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Совет по правам человека

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**Поощрение и защита всех прав человека,
гражданских, политических, экономических,
социальных и культурных прав, включая
право на развитие**

**Доклад Рабочей группы по произвольным
задержаниям**

Добавление

Миссия в Грузию* ***Резюме*

15–24 июня 2011 года по приглашению правительства страны Рабочая группа по произвольным задержаниям совершила поездку в Грузию. В ходе миссии Рабочая группа провела беседы с представителями различных органов исполнительной, законодательной и судебной власти государства. Она также имела возможность встретиться с задержанными, заключенными, представителями гражданского общества и сотрудниками Организации Объединенных Наций.

Рабочая группа посетила места содержания задержанных в Тбилиси, Батуми и Кутаиси, включая тюрьмы для содержания осужденных и лиц, заключенных под стражу, полицейские участки и полицейские следственные изоляторы, иммиграционный приемник, психиатрические больницы, а также учреждения для женщин и несовершеннолетних. Рабочая группа провела беседы наедине с 154 задержанными.

В настоящем докладе Рабочей группы рассмотрена институциональная и законодательная база в области прав человека и лишения свободы в Грузии. В нем рассмотрены важные законодательные реформы последних лет, способ-

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ствующие укреплению стандартов прав человека лиц, лишенных свободы. В нем также представлен краткий обзор системы уголовного правосудия в целях уточнения контекста, в котором существует институт лишения свободы.

Рабочая группа отмечает, что Грузия провела многочисленные законодательные реформы и выступила с позитивными инициативами по содействию недопущению случаев лишения свободы. Рабочая группа хотела бы видеть больше приверженности цели осуществления этого законодательства и системных изменений для улучшения практики судов и прокуратуры при обеспечении соблюдения установленных стандартов прав человека в случае лишения свободы.

Независимый суд – основополагающая предпосылка создания условий, в которых соблюдаются права человека задержанных и заключенных. Поэтому институциональные нововведения и изменения крайне необходимы для защиты от незаконного лишения свободы. В этой связи особую важность имеет наличие таких государственных механизмов, как ведомство народного защитника, и Рабочая группа полностью поддерживает такие институты.

Исходя из таких выводов и ставя цель гарантировать недопущение произвольного лишения свободы, Рабочая группа заострила свое внимание на ряде вопросов, на которые она хотела бы обратить внимание правительства, включая защиту права на соблюдение процессуальных гарантий и справедливый суд, независимость судебной власти, прежде всего в отношении процессуального равенства участников процесса и правомочий обвинения, вынесение чрезмерных и суровых приговоров, отсутствие альтернатив лишению свободы, систему сделок с правосудием, административный арест, задержания, связанные с мирными демонстрациями, а также вопросы, касающиеся лиц, ищущих убежище, и незаконных мигрантов. Рабочая группа вынесла ряд рекомендаций по указанным выше вопросам.

Annex

Report of the Working Group on Arbitrary Detention on its mission to Georgia (15 – 24 June 2011)

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I. Introduction

1. The Working Group on Arbitrary Detention, which was established by the Commission on Human Rights in its resolution 1991/42 and whose mandate was assumed by the Human Rights Council by its decision 1/102 and extended by resolution 15/18, visited Georgia from 15 to 24 June 2011, at the invitation of the Government. The Working Group delegation was composed of El Hadji Malick Sow, Chairperson-Rapporteur of the Working Group; fellow member Roberto Garreton; Vladimir Tochilovsky, the Working Group Secretary; and another staff member from the Office of the United Nations High Commissioner for Human Rights (OHCHR).

2. During the visit, the Working Group was grateful for the ongoing cooperation of the Government and the authorities with which it dealt, and would like to thank them for their collaboration. The Working Group was able to arrange meetings with all the people that it requested.

3. The Working Group visited detention facilities in the capital, Tbilisi, and in other cities, specifically, the Adjara Regional Temporary Detention Isolator, Establishment No. 2 in Kutaisi, Establishment No. 3 in Batumi, Establishment No. 14 in Geguti, the Special establishment for juveniles in Avchala, Prison No. 5 for women in Rustavi, Prison No. 6 in Rustavi, Prison No. 8 in Tbilisi (Gldani), the psychiatric unit of the Tbilisi Medical Facility for Remand and Convicted Prisoners No. 18 and the Tbilisi Mental Health Centre. Interviews were carried out privately with 154 detainees.

4. The Working Group had hoped to have the opportunity to also visit the regions of Abkhazia and South Ossetia, and regrets that it was not able to do so.

5. Meetings were held by the Working Group with senior Government authorities from the executive, legislative and judicial branches of the State, including the Minister for Health, Labour and Social Affairs; the Minister for Corrections and Legal Assistance; the First Deputy Minister for Internal Affairs; the Deputy Minister for Foreign Affairs; the Vice-President of the Supreme Court of Justice; the First Deputy Minister for Justice; the First Deputy Chief Prosecutor of the Ministry of Justice; the Chairperson of the Batumi City Court; the Head Prosecutor of Kutaisi; the Chairperson of the Kutaisi Court of Appeals; the Chief of Administration for the Ministry of Defence; the Head of Legal Department for the Ministry of Defence; and the authorities from local Police and the Prosecutor's Office in Batumi and Kutaisi.

6. The Working Group was also grateful to be able to hold meetings with the Public Defender of Georgia (Ombudsman) and with representatives of the national bar association and civil society organizations.

7. The Working Group also held meetings with various representatives of United Nations agencies, intergovernmental organizations operating in the country and representatives from international organizations. The Working Group expresses its appreciation for the cooperation provided by these individuals during the visit.

8. Lastly, the Working Group would like to particularly thank the United Nations Resident Coordinator, the Resident Representative of the United Nations Development Programme and in particular the staff of OHCHR in Tbilisi for the excellent support in organizing and facilitating the visit.

II. Institutional and legal framework

A. Political system

9. Georgia declared independence from the Soviet Union in 1991. In 1992, a military coup ousted the elected Government of the day. Georgia is a democratic republic with a President as the head of State.

10. The executive branch of Government is made up of the President and the Cabinet, which is composed of ministers headed by the Prime Minister. Legislative authority is vested in the Parliament of Georgia, which has 150 members. Members of Parliament are elected for a four-year term.

11. In 2004, following the “Rose Revolution”, Mikheil Saakashvili became the President of Georgia, a position he still holds after his re-election in January 2008.

B. International and regional human rights obligations

12. Georgia became a State Member of the United Nations in 1992 and is a party to a number of human rights international treaties and protocols, including the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto, and the Convention on the Rights of the Child. It is also a party to the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons.

13. At the regional level, Georgia is a member of the Council of Europe. It ratified the European Convention on Human Rights in 1999 and is subject to the jurisdiction of the European Court of Human Rights. In 2010, 375 applications from Georgia were registered with the Court and four judgements were delivered in violation of at least one human right guaranteed by the European Convention on Human Rights.

C. Judiciary

14. The judiciary of Georgia is responsible for the administration of justice in accordance with the Constitution and the State’s laws. The independence of the judiciary is guaranteed by the Constitution. Judicial power in Georgia is exercised by the courts of common jurisdiction and the Constitutional Court. The latter’s function is to ensure the uniform application of law, its correct interpretation and support for the development of legislation.

15. The High Council of Justice is a supervisory body for the judiciary. The Council is presided over by the Chairperson of the Supreme Court of Georgia, and has exclusive authority to appoint and dismiss judges. The decision-making power of the Council rests on the judges. The Working Group notes, however, article 50(3) of the Law on Common Courts, which requires that some decisions, such as the appointment of judges, have the consent of either Parliamentarians who are members of the Council or the President’s representatives, a situation that may raise questions about the impartiality of the Council. The Council established a training institution for judicial professionals where it is mandatory to complete a 14-month course in order to become a judge.

16. The Law on Common Courts, which was passed in 1997, established a three-tier court system. This includes city (regional) courts with jurisdiction to consider all cases of a criminal, civil and administrative nature, and appellate courts with the sole jurisdiction to review judgements of first-instance courts and the Supreme Court of Georgia. District

courts hear petty criminal and civil cases, and the Supreme Court of Georgia serves as a cassation organ. The appellate courts try major criminal and civil cases, review cases, and may remand cases to the lower court for retrial.

17. The Constitutional Court is also entitled to exercise judicial power with regard to the constitutionality of international treaties, agreements and normative acts, as well as individual complaints on these issues. The decision of the Constitutional Court is final.

18. Georgia has a population of 4.6 million people and approximately 281 judges.

D. Public Defender (Ombudsman)

19. The Public Defender's Office of Georgia, created in 1996, is an independent constitutional human rights institution. It is mandated to monitor and assess the observance of human rights and examine cases concerning alleged human rights violations based either on complaints received or on its own initiative. The Public Defender may receive complaints from non-governmental organizations, people who are deprived of their liberty, or even foreign nationals and stateless persons residing in Georgia. In 2010, the Public Defender's Office handled an estimated 5,000 complaints.

20. The Public Defender is independent in exercising his/her functions and is bound by the Constitution, the Organic Law on Public Defender of Georgia, international treaties, agreements undersigned by the State and other legislative acts. The law prohibits any undue pressure or interference in the Public Defender's activities. The Public Defender's Office also consists of a national preventive mechanism that carries out regular visits to places of detention.

21. The visits carried out by the national preventive mechanism are to monitor places of detention in order to prevent torture and other cruel, inhuman or degrading treatment. The national preventive mechanism is the only State entity in Georgia mandated to visit all detention facilities. It was established within the Office of the Public Defender of Georgia and comprises seven permanent members (six lawyers and one doctor) and invited members who have been selected by open competition. Most of these recruited individuals are members of different non-governmental organizations active in the field of torture prevention and general and mental health care.¹ Other than these selected individuals, civil society organizations may not, in general, visit or monitor places of detention.

E. Constitutional framework

22. Domestic legislation in Georgia is expected to be in compliance with international and regional human rights standards. The Constitution of Georgia provides that all legislation should correspond to its provisions and universally recognized principles and rules of international law. An international treaty or agreement that Georgia has signed takes precedence over domestic normative acts, but only if it does not contradict the Constitution.

23. Article 18 of the Constitution correlates to article 9 of the International Covenant on Civil and Political Rights regarding the right of every person to liberty and security of person. Article 18 provides that deprivation of liberty or other restriction of personal liberty

¹ Non-government organizations involved in the national preventive mechanism or who have members in it include Global Initiative on Psychiatry, the Rehabilitation Centre for Victims of Torture (Empathy), The Right to Health, Law and Freedom, and the Georgian Young Lawyers' Association.

without a court decision is impermissible. The arrest of an individual may only be made by a specially authorized body in cases determined by law. Anyone arrested or otherwise restricted in his/her liberty is to be brought before a competent court within no more 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 is entitled to immediate release. Furthermore, any person arrested or detained illegally has the right to receive compensation.

F. Criminal justice legislation

24. On 1 October 2010, a new Criminal Procedure Code of Georgia entered into force. The Code contains a number of safeguards and guarantees against arbitrary deprivation of liberty, namely, that the term of arrest is not to exceed 72 hours and the arrested person is to be presented with an indictment within 48 hours of arrest; if during that time the arrested person has not been indicted or charged, she or he should be released immediately. Article 205(7) of the Code also states that detention is to be used only as a last resort.

25. The new Criminal Procedure Code also imposes an obligation to inform relevant persons when a detention has occurred, particularly within three hours of arrest. This also applies to detentions where a person is placed in a medical institution for examination. A detained person has a right to appeal the decision of the court regarding application of detention as a coercive measure within 48 hours from the moment of issue.

26. Further provisions of the new Code include enhancing the guarantees of the right to a fair trial, specifically the presumption of innocence, the right to legal assistance and the right to a prompt trial.

G. Legal aid

27. The Legal Aid Law, adopted in 2007, established a free legal aid service that includes free legal consultation in all fields of law, legal representation in criminal cases for socially vulnerable situations, and representation in cases where a person is sentenced to compulsory psychiatric treatment. Legal aid is administered by the Ministry of Corrections and Legal Assistance and is guaranteed in criminal, civil and administrative matters to any indigent person in criminal and civil cases, as well as in those administrative cases that may lead to administrative detention as a sanction.

28. There are approximately 3,700 defence lawyers in Georgia and 371 prosecutors. Legal aid lawyers are all members of the national bar association. Many detainees that were interviewed could not afford a private lawyer and had resorted to using State assigned lawyers through the legal aid programme.

III. Observations made by the Working Group

A. Positive aspects

29. The Working Group acknowledges the positive efforts made by the Government to carry out significant and progressive reforms to legislation relating to situations of deprivation of liberty. Amendments such as those to the Criminal Procedure Code adopted in 2009 were made in order to bring national penal legislation into conformity with international standards for fair trials and due process of law. Reforms also focused on enhancing an adversarial system of justice.

30. The Working Group also notes some amendments made to the Constitution of Georgia that provide for, inter alia, life-time appointment of judges and an increase in their salaries. Such measures are necessary to guarantee the independence, impartiality and integrity of the judiciary.

31. Various parties, including representatives of civil society, noted the progress made by the Government in reducing corruption. Throughout its interviews, the Working Group did not receive any allegation that Government officials in the relevant institutions were corrupt in carrying out their functions. The Working Group understands that there has been a significant reduction in the crime rate in Georgia over recent years.

32. Other positive developments that the Working Group observed were in the area of juvenile justice, with the establishment in some cities of a diversion scheme as an alternative to detention for juvenile offenders, and the offering of rehabilitative measures, such as education opportunities, to juveniles deprived of their liberty. The amendment to increase the age of criminal responsibility from 12 to 14 is also an important step. The free legal aid system also gives the local population access to legal assistance.

33. The Working Group also noted the establishment of a special database under the Ministry of Internal Affairs on all temporary detention isolators in Georgia, which ensures efficient functioning of a centralized registry that contains relevant data on all detainees. The human rights, protection and monitoring unit under the Ministry of Internal Affairs was established to work closely with the Public Defender's Office in ensuring that human rights violations are prevented in temporary detention isolators. The Government informed the Working Group that human rights units had also been established within the Ministry of Corrections and Legal Assistance and the Prosecution Service of Georgia to detect and redress human rights violations in places of deprivation of liberty.

34. The Public Defender of Georgia plays an indispensable role in monitoring human rights violations. The creation of the national preventive mechanism, as called for under the Optional Protocol to the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, operating in the office of the Public Defender, has been critically important, particularly in view of the visits it conducts to places of detention. The Working Group encourages the Government of Georgia to continue to provide its full support and cooperation in strengthening this institution. The Working Group invites the Government to facilitate visits by civil society and non-governmental human rights organizations to prisons and detention centres.

35. The Working Group was informed of progress made in the situation of asylum-seekers, following the establishment of an open centre and a new draft law that would provide further protection and humanitarian safeguards. Since its visit, the Working Group has been informed of the adoption of the Law of Georgia on Refugee and Humanitarian Status and its signature by the President on 6 December 2011.

36. The Working Group also highlights efforts made to improve conditions in prisons and detention centres and notes that a number of new facilities have been built; some old and dilapidated prison facilities have been shut down, while others have been upgraded. Some similar facilities are, however, still in full use.

B. Challenges to the administration of justice with regard to deprivation of liberty

1. Independence of the judiciary and fair trial guarantees

37. The Working Group notes that the relevant laws of Georgia generally provide appropriate protection for the independence, impartiality and integrity of the judiciary and

the right to a fair trial. It also notes that the protections and safeguards guaranteed by the Constitution and various existing legislation are sufficient against arbitrary deprivation of liberty. It is, however, concerned about the internal practices of the judiciary and the information it received according to which these practices were not in conformity with the international human rights instruments and the national laws that Georgia has adopted.

38. Since the adoption of a zero tolerance policy in 2004, the number of criminal convictions with custodial sentences in Georgia has increased rapidly. Currently, Georgia has an estimated acquittal rate of 0.1 per cent, with the majority of cases ending with results in favour of the prosecution. The low acquittal rate and common use of detention in court cases have also led to overcrowding in prisons.

39. Through interviews conducted with detainees, the Working Group constantly received information regarding the highly influential role of prosecutors. Much of the information obtained from detainees and lawyers supported the belief that the independence of the judiciary was not fundamentally protected and the principle of equality of arms was not upheld, given that a majority of judgements favoured the prosecution.

40. Many detainees interviewed also expressed a lack of confidence in the ability of legal aid lawyers to defend their cases successfully in a system where an overwhelming majority of cases were decided in favour of the prosecution. Some expressed the view that evidence that was helpful to the defence's case was often not given enough careful consideration and weight, and that the defence was not taken as "seriously" as the prosecution. The Working Group received information from lawyers that it was often difficult to satisfy the stringent admissibility criteria of the court of cassation, which hindered the possibility of successful appeals. An estimated 90 per cent of decisions made by upper courts confirm the decisions made by the lower courts.² According to the Government, the Supreme Court of Georgia represents the final instance of the three-tier court system, where decisions of appellate courts may be appealed. State legislation establishes admissibility criteria, and the Supreme Court hears a case if certain conditions are evident. These conditions are (a) if the case is capable of developing case law and establishing a common standard in a particular field; (b) if a decision of an appellate court differs from the established case law on similar cases; (c) if an appellate court has made a major procedural error that might have had a significant effect on a final judgement; and (d) if an act or omission of a defendant was given a wrong qualification and if it is clear that the sentence applied does not correspond to the harm done by a defendant and his/her personality.

41. There were also controversial issues that were commonly expressed by detainees with regard to the practice of plea bargaining. The Working Group was also informed of the concept of "buying one's freedom", whereby the defendant accepts the demands of the prosecution during a plea bargain in order to escape excessive harsh sentencing. The view that court judgements favoured the prosecution was also supported by representatives of civil society organizations. The Government acknowledged that prosecutors could be better prepared for criminal proceedings when compared with defence lawyers in order to achieve improved performance. The prolonged practice of plea bargaining risks having a long-term detrimental effect on the legal profession and on lawyers who feel they were rather plea-bargain negotiators.

42. Another issue that was raised related to the difficulties of detainees and defendants in their access to lawyers. The Working Group understands that, according to State legislation, a detained person (be it on administrative or criminal charges) should be

² The Government informed the Working Group that, in 2011, 17 criminal cases handled by Legal Aid Service lawyers resulted in the full acquittal of defendants, while criminal proceedings had been suspended in 164 criminal cases during the pretrial stage.

immediately informed about his or her procedural rights, including the right to have defence counsel. In practice, if a detained person requests to contact his or her defence counsel, they should immediately be given the possibility to do so. During its visit and through various interviews, however, the Working Group was informed that clients still had problems meeting with their attorneys confidentially in prisons. The lack of adequate communication between a lawyer and his or her client in detention played a preponderant role in defendant cases. In other situations, there were delays in access of lawyers to defendants because they were not able to meet with their clients until 24 hours after the time of arrest. During this time without a lawyer, a detainee may not be able to understand their rights and can often sign documents (such as a protocol of arrest) without understanding the full implication of their acts. The Working Group was informed of several instances of prolonged interrogation of detainees without a break or rest and without the presence of counsel. Situations such as these are worrying, as they had implications for the right of a detainee not to reply. There were also concerns that detainees might provide information obtained under psychological pressure and that could be incriminating to the defendant when a case proceeds to trial. The Government informed the Working Group that, during their time in temporary detention isolators, detained persons are not restricted in meeting counsel, irrespective of the time and frequency of meetings, and that detainees usually meet their lawyers two to three hours following detention.

43. Information was also received regarding lawyers who were themselves in detention and the similarity of the crimes of which they were convicted. An estimated 111 lawyers were in the prison system and had been convicted of a number of offences, mostly economic-related. Against this backdrop, the Working Group received information that practicing lawyers were often fearful of dissatisfied clients whose allegations against them could lead to arrest and detention. Some lawyers apparently felt that it would not be difficult for vague allegations to incriminate them in the context of the zero-tolerance policy to combat crime that had been implemented. The Working Group interviewed a young female lawyer who had been sentenced to seven years in prison for aggravated fraud and who, since her arrest in 2008, had continuously maintained that she was unjustifiably convicted of an economic-related crime. She alleged that the real reason behind her conviction and detention was related to her political stance and affiliations. The Working Group received information according to which one of the Government's main objectives was to fight corruption and fraudulent activities in sectors providing services for citizens. In the past three years, criminal prosecution have been initiated against 1,723 public officials (776 were prosecuted in 2009, 606 in 2010 and 341 in the first nine months of 2011). In 2011, 12 public officials were prosecuted for fraud and five cases were initiated on grounds of fraudulent conduct by lawyers.

44. Detainees often voiced to the Working Group their lack of trust in the judicial system. They felt that the principle of the presumption of innocence was not effectively upheld in their cases and that this problem had become systematic since the policy of zero tolerance had been implemented. Many detainees stated that a competent and strong defence lawyer was needed if a client was to receive effective legal assistance. After interviewing lawyers from different sectors and regions, the Working Group discovered, however, that even highly efficient and qualified lawyers were not successful in court. An interview with one such lawyer revealed that, since 2004, he only had had three cases where his clients were successful; none was due to an acquittal, but only to some charges being dropped. The Working Group also received information that, in one particular region, of 1,400 cases, only six had led to an acquittal.

45. The Working Group reiterated in its debriefing with the Government that the principle of equality of arms between the prosecution and defence is a fundamental prerequisite of a fair trial and that the right to liberty of any citizen is significantly affected and undermined if the independence of the judiciary is not rigorously upheld. The Working

Group reiterates its view that, in accordance with the principle of the presumption of innocence, the burden of proof of a charge is on the prosecution, and the accused should have the benefit of the doubt. Furthermore, the principle of equal access and equality of arms, in accordance with international human rights standards, require safeguards to ensure that parties to proceedings are treated without discrimination. For a tribunal to be fair and impartial, judges must be free from personal bias and prejudice, as well as from external and internal interference.

46. The Working Group's view is that the inherent problem with the judiciary in Georgia does not relate to interference between the various branches of the State, but rather to the actions of judges and magistrates not being autonomous and uninfluenced in the course of administering justice. Reportedly, judges may not feel secure if they do not render a favourable decision, for instance to the Prosecutor's office in criminal cases.

2. Plea bargaining

47. Plea bargaining was introduced in Georgia in 2004 as a means of achieving a prompt and more efficient justice system. The Working Group received much information from interlocutors that suggested that the practice of plea bargaining was highly problematic.

48. In Georgia, 90 per cent of cases that go through the court system resort to plea bargain arrangements with minimal intervention from judges. In conjunction with the low acquittal rate and the majority of sentences resulting in detentions, there is a prevalent perception among those interviewed that the plea bargain procedure is mostly determined and influenced by the prosecution.

49. Despite some positive outcomes of plea bargaining, such as the reduction of sentences, the reality is that many of the detainees interviewed felt that the plea bargain arrangement was the only way to avoid a harsh and excessive custodial sentence.

50. Some of the detainees interviewed stated that they felt pressured to agree to a guilty plea in the plea bargaining process, since they would have only a small chance of obtaining an acquittal; without a plea bargain, they would likely end up with a guilty verdict and a lengthy prison sentence. The concern is that many defendants forgo their right to trial because they already envisage that a fair and impartial trial is not possible.

51. Although the plea-bargaining procedure itself as set out by existing law (namely, the Criminal Procedure Code) is not itself highly problematic, the information received by Working Group suggested that the practice was controversial, as it was often carried out without due regard for the rights of the accused.

52. Criticism was also levelled at the limited authority of judges to intervene in the plea-bargaining process. An amendment to the Criminal Procedure Code effectively revoked the right of a judge to reduce a sentence in a plea-bargain. The discretion of a judge to alter a sentence agreed upon in a plea agreement is now precluded in the current plea-bargaining system in Georgia. Detainees who were interviewed regularly expressed that it was the prosecutor who had the power to determine the terms of the plea bargain and that often it was better to accept the terms proposed by the prosecution given judges were likely to favour their submissions over those of the defence.

53. Interlocutors also informed the Working Group that the negotiation process involved in plea bargaining was heavily skewed towards the prosecution. In some cases, the prosecutor would be more open to negotiating with a legal aid lawyer who was known to be favourable to negotiating a plea. A defendant who chose a lawyer not open to negotiating a plea with the prosecution would run the risk of receiving a negative result (usually a lengthy prison sentence).

54. Some of the detainees interviewed stated that there was constant pressure on defendants to plead guilty, even when they maintained their innocence, in order to attain a more lenient outcome in their sentences. In the context of an acquittal rate of 0.1 per cent and with 90 per cent of cases ending in a plea bargain, the Working Group is gravely concerned about the independence of the judiciary and fairness in the process by which plea bargains are carried out.

55. In addition, the payment of a substantive financial penalty or fines in the majority of plea bargains has placed a heavy burden on the poor. Many of the individuals interviewed resorted to paying large amounts of money in accordance with the terms of their plea bargains.

56. The Working Group interviewed individuals who found it difficult to pay for the fines imposed in the plea bargain. Despite high figures for plea bargains, many of those interviewed felt they had no other option but to pay these fines in order to avoid harsh and lengthy sentences. One interviewee stated that he had paid 100,000 lari to reduce a sentence of 17 years to eight years. A lawyer mentioned that he had not encountered plea bargain fines for his clients that were lower than 1,000 lari. He added that a defendant who was recently tried for a minor crime faced a penalty of one year; in order for the sentence to be reduced to six months, a fine of 1,000 lari was imposed. The defendant was unable to pay the fine and the original sentence of one year stood.

57. In 2010, an estimated 112,795,907 lari in the State budget was obtained through fines imposed through plea-bargaining arrangements. Some of the individuals interviewed, including lawyers, felt that the plea bargain was being used merely as a means to earn money rather than to expedite justice.

58. The Working Group is concerned at the overwhelming amount of information received in support of the assertion that plea bargaining in Georgia is heavily in favour of the prosecution and that the majority of defendants resort to a guilty plea in order to avoid lengthy custodial sentences. It is further concerned that the presumption of innocence and the right to a fair trial have been undermined in the plea-bargaining process, as was evident in many of the interviews conducted.

3. Proportionality: harsh and excessive sentencing

59. The zero-tolerance policy has led to an increase in the the prison population. In addition, the extremely low acquittal rate is indicative of the majority of court cases that result in custodial sentences and guilty pleas. Currently, Georgia has one of the world's highest prison populations, with an estimated 24,000 prisoners (22,000 convicted, 2,000 remand). The zero-tolerance policy, though reducing drastically the crime rate in Georgia, has had the concomitant effect of increasing imprisonments through lengthy and harsh sentences. The Working Group observed this problem in both criminal and administrative offences.

60. Information received by the Working Group in its meetings suggested that detentions and convictions were indeed imposed in the overwhelming majority of cases that went through the courts. In 2010, some 19,940 people (98.3 per cent of the overall figure) going through the court system ended up with a conviction and detention. This figure includes cases with plea-bargain arrangements.

61. In additional, sentences of imprisonment were considered harsh in relation to the alleged crimes committed, highlighting the need to address the issue of proportionality. Many of the detainees interviewed had been held in pretrial detention for months while investigations on their cases were ongoing. These included cases where the alleged crime was not serious enough to warrant detention in remand. For instance, the Working Group interviewed several people alleged to have committed such crimes as fraud and who were

held in pretrial detention for over two months. Nonetheless, the Government informed the Working Group that a defendant may be kept on remand for no more than 60 days before a pretrial hearing and that the term of remand includes the time from the moment of an arrest. Total time for detention before conviction cannot exceed nine months.

62. Furthermore, plea bargains also have an impact on the issue of proportionality, given that some detainees are unable to pay plea bargain fines and hence reduce sentences that were quite lengthy when the crimes actually committed are considered. Offences related to drug use and illegal border crossing also attracted long prison sentences. The use of illegal drugs is criminalized in Georgia; many of the drug users interviewed had been sentenced to detention for an average of six to seven years. Illegal border crossing drew an average sentence of four years.

4. Administrative detention

63. Georgia has two categories of offence: administrative offences or misdemeanours, and criminal offences. Administrative offences are regulated by the 1984 Administrative Offences Code of Georgia (adopted during Soviet times); the penalty for administrative offences can be administrative imprisonment. Offences such as disobeying police orders, petty hooliganism or violating rules on public gatherings were common among detainees interviewed by the Working Group. Administrative detainees in Georgia are held in temporary detention isolators that are administered by the Ministry of Internal Affairs.

64. The Working Group was informed that, in 2004, the maximum punishment for administrative offences increased from 60 to 90 days. This raised the concern of the Working Group, given that the effect of this amendment was that a person has to serve a more severe and longer term of punishment in temporary detention isolators, but without the safeguards accorded to those convicted of criminal offences. In particular, the short length of the procedure that requires adjudication of the case within 24 hours is not considered to be in conformity with international human rights standards.

65. Furthermore, a person convicted of a criminal offence may enjoy such rights as visits from relatives and friends, whereas a person serving a sentence for an administrative offence may be detained for up to 90 days without visits. The Working Group noted that temporary detention isolators were intended for short-term rather than long-term detention. The temporary detention isolators visited by the Working Group were clearly not sufficient to house detainees for longer than 48 hours, and many of the detainees interviewed had been sentenced to up to 60 days in these facilities and without certain basic rights, such as visits from relatives or the right to exercise.

66. The Working Group also received information according to which court judgements on administrative cases were often decided hastily in a process that often saw judgements being “copied and pasted”, and most decisions were rubber stamped without proper consideration for individual cases. Other information showed how many decisions in court relied heavily on police officer testimonies and how the time frame for appeals (48 hours by law) was too short for the defence to prepare their cases effectively.

67. In the light of the serious nature of the administrative sanctions, the Working Group is concerned that the rights of detainees are neither adequately protected nor compatible with international human rights standards. The increase in the maximum administrative detention period permissible by law to 90 days means that a detainee under such a regime will have to endure a longer period of detention without basic fundamental rights, such as the right to exercise. Detainees are often not allowed to contact their families and are required to be kept longer than 72 hours in facilities unfit for detention of this duration. In contrast, a person convicted of a criminal offence will generally have these rights respected with a minimum punishment of no less than six months.

68. The Working Group draws attention to article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, which emphasize the need to safeguard the standards of fair trial applicable to all forms of deprivation of liberty.

5. Detentions in relation to the events of 26 May 2011

69. The Working Group received a considerable amount of information from civil society organizations and the Government regarding the detention of individuals in the context of the the protests held in Tbilisi on 26 May 2011. The Working Group interviewed many detainees who had been placed under administrative detention owing to their involvement in the protests. The relevant legislation governing the demonstrations is the Law on Assembly and Demonstrations 1997. The Working Group was informed of a controversial amendment made to the Law in 2009 that restricted the right to assembly in front of official buildings and imposed a more onerous procedure to receive authorization for peaceful gatherings and demonstrations. The Government informed the Working Group, however, that the Law does not establish a requirement of an authorization for peaceful gatherings and demonstrations, but only an obligation of prior notification of the local authorities in the event that a demonstration is held in a place where it could hinder the movement of transport.

70. The issue of administrative detention was highlighted throughout the discussions on the events of 26 May 2011, given that approximately 150 people were arrested and detained in relation to the demonstration. A number of the detainees interviewed stated that they had been arrested for offences such as swearing and resisting arrest by the police. The Government informed the Working Group that 75 of the protesters arrested were fined and 99 were detained for up to two months for hooliganism and resistance to the police, reportedly in line with the Administrative Offences Code.

71. Many of those detained for up to two months had to serve their sentences in temporary detention isolators without the possibility of visits from family members. An issue was raised in relation to the transfer of those detainees. Civil society organizations and family members informed the Working Group that some detainees were taken from one detention facility to another without the knowledge of family members and lawyers. Sometimes the transfer took the detainee outside of Tbilisi or to cities that were located hours away from where the detainee resided. Such a practice is not in conformity with human rights standards, which require that family members and lawyers be duly informed of a detainee's whereabouts.

72. The Working Group received information that suggested that people had been arrested without proper legal grounds. Some of the individuals arrested alleged that they were merely bystanders and not directly involved in the protest, and yet found themselves arrested and in detention. Other detainees stated that they were nowhere near the site of the protest and yet were apprehended on the street and taken into custody on the charge of hooliganism.

73. The hurried pace at which people were arrested did not allow some individuals to fully understand their rights when they were arrested. Some detainees stated that they had not been informed of their rights when they were arrested and were given very little time to find a lawyer; in some instances, lawyers were denied the right to see their clients. There was also a short time frame in which court decisions could be made and for appeals, which caused some confusion among the accused and effectively undermined the preparation of cases. One individual interviewed stated that he had asked to pay a fine rather than be detained, but his request was denied. Rather than appeal the sentence of 60 days, the detainee felt that it was better to serve his sentence in full, given that he had been denied earlier requests for a more lenient sanction.

74. The Working Group also noted information that the hasty judgements that were issued in relation to the protests seemed to be identical in content, except for the name and address of the accused.

75. The Working Group was informed that a group of individuals that was arrested on 26 May 2011 and charged with treason had had difficulty in having access to their families and shown signs of being ill-treated. The Working Group is concerned by the allegations that some members of the group were sentenced without trial to periods ranging from three to five years. Two members reportedly did not plead guilty and were given the harshest sentences (12 and 8 years).

76. The Government informed the Working Group that all detainees had been promptly brought before a judge within 12 hours, as required by law. A judge examined each and every case and decided on the measure of constraint accordingly. Most detainees (around 97 per cent) had been visited by legal attorneys promptly and by representatives of the Public Defender almost immediately. The International Committee of the Red Cross was given the opportunity to visit detainees freely.

77. The Working Group wishes to reiterate that its mandate is to, inter alia, ensure that no person is arbitrarily deprived of his or her liberty, particularly in the exercise of certain fundamental rights, such as the right to freedom of peaceful assembly and of association, the right to freedom of expression and opinion, and the right to a fair trial and due process. In this regard, it urges the Government to ensure the rigorous protection of these rights and that they are not circumvented, particularly in the case of peaceful protests and demonstrations.

6. Asylum-seekers and irregular migrants

78. The mandate of the Working Group covers the protection of asylum-seekers, immigrants and refugees against arbitrary deprivation of liberty. The Constitution of Georgia and the Law on the Legal Status of Aliens regulate the presence of foreign citizens and stateless persons in Georgia. Irregular migration is criminalized in Georgia and existing legislation allows foreigners to seek asylum in Georgia.

79. Georgia shares a border with Armenia, Azerbaijan, the Russian Federation and Turkey. An estimated 250 migrants are in the prison system for illegal border crossing, some from the mentioned bordering countries. Georgia does not have a migrant detention centre, although it has established an open centre for asylum-seekers.

80. The Working Group met with a number of detainees who had been charged with illegal border crossing. In all of their cases, no differentiation was made between criminal and administrative breaches at the border. Individuals detained in prison for illegal border crossing raised concern about the proportionality of sentences imposed and the need to take into account the nature of offences committed to avoid sentences that are unduly harsh and severe.

81. Issues also surround migrants who wish to return home but are stranded because they lack the required documentation. The Working Group was informed of a Sri Lankan citizen who had trouble returning home because the nearest embassy of Sri Lanka is in the Russian Federation. The Working Group would like to ensure that the right to be informed of one's rights in a language that is understood is particularly important for irregular migrants. The Working Group interviewed several foreigners in prison who highlighted the problems that they faced with regard to the language barrier. The Working Group was also informed that, in the first half of 2012, the Ministry of Corrections and Legal Assistance would be issuing brochures, published in English, Russian, French, Armenian, Farsi, Turkish and Azeri on the rights of remand and of convicted prisoners.

82. The Working Group notes that some of the most problematic issues with regard to irregular migrants were disproportionate sentencing and plea bargains requiring the payment of a fine. Some such detainees were required to pay 1,000 lari, a sum difficult to find for foreigners with no system of support in the country. There was no clear explanation on how the amount for fines was calculated. The Working Group received information of a four-year sentence imposed on a group of asylum-seekers that attempted to cross the border. The detention of those found attempting the border illegally and harsh sentences handed down raise again the issue of proportionality and how this needs to be carefully addressed and remedied by the Government. It also provides further examples of situations where alternatives to detention might be used, and where the qualification for amnesty declared by the President can be regularly applied. Plea-bargain fines that have been imposed on foreigners puts them in an even more vulnerable situation, given that foreigners are often without family or any means of financial support.

83. The Working Group requests the Government to ensure that the rights of irregular migrants and asylum-seekers are protected in accordance with international human rights standards. In particular, the Government should ensure that individual procedural guarantees are granted to these individuals immediately upon their detention, especially with regard to interpretation services, legal counselling and the provision of information, such as the right to seek asylum. Detention should also be used as a last resort and applied in exceptional cases, and only for a clearly specified reason and the shortest duration possible.

7. Alternative measures to detention

84. The law of Georgia provides for preventive measures of restraint and alternative measures to detention, such as bail and personal guarantee. Many of the detainees interviewed and who qualified had applied for bail, but had been unsuccessful. The detention of the accused as a measure of restraint was used in the majority of cases encountered by the Working Group. One case in particular related to a woman undergoing investigation for negligence; her application for bail was, however, denied and she remains in pretrial remand. In such cases, which are not grave in nature, alternatives to detention should be considered.

85. In Georgia, bail is granted in 53 per cent of cases of those who have been arrested. Under national law, detention is used in 47 per cent of cases. Only 1 per cent of cases lead to an acquittal, and 15 per cent of cases are settled before they are sent to court.

86. The Working Group notes that detention should be regarded as the most severe measure of restraint and used as a measure of last resort only if less restrictive measures cannot ensure the proper conduct of the defendant and due administration of justice. The Working Group recalls that the International Covenant on Civil and Political Rights allows authorities to hold people in detention only as an exceptional measure if it is necessary to ensure appearance for trial, and that suspicion that a person has committed a crime is not sufficient to justify detention pending investigation and indictment.

87. While noting the Government's observation that a defendant may be kept on remand for no more than 60 days before a pretrial hearing and that the term of remand includes the time from the moment of arrest (see paragraph 61 above), the Working Group remains concerned by the issue of pretrial detention, particularly of a long duration. Practices need to be in conformity with the entitlement to have a trial within a reasonable time or to release. Pretrial detention should be an exception and as short as possible. The Working Group would like to see changes with a view to reducing the use of pretrial detention and its duration.

8. Deprivation of liberty in psychiatric facilities

88. The Law on Psychiatric Care in Georgia provides for the placement of a patient in a psychiatric institution either on a voluntary or involuntary basis, on the condition of informed consent. A person found to have committed a crime but unwilling to undergo treatment voluntarily may be compelled to do so by the court should it so decide. Mental health patients may be released to the care of relatives if a request is made by family members in writing. A special panel of expert medical professionals may also look into the situation of patients at the mental health facilities visited.

89. The Working Group was able to visit the psychiatric unit of the Tbilisi Medical Facility for Remand and Convicted Prisoners No. 18 and the Tbilisi Mental Health Centre. It did not receive any information on cases of arbitrary deprivation of liberty in these facilities.

IV. Conclusions

90. **The Working Group notes the significant developments in institutional and legislative reforms since Georgia declared its independence in 1991. It reiterates the importance of such reforms in dealing with laws relating to deprivation of liberty that were obsolete and contrary to international law. It notes various reforms and developments, including the recent initiation of review of the Administrative Offences Code being carried out by the Criminal Justice Reform Coordination Council with a view to improve procedural and fundamental safeguards for arrested persons. It commends the Government in this regard and encourages it to continue its judicial reforms in order to bring its legislation into line with its obligations under international human rights law.**

91. **The Working Group notes that the problems of deprivation of liberty in Georgia are linked to the lack of independence of the judiciary and the highly influential role of the prosecution over that of the defence.**

92. **Violations of the right to a fair trial seem to be systematic and have distorted the role of judges and magistrates as impartial arbiters. Given the extremely low acquittal rate in court cases, public confidence in the administration of justice is very low.**

93. **The Working Group reiterates the importance of the fundamental entitlements of people who are deprived of their liberty, including ensuring the adversarial nature of trials, the principle of equality of arms, respect for the presumption of innocence, the right to defence and the right to be free from torture and ill-treatment. The right not to be compelled to testify against oneself is also a fundamental safeguard enshrined in international human rights instruments and therefore needs to be respected and protected. Laws and practices should ensure that these rights are safeguarded.**

94. **The Working Group recalls that detainees have the right to a fair and public hearing by an independent and impartial judicial authority, as provided for in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and principles of international customary law.**

95. **The Working Group found cases of overcrowding in prisons, a situation that could adversely affect the health of detainees. The Government should guarantee the right to safety of all prisoners and ensure the elimination of practices of ill-treatment of prison inmates.**

96. The judiciary in Georgia is capable of making fundamental progress by means of its various positive reforms, but should demonstrate its independence and impartiality by ensuring that the right to a fair trial is granted without bias, especially in relation to problematic practices such as the plea bargain. The Working Group received a considerable amount of information that seemed to suggest that the rights of the accused are often minimal in relation to those of the prosecution.

97. The Working Group notes that the Government is well aware of the remaining areas in which there is room for improvement to the system governing deprivation of liberty, and calls on the Government to intensify efforts to address them. It extends its support to the Government in this regard.

V. Recommendations

98. On the basis of its findings, the Working Group recommends that the Government of Georgia:

(a) Consider that the law and practice with regard to remand have resulted in lengthy detention that is disproportionate to the crimes of which a person is accused or convicted; arrest warrants should be shown at the moment of the arrest and detainees should be immediately informed of all their rights;

(b) Ensure the use of alternative measures that do not involve deprivation of liberty in cases where it is justifiable to do so, taking into account the principle of proportionality;

(c) Ensure systematic civil society participation in the monitoring and investigation of police stations and prison facilities; in this regard, it should ensure access to civil society organizations (other than those represented in the national preventive mechanism) to all premises and facilities where people are detained;

(d) Implement training and capacity-building of all State law enforcement agencies on international human rights standards, particularly with regard to the means and mechanisms of crowd control;

(e) Ensure that instances of ill-treatment of prisoners and detainees are eliminated, and that proper and thorough investigation is conducted in such situations in order to hold perpetrators accountable. Investigations should be conducted on allegations and reports of ill-treatment to ensure adherence to State obligations under the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and article 17 of the Constitution of Georgia;

(f) Establish a programme to provide all border guards with initial and ongoing training on the 1951 Convention relating to the Status of Refugees, the national Law on Refugees and all other international and internal legal norms concerning asylum-seekers and refugees;

(g) Ensure protection of all persons at risk of extradition who have expressed a clear intention of claiming political asylum and have not been able to do so in accordance with the established formal procedures in place;

(h) Ensure full implementation of national and international fair trial standards, such as ensuring adequate access of lawyers to their detained clients and that confidentiality of communications between lawyers and clients is protected;

(i) Ensure full enforcement and protection of the right to habeas corpus in accordance with the State party's obligations under article 2 of the Covenant on Civil

and Political Rights and the view of the Commission on Human Rights that habeas corpus is a personal right not subject to derogation, including during states of emergency;³

(j) Ensure full protection of the right to the freedom of opinion and expression, and the right to peaceful assembly and the right to freedom of association, as provided by articles 19 and 22 of the Covenant on Civil and Political Rights and under articles 19 and 26 of the Constitution;

(k) Ensure full respect for the International Covenant on Civil and Political Rights, in particular article 14 thereof, and in particular to guarantee the impartiality of the judicial system and strengthen the rule of law to build confidence in the independence of the judiciary;

(l) Ensure the adversarial nature of trials and the principle of equality of arms, and ensure respect for the presumption of innocence and the right to defence;

(m) Consider reducing the maximum sentence for administrative detention of 90 days and provide full due process protections for administrative detainees. Persons taken into custody for administrative offences should be informed without delay of the reasons for detention and of all their rights; be able to notify a third party about their detention; have access to a lawyer of their choosing from the moment of detention; and enjoy access to an independent mechanism to submit complaints about treatment while in police custody;

(n) Ensure the right to a fair trial of administrative detainees by providing adequate time for preparation of an effective defence;

(o) Provide judges with further training on human rights norms and international jurisprudence with regard to international standards of human rights on deprivation of liberty;

(p) Ensure the free and unhampered enjoyment of the right to assembly and to demonstrate, and consider the implications of the amendment made in 2009 to the Law on Assembly and Demonstrations. The Government should consider changing this amendment in the light of the unconstitutional restrictions placed on the right to peaceful assembly;

(q) Implement changes that improve the independence of the judiciary, particularly the process of appointment, discipline and removal of judges.

³ Commission on Human Rights resolution 1994/32.