the Order of a Judge) specifies the procedures for the carrying out of the measures provided for in Article 13. Although the Code states that an investigative action interferring with privacy of correspondence, telegraph and other communications of a person shall be carried out by an order of a judge,[604] it also provides that "[i]n urgent cases such an action may be carried out without an order of a judge by a ruling of the inquirer, investigator or prosecutor." A judge must be informed of the investigative action within 24 hours and provided with the materials showing the necessity of the investigative action. Within the next 24 hours the judge with the participation of the prosecutor, examines the legality of the investigative action taken. The judge has the power to summon the persons who carried out the

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[599] 20 February 1998.
[600] 30 April 1999.
[601] Para 1.
[602] Para 2.
[603] Para 3.
[604] Article 290(1).

investigative action to give explanations. After having examined the materials, the judge must render a ruling declaring:

a) that the investigative action carried out was legal; or
b) that the investigative action carried out was illegal, that any evidence obtained is thus inadmissible, and that the criminal case is terminated.[605]

Thus, investigative actions entailing an invasion of private life may in principle only be carried out after a decision of a court. If exceptionally such actions are conducted, in cases of urgent necessity without an order of a judge, a judge is entitled in any event to decide on the legality of the investigative action. In accordance with para. 7 of Article 290, the decision of the judge is not subject to appeal.

The Code of Criminal Procedure also determines the rules and procedures for carrying out attachment and seizure of postal and telegraph communications. Under Article 329:

"1. If there is a sufficient ground for suspecting that postal and telegraph communications contain information on the committed offence, whereabouts of the wanted suspect or accused, or the documents and items being of evidential significance to the criminal case, an inquirer, investigator or prosecutor may petition a judge for attachment of these posts and telegraph communications.
2. The attachment of post and telegraph communications implies the prohibition of their delivery to the addressee as well as of his informing of the fact of their receipt until a special order of the judge, until the termination of the case or rendering a sentence.
3. The post and telegraph communications include all kinds of letters, telegrams, radiograms, parcels, printed matters, postal containers, messages communicated by telex, fax or other technical means of communication.
4. In a warrant of attachment and seizure of post and telegraph communications … shall be indicated the name of a person who is the addressee of the post and telegraph communications subject to attachment, the name of the sender, the address, if known, a kind of the post and telegraph communications having been attached, the term for attachment, the name of the post and telegraph institution being charged with the retention of the given post and telegraph communications, the right of an inquirer, investigator, prosecutor to carry out an inspection and seizure of post and telegraph communications.
5. An inquirer, investigator, prosecutor are obliged, on the basis of a ruling/decision of the court in charge of criminal proceedings, to effect an inspection and seizure of the post-and-telegraph communication. The record of inspection and seizure shall, with the post-and-telegraph communication that has been attached, be immediately forwarded to the court.
6. A warrant or court ruling (decision) on the attachment and seizure of a post and telegraph communication shall be submitted by an inquirer, investigator or prosecutor to the head of the corresponding post and telegraph office. The failure to execute or disclosure of the warrant or court ruling (decision) entails responsibility provided by law.
7. The head of the post and telegraph office shall retain the correspondence, other items specified in the warrant or court ruling/decision, and shall immediately notify it to the inquirer, investigator or prosecutor."

[605] Article 290.

The Code of Criminal Procedure provides for guarantees against abuse of the above powers by the investigative bodies. Under Article 330:

> "1. In a post and telegraph office, an inquirer, investigator or prosecutor, in the presence of at least two witnesses from among the staff of the office, and with the participation of a specialist - where necessary, shall open and inspect the post and telegraph communication having been attached. If the inquirer, investigator or prosecutor finds the data, item or document being of significance to the criminal case, he shall seize the corresponding post and telegraph communication or make a copy thereof. In the absence of the data, document or item that might be of evidential significance to the criminal case, the inquirer, investigator or prosecutor shall give instructions to deliver the inspected post and telegraph communication to the addressee or to suspend its delivery for the term specified in the warrant or court ruling (decision).
> 2. Inspection of the retained communications shall be entered in a record, indicating which post and telegraph communication was inspected and seized, which one was to be delivered to the addressee or to be temporarily arrested, a copy of which correspondence was made, which technical means were used and what was revealed as a result. The record shall be signed by the official having effected the inspection and seizure, as well as by the witnesses and specialist."

Moreover, the Code provides for compensation for damage caused by unlawful or insufficiently motivated attachment of postal or telegraph communications. In accordance with Article 332:

> "1. A person having become aware of the attachment seizure and inspection of a post and telegraph communication being addressed to him or being sent by him is entitled to file a compliant against the illegality or groundlessness of the execution of these acts with a competent investigation board of the Supreme Courts of the Abkhazian and Ajarian autonomous republics, as well as Tbilisi and Kutaisi regional courts, where the complaint shall be examined by a judge sitting alone with the participation of the complainant or his representative. If the complaint is found founded, the judge having issued the warrant shall offer his apologies in writing to the complainant. The complainant is also entitled to claim material compensation for the moral damage caused to him and punishment of the responsible person.
> 2. Materials, documents, items obtained as a result of the unlawful attachment, inspection or seizure may not be used as evidence for substantiation of the charge or indictment."

As noted, interception of correspondence is governed not only by the Code of Criminal Procedure, but also by the Law on Operative Investigatory Activity.[606] Although the latter mainly repeats the provisions of the Code of Criminal Procedure with regard to the rules and procedure for interception of correspondence,[607] several aspects of the Law are of particular significance. Under Article 6(4) of the Law, information obtained as a result of operative investigative actions which does not relate to any criminal activity of a person, but which is embarrassing, may not be disclosed or used for any reason against that person.

[606] 30 April 1999.
[607] See paras. 3 and 4, Article 7.

Such information may not be retained and should be destroyed immediately. Under the Law a request to carry out an investigatory action is submitted to a judge competent to deal with the matter concerned.[608]

In addition, the Law specifies that information may be intercepted not only from traditional means of communication (for example, regular correspondence), but also from electronic means of communication such as electronic mail and computer communication (net).[609]

The Law contains rules and procedures for the carrying out of operative investigatory measures not only after,[610] but also before the initiation of a criminal case.[611] Although, normally the carrying out of such measures even before initiation of a criminal case requires an order of a judge, the Law provides that in cases of urgent necessity when delay may cause destruction of factual data significant for the case or when it is impossible to obtain an order of a judge because of his absence, such measures may be taken by a reasoned decision (decree) of the head of the relevant investigatory body. Within 24 hours from the commencement of operative investigatory measure, the relevant prosecutor concerned is to be informed of it. The latter must, within the next 24 hours, apply to the relevant court to, so that the court may declare the measures to have been legal. The court is under an obligation to consider the application of the prosecutor in camera within 24 hours. After hearing the prosecutor and a representative of the investigatory body concerned, the judge examines whether the measure that was taken was in compliance with the law and takes one of the following decisions:

a) a declaration that the investigative action carried out was legal;
b) a declaration that the investigative action carried out was illegal, that any of its results are thus invalid and that any information thus obtained must be destroyed.

The decision of a judge is not subject to appeal.[612]

The Law on Operative Investigatory Activity also provides that operative investigatory measures which interfere with the right to secrecy of correspondence and telephone conversations, are permissible only on the basis of an order of a judge issued in response to a substantiated petition (decree) from certain officials[613] or on the basis a written application of a victim of illegal action or if there is evidence of illegal action for which the criminal legislation provides punishment for longer than two years.[614]

Because of the importance of the rights protected, Georgian legislation makes violation of the right to freedom from interference with one's correspondence criminally punishable. Under Article 159 (Violation of Confidentiality of Personal Correspondence, Telephone Conversations or Other Means of Communication) of the Criminal Code of Georgia:

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[608] Article 7.
[609] See Articles 1(2)(h) and 7(2)(h).
[610] Para. 3, Article 7.
[611] Para. 4, Article 7.
[612] Para. 5, Article 7.
[613] The list of such officials is determined by the normative acts of the relevant state authorities. See, para. 2, Article 9.
[614] Para. 2, Article 9.

"1. Illegal violation of confidentiality of personal correspondence or parcel, telephone conversation or conversation by other technical means or notification received or transmitted by telegraph, fax or other technical means - is punishable by a fine or by publicly useful work for the period of sixty to one hundred and twenty hours or correctional work for the period up to two years or imprisonment for the same period.
2. The same action:
a) for profit;
b) multiple;
c) by the use of the official capacity
d) which caused substantial damage - is punishable by a fine or imprisonment up to three years, with the deprivation of the right to having the post or activity up to three years."

It should be noted that the above provision criminalising the violation of confidentiality of personal correspondence, telephone conversations or other means of communication, is applicable not only to interferences by state officials, but also to interferences by private persons. This is in line with the interpretation of Article 8 of the Convention, which places both negative and positive obligations upon States.

The right to respect for one's correspondence is of particular significance with regard to detained persons. The general provision on prisoner's correspondence is set forth in Article 50 of the Law on Imprisonment which reads as follows:

"1. Prisoner has the right to send and receive unlimited number of letters, under the rules determined and under the control of the prison administration to use telephones of general use, if the prison administration has the possibility of this.
2. Correspondence and telephone conversations are made at the expenses of the prisoner.
3. Prison administration is in charge of that the letter received on the name of the prisons are delivered and that the prisoners' letters are sent to the addressee."

The legal regulation of prisoner's correspondence is also contained in several normative acts. Since almost identical rules are provided in the normative acts, only the Regulation on the Prisons of General Regime will be examined.[615]

Under Article 12 of the Regulation of the Prisons of General Regime (Correspondence by Prisoners): "Each [p]risoner has the right to send and receive an unlimited number of letters, subject to the rules determined and under the control of the prison administration."[616] Para. 4 states that post boxes must be placed in specifically designated places in the prison from which authorised officials may collect letters. Under para. 5, letters are to be put in sealed post boxes and handed to a representative of the prison

[615] The other normative acts which almost identically regulate the issues of prisoners' correspondence are the Regulation of the Prisons of Strict Regime (28 December 1999, Order of the Minister of Justice of Georgia N366. The Legislative Herald of Georgia, III, 1999, N71(79)); the Regulation of the Regime of Special Isolators (28 December 1999, Order of the Minister of Justice of Georgia N367. The Legislative Herald of Georgia, III, 1999, N71(79).); the Regulation of the Educational Institutions of Minors (28 December 1999, Order of the Minister of Justice of Georgia N358. The Legislative Herald of Georgia, III, 1999, N71(78)).

[616] 28 December 1999, Order of the Minister of Justice of Georgia N365. The Legislative Herald of Georgia, III, 1999, N71(78).

administration. The Regulation also provides that prisoners may send telex messages. They are to be sent by the prison administration not later than the next day.

Para. 8 of the Regulation provides that:

> "Encoded letters sent by prisoners or addressed to prisoners, or letters written in jargons or symbols and letters which contain state or service secret will not be delivered to the prisoners.[617] The prisoners concerned will be notified in writing after which the letter is destroyed. This rule is also applicable to telex."

The Regulation also governs the making of proposals, applications and complaints by prisoners. Under Article 13 of the Regulation (Proposals, Applications and Complaints by Prisoners), "Every prisoner has the right to submit proposals, applications and complains orally or in writing." The prison administration forwards them to the addressee within 3 days".

Under para. 6, "The prison administration is prohibited from delaying or inspecting correspondence sent by a prisoner to a court, prison administration, lawyer or prosecutor."

The Regulation on Rules of Carrying out Imprisonment[618] also deal with the right to correspondence. Many of the provisions of this Regulation are similar to those already referred to. However, some of the provisions are of particular importance. Para. 2 of the Regulation states that postal items such as envelopes and stamps may be bought at the prison shop. Under para. 8, the prison administration sends letters and telex messages and delivers letters and telex massages received, within 3 days (not counting days-off and holidays).

Under para. 2, prisoners' correspondence is subject to inspection.

Under para. 11 of the Regulation on Rules of Carrying out Imprisonment:

> "letters and telex messages which are sent to the injured party, witness, as well as those which contain data relating to criminal case, insult, threat, call for squaring accounts or for committing a crime, information on the guards of the prison, its staff, the methods of transfer of prohibited items and other data, which may hinder determination of truth or facilitate commission of a crime, is encoded or contains state or other secret will be sent to the addressee (will not be delivered to the prisoner). These letters are handed to the body or official under whose consideration the criminal case is".

Under Article 14(7), "if a complaint, proposal or application contains information which may hinder determination of the truth in a criminal case or facilitate the commission of a crime, is encoded or contains state or other secrets it will be sent to the addressee (but will not be delivered to the prisoner) …".

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[617] It may be assumed that those letters of which prisoners are addressees (and not senders) are meant under "delivered to the prisoners".

[618] 28 December 1999, Order of the Minister of Justice of Georgia N362. The Legislative Herald of Georgia, III, 1999, N71(78).

A number of conclusions may be drawn from the above examination of Georgian legislation on prisoners' correspondence from the point of view of its compatibility with the standards of the European Convention. Georgian legislation expressly gives prisoners the right to correspondence. They have the right to send and receive an unlimited number of letters. The prisons administration is responsible for sending a prisoner's letter to the addressee and for delivery of letters received, and which are addressed to the prisoner.

Georgian legislation sets a 3 days' time limit for the prison administration for sending prisoners' letters to the addressee and for the delivery of letters to the prisoner – which may be deemed reasonable. Since postal items such as envelopes and stamps may be bought at the prison shop, prisoners are not actually prevented from corresponding.

Georgian legislation provides for the possibility of interfering with a prisoner's right to correspondence. Article 12 of the Regulation of the Prisons of General Regime states that a prisoner has the right to send and receive letters under the rules determined and under the control of the prison administration.[619] Although the above provision is conditional as it refers to rules still determined, the Regulation on Rules of Carrying out Imprisonment bluntly states "prisoners' correspondence is subject to inspection." There is good reason to believe that this provision will be seen as allowing automatic inspection of prisoners' correspondence by the prison administration – which is in conflict with the Convention.[620]

It is important to note that the examined regulations make a distinction between prisoners' 'correspondence' and 'the making of proposals, applications and complaints'. The right to correspond with a lawyer is included in the latter. In line with the European Convention, Georgian legislation gives the prisoner the right to correspond with his lawyer.[621]

Under the Regulation of the Prisons of General Regime "the prison administration is prohibited from delaying or inspecting correspondence sent by a prisoner to a court, prison administration, lawyer or prosecutor." Although it is a matter of interpretation, it is clear that correspondence of a prisoner with the European Court of Human Rights should also fall under the protection provided by the Regulation.

Thus, this provision of Georgian legislation regards the correspondence of a prisoner with his lawyer as privileged which is in compliance with the case-law of the European Court.[622] Although it may also be a matter of interpretation, not only correspondence *sent* by a prisoner, but also correspondence *addressed* to him from the outside should fall under the above-mentioned rule.

It is difficult to find out why a distinction was made between 'correspondence' and 'proposals, applications and complaints'. Clearly, communication with, *inter alia*, a lawyer will not necessarily take the form of a 'proposal', 'application' or 'complaint'.

The legislation provides for conditions for interfering with the right to correspondence. The legislation sets out non-delivery of correspondence, proposals, applications and complaints,

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[619] See also Article 50 of the Law on Imprisonment.
[620] *Niedbala* v. *Poland*, 12 July 2000.
[621] *Golder* v. *the United Kingdom*, 21 February 1975, Series A no. 18.
[622] *Campbell* v. *the United Kingdom*, 25 March 1992, Series A no. 233.

but does not state either whether they may be opened and read or the procedure to be followed – as is required under the case-law of the European Court.[623]

The above comparative analysis between Georgian legislation and the European Convention shows that the legal acts examined do not contain a general provision under which the prison administration may open a letter "when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose".[624] Nor does Georgian legislation provide that the letter should only be opened and should not be read. It neither provides guarantees preventing the reading of letters, e.g. by way of opening the letter in the presence of the prisoner.[625]

The legislation of Georgia does not contain any express provision which could serve as a legal basis for effectively lodging a complaint against censorship of correspondence.[626]

8.2.4.2. Telephone Tapping

As noted, the Constitution of Georgia protects every person's right to "conversation by telephone and other kinds of technical means".[627]

The rules and procedures for telephone tapping are regulated in the Code of Criminal Procedure[628] and in the Law on Operative Investigatory Activity of Georgia.[629] The rules, procedures and guarantees against abuse considered with regard to interception of correspondence are applicable *mutatis mutandis* to telephone tapping. Therefore, their examination will be relatively concise. Article 13 of the Code of Criminal Procedure prohibits telephone tapping.[630] Under Georgian legislation telephone tapping may be permitted by a decision of a court or without such a decision in case of urgent necessity as provided by law.[631]

Under Article 7(3) of the Law on Operative Investigatory Activity a judge is authorised to make an order to carry out telephone tapping. On the basis of a substantiated request from the head of the investigatory body in question an order is made by a judge to whose territory of activity the request for the investigatory measure relates. The request is considered by the judge with the participation of the prosecutor and a representative of the investigatory body within 24 hours from the moment of submitting the request. As a result, the judge takes one of the following decisions:

a) he makes an order to carry out the investigative action;
b) he makes a decree refusing the request.

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[623] *Ibid*.
[624] *Ibid.*, para. 48.
[625] *Ibid.*
[626] *Niedbala* v. *Poland*, 12 July 2000.
[627] Article 20(1).
[628] 20 February 1998.
[629] 30 April 1999.
[630] Para. 1, Article 13.
[631] Para 1, Article 20 of the Constitution and para. 3, Article 7 of the Law on Operative Investigatory Activity of Georgia.

The Law also provides that in cases of urgent necessity, i.e. when delay may cause destruction of factual data significant for the case or when it is impossible to obtain an order of a judge because of his absence, such measures may be taken by substantiated decision (decree) of the head of the investigatory body. Within 24 hours from the commencement of the operative investigatory measure a prosecutor involved in the investigation must be notified about it. The latter must, within the next 24 hours, apply to the relevant court, asking it to declare the measure taken legal. The court is under an obligation to consider the application of the prosecutor in camera within 24 hours. After hearing the prosecutor and a representative of the investigatory body, the judge examines whether the measure taken was in compliance with the law and takes one of the following decisions: a) declaring the investigative action legal; b) declaring the investigative action illegal, which entails cancelling its results and ordering the destruction of any information obtained. The decision of the judge is not subject to appeal.[632]

As noted, the Law on Operative Investigatory Activity governs the secrecy of correspondence and telephone conversations in similar ways. As in the case of correspondence, the Law provides that carrying out of operative investigatory measures interfering with the right to secrecy of telephone conversations, is permissible only by order of a judge based on a motivated decision (decree) of certain officials or on the basis of a written application from the victim of an illegal act, or if there is evidence of illegal acts for which the criminal legislation provides punishment for longer than 2 years.[633]

Article 13(3) of the Code guarantees non-disclosure of information relating to private life and other information of a personal nature which the person subjected to the measure feels should be kept confidential. The body of inquiry, inquirer, investigator, prosecutor or judge concerned must warn all participants in the investigative or judicial act of the duty not to disclose such information[634]. The person in question must confirm in writing that he/she was so warned. Personal correspondence and personal telegraphic notifications may be made public at a court session only subject to the consent of the person concerned. Where such consent is not given, the information must be examined in closed session.

Article 13(4) also provides that a person who has suffered as result of any unlawful disclosure of information about his private life is entitled to full compensation for the damage caused.

Under Article 6(4) of the Law on Operative Investigatory Activity information obtained as a result of an operative investigative action which does not relate to criminal activity of a person, but which proves to be embarrassing may not be disclosed or used for any reason against that person. Such information may not be retained and should be immediately destroyed.

As already noted, the Criminal Code of Georgia provides for criminal liability for any violation of the confidentiality of, *inter alia*, telephone conversation.[635]

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[632] Para. 5, Article 7.
[633] Para. 2, Article 9.
[634] Para 3.
[635] Article 159. See also Article 158 of the Criminal Code of Georgia.

The above comparative analysis of Georgian legislation with Article 8 of the European Convention with regard to telephone tapping shows that Georgian legislation is mainly compatible with the Convention requirements. In line with the Convention requirements, telephone tapping is governed by "law" (the Code of Criminal Procedure and the Law on Operative Investigatory Activity). The interferences provided for in the legislation has a legal basis and the law in question is sufficiently precise and contains a measure of protection against arbitrariness.

The legislation provides sufficient clarity about the scope of the discretion of the authorities to listen secretly to telephone conversations. Both the Code of Criminal Procedure and the Law on Operative Investigatory Activity provide guarantees against arbitrary use of the powers conferred, in the form of detailed rules and procedures for telephone-tapping and of guarantees against abuse. However, unlike the requirements of the Convention, neither the Code of Criminal Procedure nor the Law on Operative Investigatory Activity obliges a judge to set a limit on the duration of telephone tapping and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged or acquitted by a court.[636]

It should be mentioned that under a Presidential Order of 13 July 2002 an Interdepartmental Commission on Institutional Reform of the Bodies of Security and Law Enforcement System was set up which is in charge of drafting a new code of criminal procedure.[637] The draft code is about to be completed. The final version of the draft code is not yet available for comment.

8.3. Conclusions and Recommendations

It may be concluded that the legislation of Georgia is to a great extent compatible with the requirements of Article 8 of the European Convention. However, the following recommendations may be made:

a) The Law on Registration of Civil Acts contains, *inter alia*, the rules and procedures of changing a name/surname. It lists the reasons for changing a name or surname, but the Law does not mention a change of gender as one of the reasons for a change of name or surname. Although the Law points out that one of the reasons for a change of name or surname may be its insulting character, it remains open to interpretation whether change of gender may fall under this category.

In general, it may be concluded that the Law on Registration of Civil Acts is very ambiguous with respect to a change of name or surname as a result of a change of gender. Although the Law recognises the possibility of change of a name or surname as a result of change of gender it contains procedural gaps and requires adjustments in order to adequately regulate the change of a name/surname caused by gender reassignment.

b) The Law on Registration of Civil Acts also sets out the grounds for a refusal to change a name or surname (Article 84). It may be concluded that at least some of them are

[636] *Kruslin* v. *France*, 24 April 1990, Series A no. 176-A, para. 35.
[637] See Presidential Order N499.

formulated very broadly and therefore are not convincing. Further specification of the Law in this context is necessary.

c) One of the most important aspects of family life is the maintenance of contacts between parents and children during the latter's placement in public care. The case-law under the Convention provides that there is a presumption in favour of contacts between parents and children in public care since this serves the purpose of their subsequent reunification, provided that such contacts do not harm the interests of the children. The negative wording of Article 1211 of the Civil Code ("the parent(s) … may be allowed to have relations with the child …") may be misinterpreted in practice. Therefore, Article 1211 of the Civil Code should be amended accordingly.

One of the most important principles established in the case-law under the Convention with regard to contacts between parents and children while the latter are in public care is that no practical impediments should be placed on easy and regular access between parents and children to maintain family ties. Although enjoyment of this right greatly depends on judicial practice, it would still be important to include in the Civil Code of Georgia a provision requiring easy and regular access between parents and children to promote the enjoyment of family life and further reunification of the family.

d) Immigration and expulsion of foreigners may raise issues of family life. Compared to Article 8 of the European Convention, under which the right to family life is not violated if family members are able to be unified in some other country, the legislation of Georgia offers higher protection by granting the right to live permanently in Georgia to any foreigner who has a family member who is a citizen of Georgia or an immigrant living in Georgia. The legislation goes further by allowing any person under the guardianship or curatorship of a citizen of Georgia as well as any guardian or curator of a citizen of Georgia to live permanently in Georgia.

As regards expulsion, although the state may justify expulsion of foreigners by invoking interests of national security or public safety or a need to protect the rights or legitimate interests of others, the legislation of Georgia does not expressly point out that family ties and other factors such as linguistic and cultural links of a foreigner with the state of origin must be taken into consideration in any decision on expulsion.

Both laws governing issues of entry of foreigners into Georgia and their expulsion (the Law on Legal Status of Foreigners and the Law on Immigration) expressly state that a decision on expulsion may be appealed to a court. However, only the Law on Immigration provides that in case of appeal to a court the time-frame within which a foreigner is to leave the country is suspended. This is particularly significant since the time offered to a foreigner to appeal to a court against the decision to expel him/her is quite short.

It is notable that recently a new draft law on the legal status of foreigners has been prepared and submitted to the Parliament of Georgia. The draft law passed it first reading in Parliament at the beginning of March 2003. Although the draft law may be amended in the process of the parliamentary debates, it is clear that the proposed new law as currently drafted is more specific in determining not only the rules and procedures for entry of foreigners into Georgia and issues of expulsion, but also in the way in which it sets out factors to be taken into consideration in deciding on the entry and expulsion of foreigners.

e) As regards protection from nuisance, analysis of Georgian legislation shows that although the Civil Code and the Code of Administration Violations govern certain issues of protection from nuisance, not all areas are covered by the legislation. It is obvious that the right to the peaceful enjoyment of one's home may be violated not only by neighbours or the noise caused by the use of automobiles, airplanes, ships and other movable means or installations. The legislation should provide compensation for nuisance caused.

f) The right to respect for one's correspondence, which falls under Article 8 of the European Convention, is of particular significance with regard to detained persons. Analysis of Georgian legislation shows that it does not contain a general provision under which a prison administration may open a letter "when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose".[638] Georgian legislation does not provide that the letter should only be opened and should not be read. Nor does it provide guarantees preventing the reading of letters, e.g. opening the letter in the presence of the prisoner.

The legislation of Georgia does not contain any express legal provision which could serve as a legal basis for effectively lodging a complaint against censorship of correspondence.[639]

g) As regards telephone tapping it should be noted that Georgian legislation (the Code of Criminal Procedure and the Law on Operative Investigatory Activity) is largely compatible with the Convention requirements. However, unlike the requirements of the Convention, neither the Code of Criminal Procedure nor the Law on Operative Investigatory Activity imposes an obligations on a judge to set a limit for the duration of telephone tapping, nor do there laws specify the circumstances in which recordings may or must be erased or the tapes destroyed, in particular when an accused has been discharged or acquitted by a court.

[638] *Campbell* v. *the United Kingdom*, 25 March 1992, Series A no. 233, para. 48.
[639] *Niedbala* v. *Poland*, 12 July 2000.

9. ARTICLE 9 – FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

9.1. The European Convention and its Interpretation

Under Article 9 of the European Convention:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The right to freedom of thought, conscience and religion belongs to fundamental human rights without which a democratic state under the rule of law may not exist. Article 9 of the European Convention consists of two paragraphs. Para. 1 guarantees the right to freedom of thought, conscience and religion. Para. 2 provides certain limitations to this right. These limitations must be prescribed by law, necessary in a democratic society and they may be imposed only to achieve one of the legitimate aims (in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others) specified in the paragraph.[640] Para. 2 of Article 9 aims at striking a balance between the right of a person to freedom of thought, conscience and religion and the interests of society in cases in which they come into conflict.

The Convention guarantees the right to freedom of thought, conscience and religion without qualification. The only possible restriction to this right relates to its external expression.[641] Paragraph 2 of Article 9 only allows restriction with regard to the manifestation of religion and other beliefs. In the case of *Kokkinakis* v. *Greece* the European Court held:

> "The fundamental nature of the rights guaranteed in Article 9, para.1 is also reflected in the wording of the paragraph providing limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11 which cover all the rights mentioned in the first paragraphs of those Articles, that of Article 9 refers only to "freedom to manifest one's religion or belief". In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[642]

Thus, the power of the State to interference under Article 9(2) with the exercise of an Article 9(1) freedom is confined to manifestations of religion or belief. Therefore, the right to freedom of thought, conscience and religion, including freedom to change or abandon one's religion or belief may not be restricted by the State.

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[640] *Wingrove* v. *the United Kingdom*, 25 November 1996, 24 EHRR 1, 1996-V, para. 53.
[641] P. van Dijk & G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, 1998, 541.
[642] 25 May 1993, Series A no. 260-A, para. 33.

It is significant to note that unlike the similarly structured Articles 8, 10 and 11 of the Convention, Article 9 is the only one which does not permit the state to invoke "national security" in order to justify limitations to the protected right.

The absolute nature of the right to freedom of thought, conscience and religion means that a person cannot be subjected to any treatment intended to change his or her a way of thinking. It means that a person has the right not only to reveal his religion or conviction, but also to abstain from disclosing it. The right to freedom of thought, conscience and religion entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.[643]

One of the most important cases under Article 9 is the case of *Kokkinakis* v. *Greece*.[644] In this case Mr. Kokkinakis and his wife who were Jehovah's Witnesses called at the home of Mrs. Kyriakaki, an Orthodox Christian and engaged in a discussion with her. Mrs. Kyriakaki's husband called the police who arrested Mr. and Mrs. Kokkinakis. Both of them were charged with the offence of proselytism under Law 1363/1938 which states that: "Anyone engaging in proselytism shall be liable to imprisonment and a fine … By proselytism is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety."

Mr. and Mrs. Kokkinakis were fined and sentenced to imprisonment. On appeal, the wife of the applicant was acquitted, but the applicant's conviction was confirmed. In this case the European Court held:

"a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others."[645]

As the national court had not specified in what way the applicant has used improper means during his discussion on religious belief, it failed to establish a pressing social need demanding the conviction of Mr. Kokkinakis. In the opinion of the European Court it was therefore not proportionate to the legitimate aim pursued.[646]

The European Court took a similar approach in the case of *Larissis and Others* v. *Greece* by distinguishing between legitimate and illegitimate proselytism.[647] It noted that "Article 9 does not … protect every act motivated or inspired by a religion or belief. It does not, for example, protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church."[648]

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[643] *Buscarini* v. *San Marino*, 18 February 1999, 30 EHRR 208, para. 34.
[644] 25 May 1993, Series A no. 260-A.
[645] Para. 48.
[646] Para. 49.
[647] 24 February 1998, 1998-1, 362.
[648] Para. 45.

In another case, *Manoussakis and Others* v. *Greece,* the European Court dealt with the conviction of a number of Jehovah's Witnesses for having established and operated a place of worship without authorisation of the Minister of Education and Religious Affairs.[649] The Court held that the right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or means used to express such beliefs are legitimate. The Court concluded that although States are entitled to verify whether a movement or association carries on activities which are harmful to the population,[650] it made clear that the right to freedom of religion "excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."[651]

Article 9 of the Convention protects not only religious, but also non-religious beliefs. Pacifism has been recognised as a belief falling within the protection of Article 9. In the case of *Arrowsmith* v. *the United Kingdom* the European Commission pointed out that: "… pacifism as a philosophy ... falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief ('conviction') protected by Article 9(1)."[652]

The freedom to manifest religion or belief is not an exclusively individual right, but it may be exercised collectively – as is recognised in Article 9 through the words "in community with others".

Article 9 of the European Convention places upon States not only negative, but also positive obligations to ensure protection of the right to freedom of thought, conscience and religion. The state has an obligation to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of religious beliefs. In the case of *Otto-Preminger-Instituit* v. *Austria* the European Court held:

"Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them."[653]

Article 9 of the European Convention does not prohibit the existence of a State religion. However, in such cases special measures are to be taken to guarantee freedom of religion. The European Commission in the case of *Darby* v. *Sweden* held that:

"A State Church system cannot in itself be considered to violate Article 9 (Art. 9) of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9 (Art. 9), include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church."[654]

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[649] 26 September 1996.
[650] Para. 40.
[651] Para. 47.
[652] Report of the Commission, 10 October 1978, para. 69.
[653] 20 September 1994, Series A no. 295-A, para. 47.
[654] No. 11581/85, 9 May 1989, para. 45.

The right to conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the European Convention on Human Rights.[655] The exercise of the right to conscientious objection to military service has been an ongoing concern of the Council of Europe for over thirty years.[656] Most Council of Europe member States have introduced the right of conscientious objection into their constitutions or legislation.[657]

The Committee of Ministers of the Council of Europe in its recommendation on the matter adopted in 1987 pointed out that:

"Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service."[658]

The European Commission of Human Rights has taken the view that the Convention does not place an obligation on the States to exempt conscientious objectors from compulsory military service. In this regard the European Commission of Human Rights referred to the words of Article 4(3)(b): "conscientious objectors in countries where they are recognised". The European Commission has found no violation of Article 9 in a case in which Switzerland imposed a criminal sentence on a man who refused military service.[659]

Furthermore, as regards States which allow for exemption from military service, it must be mentioned that objections of conscience do not entitle a person to exemption from civilian service as well. The latter may be imposed on conscientious objectors as a substitute to military service. Thus, States may enforce performance of substitute civilian service and impose sanctions for those who refuse to perform such service.

The difference in duration between military and substitute service is sometimes challenged. It is argued that longer period for substitute service compared with military service is unjustified.[660] However, the European Commission of Human Rights has not been supportive of such a view. Even a length of substitute service twice as long as the length of the military service was not regarded by the Commission as a violation of the Convention.[661]

9.2. Georgian Legislation

9.2.1. The Right to Freedom of Thought, Conscience and Religion

A number of provisions of the Constitution of Georgia govern the right to freedom of thought, conscience and religion. Article 19 of the Constitution provides:

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[655] Para. 2, Recommendation 1518 (2001) on "Exercise of the Rights of Consciences Objections to Military Service in Council Europe Member States".

[656] Para. 1, Recommendation 1518 (2001) on "Exercise of the Rights of Consciences Objections to Military Service in Council Europe Member States".

[657] Para. 3, Recommendation 1518 (2001) on "Exercise of the Rights of Consciences Objections to Military Service in Council Europe Member States".

[658] Recommendation No. R(87)8. See also Resolution No. 337 (1967) of the Parliamentary Assembly of the Council of Europe and Recommendation 1518 (2001) on "Exercise of the Rights of Consciences Objections to Military Service in Council Europe Member States".

[659] N7705/76, 5 June 1977.

[660] Concluding Observations of the Human Rights Committee on the Second Report of Georgia under the ICCPR, 19 May 2002, para. 18.

[661] *Autio* v. *Finland*, 6 December 1991, N17086/90.

"1. Every person has the right to freedom of speech, thought, conscience, religion and belief.

2. The persecution of a person for his speech, thought, religion or belief is prohibited as is compulsion to express opinions about them.

3. The freedoms provided for in this Article may not be restricted unless the exercise of these rights infringes on the rights of others."[662]

Apart from that an important provision has been laid down in Article 9 of the Constitution of Georgia which reads as follows:

"1. The State declares complete freedom of belief and religion. At the same time it recognises the special role of the Georgian Apostolic Autocephalous Orthodox Church in the history of Georgia and its independence from the State.

2. Relations between the Georgian State and the Georgian Apostolic Autocephalous Orthodox Church are determined by the Constitutional Agreement. The Constitutional Agreement has to fully comply with the universally recognised principles and norms of international law, namely, in the field of human rights and fundamental freedoms."[663]

Although the European Convention on Human Rights does not prohibit the recognition of a State religion, it has been argued that Article 9 of the Constitution denied the idea of recognition of the Orthodox religion as the State religion by providing the independence of the church from the State (Article 9(1) of the Constitution).[664] With due respect, however, on the basis of the preamble of the Constitutional Agreement one may draw a different conclusion on whether the Orthodox religion is the State religion or not. Para. 3 of the preamble of the Constitutional Agreement which states that "the Orthodox religion … historically has been the state religion in Georgia" may be interpreted as suggesting that the Orthodox religion will continue to play a similarly important role for the country rather than this approach now being abandoned even though it was historically the state religion in Georgia.[665]

The Constitution lays down a general non-discrimination clause under which everyone is equal before the law regardless of, *inter alia*, religion, political and other beliefs.[666]

In addition, Article 26 of the Constitution, which deals with the freedom of association, prohibits the creation and activities of entities whose goal is, *inter alia*, to induce religious strife.[667] A decision on suspension or prohibition of activities of such entities may be made only by a decision of a court.[668]

The Constitution of Georgia lists certain rights of individuals which may be restricted in time of war or other public emergency. Although Article 15 of the European Convention allows restriction of the right to freedom of thought, conscience and religion in time of war or other public emergency, Article 46 of the Constitution does not permit restriction of this right even in time of war or other public emergency. Thus, the

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[662] Author's translation.

[663] Author's translation. It should be pointed out that Article 9 of the Constitution of Georgia has been amended on 30 March 2001. The previous version of Article 9 read as follows: "The state recognises the special role of the Georgian Orthodox Church in the Georgian history and simultaneously declares complete freedom of belief and religion and the independence of the church from the state."

[664] J. Khetsuriani, Constitutional Bases of the Georgian Church, in: Individual and the Constitution, N3, 2002, 10.

[665] R. Lawson, Legal Expertise of the Draft Constitutional Agreement Between the State of Georgia and the Autonomous Apostolic Orthodox Church of Georgia, HRCAD(2001)3, 28 May 2001.

[666] Article 14. See also Article 38(1) of the Constitution.

[667] Para. 3.

[668] Para. 6, Article 26.

Constitution offers a higher standard of protection of this right than the European Convention.

On the basis of Article 9 of the Constitution the Constitutional Agreement between the Georgian State and the Georgian Apostolic Autocephalous Orthodox Church was signed on 14 October 2002.[669] The Constitutional Agreement determines the status of the Orthodox Church in Georgia.

It has been argued that by concluding of the Constitutional Agreement, the Orthodox religion has been given certain privileges compared to other religions and that therefore, it has been treated differently from other religions. For example, Article 4 of the Constitutional Agreement provides that ecclesiastics of the GAAOC are free from military conscription. Based on Article 14 of the European Convention which prohibits discrimination, if the ecclesiastics of the Georgian Orthodox Church are exempt from military conscription, similar exemptions should apply to ecclesiastics of other religions.[670] However, the Law on Military Service and Obligations provides that conscription to military service will be postponed for ecclesiastics.[671] Although the Law does not specify that it is applied only to ecclesiastics of the Georgian Orthodox Church – which may suggest that it is applicable to ecclesiastics of all religions – it is clear that under the Constitutional Agreement the ecclesiastics of the Georgian Orthodox Church are free from military conscription, while conscription of ecclesiastics of other religions is only postponed.

There are other examples of different treatment between the Georgian Orthodox Church and other religions in the Constitutional Agreement between the State and the Georgian Orthodox Church. Article 3 of the Constitutional Agreement provides that "the State recognises marriages performed by the Church under the rules determined by the legislation.…" If the State gives status to marriages performed by the Georgian Orthodox Church, under Article 14 of the Convention it should treat marriages conducted by other religions in an identical way.

Article 6 of the Constitutional Agreement regulates property issues. Property of the Georgian Orthodox Church which is not used for economic activities and land are exempted from taxes (para. 5). Under Article 14 of the European Convention these privileges granted to the Georgian Orthodox Church should also be extended to other religions.[672]

It is clear from the Convention and the case-law of the Strasbourg institutions that all religions, traditional or not, are to be treated in an identical way.

At the level of ordinary legislation at present there is no special law comprehensively governing the rights protected under Article 9 of the Convention. However, a draft law has been prepared by the Ministry of Justice of Georgia on the freedom of conscience and religious entities, which seeks to regulate comprehensively the

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[669] The Agreement was approved by the Parliament of Georgia on 22 December 2002. See also M. Tsatsanashvili, State and Religion, 2001, 67-80.

[670] See also Protocol 12 to the European Convention ratified by Georgia, but not yet entered into force. Article 1(1) of Protocol 12 states that "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as … religion …".

[671] Article 30(1)(l).

[672] It is argued that different treatment is also provided in other articles of the Constitutional Agreement, in particular Articles 2, 4(2) and 5(2). R. Lawson, Legal Expertise of the Draft Constitutional Agreement Between the State of Georgia and the Autonomous Apostolic Orthodox Church of Georgia, HRCAD(2001)3, 28 May 2001 [Since the legal expertise related to the *draft* Constitutional Agreement the references to the various articles differ from the final version of the Agreement. However, the expert's opinions on the essence of the articles remain valid].

freedom of conscience, religion and belief. The draft law regulates the protection of the right to freedom of conscience, religion and belief recognised by the Constitution and determines the legal status of religious entities and their legal relations.[673]

The draft law lays down the basic principles to be guaranteed to everyone in enjoying the right to freedom of conscience, religion and belief such as equality of all citizens despite their religion, the independence of religious entities from the state and equality of religious entities before the law.[674]

The draft law confirms the fundamental right of all persons to freedom of conscience, religion and belief. Article 4 of the draft law stipulates that " freedom of conscience, religion and belief is guaranteed in Georgia. Everyone who has reached the age of 14 is free to choose his religious belief, and has the right alone or in community with others to recognise any religion or not to recognise any religion, change his religious belief or refuse religious belief, to freely express his religious belief and to act in accordance with it."[675] At the same time it is prohibited to force somebody to express his opinion on religion and to participate in religious entities, other than in the cases prescribed by law.[676]

The draft law provides that foreign citizens, persons without citizenship and citizens of Georgia enjoy equal rights to freedom of conscience, religion and belief.[677] The granting of any advantage, the restriction of rights, persecution or the application of any other form of discrimination on the basis of a person's religious belief is prohibited.[678]

The draft law lays down the conditions for restricting the right to freedom of conscience, religion and belief. Para. 3 of Article 4 states that: "freedom of conscience, religion and belief shall be subject only to such restrictions as are prescribed by the Constitution and the law and are necessary in the interests of State defence, the constitutional system, public safety and order, for the protection of equality, life and health of citizens and other persons, or for the protection of their rights, freedoms and legitimate interests."

The draft law also regulates the status of religious entities. Such entities are independent from the state and the latter may not interfere in the activities of religious entities unless their activities do not meet the requirements of the legislation.[679]

The draft law imposes positive obligations on the State to promote religious and ideological tolerance between persons of different beliefs and between religious entities to protect the rights and interests of such entities, and to establish tax and other advantages, etc.[680]

Under the draft law a religious entity (organisation) is a voluntary union of the same religion of citizens of Georgia and permanent residents in the territory of Georgia of full age established by not less than 50 persons for the purpose of dissemination of their religion and conscience which is registered in accordance with the rules of this law.[681]

The draft law also regulates conditions under which the creation and operation of religious entities may be restricted. Under para. 3 of Article 9 the creation and operation of religious entities may not be restricted unless this is prescribed by law and necessary in the

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[673] Article 1.
[674] Article 3.
[675] Para. 1.
[676] Para. 4, Article 4.
[677] Para. 2, Article 4. See also Article 5(1) of the draft law.
[678] Para. 3, Article 5.
[679] Paras. 1 and 3, Article 6.
[680] Para. 4, Article 6.
[681] Para. 1, Article 9.

interests of national security or public safety, for the prevention of violation of public order or of the commissioning of a crime, or for the protection of health or morals or the rights and freedoms of others.[682]

Under Article 9(4) of the draft law, a registered religious entity is a legal person of public law. Such a registration is performed by the Ministry of Justice of Georgia under the procedure prescribed by law.[683]

The draft law provides for the list of data (information) and materials to be enclosed with the application for registration submitted to the Ministry of Justice. The application for registration must be considered within a month from the moment of submission of a complete application. However, the draft law provides that the Ministry may extend the length of consideration of the application to up to three months in order to draw up a state religious expertise.[684] If no decision is made within the time-limit, a religious entity is deemed to be registered.

The draft law also regulates the basis for refusal of registration of a religions entity. Such an entity may be refused registration if, *inter alia*, the applicants do not submit the data (information) and materials required by the law, if its purpose and activity contradict the Constitution of Georgia or other legislative acts, or if as a result of a State religious expertise it has been established that the entity is not religious.[685]

In case of a refusal of registration the applicant must be sent a motivated notification in writing within one month from the moment of application for registration. The refusal to register a religious entity may be appealed to a court.[686]

The draft law also provides for the cases in which the operation of religious entities may be terminated by an order of court. These cases are, *inter alia*, as follows:

a) grave or systematic breach of state security and public order;

b) inducement of religious strife;

c) violation of the rights and freedoms of persons;

d) injury to the health of an individual in connection with religious activities committed by debauched or other illegal actions, under narcotic or psychotropic means or in a state of hypnotism;

e) calling for suicide or refusing of medical assistance to a person in a state of danger to his/her life and health on the basis of religion;

f) improper proselytism.[687]

The draft law also regulates the issues of religious education (Article 8).

The explanatory memorandum attached to the draft law states that the adoption of the Law brings about amendments and modifications in the legislation of Georgia, including criminal legislation. The memorandum provides that the Criminal Code of Georgia will be amended by three articles, including one on improper proselytism.

The Criminal Code of Georgia provides legal guarantees for the protection of the right to freedom of thought, conscience and religion. Article 155 of the Code stipulates

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[682] Para. 3, Article 9.
[683] Article 11.
[684] Para. 5, Article 11.
[685] Para. 1, Article 13.
[686] Para. 3, Article 13.
[687] Para. 2, Article 15. Although the draft law does not expressly define "improper proselytism", it may be assumed that its definition is given in Article 4, para. 7, which states: "it is prohibited to offer material or social advantages condition of entry into any confession or to exert influence of a psycho-ideological nature on a person for the purpose of changing his conscience without his clearly expressed consent given in advance."

penalties in the form of a fine, correctional labour for a period up to a year or deprivation of liberty for a period up to two years for unlawfully disturbing religious services or the performance of any other religious rites by violence or the threat thereof, or for insulting the religious feelings of believers or ministers of religion (para. 2). The same action performed in an official capacity is criminally punishable by a fine or deprivation of liberty for a period up to 5 years, with or without dismissal from the official position or deprivation of the right to such activity for up to three years (para. 2).

Article 156 of the Criminal Code sets forth penalties in the form of a fine, restriction of freedom for a period up to two years or deprivation of liberty for the same period for persecution on the grounds of, *inter alia*, speech, thought, conscience, religion, belief or religious activity (para. 1). Para. 2 of Article 156 provides for heavier criminal sanctions if the action referred to in para. 1 is performed in an official capacity.

In addition, Article 142 of the Criminal Code stipulates criminal responsibility for violation of the equality of individuals on the basis of religion or religious belief.

It is clear from the wording of the provisions of the Criminal Code that they are applied not only to state authorities, but also to third parties whose action may also interfere with the right to freedom of thought, conscience and religion.

A number of conclusions may be drawn on the basis of the above analysis of Georgian legislation from the point of view of its compatibility with the standards of the Convention. The provisions of the Constitution of Georgia guaranteeing the right to freedom of thought, conscience and religion are mainly in compliance with the standards of the European Convention.

As already pointed out, although Article 9 of the Convention guarantees the right to freedom of thought, conscience and religion and allows restrictions of this right only with regard to the *manifestation* of one's religion and belief i.e. its external expression.[688] However, unlike Article 9 of the Convention, Article 19(3) of the Constitution does not specify that only the manifestation of one's religion and belief may be restricted, but it takes a general approach making it possible to restrict the right to freedom of thought, conscience and religion.

Another problem which may possibly arise relates to para. 2 of Article 19 of the Constitution. Although under para. 1 of Article 19 of the Constitution every person has the right to freedom of speech, thought, conscience, religion and belief, para. 2 of the same Article only provides that the persecution of a person for his speech, thought, religion or belief (but not conscience) is prohibited, as is compulsion to express opinions about them. Thus, para. 2 of Article 19 leaves out 'conscience' as a ground for which persecution is prohibited. However, this problem may be solved by legal interpretation in compliance with the object and purpose of the right concerned.

In general, it may be noted that the Constitution of Georgia provides higher legal standards of protection of the right to freedom of thought, conscience and religion than the European Convention. Firstly, unlike Article 15 of the European Convention which allows restriction of the rights to freedom of thought, conscience and religion in time of war or other public emergency, Article 46 of the Constitution does not permit restriction of these rights even in time of war or other public emergency.

Secondly, Article 19(3) of the Constitution provides for only one legitimate aim (the rights of others) for which the right to freedom of thought, conscience and religion may be restricted, while Article 9 of the Convention lays down a much more extensive list.[689]

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[688] *Kokkinakis* v. *Greece*, 25 May 1993, Series A no. 260-A, para. 33.

[689] Interests of public safety, the protection of public order, health or morals, the protection of the rights and freedoms of others.

The conclusion of the Constitutional Agreement with the Georgian Orthodox Church in itself should not be understood as discriminatory towards other religions. As rightly pointed out by the Constitutional Court of Georgia in the case of *Zurab Aroshvili* v. *the Parliament of Georgia*: "… conclusion of the Constitutional Agreement only with the Georgian Apostolic Autocephalous Orthodox Church does not exclude the existence of various religious organisations in Georgia and in no way does it mean the restriction of their activities and moreover, their prohibition ...".[690]

The conclusion of such an Agreement with the Georgian Orthodox Church, which played a special role in the history of Georgia, may be justified from an historic point of view. However, the Agreement gives certain privileges to the Georgian Orthodox Church it will meet the standards of the European Convention only if the other religions existing in Georgia are not treated in a discriminatory way. Other religions should be given similar privileges. Such privileges may be specified in the draft law prepared by the Ministry of Justice. If under the draft law the State gives the same privileges to other religions as are given to the Georgian Orthodox Church under the Constitutional Agreement, identical (non-discriminatory) treatment of Georgian Orthodox Church and other religions will be duly secured.

Therefore, it may be concluded that on the basis of principle of non-discrimination, the other religions should be given the same privileges as are provided to the Georgian Orthodox Church under the Constitutional Agreement.

As regards the draft law on freedom of conscience and religious entities, its adoption should be accelerated in order to create the legal framework for comprehensive regulation of the right to freedom of conscience, religion and belief in Georgia.[691] The majority of the provisions of the draft law duly reflect the provisions of the European Convention and offer adequate legal guarantees for the enjoyment of the right concerned on a non-discriminatory basis.

Despite this there are several inconsistencies between the draft law and the Convention standards. The draft law provides for certain restrictions on the exercise of the right to freedom of thought, conscience and religion. Unlike Article 9(2) of the Convention which permits restriction of the right only with regard to manifestation of one's religion or beliefs, Article 4(3) takes a more general approach by allowing restrictions on the right to freedom of thought, conscience and religion and not only their manifestation.

Apart from that Article 4(3) of the draft law provides for much more extensive legitimate aims for which the right to freedom of thought, conscience and religion may be restricted. Aims such as the interests of 'state defence' and the 'constitutional system' are not contained in Article 9(2) of the Convention. It should also be noted that such an extensive list of legitimate aims also contradicts Article 19(3) of the Constitution which only refers to the rights of others as the only legitimate aim for which the right to freedom of thought, conscience and religion may be restricted.

As already noted, Article 4, para. 4, states that it is prohibited to force somebody to express his opinion on religion or to participate in religious entities, "except for the cases prescribed by law". The draft law leaves open in which cases a person may be forced to express his opinion on religion or to participate in religious entities and requires further specification.

The draft law prescribes the rules and procedures for registration of religious entities and for refusal of registration. Among other reasons, the draft law provides that religious

[690] Decision of 22 November 2002, N2/18/206.
[691] Second Periodic Report of Georgia Under ICCPR, CCPR/C/GEO/2002/2, 27 February 2001, para. 440.

entities may be refused registration if "as a result of a State religious expertise it has been established that the entity is not religious" (para. 1, Article 13). This provision of the draft law is arguably in contradiction to Article 9 of the Convention. In the case of *Manoussakis and Others* v. *Greece* the European Court made it clear that although States are entitled to verify whether a movement or association carries on activities which are harmful to the population, the right to freedom of religion "excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."[692]

As regards criminal legislation it is important to note that unlike para. 2 of Article 19 of the Constitution which prohibits the persecution of a person for his 'speech', 'thought', 'religion' or 'belief', but not for 'conscience', Article 156 of the Criminal Code also covers 'conscience' for the persecution of which it lays down criminal sanctions.

However, the Criminal Code does not lay down criminal sanctions for compelling a person to express opinions about his speech, thought, conscience, religion or belief as provided in Article 19(2) of the Constitution of Georgia.

9.2.2. Conscientious Objectors

The legislation of Georgia recognises conscientious objectors to military service. The legal status of conscientious objectors is governed by laws and subsidiary legislation.[693] The special Law on Non-military, Alternative Labour Service of Georgia regulates non-military (alternative) form of military service.

The Law defines non-military, alternative labour service as publicly useful civil service which substitutes for military service and is based on compelling reasons for refusal to perform military service on the basis of thought, conscience or religion.[694] Conscription to non-military (alternative) service is made by the State Commission on Non-Military, Alternative Service.[695]

A citizen of Georgia subject to military service (i.e. a person between 18 and 27 years of age), who refuses to perform military service for reasons of thought, conscience or religion will be called up for non-military (alternative) service.[696] Persons performing their non-military (alternative) service will be involved in activities relating to emergency and rescue, ecology, fire-prevention, construction, agriculture, health or municipal service.[697]

It is important to note that Georgian legislation does not distinguish between the various categories of conscientious objectors who may be released from military service and perform non-military (alternative) service. An approach taken in some countries that only Jehovah's Witnesses are exempted from military service, has not been shared by the

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[692] Para. 47.

[693] Law on Non-Military, Alternative Labour Service of Georgia (28 December 1997), The Regulation on Performance of Non-Military, Alternative Labour Service (1 May 2001); The Regulation of the State Commission on Non-Military, Alternative Labour Service (1 May 2001); The Decree of the President of Georgia on the Composition of the State Commission on Non-Military, Alternative Labour Service (10 December 2001); The Regulation of the Department of Non-Military, Alternative Labour Service of the Ministry of Labour, Health and Social Protection adopted by the Minister of Labour, Health and Social Protection (2 April 2002).

[694] Para. 1, Article 3.

[695] Para. 1, Article 3.

[696] Article 3.

[697] Para. 1, Article 5.

Georgian legislation. Thus, every citizen of Georgia who refuses to perform military service for the reasons of thought, conscience or religion (and not only Jehovah's Witnesses) will be exempted from military service and compelled to perform non-military (alternative) service.

Under the Law the length of non-military (alternative) service is 18 months for persons with higher education and 24 months for persons without higher education.[698] It is to be noted here that under the Law on Military Service and Obligations the term for military service is 12 months for persons with higher education and 24 months for persons without higher education.[699]

The Law regulates in detail the rules, procedures and terms for applying for non-military (alternative) service and for consideration of applications for exemption from military service.[700] A person requesting non-military (alternative) service has the right to attend the session of the Commission which decides the issue and to substantiate his view.[701] A decision on refusal to perform non-military (alternative) service is made by order of the Minister of Labour, Health and Social Protection of Georgia on the basis of the conclusion of the State Commission on Non-Military (Alternative) Service. The decision on refusal to perform non-military (alternative) service may be appealed to a court within 10 days. The Court must either annul the order of the Minister or leave it in force, within the next 10 days.[702]

Georgian legislation provides for legal sanctions for failing to perform non-military, alternative service and for avoidance of the performance of such service. The Law on Non-Military, Alternative Labour Service of Georgia provides that any number of days missed in the performance of non-military (alternative) service will be doubled.[703] The Criminal Code of Georgia also provides for criminal liability for avoiding the performance of alternative labour service.[704]

It may be concluded that Georgian legislation governing the status of conscientious objectors fully meets the standards established by Article 9 of the European Convention and the case-law of the Strasbourg institutions.

Although the legislation of Georgia regulating the status of conscientious objectors is in line with the Convention standards, it has been established that there are practical obstacles in implementing the legislation concerned (non-appearance of conscientious objectors before the relevant authorities, insufficient labour positions, etc). It may only be underlined here that the State is under obligation not only to set adequate legal standards, but also to secure protection of the rights concerned in practice.

9.2.3. Freedom of Religion in Prisons

The Law on Imprisonment regulates the operation of the penitentiary system of the country. Under Article 26 of the Law any person serving a sentence is entitled to engage in religious activities and to use the appropriate equipment and literature. Pursuant to Article 94 of the

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[698] Para. 1, Article 6.
[699] Para. 1, Article 32.
[700] There are about two hundred applications to the State Commission requesting the granting of non-military (alternative) service.
[701] Articles 7-10.
[702] Articles 11.
[703] Para. 1, Article 16.
[704] Para. 2, Article 356.

Law the administration of the prison is obliged to create the necessary conditions for prisoners to meet their religious needs. Depending on the technical resources of the prison establishment, its staff may include a clergyman duly authorised by the church.

Under the Regulation on the Prisons of General Regime a prisoner may at his own expense subscribe to, *inter alia*, religious literature.[705]

In addition, Article 15 of the Regulation on Rules for Carrying out Imprisonment governs the rules on performance of religious services by prisoners.[706] Para. 1 states that religious services may be performed in prison cells or, if available, in specially arranged premises according to the religious confessions to which the prisoners belong. Article 15(2) expressly prohibits performance of religious services which infringe the rights of other prisoners.

At present most Georgian penitentiaries have small churches or special rooms for the performance of religious services.[707]

9.2.4. Practice

Georgia is a country with century-old traditions of respect for freedom of religion and of religious tolerance. Anti-semitism, religious strife or religious hatred have never been known in Georgia. The old part of the city of Tbilisi, in which a Georgian church, an Armenian church, a synagogue, a mosque, a Russian church and a Catholic church are situated in close vicinity, is a good example of the tradition of religious tolerance in the country. Along with the Georgian Orthodox religion which has played a special role in the history of Georgia, traditional religions such as Islam, Judaism, Catholicism and Gregorianism were duly respected.[708]

However, by the time of the restoration of the national independence of Georgia, a number of non-traditional religious organisations had started to operate in the country. The activities of such organisations were not met by different groups of the population in a uniform manner. The different approaches to such religious organisations have frequently caused physical and moral confrontation among various groups of individuals. It may be assumed that the lack of an effective legal framework, which should have adequately regulated the right to freedom of thought, conscience and religion, has contributed to such developments. Activities of such religious organisations and/or their members have become the subject of judicial consideration in a number of cases.[709] Such a tendency of confrontation has caused deep concerns on the part of international and national

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[705] Similar regulations are laid down in: the Regulation of the Prisons of Strict Regime (28 December 1999, Order of the Minister of Justice of Georgia N366. The Legislative Herald of Georgia, III, 1999, N71(79)), the Regulation of the Educational Institutions of Minors (28 December 1999, Order of the Minister of Justice of Georgia N358. The Legislative Herald of Georgia, III, 1999, N71(78)).

[706] 28 December 1999, Order of the Minister of Justice of Georgia N362. The Legislative Herald of Georgia, III, 1999, N71(78).

[707] Second Periodic Report of Georgia Under ICCPR, CCPR/C/GEO/2002/2, 27 February 2001, para. 435.

[708] Second Periodic Report of Georgia Under ICCPR, CCPR/C/GEO/2002/2, 27 February 2001, paras. 437 and 438.

[709] Among others, see the Decision of the Supreme Court of Georgia, 24 March 2000, N3k/413; the Decision of the Supreme Court of Georgia, 22 February 2001, N3k/599; the Decision of the Supreme Court of Georgia, 11 October 2001, N79; the Decision of Marneuli District Court, 13 May 2002, N3/9-2002. Two complaints have been lodged before the European Court of Human Rights (*Gldani Congregation of Jehovah's Witnesses* v. *Georgia*, application number 71156/01 and *Union of Jehovah's Witnesses, The WatchTower Bible Tract Society of Pennsylvania in Georgia* v. *Georgia*, application number 72874/01) which were subsequently merged.

organisations, including human rights organisations and the general public. Such concerns relate to the increase in the number of acts of religious intolerance and harassment of religious minorities, particularly Jehovah's Witnesses.[710] The European Commission Against Racism and Intolerance of the Council of Europe has pointed out in this regard that:

"ECRI is deeply concerned at widespread reports of repeated manifestations of violence and harassment against members of minority religions in Georgia. … Violent attacks and harassment of members of minority religions are mostly carried out by extremist elements of the Georgian Orthodox community. However, ECRI is seriously concerned not only by the presence of these extremist elements in Georgian society and their activities, but also by the inadequate response of the public authorities to such activities and by the widespread societal tolerance apparently afforded to these extremist elements. ... [D]espite numerous reports of illegal behaviour committed by the extremist elements of the Georgian Orthodox community, very few prosecutions have so far been carried out with success."[711]

It is clear that the state authorities are well aware of this situation. Certain measures have been taken to improve the situation with regard to the protection of the right to freedom of thought, conscience and religion. Amongst the measures aimed at guaranteeing the right to freedom of thought, conscience and religion is the adoption of a Decree by the Parliament of Georgia on religions extremism (30 March 2001). It calls upon the authorities to guarantee the right to freedom of thought, conscience and religion and condemns persecution of persons for their religion. It also calls upon the law enforcement bodies to protect human rights and prevent any manifestation of religious extremism and instructed the legal committee of Parliament to prepare legislative proposals for legal regulation of the activities of the various religious confessions.

More recently, on 4 March 2003, the President of Georgia adopted a Decree on the Approval of the Plan of Action for Strengthening of Human Rights and Freedoms of Various Groups of the Population for the years of 2003-2005. The Plan of Action provides that complex measures shall be taken to fight religious extremism and intolerance (para. 4). Such measures include elimination of religious extremism and promotion of a culture of tolerance, promotion of religious tolerance by the mass media, and condemnation of any manifestation of religious discrimination. The Plan of Action also stresses the need for adoption of the law on religious entities.

As evidenced by the above, the authorities take measures to protect the right to freedom of thought, conscience and religion. However, it is clear that far more effective measures have to be taken to provide adequate protection of the right to freedom of thought, conscience and religion in Georgia.

There is no doubt that the States parties to the European Convention have not only a negative obligation not to interfere in the rights protected under the Convention, but also

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[710] Among others, see Resolution 1257(2001) on "Honouring of Obligations and Commitments by Georgia" of the Parliamentary Assembly of the Council of Europe, paras. 11(iii) and 12; Concluding Observations of the Human Rights Committee on the Second Report of Georgia under the ICCPR, 19 May 2002, para. 17; the reports of the Public Defender of Georgia for, *inter alia*, the periods covered: January-November 2000, 20, 35-39; January-June 2001, 34-42; July-August 2001, 37-43; Monthly Bulletin of the non-governmental organisation "Human Rights in Georgia", January, 2003, N1(47), 3; Country Reports on Human Rights Practices (2002): Georgia, released by the Bureau of Democracy, Human Rights and Labour of the US Department of State, 31 March 2003, Section 2, para. c.

[711] See paras. 49-51 of the first report on Georgia, CRI(2002)2, adopted on 22 June 2001 and made public on 23 April 2002.

positive obligations to take measures to ensure that the right to freedom of thought, conscience and religion are not violated by the third parties. The Georgian authorities should conduct proper investigations of cases of harassment against religious minorities and prosecute those responsible for such offences.

9.3. Conclusions and Recommendations

Georgian legislation mainly meets the legal standards of the European Convention on the protection of the right to freedom of thought, conscience and religion. However, several inconsistencies between the standards of Georgian legislation and of the Convention have been identified.

a) In general, the standards provided for in the Constitution meet those of the European Convention. The former even provides higher legal standards than the European Convention by prohibiting restrictions of the rights concerned in time of war or other public emergency. Apart from that, Article 19(3) of the Constitution provides for only one legitimate aim (the rights of others) for which the right to freedom of thought, conscience and religion may be restricted, while Article 9 of the Convention lays down a much more extensive list.[712] Yet, two problems have been discovered with regard to the Constitution.

Firstly, unlike Article 9 of the Convention, Article 19(3) of the Constitution does not specify that only manifestation of one's religion and belief may be restricted, but takes a general approach making it possible to restrict the right to freedom of thought, conscience and religion itself.

Secondly, although under para. 1 of Article 19 of the Constitution every person has the right to freedom of speech, thought, conscience, religion and belief, para. 2 of the same Article only provides that the persecution of a person for his speech, thought, religion or belief (but not conscience) is prohibited, as is compulsion to express one's opinions about these matters. Thus, para. 2 of Article 19 leaves out 'conscience' from the list of matters for which persecution is to be prohibited.

b) The conclusion of the Constitutional Agreement with the Georgian Orthodox Church in itself should not be understood as discrimination of other religions. The conclusion of such an Agreement with the Georgian Orthodox Church, which played a special role in the history of Georgia, may be justified from an historic point of view. However, the Agreement gives certain privileges to the Georgian Orthodox Church which will meet the standards of the European Convention only if the other religions existing in Georgia are not treated discriminatorily. Other religions should be given similar privileges. If under the draft law the state gives the same privileges to other religions as those given to the Georgian Orthodox Church under the Constitutional Agreement, identical (non-discriminatory) treatment of the Georgian Orthodox Church and other religions will be duly secured.

c) As regards the draft law on freedom of conscience and religious entities, its adoption should be accelerated in order to create the legal framework for comprehensive regulation of the right to freedom of conscience, religion and belief in Georgia. The majority of the

[712] Interests of public safety, the protection of public order, health or morals, the protection of the rights and freedoms of others.

provisions of the draft law duly reflect the provisions of the European Convention and offer adequate legal guarantees for enjoying the right concerned on a non-discriminative basis. Despite this there are several inconsistencies.

Unlike Article 9(2) of the Convention, which permits restriction of rights only with regard to manifestation of one's religion or beliefs, Article 4(3) takes a more general approach by allowing restrictions of the rights to freedom of thought, conscience and religion as such, and not only of their manifestation.

Apart from that, Article 4(3) of the draft law provides for much more extensive legitimate aims for which the right to freedom of thought, conscience and religion may be restricted. Aims such as the interests of 'state defence' and the 'constitutional system' are not contained in Article 9(2) of the Convention. In a similar vein, unlike Article 9(2) of the Convention, Article 9(3) of the draft law provides for more extensive legitimate aims for restriction of the right concerned.

The provision of the draft law that religious entities may be refused registration if "as a result of a State religious expertise it has been established that the entity is not religious" (para. 1, Article 13) is in contradiction with the case-law of the European Court.

The Criminal Code of Georgia should lay down criminal sanctions for compelling a person to express his or her opinions about his speech, thought, conscience, religion or belief, as provided for in Article 19(2) of the Constitution of Georgia.

The draft law requires further specification as to what are the cases in which a person may be forced to express his opinion on religion or to participate in religious entities, since such possibilities are provided for in Article 4, para. 4.

d) As regards conscientious objectors, although the legislation of Georgia governing the status of conscientious objectors is in line with the Convention standards, the State should take effective measures to eliminate the practical obstacles to securing protection of the rights concerned in practice.

e) Despite the long tradition of respect for freedom of religion and of religious tolerance, it is clear that at present the practice of protection of thought, conscience and religion is not satisfactory. Although the State authorities take certain measures to protect the right to freedom of thought, conscience and religion, far more effective measures have to be taken to provide adequate protection of the right concerned. Such measures should include the carrying out of proper investigations of cases of harassment against religious minorities and prosecution of those responsible for such offences.

10. ARTICLE 12 OF THE CONVENTION – RIGHT TO MARRY AND ARTICLE 5 OF PROTOCOL 7 – EQUALITY BETWEEN SPOUSES

10.1. The European Convention and its Interpretation

Under Article 12 of the Convention:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Under Article 5 of Protocol 7:

"Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."[713]

The right to marry and to found a family is closely connected with the rights to privacy and family life under Article 8 of the Convention. Yet, there are differences between the two Articles concerned. In general, Article 12 governs more specific relations than those of Article 8.

Article 12 of the Convention refers to the exercise of the right "according to the national laws". Although it may appear that the state party to the Convention has unlimited power to restrict the rights set forth in this Article, such an interpretation would be contrary to the object and purpose of the Convention.[714] In the case of *Rees* v. *the United Kingdom* the Court held that although it is "subject to the national laws of the Contracting States", "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired."[715]

It is for the national law to determine the form and capacity (marriageable age) of marriage, prohibited degrees, etc.

10.1.1. The Right to Marry

The European Commission and Court of Human Rights have examined several cases under Article 12 in which the applicants claimed a violation of the right to marry. The right set forth in Article 12 is of particular significance in the context of prisoners and transsexuals/homosexuals.

10.1.1.1. Prisoners

In the case of *Draper* v. *the United Kingdom* the applicant who was a prisoner serving a life sentence complained about the refusal of the authorities to grant him permission to marry

[713] Given the close link between the two rights protected under the Convention and the Protocol their examination was combined.

[714] *Hamer* v. *the United Kingdom*, Commission Report of 13 December 1979, N7114/75. See also *Draper* v. *the United Kingdom*, Commission Report of 10 July 1980, N8186/78.

[715] 17 October 1986, Series A no. 106, para. 50.

while in prison. The Government argued that as the applicant had no prospect of an early release and he could not live with his intended wife before release, there had been no unlawful interference with his right to marry. However, in finding a violation of Article 12 the Commission held that it:

"[did] not regard it as relevant that the applicant could not cohabit with his wife or consummate his marriage whilst serving his sentence. The essence of the right to marry … is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter such an association in circumstances where they cannot cohabit."[716]

In the case of *Hamer* v. *the United Kingdom* the applicant was a prisoner serving a sentence of five years' imprisonment for property offences. Soon after he began his sentence the applicant applied for permission of the authorities to marry his girlfriend. The authorities refused the applicant's request. The applicant complained before the European Commission of Human Rights of a breach of Article 12 by the United Kingdom. Before the Commission, the Government claimed that it had a broad scope of action under the "national law" provision. In this regard the Commission pointed out that measures for regulation of a right "must never injure the substance of the right".[717] Furthermore, the Commission held that:

"Such laws may thus lay down formal rules concerning matters such as notice, publicity and the formalities whereby marriage is solemnised ... They may also lay down rules of substance based on generally recognised consideration of public interest. Examples are rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy. However ... national law may not otherwise deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with their exercise of the right."[718]

10.1.1.2. Transsexuals/Homosexuals

In the case of *Rees* v. *the United Kingdom* the applicant who had a gender change from female to male claimed that his inability under English law to marry a woman was a breach of Article 12 of the Convention. The European Court stated in this regard that:

"In the Court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes its clear that Article 12 is mainly concerned to protect marriage as the basis of the family." ...

[T]he legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.

There is accordingly no violation in the instant case of Article 12 of the Convention."[719]

As for homosexuals, the Commission has taken the position that homosexuals do not have the right to marry one another.

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[716] Report of 10 July 1980, para. 60.
[717] Report of 13 December 1979, para. 61.
[718] *Ibid*, para. 62.
[719] 17 October 1986, Series A no. 106, paras. 49-51. For the earlier opposite approach of the Commission see *Van Oosterwijk* v. *Belgium,* Commission Report, 1 March 1979, Series B no. 36, para. 59.

The European Commission and Court have pointed out that the right to marry under Article 12 should not be interpreted as including a right to divorce. The case of *Johnston* v. *Ireland* is illustrative in this regard.[720] In this case, the applicant (Mr. Johnston) who separated from his wife and lived with another woman with whom he had established a stable family life complained that the Irish Government's prohibition against divorce violated his right to marry under Article 12. The European Court held that Article 12 does not guarantee a right to divorce.[721] Nor does Article 5, Protocol 7, include a right to divorce.

10.1.2. The Right to Found a Family

The case-law of the European Commission and Court made it clear that the right to found a family under Article 12 is interpreted as an obligation of the state not to interfere with the enjoyment of this right. This right implies a prohibition for the state authorities to interfere with the founding of a family (for example, by prescribing compulsory use of contraceptives or ordering a non-voluntary sterilisation or abortion).[722] Article 12 does not commit a state to guarantee the economic welfare of the family, for example, by providing financial means to maintain a family.

The Commission has examined several cases in which an issue of adoption was raised under Article 12. The Commission held that Article 12 does not guarantee the right to adoption. Thus, a State has no obligation to provide a system of adoption. In a case against the Netherlands, the applicant, a single man who had been caring for an abandoned child for several years, complained that the refusal of the authorities to allow him to adopt the child violated his right to found a family under Article 12 of the Convention. The Commission held that:

"[T]his provision does not guarantee the right to have children born out of wedlock. Article 12, in fact, foresees the right to marry and to found a family as one simple right.

However, even assuming that the right to found a family may be considered irrespective of marriage, the problem is not solved. Article 12 recognises in fact the right of man and woman at the age of consent to found a family, i.e. to have children. The existence of a couple is fundamental ...".[723]

10.1.3. Equality Between Spouses (Article 5, Protocol 7)

Under Article 5 of Protocol 7 equality must be ensured in relations between the spouses themselves, with regard to both their person and their property and in their relations with their children. It stems from the wording of the provision ("spouses") that unmarried persons are not covered.

Under the Explanatory Report to the Protocol, "the Article does not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical or labour laws."

10.2. Georgian Legislation

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[720] *Johnston and Others* v. *Ireland*, 18 December 1986, Series A no. 112.
[721] *Ibid*, paras. 51-54.
[722] D. Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights, 1995, 440.
[723] N6482/74, Decision of 10 July 1975, D.R. 7, p. 77.

10.2.1. The Constitution of Georgia

Under Article 36 of the Constitution of Georgia:

"1. Marriage is based upon equality of rights and the free will of spouses.

2. The state supports the well-being of the family. …"

Paragraph 1 of Article 36 is of particular significance in the context of Article 12 of the Convention and Article 5 of Protocol 7. It draws attention to the following two elements: a) spouses have equal rights in their relations; and b) marriage is based on their free will.

Although the Constitutional provision is quite laconic and its wording differs from that of Article 12 of the Convention and Article 5, Protocol 7, a number of similarities may be identified.

Para. 1 of Article 36 of the Constitution does not state for *in expresso* that individuals have the right to marry. However, since para. 1. goes further by stating that marriage is based upon equality of rights and the free will of the spouses, it is clear that individuals have the right to marry. Had not this been the intention of the legislator, para. 1 would not appear here.

Neither may an express reference to the right to found a family be found in the Constitution. Similarly, this right may be assumed from para. 2. It is also clear that the two rights (right to marry and right to found a family) are closely linked. It may be assumed from the reference to the word 'family' that individuals have not only the right to marry, but also the right to found a family. Although the European Court's case-law interpreted the right to found a family as mainly an obligation of the State not to interfere in the enjoyment of this right, the Constitution sets forth the obligation of the State to take measures in order to support the well-being of the family.

Unlike Article 12 of the Convention, Article 36 of the Constitution does not specify whether only a union of a man and a woman constitutes marriage under the Georgian legal system: it only refers to the word 'spouses'.

As regards equality of spouses as provided under Article 5 of Protocol 7, para. 1 of Article 36 of the Constitution states that marriage is based on equality of rights of spouses. The Constitution does not refer to equality of responsibilities of spouses. Nor does the Constitution refer to equality of rights/responsibilities of a private law character between spouses and in their relations with their children.

It general, it may be concluded that although the wording of the Constitution and Article 12 of the Convention and Article 5 of Protocol 7 differ, they are compatible.

10.2.2. Civil Legislation

The Constitutional provision relating to the right to marry is very general in nature. More specific provisions on the right to marry and to found a family are provided for in ordinary legislation. The Civil Code of Georgia (26 June 1997) is of particular importance in this respect.

Under Book Five of the Civil Code of Georgia, which regulates family law issues, "Marriage is the voluntary union of a woman and a man for the purpose of creating a

family, which is registered with an agency of the State Register of Civil Status of Citizens." (Article 1106).[724]

Under the Civil Code marriage shall require merely: a) attainment of the legal age of marriage; and b) the consent of the prospective spouses (Article 1107). The Code sets 18 as the marital age (Article 1108).[725]

The Civil Code of Georgia also states that "[a] marriage is registered with an office of the Register of Civil Status at the place chosen by the prospective spouses." (Article 1111).

The provisions of the Civil Code cited above make it clear that the standards of the European Convention are fully reflected in the civil legislation of Georgia. The definition of marriage contains a number of elements of Article 12 of the Convention. Similar to Article 12 of the Convention, the Civil Code states that marriage is a union of a man and a woman. Thus, Georgian legislation recognises that only individuals of the opposite biological sex may marry – which is in line with the current interpretation of Article 12 of the European Convention.

As regards practice, there has as yet, to our knowledge, been no case in which individuals of the same biological sex have applied to an office of the Register of Civil Status for the purpose of marriage.

In line with Article 12 of the Convention under which a man and a woman have not only the right to marry, but also the right to found a family, the Civil Code provides, albeit in different form, that a man and a woman have both the right to marry and the right to create a family ("Marriage is the ... union ... for the purpose of creating a family ..."). [726]

As pointed out, under Georgian legislation a marriage is registered with an office of the State Register of Civil Status of Citizens. Only a marriage registered with an office of the Register of Civil Status gives rise to the marital rights and duties of spouses. (Article 1151). Thus, an unregistered union of a man and a woman is not regarded as a marriage under Georgian legislation.[727]

Unlike Article 12 of the Convention and its interpretation by the European Commission and the European Court, Georgian legislation recognises the right to divorce (Article 1122).

The civil registration of marriage provided for by the Civil Code of Georgia may raise the issue of the status of marriages concluded by the Church. It is to be pointed out that under Article 6 of the Constitutional Agreement between the Georgian State and the Georgian Apostolic Autocephalous Orthodox Church: "the State recognises marriages concluded by the Church under the rules determined by the legislation. …" Such recognition of the marriage performed by the Georgian Orthodox Church may raise the issue of the status of marriages concluded by other churches under Article 14 of the Convention and Protocol 12.

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[724] The English translation of the Civil Code is available on the internet-site of the Centre for Institutional Report and the Informal Sector (IRIS): [www.iris.ge].

[725] However, para. 2, Article 1108 provides that in exceptional cases marriage is allowed from the age of sixteen years.

[726] See Commentary to the Civil Code of Georgia, Book Five, 2000, 24.

[727] See Commentary to the Civil Code of Georgia, Book Five, 2000, 25, 37.

As for equality of spouses, Georgian legislation establishes quite detailed rules in this regard. The Civil Code sets forth the general provision on the equality of spouses. It states that "In domestic relations the spouses shall enjoy equal personal and property rights and shall bear equal duties." (Article 1152).

Furthermore, the Code expressly prohibits discrimination between spouses. Under the Code "When entering into a marriage and in domestic relations, no direct or indirect restriction of rights shall be allowed and there shall be no direct or indirect preference on the bases of origin, social and property status, racial and ethnic background, gender, education, language, attitude to religion, kind and nature of activities, place of residence and other factors." (Article 1153).

Apart from the general provision on equality of spouses, Georgian legislation provides for specific guarantees of equality. Under Article 1159 of the Civil Code "The spouses shall have equal rights to their communal property. Possession, use and disposition of this property shall be exercised by mutual agreement of the spouses." (Article 1159).

The Civil Code stipulates equality of rights and duties of spouses not only between them, but also with respect to children. Article 1197 provides that "[p]arents shall have equal rights and duties with respect to their children. …" The equality of parents with respect to their children may become problematic in cases of multiple parents. Such situations may arise in a case of divorce of one of the parents and his/her marriage to another person with whom the child may develop similar relations. Although such situations are not expressly dealt with in the Code, it provides for the principle of "the best interests of the child" offering an adequate solution to any problems which may arise in practice.[728]

The above analysis of the compatibility of Georgian legislation with Article 5 of Protocol 7 makes it clear that the equality standards set forth in Georgian legislation fully reflect those of Article 5. Similar to Article 5 the Civil Code expressly provides that spouses shall enjoy equal rights and bear equal duties in domestic relations.[729] Although the wording of this provision of Georgian legislation differs from the wording in the Protocol, the legal standards established in Georgian legislation and the Protocol are the same.

Article 5 of Protocol 7 stipulates that spouses shall enjoy equal rights and responsibilities in their relations with their children. The Civil Code of Georgia provides that standard through an express provision guaranteeing parents equal rights and duties with respect to their children.

Georgian legislation also complies with Article 5 of Protocol 7 by guaranteeing equality of spouses in case of divorce. The Civil Code states that "Parents shall enjoy equal rights and bear equal duties with respect to their children, even if they are divorced." (Article 1199).

It may be concluded that Georgian legislation is in full conformity with the European Convention standards with regard to the right to marry and the right to found a family, and as concerns equality of spouses.

10.2.3. The Legislation on the Status of Prisoners

[728] Under para. 1, Article 1198 of the Code: "Parents shall be entitled and obligated to rear their children, to take care of their physical, intellectual, spiritual and social development, and to raise them as decent members of society, taking into account the best interests of the children." Para. 4 of the same Article states: "parental rights may not be exercised to the prejudice of the interests of the children."

[729] See Commentary to the Civil Code of Georgia, Book Five, 2000, 25, 100-101.

The Law on Imprisonment (22 July 1999) which contains the rules on imprisonment as a measure relating to the execution of criminal sentences on the territory of Georgia, defines the system and structure of the organs executing criminal sentences, the principles and rules of execution of sentences and the guarantees of social and legal protection of prisoners.

The regulation of the right to marry of prisoners under Georgian legislation is of particular significance in the context of the legal standards set under Article 12 of the Convention. The Law on Imprisonment does not contain an express provision stating that prisoners have the right to marry. Nor does it contain procedural rules on the right of prisoners to marry , nor that a marriage ceremony may take place in prison, as an exception. It is interesting to determine whether Georgian legislation provides for temporary release of a convicted person for the purpose of marriage.

Interesting provisions on the temporary release of convicted person may be found in the Law on Imprisonment. Under para. 2 of Article 49 of the Law, the prison administration may grant a convicted person the right to temporary leave the prison in special personal circumstances, if reliable information (notification) is received on the death of close relative or in cases of a disease threatening the life of a close relative, or of a natural calamity which caused substantial material damage to him/her or his/her family. Para. 3 states that temporary leave from a prison should not exceed 7 days.

Furthermore, para. 5 of Article 49 provides that the right to temporary leave from a prison may be granted to a convicted person at the request of the director of a prison administration with the consent of the prosecutor, taking into consideration the personality of the convicted person and the character of the crime committed. If the decision is favourable, the director of the prison administration determines the number of persons who are to accompany the convicted person.

The Order of the Minister of Justice on the Rules of Temporary Leave of the Penitentiary does not provide that a prisoner may be temporarily released for the reason of marriage[730]

Article 90 of the Law on Imprisonment also provides that in case of substantial and urgent personal or legal business which requires his or her direct participation, upon the petition of an investigator, a court may give a prisoner[731] permission for short term release for up to three days.

It is clear from the Law on Imprisonment that it neither allows temporary release of a convicted person for the purpose of getting married nor contains a procedure for carrying out the marriage ceremony in prison. The Law only list the following reasons for which a convicted person may be temporarily released: the death of a close relative; in case of disease threatening the life of a close relative; or a natural calamity which caused substantial material damage to the prisoner or his/her family.

As for a prisoner charged with a criminal offence, Article 90 is quite ambiguous, referring only in general terms to “substantial and urgent personal … business”.

The Code of Criminal Procedure of Georgia also regulates legal issues which are of significance in the context of the right to marry. Article 136 of the Code governs the treatment of a person to whom enforcement of a legal measure of criminal procedure applies. Para. 1 states that a person to whom enforcement of a legal measure of criminal procedure applies retains his/her constitutional status, citizenship and legal personality and enjoys the protection of the State. Para. 3 of Article 136 sets forth the list of rights which

[730] Order N364, 28 December 1999.

[731] For the purposes of the Law on Imprisonment, a prisoner is defined as a person convicted in a criminal offence.

will be restricted. It provides that detained persons, arrested persons or a person attending a medical agency for assessment before the entry into legal force of the judgment retains, *inter alia*, the right to marry. It follows from this provision that before the entry into legal force of the judgment a person who is deprived of his liberty may enjoy his/her right to marry. It may also be deduced from this provision that after the entry into legal force of the judgment, detained persons, arrested persons or persons attending a medical agency for assessment no longer enjoy the right to marry. It may be assumed that under this provision such persons will be able to enjoy the right to marry again only after his/her release.

Thus, under the Code of Criminal Procedure from the moment of entry into legal force of the judgment until his/her release a detained person, arrested person or person attending a medical agency for assessment does not enjoy the right to marry. A person sentenced to life imprisonment is also deprived of the right to marry under the Code of Criminal Procedure from the moment of entry into legal force of the judgment.

At the same time the Civil Code of Georgia does not include imprisonment in the list of circumstances impeding marriage.[732] On the basis of the Civil Code of Georgia since the list of circumstances impeding the marriage does not include imprisonment, an office of the Register of the Civil Status may not refuse a marriage to a convicted person.

In practice, the situation seems to be less problematic than provided for in the legislation. According to the information obtained, although only a few cases of marriage of convicted persons may be identified, in practice requests of marriage by convicted persons are satisfied. Though the convicted persons are not released from the prison to carry out a marriage ceremony, in practice it is done within the prison. A marriage of a prisoner is registered by the representative of an office of the Register of Civil Status invited for that purpose.

10.3. Conclusions and Recommendations

a) In general, it may be concluded that Georgian legislation is compatible with the standards of Article 12 of the Convention and Article 5 of Protocol 7.

b) However, the provisions of Georgian legislation on the right to marry of prisoners are less than satisfactory in terms of their compliance with Article 12 of the Convention. Amendments should be made to the Code of Criminal Procedure and the Law on Imprisonment (and its regulations) to expressly guarantee prisoners the rights to marry, which they are in any case already permitted to exercise in practice at present.

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[732] Article 1120 of the Civil Code on impediments to marriage reads as follows:
"Marriage shall not be allowed:
- between persons at least one of whom is married;
- between lineal ascendants and descendants [parents and children];
- between a sister and a brother, regardless of whether they are siblings by blood or not;
- between an adoptive parent and an adoptee;
- between persons at least one of whom has been declared by a court to be a person without legal capacity by reason of mental illness or mental retardation;"

11. ARTICLE 1, PROTOCOL 4 - PROHIBITION OF IMPRISONMENT FOR DEBT

11.1. The European Convention and its Interpretation

Article 1 of Protocol 4 states:

"No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation."

Proceeding from the requirements stipulated in Article 1, Protocol 4, it is forbidden to apprehend somebody only because he/she is unable to pay a debt. The prohibition may even cover a short-term deprivation of liberty outside prison facilities. The European Commission of Human Rights noted that this Article aims at prohibiting any deprivation of liberty caused only by the person's inability to fulfil his/her contractual obligations.

It does not prevent deprivation of liberty, if some factors are available other than those of being unable to pay a debt or carry out a task under a concluded contract. For instance, if a person intentionally refuses to fulfil an obligation, despite the fact that he/she has the means to do so, he/she may be detained under Article 5, paragraph 1(b) of the Convention. Upon the debtor's request, an individual may also be detained in order to compel him/her to give written testimony under oath.[733]

11.2. Georgian Legislation

Article 18 of the Constitution of Georgia proclaims that the freedom of a person is inviolable. Arrest or other restrictions on personal freedoms are prohibited without a court order. Breach of this Article is punishable under the law.

Nothing in Georgian legislation directly permits anybody to be deprived of liberty solely for being unable to fulfil a contractual obligation. Deprivation of liberty under the Georgian legal system can only come about in consequence of a breach of the criminal law.

Georgian legislation does, however, give rise to doubt as regards Article 1, Protocol 4. Under the Law on Business and Bankruptcy Proceedings, judicial investigations into such matters must be conducted in accordance with the legislative requirements governing civil procedure. It is advisable, nevertheless, to consider more carefully Article 14 of the Law dedicated to the measures of securing bankruptcy assets. Paragraph 1 of this Article states that the courts are entitled to apply to an insolvent debtor such exceptional measures as enforced appearance before the authorities or in court. This provision is likely not to contradict to the Article 1 of Protocol 4. At the same time, pursuant to paragraph 2 of the Article in question, "the court, taking into account the peculiarities of the case, may implement other special measures to secure bankruptcy assets." This blanket norm appears to diverge somewhat from the meaning of Article 1 of Protocol 4 of the Convention as it leaves room for different interpretations.

11.3. Conclusions and Recommendations

[733] 5025/71, Dec. 18.12. 71. Yearbook 14, p. 692 (696-698).

On the whole, Georgian legislation is in line with the requirements stipulated in Article 1, Protocol 4. However, paragraph 2 of Article 12 of the Law on Business and Bankruptcy Proceedings should be rephrased to replace the existing blanket wording by a clearer list of measures allowed under the Law.

12. PROTOCOL 4, ARTICLE 3 - PROHIBITION OF EXPULSION OF NATIONALS

12.1. The European Convention and its Interpretation

Article 3 of Protocol 4 states:

"1. No one shall be expelled, by means of either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national."

The protection provided for in the two paragraphs of Article 3 of Protocol 4 is accorded to citizens of a State. Article 3 protects citizens of a State against expulsion from that State, both individually or collectively. A question arises as to whether or not one may deprive a person of his/her citizenship for the purpose of subsequent expulsion. Such a situation may occur, for instance, when the person possesses dual citizenship (so depriving him/her of one citizenship does not make him/her a person without citizenship) and when some additional reasons exist to expel him/her from one of the two countries. Possible solutions to this problem in the light of the Strasbourg case-law are quite vague. Nevertheless, it is reasonable to discuss this issue in the context of Georgian legislation, which allows for a clearer understanding of the problem.

In addition, it should be noted that there are very few European Court cases, clarifying the implications of the principle that no one shall be deprived of the right to enter the territory of the State of which he is a national. This right is part of customary international law, as well. A situation may take place in which a State which has deprived somebody of his citizenship consequently deprives him/her of the right to enter the territory. Fortunately, no such cases have arisen in the practice of the States parties to the European Convention.

12.2. Georgian Legislation

The Constitution of Georgia prohibits the expulsion of Georgian citizens from Georgia and the extradition of a Georgian citizen to another State save in the instances provided for in international treaties. The decision to extradite a Georgian citizen may be appealed to the courts (Article 13, paragraphs 3 and 4).

Some aspects of this right are also reflected in paragraph 2, Article 22 of the Constitution of Georgia, which states that "Everyone lawfully within the territory of Georgia is free to leave the country. A citizen of Georgia can freely enter the country". At the same time, a certain reservation is made in the next paragraph of this Article, under which the right in question may be restricted, in accordance with the law, "in order to guarantee state and public security as necessary for the existence of a democratic society, health protection, prevention of crime and the administration of justice".

As in the case of freedom of movement and freedom to choose one's residence, the right stipulated in Article 22 is also not absolute and may be restricted as provided by law in the event of a state of emergency or martial law in compliance with paragraph, 1 of Article 46 of the Constitution.

This is the only provision in the Constitution which gives rise to doubt about its compliance with the Article under review. The point is that the Convention envisages no

restrictions on the right of a national to enter the territory of his/her own state, while the Constitution of Georgia does contain such a clause. Therefore, it seems reasonable to reconsider the lawfulness and advisability of the grounds under which the right of Georgian citizens to freely return to Georgia may be restricted.

12.2.1. Some Statistical Data Concerning the Matter of Naturalisation and Termination of Citizenship

In accordance with the official data available, in 2000, 61 persons acquired citizenship of Georgia and 460 persons renounced citizenship of Georgia. Georgian citizenship of 144 persons was terminated, due to their acquisition of the citizenship of other States.

In 2001, 63 persons acquired citizenship of Georgia and 392 persons renounced citizenship of Georgia. Georgian citizenship of 244 persons was terminated, due to their acquisition of the citizenship of other States.

It should be pointed out that termination of a person's citizenship of Georgia through the acquisition of another citizenship has no negative effect on his/her right to stay in Georgia.

12.3. Conclusions and Recommendations

a) It may be concluded that Georgian legislation creates no problem in terms of its compliance with the Article 3 of Protocol 4. No gaps in the legislation have been found that might result in violations of the rights protected by this Article.

b) At the same time, it is reasonable to reconsider the necessity of restricting the provisions set forth in Article 22, paragraph 3 of the Constitution of Georgia with respect to the right to freely enter the territory of Georgia.

13. PROTOCOL 6 - ABOLITION OF DEATH PENALTY IN TIME OF PEACE AND PROTOCOL 13 - ABOLITION OF DEATH PENALTY IN TIME OF WAR

13.1. Protocols 6 and 13 to the European Convention on Human Rights

Under Article 1 of Protocol 6 to the European Convention on Human Rights:

"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

Article 1 of Protocol 6 which should be read in conjunction with Article 2 on the Convention proper, affirms the principle of the abolition of the death penalty. It commits state parties to the Protocol not only to abstain from implementing a death sentence in practice, but also to abolish it in law.[734]

The prohibition of the death penalty under Protocol 6 is limited to peacetime. A State may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war. Such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions.[735]

Article 3 of Protocol 6 expressly prohibits derogation from this provision under Article 15 of the Convention.

It is important to note that the Parliamentary Assembly of the Council of Europe established a practice whereby it requires that States wishing to become a member of the Council of Europe commit themselves to an immediate moratorium on executions, to the removal of the death penalty from their national legislation, and to signing and ratifying Protocol 6.

On 3 May 2002 the member States of the Council of Europe adopted Protocol 13 to the Convention on Human Rights concerning the abolition of the death penalty in all circumstances.[736] Unlike Protocol 6, which does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war, Protocol 13 aims at abolishing capital punishment in all circumstances, including for acts committed in time of war or of imminent threat of war.

13.2. Georgian Legislation

Para. 1 of Article 15 of the Constitution of Georgia, which guarantees the right to life reads as follows: "A person's life is inviolable and is protected by law."

Para. 2 of the same Article provides:

"Special form of punishment – capital punishment, before its full abolition, may be envisaged by an organic law for particularly serious crimes directed against a person's life. Only the Supreme Court has the right to impose such a punishment."[737]

Although at the time of adoption of the Constitution of Georgia criminal legislation provided for capital punishment for several crimes, in 1997 the Parliament of Georgia

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[734] See Explanatory Report to the Protocol No. 6. Available on the internet-site of the Council of Europe's Treaty Office: [http://conventions.coe.int].

[735] See Article 2 of Protocol 6.

[736] Protocol 13 has not yet entered into force. Its entry into force required ratification by 10 States. At the time of writing 6 States have ratified the Protocol.

[737] Author's translation.

adopted the Law on the Total Abolition of the Special Measure of Punishment - Capital Punishment. The Law amended the appropriate legislative acts, including the Criminal Code of Georgia with a view to abolishing capital punishment. Capital punishment has been substituted by life imprisonment.

The Criminal Code of Georgia does not envisage capital punishment for any crimes provided for in the Code.

Under the Criminal Code of Georgia a person may not be extradited or deported if he has committed a crime punishable with capital punishment in the receiving state.[738]

Notably, on 22 March 1999 Georgia became a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (1989).

As already noted, Georgia ratified Protocols 6 and 13 to the European Convention.

13.3. Conclusion

Georgian legislation is in full compliance with Protocols 6 and 13 to the European Convention on Human Rights.

[738] Para. 3, Article 6 of the Code. See also K. Korkelia, Extradition Under the Case-Law of the European Court of Human Rights, Georgian Law Review, 5, N1, 2002, 178-181.

14. PROTOCOL 7, ARTICLE 2 – RIGHT OF APPEAL IN CRIMINAL MATTERS

14.1. The European Convention and its interpretation

Under Article 2 of Protocol 7 of the Convention:

"1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

The Convention and, in particular, Article 6 does not oblige member States to set up courts of appeal or to allow for a review of judgments. Article 2 of Protocol 7 provides for a supplementary guarantee to Article 6 of the Convention. According to the Explanatory Report to Protocol 7, this provision does not concern offences, which have been tried by bodies that are not tribunals within the meaning of Article 6 of the Convention. The guarantees of a fair trial must be respected by the higher tribunals when reviewing decisions of a lower tribunal. The first sentence of paragraph 1 provides that everyone has the right to have the "conviction or sentence" reviewed. It does not require that in every case an individual should be entitled to have both his conviction and sentence so reviewed.[739]

14.2. Georgian Legislation

The Constitution does not define the right of appeal in express terms. However, Article 84, para. 5, provides for the possibility of repeal, alteration or suspension of a court judgment, and adds that this may only be effected by a court in accordance with the procedure prescribed by law. Under Article 42, para. 1, of the Constitution, "everyone has the right to apply to a court for the protection of his/her rights and freedoms."

The Code of Criminal Procedure provides for appeals and is compatible with Protocol 7, Article 2, and with Article 6, para. 1, of the European Convention. The Court in its established case-law has found that although there is no obligation under the Convention to set up courts of appeal the procedure before such courts, where they are set up by national law, must respect the requirements under Article 6, para. 1. The Code of Criminal Procedure provides for the freedom of appeal from any action and decision in criminal procedure (Article 21).

Article 517 of the Code of Criminal Procedure entitles a convict[740] to demand consideration of his/her case by at least two judicial instances.

14.2.1. Proceedings before a Court of Appeal

[739] Explanatory Report. para. 17.

[740] Under Article 44 part 26, which defines terms referred to in the Code of Criminal Procedure, "a convict" stands for a person against whom a judgment of conviction has been rendered by a court.

Article 518, part 1 of the Code of Criminal Procedure grants the right to lodge an appeal, *inter alia,* to a convict and his defence counsel or legal representatives[741], as well as to a person to whom a coercive medical measure[742] has been applied and his/her representative.[743]

A court of appeal can take one of the following decisions: 1) to repeal a judgment of conviction rendered by a first instance court and deliver a judgment of acquittal instead; 2) to repeal a judgment of acquittal rendered by a first instance court and deliver a judgment of conviction instead; 3) to amend a judgment of a first instance court; 4) to decline to uphold an appeal and leave unaltered a judgment of a first instance court (Article 536).

The Code of Criminal Procedure is in conformity with the European Convention in terms of application of the Article 6 requirements to appeal proceedings and their observance by the "higher tribunal".[744] Under the Code of Criminal Procedure the appeal proceedings must be adversarial and conducted on the basis of equality of arms (Article 518, part. 2). The defence counsel and representatives of the convict are authorised to lodge an appeal only with the consent of the convict, unless the convict is a minor, or has a physical or mental defect (*ibid*, part 4). A court of appeal is composed of three judges[745] (Article 521, part 2). An appellant is entitled to obtain a copy of the rebuttal lodged by another party from the court (Article 527, part 2). The Code of Criminal Procedure also lays down the time limits for the appeal proceedings, which may be deemed reasonable within the meaning of Article 6. The first instance court must send all the relevant materials to the Court of Appeal within a month (from rendering a judgment) and the latter is obliged to consider the appeal within a month of receiving it. The President of the Court of Appeal is entitled to extend the time-limit for consideration of complex and voluminous cases by another 15 days[746] (Article 528). A convict who is detained can, but doesn't need not,, attend the appeal hearing. A convict who is not detained and his/her representative must be summoned to appear before the court of appeal but their non-appearance does not prevent consideration of the case unless the appeal has been brought by them, in which case the hearing must be postponed. In case of repeated non-appearance, the case must be heard *in absentia* (Article 531). The Code of Criminal Procedure sets out rules on the appointment of a defence counsel and other procedural guarantees and on the holding of the hearing of an appeal which are similar to the corresponding provisions applicable to the first instance proceedings. Accordingly, the considerations above show that appeal proceedings as provided for by the Code of Criminal Procedure comply with Article 6.

The lodging of an appeal entails consideration of the case by a court of appeal in a mandatory way and the conducting of a fresh judicial investigation. The court of appeal may not decline consideration of a case. The lodging of an appeal suspends execution of the sentence (Article 520).

The Code of Criminal Procedure stipulates certain formal requisites, in particular, an appeal must specify, *inter alia,* the name of the respective court and of the appellant, the

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[741] Under Article 44 part 22 "a legal representative" stands for a close relative, tutor or guardian of the person being represented, these terms themselves being defined by the Civil Code of Georgia.

[742] A coercive medical measure may be applied to a person by a court judgment in the cases defined by the Criminal Code of Georgia.

[743] The same rule applies to cassation proceedings (Article 546).

[744] Under the Organic Law of Georgia of 13 June 1997 on Courts of General Jurisdiction" and Article 521, part 1 of the Code of Criminal Procedure the following act as the courts of appeal: Appeal Chambers of Criminal Cases at the Higher Courts of the Autonomous Republics of Abkhazia and Ajara and at the Regional Courts of Tbilisi and Kutaisi.

[745] The same applies to cassation proceedings (Article 549).

[746] The same applies to cassation proceedings (Article 550).

relevant dates, as well as the alleged shortcomings in the judgment, with reference to the relevant statements in the judgment, with appropriate arguments and claims supporting the appellant's opinion, together with relevant evidence, including any newly revealed evidence. If the appeal fails to comply with the aforementioned requirements, the appellant is given 5 days to correct it. In accordance with the wording of Article 529, part 3, "if the appellant does not comply with the aforementioned requirement, the appeal shall not be considered". In that case, the contested judgment enters into force and must be executed. The ruling of the court of appeal concerning dismissal of the appeal is final and not subject to appeal. The same rule with the same limitation applies to cassation proceedings (Article 552, part 2).[747]

In accordance with the Code of Criminal Procedure, a sentence must be lawful, motivated and fair. A sentence is lawful if it is rendered in accordance with the requirements of the Constitution, the Code of Criminal Procedure and other laws of Georgia. A sentence is motivated if its conclusions are based on the totality of such evidence considered in court as has been shown to be reliable beyond reasonable doubt and which suffices to establish the truth. A sentence is fair if the punishment imposed is appropriate to the personality of the offender and the gravity of the offence committed (Article 496).

An appellant may appeal against the judgment of a first instance court, which has not become final,[748] alleging it is insufficiently motivated. By virtue of an appeal an appellant questions the reasoning and/or lawfulness of the judgment (Article 519).

Similarly, the grounds of repeal of a sentence in the appeal proceedings are the following:

a) an incomplete or biased pre-trial investigation and/or a defective court hearing, when such defects cannot be remedied in the appeal proceedings; b) incompatibility of the findings in the judgment with the evidence on file, unless collection of additional evidence is possible during the appeal proceedings; c) an essential breach of the Code of Criminal Procedure (Article 537, part 1).[749]

Under Article 537, part 2, a sentence may be amended on a ground referred to in part 1, if the ground is related to some, but not all, of the charges or to certain distinct instances of multiple same charges.[750]

The Code of Criminal Procedure provides for the prohibition of *reformatio in pejus* in appeal proceedings if the latter is instituted on the basis of an appeal lodged by the defence (Article 540).

The Code of Criminal Procedure also provides for the so-called principle of revision, which has been known since the Soviet period. Under the principle, the appeal proceedings are not confined to the allegations raised in the appeal. A court of appeal is obliged to examine the case in full, also with regard to any defendants who have not lodged an appeal. A court is entitled to adopt a judgment favourable to those defendants. *Reformatio in pejus* is inadmissible unless it has been requested by the prosecution (Article 543).

14.2.2. Cassation Proceedings

[747] See, Conclusions and Recommendations, 14.3 a).
[748] A sentence, unless it is appealed, becomes final after the expiry of appeal and cassation terms, i.e. after 14 days (Article 602).
[749] The Code elaborates a) and b) grounds in the subsequent articles.
[750] See, Conclusions and Recommendations, 14.3. b),c).

Under the Code of Criminal Procedure, judgments of a court of first instance (Judicial Boards of Criminal Cases of the Higher Courts of the Autonomous Republics of Abkhazia and Ajara and of the Regional Courts of Tbilisi and Kutaisi, the Judicial Board of Criminal Cases of the Supreme Court) or of a court of appeal that have not become final and are, in the appellant's opinion, unlawful, may be appealed in cassation proceedings. Under the Code "unlawful" implies: a) an essential breach of due process which has passed unnoticed or has been allowed to occur by the courts of first instance and a court of appeal; b) an incorrect qualification of a defendant's act; or c) the application of a type of measure inappropriate to a defendant's actions and personality (Article 547).

A court of cassation may take one of the following decisions: a) leave the judgment unaltered; b) repeal the judgment and refer the case back for additional investigation or fresh judicial consideration; c) repeal the judgment and discontinue the case; d) alter the judgment in favour of the defendant; e) repeal the judgment of the court of first instance and the court of appeal.

The grounds for repeal and alteration of a judgment in cassation proceedings are the following:

a) an essential breach of a law of criminal procedure;
b) the incorrect application of criminal law or other substantive law;
c) the inappropriateness of a penalty in view of the seriousness of the action committed and the personality of the defendant (Article 562).

Under Article 2 of the Code of Criminal Procedure the norms of criminal procedure are contained in the Constitution of Georgia, international treaties to which Georgia is a party, the Code of Criminal Procedure, other laws of Georgia and universally recognised principles and norms of international law. But Article 562 refers to "a law of criminal procedure" only, which implies the Code of Criminal Procedure. While the international treaties to which Georgia is a party constitute part of its legal system, the treaties have the status of a normative act not that of a legislative act.[751] Thus, Article 562 referring to "a law of criminal procedure" excludes the possibility of invoking the European Convention on a basis for cassation proceedings.[752]

The Code of Criminal Procedure provides for inadmissibility of *reformatio in pejus* in cassation proceedings (Article 566).

14.2.3. Exceptions to the Right to a Review

Georgian legislation provides for only one exception of the kind envisaged by para. 2 of Article 2 of Protocol 7. In particular, the resolution concerning administrative imprisonment (which constitutes an administrative penalty for certain administrative violations as defined by the Code of Administrative Violations) must be executed immediately after its rendering.[753] There is no appeal procedure provided against it.

The administrative proceedings referred to above are criminal matters within the meaning of Article 6, para 1, of the European Convention and therefore Protocol 7, Article

[751] See the system of legal acts given in the Compatibility Report of February 2001, pp. 13-14 and 19.
[752] See Conclusions and Recommendations, 14.3.d).
[753] Article 308 of the Code of Administrative Violations.

2, also applies. They seem not to be offences of a minor character so para. 2 cannot be applied. That seems to show that the law is in breach of Protocol 7, Article 2.[754]

A judgment of the Judicial Board of Criminal Cases of the Supreme Court which acts as a first instance court may be appealed in cassation proceedings before the Chamber of Criminal Cases of the Supreme Court.

Conviction following an appeal against acquittal may be appealed in cassation proceedings. The Code of Criminal Procedure does not provide for any exceptions .

14.2.4. Application of Article 2 of Protocol 7 to the Law on Military Discipline[755]

Article 2 of Protocol 7 may apply to the disciplinary law. Under the Disciplinary Statute of the Armed Forces of Georgia,[756] which stipulates disciplinary penalties for disciplinary offences committed by servicemen (*inter alia,* confinement to a guardhouse for up to ten days), the sanctions are imposed by a commander and not by "a tribunal" within the meaning of Article 2.[757] The Statute does not provide for a serviceman's right to appeal from the decision reached by the commander to a court. The possibility of reviewing such a judgment by a higher tribunal would be in conformity with the requirements of Article 2 of Protocol 7.[758]

14.3. Conclusions and Recommendations

In general, Georgian legislation is in line with the provisions set forth in Article 2 of Protocol 7 to the Convention. However, the following recommendations may be made:

a) Although the Code of Criminal Procedure provides for a general rule for the restoration of terms missed due to a good reason in Article 215 and for the right to appeal the refusal of restoration, it is recommended to modify Article 529, part 3 of the Code of Criminal Procedure so that it additionally requires "a good reason" for a failure to comply with a request so that, in the absence of a good reason, the appeal be dismissed and the appealed sentence enters into force. This would exclude an unconditioned limitation of the right to appeal established by the present provision. The same recommendation is made with regard to cassation proceedings, namely, Article 552, part 2 of the Code of Criminal Procedure as well.

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[754] See Conclusions and Recommendations, below, 14.3.e).

[755] See above as concerns the compatibility of the disciplinary law with regard to Articles 5 and 7 of the Convention.

[756] Approved by the Ordinance of 2 September of 1994 of the Head of State of Georgia.

[757] The only context in which "a tribunal" is referred to in the Statute is where it mentions a "court of honour". This is not an independent and impartial court within the meaning of Article 6 adjudicating upon the guilt of an individual in the commissioning of a disciplinary offence and providing him/her with procedural guarantees. Instead, a case is referred by a commander to the court of honour with the view of condemning the serviceman who was found responsible for the commissioning of a disciplinary offence by that commander. Imposition of a disciplinary sanction and committal to the court of honour for the same offence is prohibited under the Statute. Thus committal to the court of honour constitutes a disciplinary sanction *per se*.

[758] See, Conclusions and Recommendations, 14.3.f).

b) It is recommended that the Code of Criminal Procedure should provide for the possibility of lodging an appeal requesting a review of the fairness of a sentence, i.e. of the appropriateness of a sentence in view of the personality of the offender and the gravity of the offence committed.

c) In accordance with Article 2 of the Code of Criminal Procedure (headed "the sources of the criminal procedures"), the norms of criminal procedure are contained in the Constitution of Georgia, international treaties to which Georgia is a party, the Code of Criminal Procedure, other laws of Georgia and universally recognised principles and norms of international law. The above articles do not make clear that unlawfulness of a sentence may derive also from a failure to observe the norms of international treaties in the criminal procedure. Thus, the European Convention may not be invoked with a view to challenging a sentence before a higher tribunal. It is recommended that Articles 496 and 537 as well as other relevant articles should refer to the norms of criminal procedure instead of the Code of Criminal Procedure or other laws of criminal procedure (the same rule applies to the cassation proceedings and accordingly an analogous recommendation is made with regard to the latter[759]).

d) It is recommended that Article 562 of the Code of Criminal Procedure should refer to a norm of criminal procedure instead of a law of criminal procedure.

e) It is recommended to provide for a right of appeal in administrative proceedings involving administrative imprisonment.

f) It is recommended that the Law on Military Discipline be amended to bring it in line with Article 2 of Protocol 7.

[759] Article 562 of the Code of Criminal Procedure.

15. PROTOCOL 7, ARTICLE 4 - RIGHT NOT TO BE TRIED OR PUNISHED TWICE

15.1. The European Convention and its Interpretation

Under Article 4 of Protocol 7 of the European Convention:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

Article 4 of Protocol 7 only applies to a final judgment in criminal proceedings. According to the Explanatory Report to Protocol 7, the wording of Article 4 and in particular the reference to "the jurisdiction of the same state" limits the application of the article to the national level. The European Commission came to the same conclusion, *inter alia*, in the *Baragiola* v. *Switzerland* case.[760] The Commission stated that the *non bis in idem* principle was upheld in Protocol 7, Article 4 only in respect of cases where a person had been tried or punished twice for the same offence by the courts of a single state. Article 4 of Protocol 7 prohibits repeated convictions based on the same conduct of the accused.[761] In the *Raninen* v. *Finland* case[762], the Commission held that Article 4 did not exclude repeated convictions based on similar conduct taking place on different occasions.[763] If an individual is convicted of an administrative offence which must be classified as "criminal" within the meaning of Article 6 of the Convention, Article 4 will apply as well.[764] At the same time, Article 4, since it only applies to trial and conviction of a person in criminal proceedings, does not prevent him from being subjected, for the same act, to actions of a different character – for example, disciplinary action in the case of an official, as well as to criminal proceedings.[765]

The second paragraph of Article 4 of Protocol 7 does not limit the exceptions from the *non bis in idem* principle listed there to cases, in which the re-opening of a case leads to acquittal or is otherwise favourable to the individual.

15.1.1. Re-examination and Reopening of Cases Decided by the European Court of Human Rights

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[760] DR 75/76.

[761] *Gradinger* v. *Austria*, 23, October 1995, Series A no. 328-C, para. 55.

[762] 16 December 1997, *Reports* 1997-VIII.

[763] Admissibility Decision of 1996, para. 4.

[764] In the *Gradingen case* the applicant was convicted and punished by a criminal court and subsequently fined by administrative authorities for the same conduct. The Court found a violation of Article 4, thus extending the principle of double jeopardy to administrative proceedings as well.

[765] Explanatory Report.

Under Article 46 of the Convention, the High Contracting Parties have accepted an obligation to abide by the final judgment of the European Court in any case to which they are parties.

On 19 January 2000 at the 694th meeting of the Ministers' Deputies the Committee of Ministers adopted Recommendation NR (2000) 2 to member States on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights. It is acknowledged in the Recommendation that in certain circumstances the obligation under Article 46 may entail the adoption of measures other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures to ensure, as far as possible, *restitutio in integrum* of the injured party. The practice of the Committee of Ministers in supervising the execution of the Court's judgments has shown "that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*."

The European Commission for Democracy through Law of the Council of Europe (the Venice Commission) in its Opinion N209/2002 on the Implementation of the Judgments of the European Court of Human Rights of 18 December 2002 has dealt with this problem as well (see paras. 72-74) and has come to the following conclusion (para. 107 under e): "Legislation allowing for reopening or review of proceedings following the finding by the Court of a violation of the Convention should be adopted with no further delay by all member States, at least as far as criminal proceedings are concerned".

15.2. Georgian Legislation

Under Article 42, para. 4 of the Constitution of Georgia "no one shall be convicted twice for the same offence."

Under the first paragraph of Article 46 of the Constitution, the President of Georgia is authorised in time of war or a state emergency to restrict certain constitutional rights and freedoms enumerated in the article. The right not to be convicted twice for the same offence is not on the list of those rights and freedoms.

By referring to the prohibition of a double conviction only, the constitutional provision obviously fails to rule out a repeat of the stages of criminal prosecution which precede the conviction for the same offence. Moreover, it does not provide for any exception to the *non bis in idem* principle thus bearing potential problem of raising the issue of constitutionality of the relevant articles of the Code of Criminal Procedure, which do permit such exceptions and are not in breach of the Convention in view of the second paragraph of Article 4.[766]

The Code of Criminal Procedure does not define the right not to be tried or punished twice as such in express terms. But Article 28, part 1, subparagraphs l) and m) set out the grounds for refusing to institute criminal proceedings and criminal prosecution and for ceasing criminal prosecution. Under subparagraph l) criminal proceedings shall not be instituted, and already instituted proceedings shall be discontinued, if there is a final sentence concerning the same charges and/or a ruling (resolution) of a court (a judge) concerning the discontinuation of the criminal proceedings relating to the same charges. Under subparagraph m), criminal proceedings shall not be instituted, and already instituted proceedings shall be discontinued, if there is a resolution of an organ of enquiry, an

[766] See, Conclusions and Recommendations, 15.3.a).

investigator or a prosecutor discontinuing criminal proceedings, or declining to institute criminal proceedings, relating to the same charges. Part 8 of the article provides for the obligation to discontinue proceedings before a court of appeal or a court of cassation if any of the above mentioned preconditions is revealed during consideration of the case before the respective court.

Administrative responsibility based on an administrative violation provided for by the Code of Administrative Violations is imposed if a violation, due to its character, does not entail responsibility under criminal law in accordance with existing legislation (Article 10, part 2). The Code of Administrative Violations prohibits initiation of proceedings regarding an administrative violation, and requires the discontinuation of already initiated proceedings, if there is already a decision of a competent body (an official) imposing an administrative penalty for the same fact, or a valid decision of a community court to which the case had been referred by a body authorised to impose an administrative penalty, or a valid resolution discontinuing the administrative proceedings, as well as if there is a criminal case pending or decided with regard to the same fact (Article 232, part 1, subparagraph 8). But in cases in which it is decided not to institute criminal proceedings, or in which criminal proceedings have been discontinued, but in which elements of an administrative violation are found in the acts concerned, administrative responsibility may be imposed (Article 38, part 2).

Under Article 42 of the Disciplinary Statute of the Armed Forces of Georgia approved by the Ordinance of 2 September of 1994 of the Head of State of Georgia, a serviceman upon whom a disciplinary punishment is imposed is not exempt from responsibility under the criminal law. Taking into consideration the fact that a disciplinary punishment may constitute confinement to a guardhouse for up to ten days, Article 4 applies and the aforementioned provision of the Statue seems to fail to comply with it. Meanwhile, Article 77 of the Statute prohibits punishing “several times” for the same violation.[767]

15.2.2. Exceptions from Non Bis In Idem Principle in Georgian Legislation

Although the Constitution of Georgia sets out the *non bis in idem* principle in absolute terms, the Code of Criminal Procedure provides for two groups of circumstances of factual and legal character which can give rise to a re-examination of a final judgment of a court (both a judgment of acquittal and of conviction are implied). In particular, the Code of Criminal Procedure differentiates between newly discovered facts and new legal circumstances resulting from a development in practice, or new legislation (Chapter LIX).

The first group consists of circumstances which point to defects in the proceedings: (a) if it is established by a final judgment of a court that the testimony of a witness, the conclusion of an expert or other evidence that served as a ground for rendering a judgment, is false; b) if it is established by a final judgment of a court that an act committed by a judge, an inquirer, an investigator or, where appropriate, by a prosecutor while considering the case, constitutes an offence; c) if there are other circumstances, which were not known to the court while rendering the sentence and which, alone or in connection with other established circumstances, suggest that the defendant was innocent or committed a lesser or a graver offence than the one for which he was convicted, or which suggests the guilt of an acquitted defendant or of a person against whom the case had been discontinued; d) if

[767] See, Conclusions and Recommendations, 15.3.b).

there are circumstances which prove the illegality of the composition of the court, or the inadmissibility of any evidence, which served as a basis for the sentence.

The new legal circumstances are the following: a) if there is a judgment of the Constitutional Court of Georgia which declared as unconstitutional, a law which has applied while rendering a final sentence by a court of general jurisdiction; and b) if a new law is adopted, which annuls or mitigates criminal responsibility for the acts concerned.

Under the Code of Criminal Procedure, newly discovered facts and new legal circumstances may be invoked for the re-examination both of a sentence of acquittal and a sentence of conviction to the detriment of the acquitted or convicted person, though the Code of Criminal Procedure sets time-limits for this. In such cases a sentence may be challenged within a year from the moment of lodging a claim or a petition with the Chamber of Criminal Law of the Supreme Court, the Presidium of the Higher Court of an Autonomous Republic or with the Prosecutor General concerning establishment of the existence of newly discovered facts or new legal circumstances. The Code does not set any time-limits for challenging a final judgment of a court to the benefit of a convict on the basis of newly discovered facts and new legal circumstances (Article 601).

The Code of Criminal Procedure provides for a comprehensive mechanism for the re-examination of cases.

Under Article 594, part 1 of the Code of Criminal Procedure a complaint requesting re-examination of a court sentence because of newly discovered circumstances is to be lodged with the Prosecutor General with regard to final sentences rendered by the courts of general jurisdiction of Georgia or with the prosecutors of the Autonomous Republics of Ajara and of Abkhazia with regard to the final sentences rendered by the courts of general jurisdiction of these Republics, while a complaint requesting re-examination of a final court sentence, because of new legal circumstances, is to be directly lodged with the Chamber of Criminal Cases of the Supreme Court of Georgia or the Presidiums of the Higher Courts of Ajara and Abkhazia respectively (Article 594 part 2). In the former case the prosecutors concerned must request the relevant criminal case and the court judgments and, if the complaint is reasonable, institute proceedings and assign a prosecutor or an investigator to the investigation. The examination of the complaint is conducted by means of the usual investigative actions provided for by the Code of Criminal Procedure. If a ground for re-examination of the case is established, the investigator or the prosecutor in charge drafts a reasoned conclusion concerning the necessity for re-examination, which is to be approved by the Prosecutor General or the Prosecutors of the Autonomous Republics respectively. The respective prosecutor must lodge a request for re-examination with the Chamber of Criminal Cases of the Supreme Court of Georgia or the Presidiums of the Higher Courts of Ajara and Abkhazia respectively. Both the Prosecutor General and the prosecutors of the Autonomous Republics are entitled to lodge such a request of their own motion (Article 596).

15.2.3. Re-examination and Reopening of the Cases Decided by the European Court of Human Rights

There is no provision in the Code of Criminal Procedure concerning either re-opening or re-examination of a case following a finding of the European Court. As regards the Code of Civil Procedure, a final judgment of a court may be challenged with a request to re-open a case on the basis of newly discovered circumstances. Under Article 423, part 1, subparagraph e), such a newly discovered circumstance may, *inter alia*, be “a court

judgment". Since there have been no judgments against Georgia so far, the domestic courts have had no opportunity to pronounce themselves on whether the European Court's judgments are also covered by Article 423 of the Code of Civil Procedure.[768]

15.3. Conclusions and Recommendations

Georgian legislation is to a greater extent in line with the provisions of Article 4 of Protocol 7 to the Convention. However, the following recommendations may be made:

a) The constitutional provision should prohibit criminal proceedings against, as well as punishment of, anybody for the same offence, except in accordance with the procedure provided for by law;

b) the Law on Military Discipline should be amended in the light of the incompatibility considered above;

c) the Code of Criminal Procedure and the Code of Civil Procedure should expressly provide that a finding of the European Court of Human Rights is a ground for the re-examination of a sentence and for the re-opening of a civil case respectively.

[768] See, Conclusions and Recommendations, 15.3.c).

16. PROTOCOL 12, ARTICLE 1 - GENERAL PROHIBITION OF DISCRIMINATION

16.1. The European Convention and its Interpretation

Article 1 of Protocol 12 states:

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

There is no case-law under Article 1 since Protocol 12 has not yet entered into force. Nevertheless, some general comments may be made on the meaning of Article 1, of Protocol 12. The Article entails a prohibition of discrimination in a broad sense as the most general rule and this principle must be applied to everybody within the jurisdiction of the state. The Article states that the prohibition of discrimination covers "any right set forth by law", i.e. it is applicable not only to the rights and freedoms covered by the Convention, but all human rights, including economic, social and cultural ones [provided under the national legislation]. At the same time, it is important to keep in mind that this Article does not exclude differences in treatment which cannot be regarded as discrimination.

In the context of Article 1, reference should be made to the previous study performed by a group of Georgian experts on the compatibility of domestic legislation with the requirements of European Convention and its Protocols.[769] Article 14 of the Convention, which prohibits discrimination with respect to the rights and freedoms protected by the Convention has also been covered by the 2001 Compatibility Study.[770] Thus, it seems reasonable to briefly reproduce once again the most essential legal provisions on this point.

At the same time, the most recent developments in this regard will be discussed bearing in the mind the principle of affirmative action – i.e. action which aims at achieving actual equality – with respect to the implementation of minority rights.

In March 2002 the UN Human Rights Committee at its 1986th and 1987th meetings considered the second periodic report of Georgia regarding the implementation of its obligations under the International Covenant on Civil and Political Rights and elaborated final conclusions and recommendations.[771] According to paragraph 19:

"The Committee expresses its concern with respect to obstacles facing minorities in the enjoyment of their cultural, religious or political identities.

The State party should ensure that all members of ethnic, religious and linguistic minorities enjoy effective protection from discrimination, and that the members of such communities may enjoy their own culture and use their own language…"

The Committee also noted with deep concern the increase in the number of acts of religious intolerance and harassment of religious minorities of various creeds, particularly

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[769] A Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols: Pilot Project, prepared by A. Kakhniashvili, A.Nalbandov, G. Tskrialashvili, HRCAD(2001)2, 2001.

[770] *Ibid*, pp. 64-70.

[771] See document CCPR/CO/74/GEO.

Jehovah's Witnesses and requested that the State party take the necessary measures to ensure the right to freedom of thought, conscience and religion in Georgia.[772]

16.2. Georgian Legislation

16.2.1. Respect For and Exercise of the Rights of All Persons Subject to the Jurisdiction of a State

Article 14 of the Constitution of Georgia states that all people are born free and equal before the law irrespective of their race, colour, language, sex, religion, political and other beliefs, national, ethnic and social affiliation, origin, property and class status or place of residence.

Under the Constitution, citizens of Georgia enjoy equal rights in the social, economic, cultural and political life of the country, regardless of language or national, ethnic or religious affiliation. In keeping with the generally recognized principles and norms of international law, they are free under the law to develop their own culture and to use their native language both in private and in public, without discrimination or interference of any kind (Article 38, paragraph 1).

In this context it is expedient to recall the following: in the 2001 Compatibility Study on Article 14 of the Convention some amendments to Articles 14 and 38 of the Constitution were proposed, in order to bridge certain gaps therein. These proposals have not been considered yet. That is why they are repeated here: "Following amendments should be made in Article 14 of the Constitution: a) Add the criterion 'birth'; b) Add the blank norm on 'or other status'. Following amendment should be made in Article 38 of the Constitution: In the first sentence of Para.1 wording 'Citizens of Georgia…' to be substituted by wording 'minorities in Georgia'."

According to paragraph 2 of Article 85 of the Constitution in areas where the population does not speak the State language, the state shall provide teaching and explanations of matters pertaining to legal proceedings in that language. The inclusion of this provision in the Constitution can be seen as a product of the Soviet period, when Russian (and not Georgian) was the *lingua franca* for minorities living in Georgia.

The Constitution provides for observance of the principle of non-discrimination in respect of non-citizens as well, in that it states that aliens and stateless persons living in Georgia have the same rights and obligations as Georgian citizens except where otherwise stipulated by the Constitution and the laws (Article 47, paragraph 1).

One such exception provided for in the Constitution is the authority of the State to place restrictions on the political activity of aliens and stateless persons (Article 27).

In the context of this Article it is expedient to repeat once again that human rights and freedoms set out in Chapter II of the Constitution are apparently divided into two groups: those applicable to all persons and those applicable to citizens.[773]

16.2.2. Legal Shortcomings to be Corrected

[772] For detailed examination of Georgian legislation on the right to freedom of thoughts, conscience and religion see the analysis with Article 9 of the European Convention above.

[773] For detailed information on this issue see the analysis on Article 1 above.

In March 2001 the Committee on the Elimination of All Forms of Racial Discrimination considered the initial report of Georgia under the respective Convention[774] and adopted its concluding observations.[775] In particular, the Committee noted in its observations that it is concerned:

- at the failure of Parliament to adopt a special law on national minorities;
- at the absence of provisions explicitly banning the advocacy of national, racial and religious hatred;
- at the under-representation of ethnic minorities in Parliament and in local bodies.

The Parliament of Georgia has not yet passed a special law on national minorities. No practical steps have been taken to increase the presentation of ethnic minorities at the decision-making levels. Nevertheless, some progress made in this regard is discussed below.

As mentioned in the 2001 Compatibility Study on Article 14 of the European Convention, "it should be noted that the norm according to which the determination of the nature of a crime is made on the incitement of any kind of racial enmity (old Criminal Code, Article 75) is taken out from the new Criminal Code. In our opinion, the inclusion of such Article in the new Code also would be reasonable."[776] As a further recommendation, the adoption was proposed of an "Additional Article on the punishment of national, ethnic, religious and other enmity should be incorporated in the Criminal Code."[777]

In Decree N240 "About the Measures on Strengthening Protection of Human Rights in Georgia" (see above), the President of Georgia instructed the Ministry of Justice to "elaborate draft amendments to the Criminal Code of Georgia on recognizing as a crime activities directed to incite ethnic and racial enmity or hatred, direct or indirect restriction citizens' rights based of their ethnic or racial belongings and envisaging corresponding sanctions for this crime". It is necessary to note that in March 2003 the Government of Georgia considered and approved an amendment to the Criminal Code, in accordance with which a new article (142^1 - "Racial Discrimination") will be added. This article contains a definition of discrimination which is in compliance with the interpretation of this term under the UN Convention on the Elimination of All Forms of Racial Discrimination and will allow punishment for the commissioning of the crime of racial discrimination with imprisonment from 3 to 10 years, depending on whether there are aggravating circumstances. The President of Georgia has submitted the above amendment to Parliament for adoption. It is advisable that this is done as soon as possible.

The Law on Payment for Deferment of Compulsory Military Service entered into force on 21 June 2002. Under this Law a person eligible for compulsory military service (aged 18 to 27) can be granted such deferment provided that he pays a specified amount of money to the state budget of Georgia. The payment has been fixed at 200 GEL (approximately 90 USD) a year or 2000 GEL (approximately 900 USD) in a lump sum. As a result, by using this legal act one can fully avoid compulsory military service.

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[774] See document CERD/C/369/Add.1.
[775] See document CERD/C/304/Add.120.
[776] A Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols: Pilot Project, prepared by A. Kakhniashvili, A.Nalbandov, G. Tskrialashvili, HRCAD(2001)2, 2001, 69.
[777] *Ibid*, 70.

The reasons for adopting such a law were to prevent corruption relating to the call-up process. Previously young men were often forced to bribe representatives of the respective authorities to evade compulsory military service. It was considered more acceptable to legalise such payments to render financial assistance to the Ministry of Defence: 80 per cent of these payments must be transferred to the Ministry's special account. For the time being, 124 young men have already made use of the Law on Payment for Deferment of Compulsory Military Service by paying the sums in question.

Bearing in the mind constitutional provisions which prohibit discrimination, *inter alia*, on the basis of "property status" (Article 14), It may be supposed that this Law is inconsistent with the requirements of Article1 of Protocol 12, which states that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as […] property […] status". Therefore, the application of the Law can be considered discriminatory.

16.2.3. Framework Convention on the Protection of National Minorities and the Matter of Passing a Special Law

As it was noted in the 2001 Compatibility Study that on 21 January 2000 Georgia signed the Framework Convention on the Protection of National Minorities, which would have entered into force for Georgia upon ratification by Parliament. Stemming from this Convention, the Law on the Protection of National Minorities should have been adopted before April 2001 according to political commitments of Georgia assumed at the time of admission to the Council of Europe.

Unfortunately, for the time being neither has the Framework Convention has been ratified nor has the legal act dealing with minority issues been elaborated. As a matter of fact, there is no uniform view among competent state bodies (both legislative and executive) as to whether it is necessary to adopt such a law. Opinions in this respect still vary, which may be explained by the lack of clear understanding of the Convention's essence. Unlike other international human rights instruments to which Georgia is a party, the Framework Convention on the Protection of National Minorities is not a self-executing act i.e. it can only be implemented through relevant national legislation and practice. There is a solid ground to suppose that the existing Georgian legislation does not fully cover the entire scope of minority rights and freedoms enshrined by the Convention. This relates, in particular, to the possibility of communication with administrative bodies using a mother tongue, toponymic indications and so on. That is why it is of utmost importance that the ratification of the Framework Convention on the Protection of National Minorities be followed by the adoption of legal act(s) to implement it at the national level.

Pursuant to the most recent information available, the Parliamentary Committee on Civil Integration is going to submit to Georgian law-makers a draft document entitled "Concept for Integration of National Minorities (in Georgia)" which is expected to be a legal instrument that would ensure better promotion and protection of minority rights in Georgia, based on the provisions of the Framework Convention. Anyway, there is an urgent need to both ratify the Convention and pass the legislation necessary to implement it.

In order to reinforce such an attitude to this matter, it is advisable to refer to the opinion expressed by the Committee on the Elimination of All Forms of Racial Discrimination in the course of its consideration of the initial report of Georgia under the CERD: "In the context of the implementation of Article 5 (of the CERD), the Committee expresses its concern at the under-representation of ethnic minorities in Parliament. The

Committee notes with concern the barriers to participation of minorities in political institutions, for instance with regard to the limitation on the participation of minorities in local executive bodies due to a lack of knowledge of the Georgian language. The Committee recommends that the State party take all necessary steps in order to increase the representation of national minorities in Parliament and in local bodies".

In addition, the Committee clearly stipulated its position as reflected in the following: "the Committee encourages the State party to continue to provide its utmost support to this process and to adopt legislation on minorities".

It is clear that the above opinion is a good demonstration of problems to be addressed within Georgian legislation and in practice. In this context it is relevant to stress the importance of taking positive measures to achieve real equality between the majority of the population and minorities residing in the country, with the view to final results and not only equal opportunities.

In the process of finalising the present Compatibility Study a remarkable legal act appeared in Georgia directly linked to the questions under consideration. Namely, at the beginning of March 2003 the President of Georgia issued Decree N68 "On Approval of the Plan of Action for Strengthening Protection of Human Rights and Freedoms of Minorities Living in Georgia (2003-2005)". The preamble to this Decree states: "Racial discrimination is an unacceptable event in any civilized society. Georgia is a multiethnic country, which has the best traditions of peaceful coexistence among many ethnic groups, as well as centuries-old history of religious tolerance. That is why combating all forms of discrimination (including religious discrimination) and protecting the human rights and freedoms of different groups of the population is a key prerequisite for the State development of Georgia." The Plan of Action includes the following objectives:

- Adoption of amendments to the existing legislation and elaboration of new legal acts to ensure full implementation of the international obligations assumed by Georgia and recommendations of the respective UN treaty bodies in the field of human rights and to make domestic legislation compatible with the standards of the UN and the Council of Europe;
- Increasing the role and participation of ethnic minorities in the decision making process by means of encouraging increased representation of national minorities within governmental bodies;
- Protection of minority rights by using special mechanisms and holding training for minorities on the legal remedies available to them;
- Elimination of religious extremism and intolerance;
- Promotion of a civil integration processes:
- Preservation and development of the cultural identity of minorities.

The Plan of Action includes a series of specific measures to be undertaken to achieve each particular objective mentioned above. In the context of this paragraph it is noteworthy to mention that in conformity with this document the Parliament of Georgia is requested to ratify the Framework Convention for the Protection of National Minorities and to complete elaboration of the "Concept for Integration of National Minorities" and the relevant legislative proposals.

If this Plan of Action is implemented, it will significantly contribute to the realisation of the positive obligations of the State in relation to the protection of the rights of minorities.

16.2.4. Some Remarks Concerning the Matter of Gender Equality

As noted above, Article 14 of the Constitution sets out the freedom and equality of all persons before the law irrespective of, *inter alia*, gender. As far as women are concerned, another noteworthy constitutional provision provides for legal protection of maternity rights (Article 36, paragraph 3).

Given the importance currently attached to gender equality, it might be appropriate to reproduce the wording of Article 3 of the International Covenant on Civil and Political Rights directly in the Constitution. This would be consistent with both the spirit and the letter of Georgian legislation and Georgia's international human rights obligations.

Accordingly, the following recommendation made in the 2001 Compatibility Study still remains valid: "The provision on women's rights and gender equality should be stipulated as a separate Article or clause in the Constitution".

The following should be stressed in this context. Although the Human Rights Committee, in its abovementioned conclusions and recommendations, recognized that "some progress has been made in efforts to achieve equality for women in political and public life", it remained concerned because the level of representation of women in Parliament and in senior public- and private-sector jobs remains low.

The Committee suggested that the State take appropriate measures to fulfil its obligations in order to improve the representation of women in Parliament and in senior positions in the public sector, as provided for in Article 3 of the Covenant. It noted that the State should also consider measures, including educational ones, to improve the situation of women in society.

Recently one of the Georgian NGOs, the, "Gender Development Association", elaborated a series of proposals aimed at enhancing women's participation in the sense of their representation in the Parliament of Georgia. For the time being no amendments of such kind have been made to the electoral legislation.

According to the Plan of Action for Strengthening Protection of Human Rights and Freedoms of Minorities Living in Georgia (2003-2005), the Parliament of Georgia, together with the Ministry of Justice of Georgia and the State Commission for the Elaboration of Politics Aimed at Advancement of Women, are requested to elaborate a new edition of Article 36 of the Constitution, in order to ensure a separate clause on women rights and gender equality.

Finally, in the context of this question it should be mentioned that at the end of 2001 a woman – a well-known politician - has been elected the chairperson of the Parliament of Georgia.

16.2.5. Legal Remedies Available

Under the Constitution all persons are entitled to have their rights and freedoms protected in the courts. The State guarantees to pay full compensation, through the courts, to any person who is wrongfully injured by the State, or by self-governing bodies or their officials (Article 42, paragraphs 1 and 9).

Among the legal remedies available in Georgia for redressing violations of any person's rights and freedoms, priority is given to the courts. This does not, however, preclude the use of any other legal remedies provided for by law.

In the context of Article 1 of Protocol 12 reference may be made to Georgia's initial report on implementation of the CERD. The section of that report dealing with Article 6 of the Convention contains fairly detailed information on the structure and procedures of the judicial system (paragraphs 283-290); on judicial procedure in respect of constitutional supervision (paragraphs 291 and 292); on administrative court proceedings (paragraphs 293-295); on civil proceedings (paragraphs 296 and 297); on criminal proceedings (paragraphs 298-302); and on the related right to institute proceedings in other fora with respect to violations of rights and freedoms (paragraphs 303 and 304).

In addition, all persons have the right to file an appeal concerning any infringement of their rights and freedoms with the corresponding legislative and executive authorities.

16.3. Conclusions and Recommendations

a) On the whole, Georgian legislation is in line with the requirements of Article 1 of Protocol 12 to the European Convention. At the same time, there is an urgent need both to amend existing legislation and to adopt new legal acts to bring the legislation in full conformity with the letter and spirit of Article 1 of Protocol 12.

b) It should be particularly noted that for the time being lawmakers have not acted on the recommendations contained in the 2001 Compatibility Study with regard to the Constitution of Georgia.

c) Adoption of the Law on Freedom of Religion and Religious Organizations should be accelerated in order to ensure full implementation of the right to freedom of thought, conscience and religion in Georgia.

d) Adoption of a draft amendment to the Criminal Code of Georgia by the Parliament of Georgia should be accelerated with the view to recognizing as a crime any acts of racial discrimination.

e) Timely and effective implementation of the strategies envisaged by the Plan of Action for Strengthening Protection of Human Rights and Freedoms of Minorities Living in Georgia (2003-2005) would be welcome, especially concerning the necessary steps in the legal sphere.

f) The Law on Payment for Deferment of Compulsory Military Service should be revised to bring it in line with the Constitution and international human rights obligations of Georgia.

g) The Parliament of Georgia should ratify the Framework Convention on the Protection of National Minorities as soon as possible.

h) Elaboration and adoption of legal act(s) governing minority issues should be encouraged to ensure implementation of the Framework Convention on the Protection of National Minorities at the national level. The legal act(s) in question should, in particular, include (1) measures to increase representation of minorities at decision-making levels and (2) a list of positive actions aimed at achieving real equality in all spheres of life.

i) The provision on women's rights and gender equality should be stipulated as a separate Article or clause in the Constitution of Georgia.

j) Special legislative measures (e.g. amendments to the Electoral Code) and other measures should be taken to increase the representation of women in the Parliament and in senior positions in the public sector.

13.12.04.