International Center for Transitional Justice

Assessing the Prospects for Transitional Justice in Georgia

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ICTJ Justice Truth Dignity

Cover Image: Tbilisi, Georgia, September 2012. Students demonstrating in front of Gldani Prison, after footage was released of torture being committed against inmates.

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About ICTJ

ICTJ assists societies confronting massive human rights abuses to promote accountability, pursue truth, provide reparations, and build trustworthy institutions. Committed to the vindication of victims' rights and the promotion of gender justice, we provide expert technical advice, policy analysis, and comparative research on transitional justice approaches, including criminal prosecutions, reparations initiatives, truth seeking and memory, and institutional reform. For more information, visit www.ictj.org

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ACRONYMS

COE	Council of Europe
EU	European Union
ECHR	European Convention on Human Rights
GD	Georgia Dream (political party)
ICTJ	International Center for Transitional Justice
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental organization
OHCHR	Office of the UN High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
UN	United Nations
UNM	United National Movement (political party)
US	United States

Executive Summary

Since Georgia's independence in 1991, successive governments have struggled to deal with endemic corruption, organized crime, and various disputes along its borders, which sometimes sparked into armed conflict. Efforts to combat corruption and organized crime through its "zero-tolerance" policy on crime degenerated into extensive human rights violations. These human rights violations most notably involved torture and ill-treatment in detention, arbitrary arrests, and denial of due process protections, as well as confiscations of property.

After the 2012 parliamentary elections, there have been various attempts to address this past. These included the introduction of amnesties, the rehabilitation of torture victims, a proposed commission on miscarriages of justice; the creation of a unit for land restitution in the Office of the Prosecutor; and criminal proceedings against former senior officials. However, none of these measures proved effective. The proposed commission on miscarriages of justice was criticized and abandoned. Efforts at prosecutions were seen as politically motivated and lacking due process. Institutional reforms effected so far have not realized the desired results. Victims have received little or no support or acknowledgment.

Towards the end of 2015, the International Center for Transitional Justice (ICTJ) was invited to Georgia to consider whether current conditions were conducive to a serious exploration of the past and the implementation of substantive transitional justice steps to reckon with its past conflicts and human rights abuses. ICTJ conducted interviews with key stakeholders and discussed a range of ideas with them.[1]

Interviewees pointed to the need for concerted steps to address the past, but highlighted the lack of political will as an inhibiting factor and noted that, outside of victim communities and organized civil society, the wider public prioritized economic prosperity over addressing past injustices. Nonetheless, victims of torture and property violations continue to push for restoration of property, guarantees of non-recurrence, and institutional reform.

Based on this research and findings, this report assesses the prospects for transitional justice in Georgia and makes recommendations in this regard.

This assessment takes place some seven years after ICTJ last carried out an assessment in Georgia.[2] In 2009 ICTJ stopped short of recommending formal transitional justice steps on the grounds that conditions were not conducive at that stage. This report makes recommendations for several steps for the consideration of Georgians. It does so on the understanding

1 The mission team members were Howard Varney and Patrick Pierce.
2 Magdalena Frichova, ICTJ, "Transitional Justice and Georgia's Conflicts: Breaking the Silence," May 2009, www.ictj.org/sites/default/files/ICTJ-Georgia-Breaking-Silence-2009-English.pdf

that while conditions may not necessarily be perfect, waiting longer may have a deleterious impact on the country. Indeed, ICTJ finds that it is time for concrete and meaningful steps to be taken to address the past as a contribution to reform and nation building.

Recommendations include:

- Hold a national dialogue on the past and the future of Georgia, as an initial step, with the process identifying the possibilities for redressing the past and building the future.
- Conduct a national human rights documentation effort to gather data on past violations for purposes of informing and facilitating redress and accountability through subsequent mechanisms.
- Consider establishing an issue-based truth and nation-building commission, with a relatively short operational duration, to investigate the underlying causes of conflict and abuse and recommend measures to ensure non-repetition.
- Create an independent criminal cases review commission, which complies with the standards highlighted by the Venice Commission, to examine alleged miscarriages of justice and to make a recommendation in each case in relation to a possible retrial or pardon.
- Create a skilled and well-resourced "Independent Investigative Mechanism" that is protected from political interference. The subject-matter jurisdiction should include serious crimes committed by public officials as well as other crimes considered to be priority crimes because of their considerable impact or threat to society; the temporal mandate should include both past and future cases that fall within its subject-matter jurisdiction.
- Devise institutional reforms, to be premised largely on the findings and recommendations of the proposed issue-based truth commission.
- Establish an independent agency or mechanism to reach out to victims; design and implement a comprehensive reparations program for Georgia.

1. General Context

After the collapse of the Soviet Union and following Georgian independence in 1991, the country experienced insurrection and civil war, resulting in its first-elected president, Zviad Gamsakhurdia, fleeing the country in January 1992. A military coup brought former Soviet Foreign Minister Eduard Shevardnadze to head a newly created State Council. In the early 1990s Georgia was shaken by secessionist conflict with South Ossetia and Abkhazia that resulted in ceasefires in 1992 and 1994, respectively. Subsequently, Eduard Shevardnadze was elected as president under the Constitution adopted in 1995.

The second half of the 1990s was mainly characterized by attempts by the Shavardnadze government to combat widespread syndicated crime and corruption. Shevardnadze attempted to establish close ties with the West, maximize the value of Georgia's strategic location, and remove the country's financial and energy dependence on Russia. However, systemic corruption and nepotism penetrated almost every sphere of public life. State institutions were weak and fragile and there was no political will to reform them. In addition to corruption and nepotism, very low salaries and pensions exacerbated the plight of ordinary citizens.

Developments since the Rose Revolution

In November 2003, following general elections that were widely perceived as tainted by fraud in favor of the ruling party, massive popular demonstrations in Tbilisi and other cities led to the resignation of Shevardnadze in the so-called Rose Revolution. New elections brought Mikheil Saakashvili to power in January 2004 and a new majority in Parliament in March 2004.

In order to tackle corruption and organized crime, Saakashvili's government amended the criminal code and implemented significant reforms in law enforcement. These reforms included the dissolution of the former Ministry of State Security, which had been modelled on the KGB,[3] as well as the Ministry of Internal Affairs (MIA) and the Traffic Police, all seen by citizens as the "epitome of state dysfunction."[4] All members of these departments were dismissed and a new MIA and Patrol Police department created.[5] It announced a "zero-tolerance" policy for corruption and organized crime. Amendments to the constitution in 2004 consolidated significant power in the executive, particularly in regards to the judiciary, giving the president authority to chair the High Council of Justice, which enabled him to appoint and dismiss judges.[6]

3 The KGB is the Russian acronym for the Committee for State Security, which was the main security agency for the Soviet Union from 1954 until its breakup in 1991.
4 Matthew Devlin, "Seizing the Reform Moment: Rebuilding Georgia's Police, 2004-2006," *Innovations for Successful Societies*, 2010, 1, https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy_Note_ID126.pdf.
5 Ibid.
6 *See* Constitution of the Republic of Georgia, Art. 73(1)(p) (adopted 24 August 1995, as amended Feb. 2004), https://matsne.gov.ge/ka/document/view/13294. See Karlo Godoladze, "Constitutional Changes in Georgia: Legal Aspects," Humanities and Social Sciences Review 443 (2013).

The new government included young western-educated reformers with an ambitious development agenda. The newly elected president and government prioritized the combating of widespread corruption and criminality, liberalizing the state-dominated economy, and strengthening state institutions. The impact was immediately noticeable. Great strides were made in eliminating pervasive corruption. Confidence in the prospects of the country grew and state coffers swelled as foreign and local investment increased. In 2010 Georgia was identified by the World Bank as a leader in the fight against corruption and nepotism.[7]

The Zero-Tolerance Policy

In 2006 the Georgian government announced a zero-tolerance policy for organized crime. The Georgian Parliament introduced several amendments to the Criminal Code of Georgia, outlawing the existence of the "thieves-in-law" and any association with the criminal underworld and introducing severe prison sentences for such crimes.[8] In 2014, the European Court of Human Rights (ECHR) in *Ashlarba v. Georgia* ruled that even though these criminal practices were not specifically defined they were nonetheless consistent with the European Charter of Human Rights because they were easily foreseen as criminal practices.[9]

This approach significantly reduced crime in Georgia,[10] which was reportedly ranked among the top ten safest countries in the world in 2014.[11] However, in a context of increasing authoritarianism, the zero-tolerance policy resulted in high numbers of arrests and many abuses. There was a substantial increase in prisoners in Georgia's penitentiaries, with the highest number of inmates reached in 2011, 24,114.[12] Georgian courts were accommodating nearly every request by the prosecution for arrest warrants. Between 2008 and 2012 the courts approved pre-trial detention in more than 90 percent of cases.[13] From 2013, the number of pre-trial detentions decreased significantly to 65 percent of cases, suggesting that judges were applying their minds to the necessity of pre-trial detention.[14]

While steps taken under the zero-tolerance policy generally enjoyed high support among the public, they resulted in serious lapses in due process and violations of human rights, and infringed on the separation of powers doctrine. The weak system of checks and balances meant that there was little to restrain authoritarian tendencies from returning to Georgia's government.[15]

A few years after Saakashvili took office, public trust in government plummeted. Practices typical of a "particularistic" society—in which nepotism was rife—undermined transparency and accountability. The ruling elite became increasingly intolerant of critics.[16] The Saakashvili administration prioritized a strong state over human rights. Building a strong state with a strong security sector was seen by the Saakashvili government as the answer to external and

7 The World Bank, *Fighting Corruption in Public Services: Chronicling Georgia's Reforms*, 2012.
8 Gavin Slade et al, "Crime and Excessive Punishment: The Prevalence and Causes of Human Rights Abuse in Georgia's Prisons," Open Society Georgia Foundation, 2014, www.osgf.ge/files/2015/Publication/Final_Report_ENG.pdf
9 Chamber Judgment, [2014] ECHR 775, 45554/08 – Legal Summary, [2014] ECHR 884, [2014] ECHR 962: http://swarb.co.uk/ashlarba-v-georgia-echr-15-jul-2014-4/
10 US State Department, Georgia 2014 Crime and Safety Report, 2014, www.osac.gov/pages/ContentReportDetails.aspx?cid=15207
11 *Agenda.GE*, "Georgia: Among top 10 safest countries to live," July, 7, 2014, http://agenda.ge/news/17480/eng
12 See Criminal Justice Statistics of the National Statistics Office of Georgia, webpage, http://geostat.ge/index.php?action=page&p_id=602&lang=eng
13 Ivóna Bieber et al, "Promoting the Reform of Pre-trial Detention in CEE FSU Countries– Introducing Good Practices," Hungarian Helsinki Committee, 2013, http://helsinki.hu/wp-content/uploads/Pre-trial_detention_in_CEE-FSU_countries.pdf
14 US State Department, OSAC, "2014 Human Rights Report: Georgia," 2015, www.state.gov/j/drl/rls/hrrpt/2014/eur/236526.htm
15 Gavin Slade et al, "Crime and Excessive Punishment."
16 International Crisis Group, "Georgia: Sliding towards Authoritarianism?," Europe Report No. 189, December, 19 2007.

internal challenges. Checks and balances were stripped away and government became highly centralized while Parliament was emasculated.[17]

The government's failure to address demands from the opposition and civil society for transparency and accountability led to protests in November 2007, which resulted in a violent crackdown. A government crackdown on political opponents and a raid at Imedi TV forced Saakashvili to step down as president in the face of mounting domestic and international criticism. He sought a fresh mandate to govern and was re-elected as president in January 2008.

In 2008, the country was seriously affected by a short but disastrous conflict with Russia over South Ossetia that resulted in significant economic damage and thousands of new internally displaced persons (IDPs). In the months following the August 2008 conflict, the opposition's criticisms of Saakashvili's democratization record and the war, with its disastrous consequences, intensified. Opposition parties, led by an organization called the People's Assembly, unsuccessfully backed their demand for Saakashvili's resignation with a strategy of daily street protests launched in April 2009. Their core demands were accountability and transparency in governance, genuine freedom of the press, independence of the judiciary, uprooting of corruption, reform of the electoral code, and the limiting of presidential powers.[18]

In 2010 local municipal elections were held, and although the Organization for Security and Co-operation in Europe (OSCE) reported that the elections "marked evident progress towards meeting OSCE and Council of Europe [democratization] commitments," it expressed concern that "significant shortcomings" remained, particularly the abuse of administrative resources for candidates favored by the government.[19]

In May 2011, the People's Assembly launched large-scale demonstrations in Tbilisi that were forcibly dispersed by Georgian security forces, resulting in several casualties. The excessive force employed was roundly condemned locally and abroad. An internal probe by the Ministry of Interior resulted in 16 police officers being fired or disciplined.[20]

17 Ibid.
18 Jim Nichol, "Georgia [Republic]: Recent Developments and U.S. Interests," June 21, 2013.
19 Ibid.
20 UN OHCHR, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, mission to Georgia (A/HRC/20/27), June 2012.

2. Major Human Rights Violations Between 2004 and 2012

Miscarriages of Justice

In combating corruption, the prosecution authorities came to completely dominate the criminal justice system, dictating their will to a subservient judiciary. From 2008-2012 the courts approved pre-trial detention in more than 90 percent of all cases.[21] In 2009 and 2010, less than 0.1 percent of cases resulted in acquittals.[22]

According to a 2011 report, Georgia had the fourth-highest number of prisoners per capita in the world, at a rate of 547 prisoners per 100,000 persons.[23] Whole-scale abuse of the plea-bargain system facilitated abnormally high conviction rates, as accused persons sought to avoid serving time under appalling prison conditions. Plea bargains most commonly resulted in the imposition of monetary fines. The fairness of trial proceedings in criminal and administrative proceedings were questioned by local and international human rights organizations, as well as the Council of Europe and the US State Department.[24]

Judgments were rarely adequately substantiated.[25] The abusive practice of extracting large "donations" for extra-budgetary funds in order to avoid jail penalties became commonplace.[26] These abuses affected a range of people, from those accused of committing ordinary crimes to political opponents of the government who were prosecuted for political reasons.[27]

Torture and Mistreatment in Detention

During the years of Saakashvili's administration thousands of complaints of torture and mistreatment were made amidst extensive overcrowding in prisons. Inexperienced and overstretched police and prison officers claimed that they had to resort to torture to maintain discipline and extract confessions.[28] However, these practices were condoned at the highest levels.[29] An Open Society Foundation report on Georgia, based on interviews of 1,200

21 Coalition for an Independent and Transparent Judiciary, "Study of the Preventive Measures in Administrative Law Proceedings: Analysis of Legislation and Practice," www.coalition.org.ge/article_files/142/Study%20of%20The%20Preventive%20Measures%20in%20Criminal%20Law%20Proceedings.pdf (last accessed 8 Aug 2016).
22 Transparency International – Georgia, "Plea Bargaining in Georgia: Negotiated Justice," December 2010, http://transparency.ge/sites/default/files/post_attachments/Plea%20Bargaining%20in%20Georgia%20-%20Negotiated%20Justice.pdf
23 Roy Walmsley, International Center for Prison Studies, "World Prison Populations" (ninth edition), 2011.
24 See, for example, Freedom House, "Nations in Transit: Georgia (2012); Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Georgia from 18 to 20 April 2011," Council of Europe, June 30, 2011; US State Department, Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights, Practices for 2012: Georgia," 2012.
25 Ibid.
26 Gavin Slade et al, "Crime and Excessive Punishment
27 Ibid.
28 Interview with Nika Jeiranashvili, human rights program manager, Open Society Georgia Foundation.
29 Gavin Slade et al, Crime and Excessive Punishment."

prisoners and former prisoners, most of whom were convicted of ordinary criminal charges, found that torture was systematic and rose to the level of state policy.[30]

Just days ahead of the country's parliamentary elections in 2012, televised images of the brutal treatment of detainees at Georgia's Prison No. 8 shocked Georgian society. Video footage of male prisoners being beaten and raped with broomsticks prompted days of protests and led to the resignations of the Interior Minister and the Minister of Corrections.[31] The footage demonstrated the alarming situation in Georgian penitentiaries, which had been frequently criticized by the Ombudsman,[32] who wrote about the issue in his annual reports.[33] This scandal was cited as one of the main reasons for the defeat of the United National Movement (UNM) in the 2012 elections.[34]

Confiscation of Property

Numerous former business owners claimed that officials from the former UNM government had arbitrarily deprived them of their properties. The Economic Policy Research Center reported that the government used criminal proceedings to seize property as a means of exerting pressure on businesses.[35] It is estimated that officials seized land and property, valuing up to $100 million, through various means.[36] In 2012, the Public Defender confirmed that cases of unlawful asset seizure were frequent.[37] Many allegations have been made involving the abuse of state power to force business owners to sell land at artificially low prices or to "donate" the land to the government. Often this was done in exchange for favorable treatment in other matters, including for criminal charges (legitimate or not) to be dropped.[38]

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A large number of complaints were made against the former administration for improperly using its eminent domain (the right of a government or its agent to expropriate private property for public use, with payment of compensation) to effectively seize property at unreasonably low prices. There are numerous documented cases of valuable private property being abandoned or gifted to the government, in particular to the Ministry of Economy, mainly in touristic areas, like along the Black Sea.[39] Between 2004 and 2012, Transparency International (Georgia) reported cases of private individuals and companies giving valuable land to the state free of charge or for a token price of one lari (60 cents).[40] In virtually all of these cases it appears that private citizens abandoned their properties under duress.[41]

30 Ibid.
31 Giorgi Lomsadze, "Georgia: Exposure of Prison Torture Sparks Changes, but How Deep?," September 24, 2012, www.eurasianet.org/node/65948
32 The office of the Public Defender (Ombudsman) was established in 1997 based on the 1996 Organic Law on the Public Defender of Georgia. The Ombudsman is tasked with monitoring the observance of human rights and freedoms in Georgia and its jurisdiction. The office also advises the government on steps to protect human rights based on international standards and national laws and engages in educational activities on topics of human rights. See "Functions of the Public Defender (Ombudsman) of Georgia," www.ombudsman.ge/en/public-defender/mandati
33 Public Defender of Georgia, Reports to Parliament: http://ombudsman.ge/en/reports/saparlamento-angarishebi
34 *See, for example*, Simon Shuster, "Inside the Prison that Beat a President: How Georgia's Saakashvili Lost His Election," *TIME*, October 2, 2012; *CNN*, "Georgia's Ruling Party Concedes Defeat in Parliamentary Elections," October 3, 2012.
35 Economic Policy Research Center, "Detection of Cases of Elite Corruption and Governmental Pressure on Business," 2012, 13-14.
36 US State Department Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights Practices for 2012: Georgia," 2013.
37 Ibid.
38 Economic Policy Research Center, "Detection of Cases of Elite Corruption and Governmental Pressure on Business," 2012.
39 Association Green Alternative et.al, "Stripped Property Rights in Georgia: Third Report," March 2012.
40 Transparency International – Georgia, "Voluntary Gifts or State Robbery?," April 22, 2013; and "Voluntary Gifts or State Robbery? The Years 2008-2012," May 7, 2013.
41 Ibid.

3. Georgia After the 2012 Parliamentary Elections

In 2012, the Georgian Dream Party, a new political coalition, set up by prominent businessman Bidzina Ivanishvili, won the parliamentary elections, notwithstanding serious attempts by the government to disqualify Ivanishvili from running.[42] These included stripping Ivanishvili of his citizenship and placing his cable and satellite TV Company, Global TV, under state management.

The elections were declared by the OSCE and the Council of Europe (COE) as free, fair, and reflecting the will of the people. They marked the first peaceful transfer of power in Georgia since it had regained independence.[43]

Ivanishvili became prime minister and his government immediately set about amending the constitution to increase the power of Parliament. The State Constitutional Commission was established in October 2013 in order to prepare the draft Constitutional Law on the revision of the Constitution of Georgia. It was set up by the parliamentary decree "On the Establishment of the State Constitutional Commission".[44]

Other priorities included depoliticizing law enforcement, pursuing free-trade agreements, integrating with the European Union and NATO, conducting dialogue with Russia to remove embargos on Georgian products and to reintegrate the breakaway regions of Abkhazia and South Ossetia, reducing poverty, and promoting a free market economy.

Following the 2012 Parliamentary elections a large number of municipal officials were replaced, starting with 46 district governors (Gamgebeli) and 24 chairpersons of local councils (Sakrebulo).[45] As a result the former ruling party, the UNM, lost its majority at the local level of government.[46]

The change in government was not accompanied by an in-depth review of the past nor fundamental reforms. The main message of the Georgian Dream campaign had been "restoration of justice" for politically motivated crimes, loss of property, and abuses in the prison system. While some former leaders and officials were prosecuted, according to a leading business organization, little else was done to address the past.[47]

42 Jim Nichol, "Georgia [Republic]: Recent Developments and U.S. Interests," June 21, 2013.
43 OSCE, "Georgia, Parliamentary Elections, Final Report," October 1, 2012, www.osce.org/odihr/98399
44 State Constitutional Commission, "About," webpage, http://constcommission.parliament.ge/en/about
45 International Society for Fair Elections and Democracy, "Monitoring of Post-Election Processes – Staff Changes, Protest Rallies, Legal Proceedings in Local Self-Government Authorities," Second Report, February 12, 2013.
46 Ibid.
47 Interview with Archil Bakuradze and Natia Katsiashvili, chairman and executive director (respectively), of the Business and Economic Centre.

4. Presidential Elections of 2013 and Subsequent Developments

The presidential elections held in October 2013 gave an outright victory to the Georgian Dream (GD) candidate Giorgi Margvelashvili, with over 62 percent of votes. The results served to consolidate the GD, with the party controlling the presidency and holding a majority in Parliament. [48] The inauguration of Margvelashvili as president marked the entry into force of a new Constitution, which significantly reduced the president's powers while adding to those of the prime minister.[49]

In November 2013, Irakli Garibashvili became prime minister, replacing Ivanishvili, who left his position voluntarily. The opposition and civil society had criticized Ivanishvili for his informal style of governance.[50] However, in 2014, relations between the GD and Margvelashvili significantly deteriorated over differences in their approaches to governance and the handling of the economy, leading the president to distance himself from the GD and its leaders.[51]

Regrettably, some serious patterns of abuse persist under the GD administration, including torture and mistreatment in detention and use of excessive force by law enforcement.[52] Prosecutors appear much less willing to pursue cases involving current officials than against former officials.[53] Despite numerous complaints of torture and mistreatment, only four prison officials were convicted of mistreatment in 2015.[54] This apparent disparity in prosecution priorities, along with procedural issues, has raised concerns that certain prosecutions are aimed at discrediting the Saakashvili administration.[55]

48 Jim Nichol, "Georgia's October 2013 Presidential Election: Outcome and Implications," Congressional Research Service, November 4, 2013.
49 Constitution of Georgia, Constitutional Law of Georgia, https://matsne.gov.ge/ka/document/view/1080890
50 Alexander Scrivener, "Georgia's Parliament: A Rubber Stamp No Longer?," Georgian Institute of Politics, March 2016.
51 Liz Fuller, "Georgian President Remains a Divisive Figure," Radio Free Europe, February 23, 2016.
52 Thomas Hammarberg, "Georgia in Transition: Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges," European Union, September 2013. See also US Department of State, "2015 Human Rights Reports: Georgia," www.state.gov/j/drl/rls/hrrpt/2015/eur/252849.htm
53 Ibid.
54 Ibid.
55 Johanna Popjanevski, "Retribution and the Rule of Law: The Politics of Justice in Georgia," Central Asia Caucasus Institute, June 2015, http://silkroadstudies.org/resources/pdf/SilkRoadPapers/2015-popjanevski-retribution-and-the-rule-of-law-the-politics-of-justice-in-georgia.pdf

5. Post-2012 Measures to Address the Past

The Introduction of Amnesties

With the release of the torture videos just before the 2012 election and a flood of complaints alleging violations of due process, the incoming government was under enormous pressure to respond expeditiously. A significant number of persons complained to the new government that they had been imprisoned for political reasons.[56] However, it was not immediately apparent which cases were unlawful and which legitimate. The use of plea bargains coupled with the lack of detail in judgments meant that there was little foundation that could be used to review convictions.[57]

In this context there appeared to be two options, issuing pardons or granting amnesties. In Georgia, as in most countries, the president enjoys a prerogative power under the constitution to grant pardons. Amnesties, on the other hand, are generally authorized by legislation and usually apply to defined groups, rather than named individuals.

The ultimate decision to pass an amnesty law was political, as Saakashvili was still president for another year and unlikely to pardon those imprisoned under his government. In addition, many who claimed they were unlawfully convicted reportedly did not want to petition for a pardon because they saw it as implicit recognition of guilt.[58]

Accordingly, the Human Rights and Civil Integration Committee of Parliament set up a special "working group on the deliberation of issues relating to the persons politically imprisoned or politically persecuted." The group included representatives from NGOs, in some cases the same NGOs that submitted lists of names to be considered. After receiving proposals, it deliberated and came up with a list of political prisoners. The criteria for deciding which cases were political were not made public.[59]

Two months after the election in December 2012, parliament adopted a resolution naming 190 individuals as "persons incarcerated on political grounds" and 4 others as "persons persecuted on political grounds," and resolved to take legal measures to absolve them from responsibility and release them from any penalty.[60] On December 28, 2012, the new ruling coalition launched a broad amnesty in response to widespread allegations of ill-treatment of

56 Gavin Slade et al, Crime and Excessive Punishment.
57 Besarion Bokhashvili, "Georgia," in *Effective Criminal Defence in Eastern Europe*, Ed Cape and Zaza Namoradze, eds. (Soros Foundation: Moldova, 2012), www.opensocietyfoundations.org/reports/effective-criminal-defence-eastern-europe
58 Venice Commission, "Opinion on the Provisions Relating to Political Prisoners in the Amnesty Law of Georgia, Adopted by the Venice Commission at its 94th Plenary Session," March 8–9, 2013.
59 Ibid.
60 Civil Georgia, "Parliament Recognizes 215 Persons as 'Political Prisoners and Exiles,' December 5, 2012, www.civil.ge/eng/article.php?id=25519&search=

prisoners in Georgian prisons.[61] The amnesty resulted in a substantial decrease in the prison population, from 24,114 prisoners in 2011 to 9,093 prisoners in 2013.[62]

The Venice Commission,[63] in its opinion on the Amnesty Law, concluded that "an amnesty by Parliament must comply with certain fundamental principles of the rule of law, namely legality (including transparency), the prohibition of arbitrariness, non-discrimination, and equality before the law. Among other faults, the Venice Commission pointed out that the law failed to define "political prisoner," leading to arbitrary implementation. The commission stated that "Article 22 of the Amnesty Law failed to comply with these principles. Nevertheless, it is undisputable that it would be contrary to the principles of legal certainty and non-retroactivity of criminal law if the persons who have been released were to be returned to prison."[64]

While the records of those listed as political prisoners were expunged, the rest of those released still have criminal records. Some political prisoners reportedly received letters of apology from the Ministry of Justice before their release, but those unlawfully convicted of ordinary crimes have received no specific recognition or apology.

Further, the commission, in noting that there were remaining prisoners who alleged that their sentences were politically motivated, recommended a mechanism to review those cases under the principles outlined in its opinion.[65] There was an attempt to implement this recommendation by establishing a review commission on miscarriages of justice, but as will be discussed below, this proposal was heavily criticized by the commission.

While the records of those listed as political prisoners were expunged, the rest of those released still have criminal records, notwithstanding allegations of severe deprivation of fair-trial rights. Some political prisoners reportedly received letters of apology from the Ministry of Justice before their release, but those unlawfully convicted of ordinary crimes have received no specific recognition or apology.[66]

Proposed Commission on Miscarriages of Justice

After the 2012 parliamentary elections, the new government prepared a draft law on the creation of a temporary (three-year), nonjudicial independent state commission on miscarriages of justice. The aim of the bill was to restore law and justice for the thousands of Georgian citizens, foreigners, or stateless persons who had filed alleging wrongful prosecution and/or unjust conviction of criminal offences.[67]

The proposed commission was meant to review the criminal convictions of persons who claimed that they had been convicted due to a miscarriage of justice and ostensibly to make a final decision on whether a conviction should be overturned.[68] Miscarriage of justice was de-

61 The Law of Georgia on Amnesty, December 28, 2012, https://matsne.gov.ge/ka/document/view/1819020
62 Institute for Criminal Policy Research, "World Prison Brief: Georgia," www.prisonstudies.org/country/georgia (accessed 15 Aug. 2016),
63 The primary task of the European Commission for Democracy through Law (known as the Venice Commission) is to provide states with non-binding legal advice in the form of legal opinions on draft legislation or legislation already in force that is submitted to it for examination. It also produces studies and reports on topical issues, www.venice.coe.int/WebForms/pages/?p=01_activities
64 Venice Commission, "Opinion."
65 Ibid., at para 59.
66 Interview with Lela Tsiskarishvili, executive director, The Georgian Center for Psychological and Medical Rehabilitation of Torture Victims.
67 Draft Law Submitted to Joint Opinion of the COE Venice Commission for expertise by and the Ministry Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia, Opinion No. 728/2013 (adopted 17 June 2013).
68 Ibid.

fined to include a failure to meet certain conditions of evidence, a manifest and grave breach of procedural rights that substantially influenced the outcome of the case or if the conviction was the result of a plea bargain in which the judge "manifestly disregarded certain articles of the Criminal Procedural Code."[69] The draft law would have also tasked the commission with "adopt[ing] and submit[ting] to the Parliament of Georgia and public authorities of justice system its opinions on possible systemic causes of miscarriages of justice, as well as recommendations for elimination and prevention of such miscarriages in the future."[70]

The Minister of Justice requested that the Venice Commission and the Director General of Human Rights and Rule of Law of the Council of Europe to provide an opinion on this draft law. According to the commission, the very idea of a process of massive examination of possible cases of miscarriage of justice by a nonjudicial body implicated the separation of powers doctrine and the independence of the judiciary, as enshrined in the Georgian Constitution.[71]

The Venice Commission also concluded that the mere re-examination of cases without a profound reform of the judiciary would be insufficient and any such measure would have to be accompanied by a wider reform of the judiciary, in order to strengthen its independence and impartiality. Finally, it advised that the rule of law could be undermined by the adoption of a measure that might be perceived as politically motivated.[72] However, the commission did not totally reject the idea of a mechanism to address the miscarriages of justice and made detailed recommendations on how the proposed law could be adjusted to comply with European standards.[73] It also provided examples of similar, but compliant, commissions in Europe.[74]

In addition to the commission's criticisms, policy makers could never agree on the temporal scope for the proposed mechanism, with some wanting a mandate of just the recent past while others wished it would go back to the 1990s.[75] The government ended up concluding that financial resources were not available to compensate all who had suffered and shelved this initiative.[76]

Some feel that the process to redress miscarriages of justice has been completely abandoned.[77] However, the government is apparently open to considering options that would avoid a large compensation payout. The prime minister has reportedly asked Michael O'Boyle, special advisor to the government of Georgia in human rights, to look at various models of compensation that would be affordable. [78]

Rehabilitation

Limited measures have been taken by the Georgian government to redress the harm sustained by victims. The Georgian government operates rehabilitation programs, including psychosocial services, for the prison population generally.[79] It is working toward improving and

69 Ibid, at 8.
70 Draft Law on the Creation of a Temporary Commission on Miscarriages of Justice (in Georgian), https://matsne.gov.ge/ka/document/view/1924705
71 Venice Commission, "Joint Opinion of the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia." Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) on the basis of comments by Mr Nicolae ESANU (Member, Moldova), Mr James HAMILTON (Substitute member, Ireland), Mr Angel SANCHEZ NAVARRO (Substitute member, Spain), Ms Janne KRISTIANSEN (Expert).
72 Venice Commission, "Joint Opinion of the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia," Opinion No. 728/2013 (adopted 17 June 2013).
73 Ibid.
74 Ibid.
75 Interview with Nino Elbakidze, executive director, and other members of the management team at Article 42.
76 Ibid.
77 Interview with Cristian Urse, head of the mission, and Sophio Tsakadze, senior project officer, European Union/Council of Europe Joint Project "Support to the Georgian Bar Association."
78 Interview with Sopo Japaridze, assistant to the prime minister of Georgia on human rights and gender equality issues.
79 Council of Europe, "Criminal Justice Responses to Prison Overcrowding in Eastern Partnership Countries," 2016, 206–210.

standardizing them under the framework of the country's EU accession. For instance, the Ministry of Justice established a Crime Prevention Centre to help with the reintegration and rehabilitation of prison victims.[80] Some felt that the center would have been more effective if it had been an interagency project, rather than one based solely with the Ministry of Justice.[81] The government has pointed to those programs in defense of its lack of specific rehabilitation services for victims of torture in prison, for instance in a formal response to a report on torture by the Council of Europe.[82] However, experiences in other contexts demonstrate that torture victims have reparative needs that are distinct from those of ordinary prisoners and unlikely to be adequately met by generalized rehabilitation services.

Property Violations

Attempts to address property-related abuses have included the establishment of a Special Department for Land Restitution in the Office of the Prosecutor. In May 2015, a government decree directed that property illegally deprived from citizens should be returned if it is still in the state's possession.[83] Within nine months of the issuance of this decree, 21 cases involving 18 perpetrators and 24 victims were resolved.[84] There is currently no land commission or land court in Georgia.[85]

Criminal Proceedings against Former Senior Officials

According to the 2014 US State Department Report on Georgia, since the 2012 parliamentary elections, prosecution authorities have charged some 45 mid- to high-level former government officials.[86] These include Saakashvili; Merabishvili; the general secretary of the opposition party, UNM; former ministers of Internal Affairs, Defense, Justice, and Health; heads of departments; and the former mayor of Tbilisi. They were charged with various crimes, including obstruction of justice, misappropriation of government funds, money laundering, blackmail, privacy intrusion, and abuse of power. Of these cases, 15 involved high-level officials, 4 of whom were charged with torture or other physical abuse. [87]

Saakashvili and other high-ranking officials were also charged in 2015 with exceeding their official authority in relation to the crackdown on protests in 2007 and the raid against Imedi TV. Prosecutions for law-enforcement abuses under the previous administrations have continued through 2015, which has seen the conviction of a former deputy chief of police for an extrajudicial killing in 2006. In February 2015, 11 current and former officials from the Ministry of Internal Affairs were arrested for their involvement in the killing of a human rights activist.[88]

The GD government has been accused by the NATO Secretary General, the EU Commission President, and the US Secretary of the State, among others, of politically motivated prosecutions against UNM members. The Parliamentary Assembly of the Council of Europe adopted resolutions in 2014 and 2015 criticizing the abuse of preliminary detention against former UNM high officials. French, Greek, and Austrian courts have rejected the extradition of various senior officials on the grounds of political persecution. Interpol has cancelled red notices for

80 Ibid. at 209.
81 Interview with Lela Tsiskarishvili.
82 Council of Europe, "Response of the Georgian Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its Visit to Georgia from 1 to 11 December 2014," CPT/Inf (2015) 43, December 15, 2015.
83 Order of the Minister of Georgia No. 62, February 13, 2015 (in Georgian), https://matsne.gov.ge/ka/document/view/2728207
84 Interview with Georgi Gogadze, deputy chief prosecutor; Natia Mezvrishvili, head of the Department of Supervision Over Prosecutorial Activities; Givi Bagdavadze, head of the International Co-operation Unit; and Office of the Chief Prosecutor.
85 Interview with Gia Gvilava, project manager, Judicial Monitoring and Legal Advice Program, Transparency International.
86 US State Department, "2014 Human Rights Reports: Georgia," 2015, www.state.gov/j/drl/rls/hrrpt/2014/eur/236526.htm
87 Ibid.
88 US State Department Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights Practices for 2015: Georgia," www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper

Saakashvili, former Justice Minister Adeishvili, and former Defense Minister Kezerashvili.[89] The Council of Europe's Committee for the Prevention of Torture raised concerns about the independence of investigations conducted by officials from the same ministry as the accused and reported procedural shortcomings in investigations, including "delays in collecting and securing evidence, failure to question witnesses, and initiating investigations under inappropriate sections of the criminal code."[90] The Parliamentary Assembly of the Council of Europe adopted resolutions in 2014 and 2015 criticizing the abuse of preliminary detention against former UNM high officials. [91] The European Court of Human Rights found in the case of *Merabishvili v. Georgia* that Georgia had violated Article 18 (restrictions for unauthorised purposes) of the European Convention on Human Rights, read together with Article 5 § 1 (deprivation of liberty).[92]

Accountability for Torture and Other Serious Crimes

Prosecutors allege that since October 2012 the Office of the Public Prosecutor has received approximately 10,000 complaints of abuse against state officials, including violent offences.[93] Because of this high number, the Office of the Public Prosecutor had to prioritize and chose to focus on cases dealing with illegal deprivation of property, improper or wrongful criminal proceedings, and cases of assault and torture involving law enforcement personnel, including prison authorities.[94] Notwithstanding this focus, the Georgian authorities have been accused of not systematically holding perpetrators of torture accountable.[95]

The Ivanishvili administration prosecuted several prison and police officials for torture in 2013.[96] However, the sanctions imposed were minimal and did not meet the standards of domestic or international law, nor did they meet public expectations. Many of the same procedural problems that led to the miscarriage of justice cases plagued these cases, including flawed plea bargains that led to significantly lighter sentences. [97] Moreover, the continued presence of officials implicated in earlier abusive practices in key decision-making positions compromised the effectiveness of the prosecutorial efforts.[98] Due to the short sentences and prevalence of plea bargains, many in the public perceived these prosecutions as politically motivated and not as part of a meaningful accountability process.[99] The concern has been raised that some of the key masterminds behind the torture have not been investigated and have yet to face justice.[100] Supporters of the previous government consistently deny the severity of the torture and miscarriages of justice.[101]

While some hold the view that it is already too late to launch successful prosecutions, there have been recent efforts to focus on torture cases and other past abuses.[102] In 2015 the Office of the Public Prosecutor created the Department to Investigate Offenses Committed in the Course of Legal Proceedings, to address past and current cases of corruption, beatings, and

89 Ibid.
90 Council of Europe, "Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 1 to 11 December 2014," December 15, 2015, 6.
91 Resolution 2015: The Functioning of Democratic Institutions in Georgia, Parliamentary Assembly of the Council of Europe, art. 5.4 (1 Oct 2104) and Resolution 2077: Abuse of Pretrial Detention in States Parties to the European Convention on Human Rights, Parliamentary Assembly of the Council of Europe, art. 7.2 (1 Oct. 2015).
92 App. No(s). 72508/13, Judgment Date of June 14, 2016, http://hudoc.echr.coe.int/eng#{"fulltext":["merabishvili"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-163671"]}
93 Interview with Georgi Gogadze, Natia Mezvrishvili, and Givi Bagdavadze.
94 Ibid.
95 Tsira Chanturia, "Georgia's Decade-Long Challenges of Tackling Torture," Open Society Georgia Foundation, May 2015, www.osgf.ge/files/2015/Publication/EU-Geirgia%20Association%20/Angarishi_A4_2.pdf
96 Ibid.
97 Ibid.
98 Ibid.
99 Interview with Archil Bakuradze and Natia Katsiashvili.
100 Interview with Besarion Bokhashvili, national program officer, UN OHCHR in Georgia.
101 Ibid.
102 Interview with Ucha Nanuashvili, public defender (Ombudsman); Paata Beltadze, first deputy public defender; Natia Katsitadze, deputy public defender; Public Defender's (Ombudsman) Office

torture.[103] This unit is made up of 10 investigators, 4 prosecutors, and 4 victim and witness coordinators. [104] According to Giorgi Gogadze, its deputy chief prosecutor, by the end of 2015 numerous individuals, including high-ranking officials, were either under investigation or convicted of various crimes.[105] However, this assertion has been disputed as inaccurate.[106]

Secret Surveillance

Shortly after the 2012 parliamentary elections, the Georgian Ministry of Internal Affairs revealed that it had unearthed some 26,000 audio and visual recordings of meetings and discussions of numerous politicians, journalists, civil society representatives, and citizens dating back to 2007 made without court approval.[107] Recordings included footage of private lives apparently recorded for purposes of blackmail.[108] Twelve officials from the Ministry of Internal Affairs were arrested and charged with abuse of power and illegal surveillance.[109]

In June 2013 the government created a commission known as the Special Commission on Illegal Surveillance, composed of representatives from the government and civil society, to establish a policy to guide the handling of the tapes. This commission oversaw the destruction of private audio and video recordings, mostly of a sexual nature.[110]

Ensuring the protection of personal data and controlling illegal surveillance was one of the GD coalition's main election promises. Currently, wire-tapping regulations permit direct access to private conversations without a court order and all service providers are required to make available their "black box" servers to the government.[111] Since the reform process was stalled in 2014, several civil society organizations started a campaign called "This Affects You – They Are Still Listening," which pushed for legislation to uphold the right to privacy.[112] This group was critical of the law providing for a Personal Data Protection Inspector and filed a lawsuit in the Constitutional Court seeking to strike down those clauses that allow law enforcement authorities to retain direct and unimpeded real-time access to the data of electronic communications companies.[113] The case was successful and the offending regulations were declared unconstitutional. Parliament was directed to repeal the law in 2017 and adopt new legislation.[114]

Institutional Reforms

One major challenge to addressing miscarriages of justice and torture in Georgia is the continuing presence in power of mid-level officials who were involved in the violations. Key institutions among the three branches of government have not been sufficiently reformed. As a result, the executive was able to exert undue influence over the judiciary and the criminal

103 Government of Georgia,"Department to Investigate Offenses Committed in the Course of Legal Proceedings Is Being Created in the Office of the Chief Prosecutor of Georgia," January 30, 2015, http://pog.gov.ge/eng/news?info_id=627. See also *Agenda.ge*, "12 cars illegally seized by ex-high officials returned to owners," September 24, 2015, http://agenda.ge/news/43072/eng
104 Interview with Giorgi Gogadze, deputy chief prosecutor.
105 Ibid.
106 Interview with Giorgi Burjanadze, program manager, Open Society Georgia Foundation.
107 US Department of State, "Country Report on Human Rights Practices 2013 - Georgia," February 27, 2014, http://www.ecoi.net/local_link/270713/387458_en.html
108 Ibid.
109 Ibid.
110 Ibid. See also: Democracy and Freedom Watch, "Georgia Introduces Stricter Regulation of Secret Surveillance," August 5, 2014, http://bit.ly/10w5Bws; and Institute for Development of Freedom of Information, "Regulating Secret Surveillance in Georgia: 2013-2015," June 9, 2015, http://bit.ly/1BWsU50
111 Interview with Nika Jeiranashvili.
112 "This Affects You – They Are Still Listening: Beselia Popkhadze Sesiashvili's draft is a step backwards for protection of civil liberties," November 24, 2014, https://gyla.ge/eng/news?info=2356; and Transparency.ge, "Nine threats to your personal life stemming from the new legislation on secret wiretapping," December 23, 2014, http://transparency.ge/en/blog/nine
113 Institute for Development of Freedom of Information, "Regulating Secret Surveillance in Georgia: June 2015–March 2016," https://idfi.ge/public/upload/Meri/Surveillance-Report-06-04-2016-t.i.pdf
114 Interview with Giorgi Chitidze, human rights program coordinator, Open Society Georgia Foundation.

justice system.[115] Notwithstanding gradual reforms of the criminal justice system, the lack of adequate and effective investigation of wrongdoings committed by law enforcement agencies has significantly eroded the prospects of successful, substantial reform.[116]

Some security-sector reform has been initiated. In August 2015, in an effort to comply with European Union standards, the much-criticized security services were removed from the control of the Ministry of Internal Affairs.[117] Further, special efforts have been made to implement the recommendations of the Public Defender, especially in respect of prison conditions.[118]

In assessing the proposed "temporary state commission on miscarriages of justice," the Venice Commission recognized that Parliament was looking for a credible means of reviewing inappropriate criminal sentences, given "their assessment that the entire judiciary and prosecution service have participated in this massive alleged miscarriage of justice." [119] The commission recognized an urgent need for the "wider reform of the judiciary in order to strengthen its independence and impartiality."[120] Without such reform, Georgia would keep repeating this cycle of politically motivated prosecutions followed by amnesties.

The Saakashvili government embarked on a radical and quick lustration process targeting the police service. However, the massive dismissal of police officers was mainly based on the subjective judgement of a few individuals trusted by the president, without proper procedures.

Judicial reform remains on the Georgian government agenda, as highlighted in the National Human Rights Strategy.[121] There have been some positive developments that will contribute to building the independence of the Office of the Public Prosecutor, but international observers, including the COE, note that there is a long way to go.[122] Until September 2015 the prosecution service was part of the executive branch and the chief prosecutor was appointed by the president. Following reforms, the chief prosecutor is now elected by a council of prosecutors, chosen from three candidates shortlisted by the Minister of Justice, subject to parliamentary approval.[123]

The Saakashvili government embarked on a radical and quick lustration process targeting the police service. However, the massive dismissal of police officers was mainly based on the subjective judgement of a few individuals trusted by the president, without proper procedures.[124] All uniformed policemen, who were all part of the traffic police, were dismissed in July 2004, and new recruits were deployed one month later with very little training. The process was more cautious in relation to the Criminal Police and other investigative units, where indi-

115 The Georgian Young Lawyers' Association, "Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive," 2011.
116 Interview with Archil Bakuradze and Natia Katsiashvili.
117 Interview with Shalva Khabuliani, head of division, Reforms and Development Agency; Valeri Lomuashvili, deputy director, Reforms and Development Agency; Nino Gakharia, head of Euro-Atlantic Integration Division; Ministry of Internal Affairs.
118 Ibid. A new law adopted in September 2016 provides for a more comprehensive monitoring of prison conditions. Similarly, recommendations on medical treatment and the improvement of medical care in correction facilities were implemented.
119 Joint Opinion of the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia, Opinion No. 728/2013 (adopted June 17, 2013).
120 Ibid., at para 11.
121 Government of Georgia, *National Strategy for the Protection of Human Rights in Georgia 2014–2020*, March 2014.
122 Council of Europe Commissioner for Human Rights, "Georgia Should Continue Strengthening the Independence and Impartiality of its Judges," January 12, 2016.
123 *Agenda.GE*, "New process to select Chief Prosecutor begins in Georgia," October 19, 2015, http://agenda.ge/news/44696/eng
124 Ibid.

viduals were scrutinized on a case-by-case basis and only the leadership was purged. Notwithstanding the deficiencies, the exercise was considered, at that time, a success, resulting in a "measurable shift in the police's reputation."[125] The insufficient training prior to and following deployment was however identified as a major shortcoming impacting on the long-term sustainability of the effort.[126] More importantly, the absence of any public oversight during the process contributed to the politicization of the newly restructured Ministry of Internal Affairs. Such politicization led to the gross abuse of public power highlighted in this report.[127]

After the 2012 parliamentary elections, a few hundred officials in local government were removed from office due to their political affiliation.[128] According to the International Society for Fair Elections and Democracy the new government wanted to demonstrate that it was cleaning the public sector of the supposedly corrupt people appointed by the previous government. This process was cast as part of the "Restoration of Justice" program. [129] The results were considered by many as a great achievement in purging corrupt elements.[130]

In 2013, a process commenced to depoliticize the Board of Public Broadcasting, which involved the introduction of a law that created a new mechanism for electing its members.[131] The president and prime minister are no longer part of the nomination process. The process is much more democratic and decisions are made by Parliament. The changes have apparently resulted in greater transparency and better programming for the public.[132]

National Human Rights Strategy

In September 2013, the EU special adviser on constitutional and legal reform and human rights in Georgia published a report titled "Georgia in Transition."[133] The report commended steps taken by the government to promote the independence of the judiciary, improve human rights, develop labor reforms, increase transparency, promote stakeholder consultation, and combat "elite corruption."[134]

Based on the report's findings, the government developed the first Georgian National Human Rights Strategy, which was adopted by Parliament in April 2014, followed by the Human Rights Action Plan, which was approved in July 2014.[135] The seven-year strategy, which envisages some 23 human rights projects, resulted from an inclusive drafting process involving state agencies and local and international nongovernmental organizations. The Human Rights Council is an interagency council chaired personally by the prime minister, which includes the largest local NGOs as well as the United Nations, COE, EU delegation, and the Public Defender of Georgia. It monitors the implementation of the Action Plan. The Human Rights Secretariat, which is located in the Prime Minister's Office, is responsible for the actual implementation of the plan as well as interagency coordination.[136]

125 Ibid., For a dissenting opinion, stressing how the reforms have yet to achieve democratic policing, see Jozsef Boda and Kornely Kakachia, "The Current Status of Police Reform in Georgia," in *From Revolution to Reform: Georgia's Struggle with Democratic Institution Building and Security Sector Reform*, Ph. Fluri and E. Cole, eds. (DCAF, July 2005) 13.
126 Matthew Devlin, "Seizing the Reform Moment," 10; Kakachia and Boda, "The Current Status of Police Reform," 7.
127 Erica Marat and Deborah Sutton, "Reforming Georgia's Police in the Post-Saakashvili Era," The Central Asia-Caucasus Analyst, June 4, 2014, http://cacianalyst.org/publications/analytical-articles/item/12987-reforming-georgias-police-in-the-post-saakashvili-era.html
128 Interview with Nino Lomjaria, executive director, International Society for Fair Elections and Democracy.
129 Ibid.
130 M. Devlin, "Seizing the Reform Moment," 10; Zachary Fillingham, "Nation Building & Police Reform: Lessons from Georgia," Geopolitical Monitor, July 4, 2012, www.geopoliticalmonitor.com/author/zacharyfillingham/.
131 Georgian Law on Amendments to the Law on Broadcasting, 2013. Interview with Hatia Jinjikhadze, deputy executive director and media support program manager, Open Society Georgia Foundation.
132 Ibid.
133 Thomas Hammarberg, "Georgia In Transition."
134 Ibid.
135 National Human Rights Strategy of Georgia, http://yourhumanrights.ge/documents/national-human-rights-strategy-of-georgia/; and Human Rights Action Plan, http://yourhumanrights.ge/discussion/
136 Ibid.

6. Perceptions and Politics of Transitional Justice in Georgia

Public opinion on transitional justice varies depending on political preferences, with some believing that it amounts to politically motivated revenge against opponents.[137] Public priorities appear to be less focused on retributive justice than on property restoration.[138] Many in the public view victims of past abuses as criminals. Support for the zero-tolerance policy was, and often still is, very high.[139] In addition, surveys carried out by the National Democratic Institute found that the economy is the top issue for most Georgians.[140]

Transitional justice does not appear to have been a major topic of interest in civil society. Some in the organized legal profession see transitional justice as not being "legalistic" enough and an undesirable compromise from a strictly criminal justice approach. However, there appears to be greater interest among the psychosocial and academic sectors.[141] Some civil society organizations also face the dilemma that transitional justice is widely seen as a "Georgia Dream issue," so supporting it would be seen as a political endorsement.[142]

The public scandal surrounding the torture videos just before the 2012 election was cited as one of the main factors in the GD's victory, together with its promise to deal with the past miscarriages of justice. After initial steps, such as the release of prisoners and a failed attempt to set up a mechanism to systematically address past violations, the government's efforts have stalled. This has allowed some opposition parties to ramp up the political rhetoric on these issues.[143]

According to Lela Tsiskarishvili, executive director of the Georgian Center for Psychological and Medical Rehabilitation of Torture Victims, it is a good time to survey expectations, which, in her view, appear to be "a complicated mix." She described some such mixed perceptions:

> Real criminals were tortured. Someone who was really a violent murderer was tortured to maintain order in prison. On the other hand, some people were in prison for really minor charges and then tortured. Inhuman conditions were so big and so horrible, so sympathy really grew and a victim mentality emerged, including some sense of entitlement, a sense of wanting their rights fulfilled, and when not fulfilled there is more resentment and conflict.[144]

137 Interview with Laura Thornton, resident senior director, National Democratic Institute.
138 Ibid.
139 Interview with Besarion Bokhashvili, national program officer, OHCHR in Georgia.
140 Ibid.
141 Interview with Lela Tsiskarishvili.
142 Interview with Ana Natsvlishvili, chairperson, Georgian Young Lawyers' Association.
143 Interview with Kakha Kojoridze, human rights advisor to the president of Georgia.
144 Interview with Lela Tsiskarishvili.

Western powers have criticized recent prosecutions as politically motivated and have stated that Georgia cannot afford to spend political capital to look at the past when the real threat is from Russia, which ought to be the priority.[145] According to Archil Bakuradze and Natia Katsiashvili, chairman and executive director (respectively) of the Business and Economic Centre, the refrain that Georgia "should look forward" is very irritating for Georgian people. Western countries are perceived as wanting to protect the Saakasvili administration. Bakuradze adds that it is only when Georgian people "look at the past with honesty" that they will be able to move forward.[146]

According to some interlocutors, the current government is trying to defer accountability and reform, in part because they want to secure the loyalty of law enforcement agencies.[147] However, others contend that the government does not lack will but has lost momentum following its failure to get the Commission on Miscarriages of Justice off the ground and has since failed to generate a clear vision of the way forward.[148]

Any discussion of reparations appears to be largely limited to compensation. An oft-mentioned concern is that the state cannot bear the full cost of restitution and that the process of determining the value of compensation for each case would be prohibitively complicated. For instance, there is a "commonly understood" estimate that reparations would cost some $6 billion.[149]

Some civil society organizations, like the Business and Human Rights Centre, have started exploring transitional justice options more seriously. They seek to explore opportunities to serve as facilitators between government and society and to establish a database of victims for future use.[150]

There are few organized victims' groups that could seek to influence transitional justice. They are mostly politically inactive and are not organized. Civil society is seen as weak and not linked to communities.[151] However, the coalition of women's groups, which is born out of common cause and anger, despite some ideological differences, is growing stronger.[152] Some academics are viewed as potential leaders in a transitional justice process. While the church is popular among Georgians, its leadership has not been inspirational on these issues.[153]

According to an interlocutor, policy makers appear uninterested in consulting victims.[154] However, many victims, particularly victims of the zero-tolerance policy, struggle with health issues, and are reportedly frustrated and angry. Most were released from prison with little recognition and no support. Their medical and other needs have not been addressed. This has led to a "victim mentality" arising among some and concerns of ongoing cycles of revenge.[155]

In 2015 the Business and Economic Centre conducted an assessment of victims' transitional justice preferences and found that victims of torture and property violations generally want guarantees of non-recurrence and institutional reform.[156]

145 Interview with Archil Bakuradze and Natia Katsiashvili.
146 Ibid.
147 Interviews with Nika Jeiranashvili and Kakha Kojoridze.
148 Interview with Sopo Japaridze, assistant to the prime minister of Georgia on human rights and gender equality issues.
149 Interview with Bakuradze and Katsiashvili.
150 Ibid.
151 Ibid.
152 Interview with Lela.
153 Interview with Archil Bakuradze, Natia Katsiashvili
154 Ibid.
155 Interview with Lela Tsiskarishvili.
156 Interview with Archil Bakuradze and Natia Katsiashvili. See Jenny Munro, "Facing the Past: Learning from shared experiences," Business and Economic Centre, 2015, www.bec.ge/images/doc/2015_09-facing-the-past-jenny_munro-2.pdf

7. Transitional Justice Preferences

Respondents interviewed by ICTJ highlighted a range of preferred options for a transitional justice program. There appeared to be consensus that there was a need to break the cycle of impunity and that meaningful remedies and acknowledgement for victims were long overdue.[157] In this regard exploring comparative cases would be helpful.[158] It was recommended that public expectations and perceptions in relation to transitional justice should be surveyed.[159]

Generating the Political Will

It was suggested that politically motivated measures to address the past should be avoided and that concrete proposals were required on how to move forward. [160] Some advocated taking steps to open up the space for transitional justice by ensuring that policy decisions are properly informed, which requires a thorough exploration of all options.[161]

The necessary political will can be developed through generating knowledge and understanding different transitional justice options. Importantly, the cost of not addressing the past should be understood and appreciated. Following such preliminary steps the government can develop a clear strategy on what steps should be taken and how they should be sequenced.[162]

Among government officials there has not been uniform or consistent support for a transitional justice program for Georgia.[163] Currently the government lacks a vision for transitional justice, but the starting point could be to raise awareness of the different possibilities among government ministries and Parliament.[164]

It has been suggested that a national dialogue on addressing the past, possibly brokered by Parliament, is required as a precursor to legislative and constitutional reforms to facilitate a comprehensive approach to transitional justice. [165]

Addressing Miscarriages of Justice

High on the agendas of most respondents was redressing past miscarriages of justice, acts of torture, and property seizures. While all called for the creation of credible and independent mecha-

157 Interview with Ucha Nanuashvili, Paata Beltadze, Natia Katsitadze.
158 Ibid.
159 Interviews with Lela Tsiskarishvili and Dr Anna Dolidze, deputy minister, Ministry of Defence.
160 Interview with Archil Bakuradze and Natia Katsiashvili.
161 Ibid.
162 Ibid.
163 Interview with Sopo Japaridze.
164 Ibid.
165 Interview with Archil Bakuradze and Natia Katsiashvili.

nisms to tackle these and other issues, it was also noted that maximum use should be made of European courts and bodies to prompt changes in Georgian law, state policy, and practice.[166]

It was suggested that miscarriages of justice must be handled by the justice system and not through presidential pardons or other means. Kakha Kojoridze, human rights advisor to the president of Georgia, recommended that a new chamber in the Supreme Court be created to reconsider these cases with specially vetted judges, unconnected to past abuses, nominated by the president, and appointed by parliament. [167]

Truth Seeking

The idea of a truth commission has been floated most recently by Michael O'Boyle, special advisor to the government of Georgia in human rights and rule of law and a representative of the Directorate of Human Rights of the Council of Europe.[168] Giorgi Gogadze, the deputy chief prosecutor, asserted that an alternative truth or reparations mechanism would greatly alleviate the burden of so many cases weighing on the Prosecutor's Office.[169]

In relation to truth seeking, Archil Bakuradze noted that to date there had been no real truth seeking—or apologies—from perpetrators. He asserted that a truth-seeking effort was required as a priority, but that it should not look at individual cases, but rather address systemic problems in society. Kakha Kojoridze also preferred a big-picture analysis to a case-by-case investigation.[170]

Truth-seeking efforts should be done with state backing, and, in particular, access to documents should be facilitated. It was alleged that the archives of certain ministries, such as Internal Affairs and Defense, remained off limits to researchers.[171] However, members of the NGO Article 42 doubted that a truth commission would be feasible, because people already "know" the causes of past conflicts and the flaws in the system.[172]

> The necessary political will can be developed through generating knowledge and understanding different transitional justice options. Importantly, the cost of not addressing the past should be understood and appreciated.

Tsiskarishvili stated that a truth commission would need to apply procedural fairness and avoid defaming people. She suggested that a pilot project precede any official truth-seeking exercise.

There did not appear to be consensus on exactly what a truth commission ought to investigate and what its temporal mandate ought to be. Some commentators have suggested that a truth commission should examine Georgia's history from 1990 to the present.[173]

Reparations

With regard to reparations, the prevailing view appears to be that reparations will be prohibitively expensive and that the government should avoid large-scale payouts. [174] A comprehen-

166 Interview with Nino Elbakidze and members of the management team, Article 42.
167 Interview with Kakha Kojoridze.
168 Interview with Besarion Bokhashvili. See *Agenda.GE*, "Georgian Government appoints new Special Adviser," June 25, 2015, http://agenda.ge/news/37941/eng. See also Anna Dolidze, Thomas de Waal, "A Truth Commission for Georgia," Carnegie Endowment for International Peace, December 5, 2012 http://carnegieendowment.org/2012/12/05/truth-commission-for-georgia-pub-50249
169 Interview with Georgi Gogadze, Natia Mezvrishvili, and Givi Bagdavadze.
170 Interview with Kakha Kojoridze.
171 Interview with Irakli Khvadagiani, board member, Soviet Past Research Laboratory
172 Interview with Nino Elbakidze and members of the Article 42 management team.
173 Interview with Giorgi Chitidze, Human Rights Program Coordinator at the Open Society Georgia Foundation.
174 Interview with Sopo Japaridze.

sive needs assessment is required to determine whether the costs will be as huge as claimed. [175] Moreover victims need to be asked what they want. According to Tsiskarishvili, victims want meaningful rehabilitation services:

> A lot of harm was done by torture and they are not getting any assistance. They have medical problems . . . First give them status as victims and if compensation is not possible, some sort of education voucher for their kids or some other support.[176]

There appears to be an emerging consensus that a special mechanism is needed to identify victims and create a victims' database.[177] Rehabilitative services required include medical and psychological, but because these services have been lacking in Georgia, individual financial grants should be considered. [178] It was noted that a medical and psychological response to torture and other trauma on its own was insufficient for holistic healing. A legal approach that offered the possibility of truth and accountability was needed. [179]

In relation to property violations, Gia Gvilava, project manager for the Judicial Monitoring and Legal Advice Program at Transparency International, asserted that the state should recognize traditional land ownership and deal with the complexities of property seizures as a result of miscarriages of justice. There is a strong demand for compensation for illegally seized property. The Special Department in the Prosecutor's Office was seen as particularly ill-equipped to handle the question of property restitution.[180] Land dispute cases go back as far as the Soviet era and World War II.[181]

Institutional Reform

Several recommendations were made regarding institutional reform. A call has been made for competence-based lustration, with an opportunity for retraining, rather than ideology-based purges.[182] The pitfalls of a lustration program based on ethical considerations were expressed, in that it could result in the removal of close to half of Georgia's 230 judges.[183] Other reforms should emerge from truth-seeking recommendations on the systemic causes of conflict.[184]

Civil society has presented a draft "Freedom of Information law that has stalled in various ministries.[185] Nonetheless, civil society is active on this issue and the media has generally supported the cause of victims.[186] In 2011 the law on media ownership was amended to provide for more transparency.[187] It has been asserted that media legislation is consistent with EU standards, but enforcement has been, and remains, problematic.[188]

In respect of illegal dismissals, a commission established by the Ministry of Education and Science to study the dismissal of employees on political grounds released its report in May 2015.[189] It found that approximately 90 officials had been illegally dismissed.[190] The work

175 Interview with Lela Tsiskarishvili.
176 Ibid.
177 Interview with Archil Bakuradze and Natia Katsiashvili.
178 Interview with Lela Tsiskarishvili.
179 Ibid.
180 Interview with Nino Elbakidze and other members of the Article 42 management team.
181 Interview with Irakli Khvadagiani.
182 Interview with Archil Bakuradze and Natia Katsiashvili.
183 Iinterview with Cristian Urse and Sophio Tsakadze.
184 Interview with Archil Bakuradze and Natia Katsiashvili.
185 Interview with Hatia Jinjikhadze.
186 Ibid.
187 Ibid.
188 Ibid.
189 Commission for the Study of Dismissals of Employees of the Ministry of Education and Science of Georgia Territorial Agencies – Education Resource-Centers and Public Schools on Grounds of Political Belief, May 5, 2015, http://mes.gov.ge/content.php?id=5805&lang=eng
190 Ibid.

of this commission, with the support of the International Society for Fair Elections and Democracy, demonstrates that there is capacity to engage in institutional reform and merit-based vetting. [191]

Reconciliation

It has been noted that national reconciliation is needed in Georgia because "[the country is] too small to be divided."[192] There is a Ministry of Reconciliation; however, it is focusing on issues arising from the breakaway regions, such as ethnic conflict and property restitution.[193]

Criminal Accountability

The need to end the system of impunity was highlighted, "which means there should be some punishment for perpetrators."[194] Although the creation of the Special Department in the Prosecutor's Office[195] was generally welcomed, it is seen as inadequate and lacking in legitimacy.[196] There was a recognition that the Prosecutor's Office needs considerably more resources to handle cases of torture and appropriated property, although it was lamented that there appears to be little political appetite to take these cases forward.[197] Concerns were raised about the possibility of investigating past cases of torture due to the apparent lack of evidence.[198] It was highlighted that even if there were few or no prosecutions, there should at least be investigations and acknowledgement of what happened. Most in civil society have recommended the establishment of an independent investigatory body.[199] This body or agency ought to be institutionally independent of the entities and individuals being investigated.[200]

Proposals on the Establishment of Special Investigation Mechanism

Since the 2012 parliamentary elections several recommendations have been made to the Georgian government for the creation of an independent and impartial body to investigate the wrongdoings of law enforcement officials that resulted in violations of the right to life and personal integrity. The EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, the UN Human Rights Committee, the UN high commissioner for human rights, the UN special rapporteur on torture, the ombudsman of Georgia, and several in the NGO sector have called on the Georgian authorities to establish a credible mechanism to investigate serious human rights violations.[201] During the 2015 UN Universal Periodic Review cycle,[202] many states recommended that Georgia create an independent and impartial investigative mechanism.[203] In its 2014–2015 Human Rights Action Plan, the government agreed to establish such a mechanism.[204]

191 Interview with Nino Lomjaria.
192 Interview with Archil Bakuradze and Natia Katsiashvili.
193 Interview with Ucha Nanuashvili, Paata Beltadze, and Natia Katsitadze.
194 Ibid.
195 This Department focussed on cases dealing with illegal deprivation of property, improper or wrongful criminal proceedings; and cases of assault and torture involving law enforcement personnel, including prison authorities.
196 Interview with Nino Elbakidze and other members of the Article 42 management team.
197 Interview with Kakha Kojoridze.
198 Interview with Nika Jeiranashvili.
199 Ibid.
200 Ibid.
201 See for example, Thomas Hammerberg, "Georgia in Transition: A Report Addressed to the High Representative and Vice-President Catherine Ashton and Commissioner for Enlargement and European Neighbourhood Policy," Stefan Füle, September 2013: 22-23; UN Commissioner for Human Rights, "Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police," CommDH, 2009, 4; Public Defender of Georgia, "Assessment of Fulfilment of Recommendations Offered in Parliamentary Report," July 31, 2015, www.ombudsman.ge/en/news/assessment-of-fulfillment-of-recommendations-offered-in-parliamentary-report.page
202 The UN Universal Periodic Review was created through the UN General Assembly on March 15, 2006, by resolution 60/251. It is a unique mechanism of the Human Rights Council aimed at improving the human rights situations in all UN member states. Under this mechanism, the human rights situations of all member states are reviewed every four to five years.
203 Switzerland, Turkey, the Czech Republic, Cyprus, and France, among others have called for such measures, see UPR Database of Recommendations, www.upr-info.org
204 Government of Georgia, *Action Plan of the Government of Georgia on the Protection of Human Rights 2014-2016* point 6.6.1 ("creation of a professional, independent, powerful and trustworthy mechanism to deal with cases of offences committed by public prosecutors, police officers etc.").

The most comprehensive set of recommendations has come from the Office of the UN High Commissioner for Human Rights (OHCHR) in Georgia, the Open Society Georgia Foundation, and the COE/EU, in close cooperation with the local NGO sector.[205] The proposal considered three investigative and prosecutorial models: 1) a completely independent investigative mechanism situated outside the executive; 2) a mechanism located within the executive branch of government, but which enjoys independence guaranteed by law; and 3) an executive government agency with powers akin to that of the Ombudsman. The proposal concluded that in the Georgian context only an independent mechanism located outside of the executive would be consistent with international standards.[206]

This group has developed a draft law for an independent and impartial investigatory mechanism, which has been submitted to government authorities.[207] The draft law envisages the establishment of an "Independent Investigative Mechanism" entirely independent of the executive,[208] which would be mandated to investigate and prosecute human rights violations allegedly committed by law enforcement agencies, including police, security forces, prosecutors, and prison officials.[209] Currently, investigations of such crimes are carried out by the Prosecutor's Office and law enforcement agencies themselves.[210] This places Georgia's policy in conflict with various European guidelines.[211]

The proposed independent investigation mechanism would be a permanent body that provides Georgia with a special capacity to handle endemic abuses and complex crimes perpetrated by law enforcement agencies. It would be headed up by a commissioner, appointed by parliament after a selection process involving all three branches of government and civil society. [212] The commissioner would then appoint an investigator and a prosecutor following a competitive hiring process administered by a selection commission staffed in part by criminal law and human rights law experts.[213]

As proposed in the draft law, the mechanism would be empowered to initiate its own investigations and prosecutions and be accountable only to Parliament. It would be conferred with subject matter jurisdiction over crimes committed by officials against individuals held in state custody or control.[214] Although still the subject of ongoing debate, the proposed investigative model excludes past violations from the mechanism's temporal mandate, in order to avoid a potentially overwhelming caseload.[215] It also reflects a concern that there could be a lack of evidence to sustain older cases.[216]

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205 Open Society Georgia Foundation, "Introduction to Draft Law on the Establishment of Independent Investigative Mechanism," www.osgf.ge/index.php?lang_id=ENG&sec_id=15&info_id=4077

206 Open Society Georgia Foundation, "Draft Law on the Establishment of Independent Investigative Mechanism," February 2015, www.osgf.ge/index.php?lang_id=ENG&sec_id=15&info_id=4077

207 Open Society Georgia Foundation, "Draft Law of Georgia on the Independent Investigative Mechanism," February 24, 2015, www.osgf.ge/files/2015/News/Draft_Law_-_Independent_Investigation_Mechanism_(ENG).pdf; Open Society Georgia Foundation, "Draft Law on the Establishment of Independent Investigative Mechanism," PowerPoint Presentation, www.osgf.ge/files/2015/News/IIM_-_ENG.pdf

208 Article 5 of the Draft Law, for instance, provides for "Independence and political neutrality – the Independent Investigative Mechanism is not accountable to any executive body or political force, but only to the Parliament of Georgia."

209 It is proposed that the mechanism enjoy primacy jurisdiction in respect of such crimes and exclusive jurisdiction in respect of deaths in state custody. See Articles 2, 3, and 6 of the Draft Law.

210 Criminal Procedure Code of Georgia read with the order of the Minister of Justice in respect of the Allocation of Investigative and Territorial Competence for Criminal Investigations (N34, 07.07.2013).

211 Eric Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards*, Council of Europe, 2009, Guideline IV.1.1, officials involved in such investigations must be independent from those implicated. The obligation of independence covers anyone making decisions during investigations (*Mikheev v. Russia, the judgment of the European Court of Human Rights, 26.01.2006, N 77617/01, para. 116);* as well as supervising prosecutors (*Ramsahai v. the Netherlands, ECtHR judgment, 15.05.2007, N 52391/99, paras. 6-63*).

212 Draft Law, Article 8 (Commissioner of the Independent Investigative Mechanism).

213 Draft Law, Article 10.

214 Draft Law, Article 4. These crimes include: torture, manslaughter, damage to health, battery, degrading or inhuman treatment, forced confessions, sexual violations, and prison-related offences committed against persons under state control and/ or committed by members of law enforcement bodies.

215 Interview with Cristian Urse and Sophio Tsakadze.

216 Interview with Nika Jeiranashvili.

The mechanism would have "exclusive jurisdiction" over the crimes under its purview and the power to transfer cases from other authorities, including disciplinary proceedings, for investigation and prosecution. Other government agencies would have an obligation to inform the mechanism of crimes under its exclusive jurisdiction.

Currently, the draft law provides for oversight and accountability through reporting to Parliament twice a year and appearing before a parliamentary committee, on request.[217] Public scrutiny would be afforded through the mechanism's website;[218] and the commissioner would be under an obligation to submit information about cases to victims with "reasonable frequency."[219] The governing principles of the mechanism include victim involvement, openness to the public, and transparency, so as to maintain a "high level of public trust."[220]

In early 2015 the draft law was submitted to the government, but has not yet been adopted.

217 Draft Law, Article 17.
218 Draft Law, Article 18.
219 Ibid.
220 Draft Law, Article 5e (Openness to public and transparency).

8. Recommendations

Developments in Georgia, particularly in its recent history, have left the nation divided with many burning questions unaddressed. While some attempts have been made to deal with the past, they have not been viewed as effective or serious. A clear vision of how to move forward has yet to be presented by government or civil society. Indeed, it appears that support for addressing the past among Georgians is uneven and far from overwhelming.

Georgia is a small country with a small population, which has a fairly unique context. It is quite different from countries that have experienced mass atrocity or repressive rule by military juntas or abusive regimes. In Georgia institutions of state have suffered interference for political ends, but they have not been destroyed and do not require rebuilding from scratch. The state is largely functional and some basic needs of the population are being met.

The full potential of the Georgian people is being held back by the failure to conduct a full assessment of the past and to take steps to redress abuses. Moreover, the dangers of repeating the past are ever present.

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In this report ICTJ recommends taking formal, measured, and targeted steps to address the past. While it is arguable that conditions are not totally ripe for a formal transitional justice process in Georgia, it is also true that conditions are unlikely to ever be perfect. Waiting too long may have its own deleterious consequences.

It is not the aim of this report to propose a blueprint for what should be done in Georgia. It is ultimately up to Georgians to decide whether to confront the past or not, and if so, how this should be done. Nonetheless, recommendations are made below as possible approaches to overcome current obstacles, based on discussions held with Georgians in the course of this study and ICTJ's experience in other contexts. Some of the ideas laid out below could be discussed as part of a national dialogue process.

National Dialogue on the Past and Future

- **Begin a national dialogue in the short term for the purpose of exploring options to address past abuses and nation building.** This could include holding a national conference to identify possibilities for redressing the past and nation building for the future. Such a conference could be sponsored by government and key stakeholders in civil

society. It could be a venue where different options are explored and debated and where comparative examples are considered.

- In order to make the conference as informed as possible, it could be preceded by a process of interviewing key stakeholders in different sectors and carrying out regional or district consultations to collect proposals. This could be followed by a "quantitative phase" involving written and telephone surveys to gauge the views of the wider public. Online and media debates around the proposals could be encouraged. A special effort should be made to raise awareness among key policy makers in government, Parliament, and business and professional sectors. A national dialogue secretariat, with the help of thematic work groups, could analyze the information collected and prepare reports to be fed into the national conference.
- Ultimately, the national conference should provide guidance on the way forward, identifying broad policy approaches for a transitional justice program, together with any constitutional and legislative measures that may be needed to facilitate such a program.

National Documentation Project

- **Carry out a national human rights documentation effort to provide a strong foundation for any subsequent measures for acknowledgement, accountability, and reform.**

Regardless of the strategy adopted for addressing past abuses, it will require reasonably accurate information on the nature and extent of human rights violations committed during the selected time period. A credible documentation program will prove to be invaluable for a range of activities and purposes. These include contributing to an accurate historical record and helping to establish patterns of violations and institutional responsibilities. While documentation is not intended to determine individual criminal responsibility, it may provide leads and sources of evidence for criminal investigations and prosecutions. Thus, a strong documentation effort could serve both as the basis for acknowledgement of wrongdoing and harm and promotion of accountability. Any future reparations or rehabilitation programs will be greatly assisted by the documentation of harm and loss sustained by victims. Efforts to transform abusive institutions and establish new standards will similarly be better informed by such an undertaking.

Typically, a human rights documentation project does not replace in-depth investigations, but involves a range of activities aimed at facilitating further fact finding and investigations, if deemed necessary. These include the collection and analysis of official and unofficial information from different sources, consultations with experts in different fields, and witness interviews. It provides a chronological, high-level picture of the kinds of incidents that have taken place, including when and where they occurred; who the victims are; and the likely identity of perpetrators or of the institutions involved.

Human rights documentation is normally carried out by organizations and persons known for their independence and objectivity. Most serious documentation around the world has been carried out by reputable national or international human rights bodies. The Office of the Public Defender in Georgia enjoys considerable respect for its professionalism and impartiality. In 2013, the ombudsman was reaccredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights with an "A" status.[221] It is recommended that the public defender be charged with carrying out a national documentation program, as described above. [222]

221 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Chart of the Status of National Institutions," (accreditation status as of 26 Jan 2016), www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

222 Most recent national human rights documentation projects have been supported with expertise and funding by major UN agencies, such as the OHCHR, the UN Development Programme, as well as international organizations.

The deliverables could include, in addition to reports and briefings, a national human rights archive and database, educational materials, and digital resources. The data and analysis would then be made available for others, as it would help in making realistic estimates of the necessary allocation of resources and facilitate a coherent approach to further investigations and actions by identifying key issues and cases.

Typically, a human rights documentation project could take between six months and a year to complete. Because Georgia is not an example of large-scale abuses or mass atrocity, it may be able to complete a comprehensive documentation exercise in considerably less than one year.

Truth and Nation-Building Commission

- **Depending on the outcomes of the national dialogue and documentation effort, consideration should be given to establishing a truth commission focused on identifying the underlying causes behind past abuses and to recommend measures for non-recurrence.**

Since the mid-1990s truth commissions have proven to be a popular method of addressing the past; yet, all too often, however, they are seen as a panacea or quick fix for all of the ills and traumas of the past.[223] It is arguable that they have become less effective as they have grown in size and their responsibilities have become more expansive. In order to fill the void of little or no criminal accountability, truth commissions have been asked to investigate and report on large numbers, often thousands, of violations. Moreover, they have been required to give a public voice to thousands of victims and deliver on multiple objectives, such as national healing and reconciliation, the truth behind past conflicts, as well as its causes, and offer technical and considered recommendations on all forms of redress as well as measures, both practical and regulatory, to prevent the repetition of abuses.

In order to complete tasks of such magnitude, truth commissions have established highly complex, but ultimately cumbersome, organizational structures. Ambitious targets are set and invariably are not met. Some truth commissions have taken tens of thousands of statements in an effort to meet legally imposed, or in some cases self-imposed, requirements. They have struggled to utilize or make sense of the volume of information collected and often verged on collapse under their own organizational weight.

ICTJ does not recommend such a complex truth commission involving multiple objectives in Georgia. Instead, if it is decided to establish a truth commission, ICTJ would suggest that it not focus on individual violations on a case-by-case basis, but rather focus primarily on:

- establishing an overall account of Georgia's recent history and in particular the nature, character and extent of past abuses and violations
- explaining the context, antecedents, and underlying causes and fault lines of such conflict and abuse
- identifying systemic problems and practices in institutions, governance, and society that gave rise to conflict and abuse and that may cause their repetition
- recommending reforms and other measures to address such systemic problems, practices, and divisions

223 For a fuller discussion of this trend in truth seeking, and how to avoid common pitfalls, see ICTJ and Kofi Annan Foundation, "Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?," 2014, www.ictj.org/publication/challenging-conventional-can-truth-commissions-strengthen-peace-processes

Based on experiences in many other contexts, the following characteristics and measures could help to strengthen possibilities for success:

- The proposed truth commission should have the power to gain unhindered access to state documents and to compel testimony in appropriate circumstances. It should be required to adhere to procedural fairness at all times.
- A politicized selection process for commissioners and staff should be strictly avoided.
- If the human rights documentation program is comprehensive, it should obviate the need for mass statement taking and permit the commission to carry out focused, in-depth inquiries into key themes, practices, and events identified by the documentation exercise.[224]
- Active public participation by all key sectors of society should be emphasized, with victims encouraged to make submissions on important themes and appear before issue-based hearings.
- Where appropriate, the truth commission should be empowered to refer matters to criminal accountability and reparations bodies.

If the proposed truth commission is not required to investigate all violations on a case-by-case basis or conduct mass statement taking, such a truth commission could potentially conclude its operations within a year to 18 months, excluding time required for start-up and closure.

Institutional Reform and Vetting

- **Avoid politicized vetting programs that exclude persons on the basis of membership or association in favor of competency-based and sector-driven vetting, applying fair and objective criteria for the purpose of rebuilding institutions.**

In relation to institutional reform it has already been recommended that the proposed truth commission identify systemic issues in governance and recommend steps and measures to overcome them. However, given that there appears to be a demand for some form of public-office vetting in Georgia, certain advisories are offered based on experiences in other parts of the world.

National lustration or vetting programs that exclude persons on flimsy grounds, such as membership or association, can have catastrophic consequences for the country as a whole.[225] Politicized vetting measures can destroy public confidence in institutions of the state, in addition to constituting serious violations of human rights. On the other hand, competency-based, sector-driven vetting can be more effective in rebuilding institutions, making them more effective, and restoring the trust of citizens in those sectors. Such programs should involve case-by-case examination of staff competency and suitability, including checking records for any history of human rights violations.[226]

One relevant experience was undertaken in order to overcome concerns in Bosnia and Herzegovina about perceived biases in the judiciary. There, an extensive vetting process was developed to re-evaluate judges and prosecutors. A self-regulatory body of judges and prosecu-

224 If the documentation process discloses that there is a pressing need for individual acknowledgment beyond material reparations, consideration can be given to holding country-wide victim hearings. Alternatively, the holding of victim hearings could potentially be assigned to the proposed reparations mechanism, elaborated on below, which in any event has to reach out to victims.

225 For example, the de-Baathification process undertaken in Iraq after Saddam Hussein's regime was deposed was so politicized and broadly construed, it resulted in the destabilization and collapse of the entire system of governance: See Miranda Sissons and Abdulrazzaq Al-Saiedi, "A bitter legacy: Lessons of De-baathification in Iraq," 2013, ICTJ, www.ictj.org/publication/bitter-legacy-lessons-de-baathification-iraq

226 Organisation for Economic Co-operation and Development, *The OECD DAC Handbook on Security System Reform Supporting Security and Justice*, 2007; UN Development Program, *Vetting Public Employees in Post-conflict Settings: Operational Guidelines*, 2006; OHCHR, *Rule-of-Law Tools for Post-conflict States: Vetting: An Operational Framework*, 2006.

tors—the High Judicial and Prosecutorial Council—was established and tasked with ensuring an independent, impartial, and professional judiciary. Judges and prosecutors had to reapply for their jobs between 2002 and 2004. [227] The council assessed the professional competence, integrity, and ability of applicants to be impartial and also considered conflict-related complaints made against judges.[228] Judges and prosecutors were required to provide evidence of their compliance with various laws, any political activity, records of their personal assets, their past military or paramilitary involvement (if any), past governmental positions held, and their judicial record during the conflict.[229] The vetting procedure reduced the size of the judiciary and helped ensure adequate ethnic representation. Of the 1,000 applicants reviewed, the council rejected approximately 200.[230]

Reparations and Rehabilitative Agency

- **Establish an independent agency or mechanism to reach out to victims, assess needs and priorities, and devise and roll out a meaningful and feasible reparations program.**

Such a mechanism ought to reach out and identify victims, provide them with an opportunity, in public or private, to relate their own accounts of the violations and harms they have suffered and to set out their needs. The initial national documentation project recommended above will go a long way toward helping to design and shape a reparations policy. The results of this exercise should give a good sense of the numbers of potential victims, the general nature of harms suffered, as well as their locations. Any subsequent reparations initiative can use such data to plan an informed approach to reparations and, in particular, an inclusive registration program.

The program devised will naturally have to take into account what is affordable in the context of Georgia, but it should strive to be consistent with the 2005 UN Basic Principles and Guidelines on Remedy and Reparations.

Several stakeholders interviewed indicated that the government was most reluctant to embark on a reparations program because of the prohibitive costs involved, which could be as much as USD $6 billion. This would place a considerable burden on the national budget. It should be noted from the outset that reparations programs are invariably never a question of "all or nothing." Indeed, typical reparation programs do not envisage full compensation. Generally speaking, victims seeking full or comprehensive compensation would need to prove a damages claim before a court. Since case-by-case adjudication before the courts is an unrealistic proposition in most countries emerging from conflict or abusive rule, administrative reparation programs are designed to ensure that acknowledgment and a measure of support is directed to those who have suffered serious violations and harm.

It should be noted further that reparations do not have to be delivered immediately or all at once. Reasonable measures can be taken, within available resources, to achieve the progressive realization of the right to reparations. Where the state claims that it has no resources it ought to be required to demonstrate that the resources are not available and present a plan for the longer-term overcoming of the resource constraint.

The affordability argument appears to anticipate cash handouts to the exclusion of other forms of reparations. While individual grants are often sought by victims, because it may

227 Alexander Meyer-Rieckh, "Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina," in *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Alexander Mayer-Rieckh and Pablo De Greiff, eds. (New York: SSRC, 2007), 180, 195—96, http://sro.sussex.ac.uk/52113/1/Vetting.pdf
228 Ibid.
229 See also the example of the Kenyan Judges & Magistrates Vetting Board, www.jmvb.or.ke/
230 ICTJ Former Yugoslavia Factsheet, 2

open some options to change their own lives, there are other meaningful form of reparations. These include material benefits, such as health care, educational scholarships, skills training, and micro-finance loans.

Other steps can also be taken to recognize the loss, pain, and suffering of victims and their families. More general acknowledgment can take place through symbolic reparations, such as memorials, renaming of public places, or official apologies.

On the question of the standard of proof and the lack of evidence in torture cases it should be recognized that most administrative reparation programs are not judicial processes requiring the satisfying of a criminal or even a civil standard of proof. Typically a lower threshold is used in reparations programs for purposes of determining who is a victim and the nature and extent of the harm suffered, generally based on a consideration of the probabilities. The absence of hard or forensic evidence is not in itself a reason to exclude an application for reparations, where the available facts and circumstances point to victim status.

Important policy decisions will need to be made in respect of what forms of harm and loss will be covered by a reparations program. For example, should a reparations program cover claims of restitution in relation to lost or seized properties and land through the zero-tolerance policy? It may be that such claims and disputes, which require meticulous and technical inquiries, are better handled by a specialist land restitution commission.[231] Ultimately these are important policy decisions for Georgians to make.

Remedying Miscarriages of Justice

- **Establish an independent review commission to examine each alleged miscarriage of justice and make a considered recommendation in each case, either for retrial or pardon. Ensure that the judges hearing retrials are drawn from a pool of judges unconnected to the miscarriages and who are seen to be independent judges with unquestionable integrity.**

It appears to be accepted in Georgia that serious flaws in the criminal justice system gave rise to a large number of miscarriages of justice that cannot be left unattended. It is further accepted that judicial decisions may only be overturned or reversed by the judiciary. While the presidential pardon power may not overturn or reverse a judgment, the president is authorized under the Constitution to offer clemency through a pardon, which can stop any outstanding penalty and may, if the president so deems, have the effect of completely expunging a criminal record.[232] Accordingly the remedy has to be either judicial in nature or involve the exercise of the pardon power, or be a combination of both.

Many of the judges implicated in miscarriages of justice are still serving in the judiciary, and judicial reforms are moving slowly. This context suggests that the judiciary is currently ill-equipped to handle these cases in the normal course. A recommendation has been made that a special chamber or panel of the Supreme Court with carefully selected judges unconnected to the miscarriages be established to review these matters.

It should also be noted that while the Venice Commission found that only an appropriately authorized court may overturn the decision of another court, it did not rule out the important investigative and preparatory work that could be done by a review commission. It referred with approval to the experiences of the Criminal Cases Review Commission for England, Wales

231 See the example of the South African Commission on Restitution of Land Rights, www.nationalgovernment.co.za/units/view/62/Economic-Infrastructure-Development/Commission-on-Restitution-of-Land-Rights
232 Constitution of Georgia, Article 73(1)(o).

and Northern Ireland,[233] and the Norwegian Criminal Cases Commission.[234] In both of these examples the review commissions did not make final decisions, but rather recommended to the criminal justice authorities which cases should be referred to the courts for retrial.

ICTJ accordingly recommends the following:

- The establishment of an independent review commission for the purpose of examining each alleged miscarriage of justice and making a considered recommendation in each case. Such a review commission ought to comply with the standards referred to by the Venice Commission. The review commission should be empowered, in appropriate circumstances, to recommend that cases be considered by the president for pardon.
- Where the commission recommends that a case be referred back to the judiciary for a retrial, such a retrial must take place before a judge who has no connection to any of the alleged miscarriages. This could conceivably take place within a special chamber or, alternatively, the presiding judges could be drawn from a pool or panel of independent minded judges with unquestionable integrity.[235]
- The selection process must be conducted in an entirely open and transparent manner. The selection criteria must be publicly known and the legal profession and the wider public must have an opportunity to comment on the record of each candidate before the final selection is made. Presently, the High Council of Justice, which is authorized under the Constitution to appoint judges and assign duties, is not seen as scrupulously independent, so it should not be tasked for this function.

Independent Investigative Agency

- **Create a skilled and well-resourced "Independent Investigative Mechanism" that is protected from political interference.**

Most stakeholders interviewed in Georgia accept the need for the creation of a properly resourced, independent, and impartial body to investigate serious crimes, in particular those committed by law enforcement officials. The government itself has agreed to establish such a mechanism.[236]

As already discussed, OHCHR, the Open Society Foundation, and the COE have made a proposal in the form of a draft law for the setting up of an "Independent Investigative Mechanism" that is protected from political interference.

The following recommendations focus on that draft law and suggest some significant modifications that address the particulars of the Georgian context which saw rampant political interference in the criminal justice system in the recent past.[237] They reflect emerging best practices and experiences in other contexts which could be relevant for Georgia.

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233 Criminal Cases Review Commission (UK), "What We Do," webpage, www.ccrc.gov.uk/about-us/what-we-do/
234 Norwegian Criminal Cases Review Commission, "Introducing the Commission," www.gjenopptakelse.no/index.php?id=166
235 While the Venice Commission's "Joint Opinion on the Draft Law on the Temporary State Commission on Miscarriages of Justice" concluded that the establishment of a special "chamber for miscarriages of justice" would be contrary to the constitutional prohibition against extraordinary courts (at paragraph 83, recommendation 15), it could only have been referring to the creation of a special court as opposed to another chamber within the existing judiciary. It is commonplace in countries where constitutions prohibit the creation of special courts to permit the establishment of chambers within the judiciary to deal with specialist issues. An example is Tunisia, where Article 110 of the Constitution of the Republic of Tunisia (2014) prohibits the establishment of special courts. Nonetheless, the Organic Law on Transitional Justice authorizes the creation of a special chamber within the judiciary to adjudicate crimes constituting gross human rights violations. See ICTJ, "ICTJ Welcomes Tunisia's Historic Transitional Justice Law," December 17, 2013, www.ictj.org/news/ictj-welcomes-tunisia%E2%80%99s-historic-transitional-justice-law
236 Government of Georgia, *Action Plan of the Government of Georgia on the Protection of Human Rights 2014–2016*, point 6.6.1 ("creation of a professional, independent, powerful and trustworthy mechanism to deal with cases of offences committed by public prosecutors, police officers etc.").
237 They do not focus on the various best practices one would expect to see in a special investigation, such as the need for a multidisciplinary investigation, witness protection, victim support, and outreach. Such recommendations can be made at the time that the government acts to establish such an investigation.

- **Consider any constitutional questions that may arise with the vesting of prosecutorial authority.**

The draft law would establish a special investigatory and prosecutorial mechanism outside the existing Prosecutor's Office with a commissioner who would be assisted by investigators and prosecutors appointed by the commissioner.

The involvement of prosecutors in such initiatives helps to ensure that investigations will yield evidence sustainable in court. This is in line with a worldwide trend of closer cooperation between investigators and prosecutors, particularly where the perpetrators are powerful or politically well-connected and/or where the crimes under investigation are of a complex nature or where the criminal conduct in question has become endemic.[238] An effective special capacity ought to have appropriate powers of investigation, prosecution, and, where appropriate, prevention as well.

Because Article 81 of the Constitution of Georgia places the Minister of Justice in charge of the management of the operations of the bodies of the Prosecutor's Office,[239] consideration must be given to whether this article needs to be amended to accommodate prosecutors in the proposed mechanism.

- **Improve guarantees for ensuring the independence and autonomy of the proposed mechanism.**

The public expectation or confidence that the proposed investigative body will be independent is foundational to the concept of independence itself.[240] In this regard, the question to be addressed is one of real and perceived insulation from political management and control.[241] More can be done to promote the actual and perceived independence of the body. These include credible structural and operational independence for the institution, financial security for individuals and the institution, security of tenure for senior staff with clear criteria for appointments, and removals, particularly of senior staff.

  - **In respect of structural and operational independence**, the body should, from the very outset, have a structure that prevents interference. Like the draft law, its enabling statute should establish its independence and ideally such independence should be enshrined in the Constitution. The body should, subject to its broad statutory mandate and the policy guidelines laid down by the proposed oversight board (discussed below), be able to determine its own investigative policy and scope of investigations, including the selection of national priority crimes to be investigated.
  - **In respect of autonomy**, the mechanism should exercise control over its own finances and make its own decisions in relation to expenditure and allocation of resources. In addition, the UN Convention against Corruption,[242] and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,[243] and the Principles on the Effective Investigation and

238 See Martin Schönteich, "Presentation: Prosecution led investigation: An innovative approach from South Africa," 6 December 2005, Open Society Justice Initiative, http://biblioteca.cejamericas.org/bitstream/handle/2015/3188/schoenteich-prosecution-led-ing.pdf?sequence=1&isAllowed=y; Despina Kyprianou, "Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies," 7 *Cyprus and European Law Review* (2008); Council of Europe, Recommendations issued by the Council of Europe relating to prosecutions, Rec (2000) 19, Rec (97) 13, Rec (92) 17, Rec (95) 12, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680 4be55a
239 Constitutional Law of Georgia, No 3710 of 15 October 2010 - LHG I, No 62, 5.11.2010, Art. 379.
240 Supreme Court of Canada, *Valente v. The Queen* (1986) 24 DLR (4th) 161 (SCC) at 172, where it was held that the test for independence should include public perception.
241 South Africa Constitutional Court, *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) from para 207, www.saflii.org/za/cases/ZACC/2011/6.html
242 UN General Assembly, *2003 United Nations Convention against Corruption,* A/58/422 (2003)/ (2004) 43 ILM 37 (31 October 2003), Article 6(2). Georgia acceded to this convention on November 4, 2008.
243 United Nations Economic and Social Council, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,* E/RES/1989/65 (14 July 1989), Annex 10

Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stipulate that investigators must have all the necessary budgetary and technical resources for effective investigation.[244]

- **In respect of resourcing**, there can be little doubt that there is a direct relationship between an investigation's budget and resources and its capacity to deliver.[245] As the Draft Law is silent in regards to financing, we recommend that the mechanism be allowed to participate and be heard in the determination of its budget and resourcing, with the head of the unit given an adequate opportunity to defend the unit's budgetary requirements before Parliament or its relevant committees. The commissioner should be designated as its accounting officer and be responsible for preparing the unit's budget. Where the Georgian government demonstrates a real intention to create a credible investigation but lacks the necessary financial resources and forensic and other expertise,[246] the international community should provide any shortfall in funding and expertise, without attaching any unreasonable conditions to such support.

- **The appointment and removal of staff to both the proposed independent mechanism and oversight board**, discussed below, should, as far as possible, not be politicized. The sensitivity of the mandate of the institution requires that the appointment of all senior roles be based on clear criteria established by law and strictly applied. A politicized process will not necessarily select the most qualified and suitable senior staff and will incentivize staff to do the bidding of their political backers. In order to avoid such outcomes some countries have established bodies that are charged with making credible and objective appointments to the most important posts.[247] Such an appointing body should include a mix of respected and distinguished persons from government and civil society. Criteria for the appointment for senior staff to the special investigation unit, as well as the proposed oversight board, should be established in law and strictly applied. In ICTJ's view, the Draft Law's suggested criteria and procedure for the appointment of the head of the Independent Investigative Mechanism is consistent with such best practice.[248] However, it is recommended that the head of the body ought to have the final say in appointing investigators and prosecutors, but should be required to select appointees from a short list provided by the panel referred to in Article 10 of the Draft Law.

- **In respect of security of tenure**, the commissioner should be subject to a fixed and nonrenewable term of office, as recommended in the Draft law. In addition, statutorily secured remuneration levels should be imposed on the commissioner and most senior staff. All members of the body should enjoy a measure of specially entrenched employment security, in order to enable them to carry out their work diligently. Dismissal of staff must rest on objectively verifiable grounds, such as misconduct or ill-health.

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244 UN General Assembly, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1/RES/55/89 (22 February 2001), Article 3(a).
245 Any investigation should have sufficient resources to enable the mechanism to deliver on its legal mandate without compromising its independence and autonomy. A lack of resources may lead the entity entering into inappropriate functional relationships with other bodies. OECD, *Specialised Anti-Corruption Institutions: Review of Models*, 2008, at 17, 24 and 27.
246 The amount of resourcing provided is often a good indicator of the level of political support for the initiative. P. Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Human Rights Council, 2008, at para 30.
247 The Constitutional Council in Sri Lanka was established in 2015 under the 19th Amendment to the Constitution, with a limited mandate, namely to ensure proper appointments to the most important public posts, http://slembassyusa.org/downloads/19th_Amendment_E.pdf
248 See Article 8 of the Draft Law, which sets out the proposed criteria for appointment. It proposes a body for the selection of the Commissioner of the Independent Investigative Mechanism comprising nine unpaid members, including the Minister of Justice; representatives of the Legal Affairs Committee and the Human Rights and Civil Integration Committee of Parliament, including a member of the minority political party; a representative of the President's Office; a representative of the High Council of Justice; the Public Defender of Georgia; and three persons selected by the Public Defender from NGOs. Article 10 provides for a "selection commission" to select the investigators and prosecutors. Half of this body should be public officials and the balance should be criminal law and human rights experts.

- **Establish an oversight board to oversee the activities of the independent investigative mechanism, ensure that the mechanism operates strictly within the law, and protect it from manipulation or interference.**

Currently, the Draft Law provides for oversight and accountability through biannual reports to Parliament and, on request, appearances before a parliamentary committee.[249] Additional public scrutiny would be afforded through the mechanism's website.[250] Unfortunately, the suggested method of accountability and oversight, as proposed by the sponsors of the independent mechanism, may be insufficient to safeguard its independence and protect the mechanism from pressure and interference. Consideration should be given to a more robust oversight mechanism.

Parliamentary oversight can provide an important check and balance because it includes perspectives from across the political spectrum and ensures that pertinent questions are asked, particularly in relation to motivations for decisions.[251] However, it is doubtful whether biannual reports and occasional appearances can provide the kind of methodical and effective ongoing oversight that is needed, particularly given the likely controversial and politically sensitive nature of many of the cases. Given Georgia's history of political manipulation in the criminal justice system, more practical and ongoing oversight and accountability over the activities of the body is probably required, in addition to parliamentary oversight.

An oversight board, with a mixed composition of respected executive and civil society members, should be appointed to provide more hands-on oversight. Such an oversight body ought to benefit from a wide breadth of experience that spans civil-society stakeholders, professional associations, and key state agencies and ought to ensure that the mechanism remains free of manipulation by any person or group and acts strictly in accordance with the Constitution and applicable law.[252]

While such an oversight body should not necessarily be empowered to overrule investigative and prosecutorial decisions, it should lay down policy, guidelines, and terms of reference for the mechanism's investigations and assess whether investigative decisions, including the exercise of coercive powers, such as search and seizure, fall within those guidelines. It should also assess the body's strategic direction. These assessments should be provided to the investigative body itself and to Parliament. Such a board should also report to the public, without disclosing details that may prejudice the investigations. There is a precedent for an oversight body from South Africa,[253] the United Kingdom,[254] and elsewhere.

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249 Draft Law, Article 17.
250 Draft Law, Article 18.
251 South African Constitutional Court, Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) at para 239.
252 The Directorate of Special Operations was established in South Africa in 1999. It was a particularly effective specialist investigation unit but did not enjoy the protection or guidance of an oversight body. Political pressure ultimately saw its closure in 2008. See Sebastian Berger, "South African crime-fighting unit stung by its own success," The National, July 29, 2008, www.thenational.ae/news/world/africa/south-african-crime-fighting-unit-stung-by-its-own-success
253 The criminal investigations launched in the mid-1990s into organised hit squads plaguing South Africa, by the Investigation Task Unit, was overseen by an independent civilian board, the Investigation Task Board, appointed by the Minister of Safety and Security. Melanie Lue, "A Short History of the Establishment of the ITU: Making Enemies - Dismantling KwaZulu Natal's Hit Squads," Crime & Conflict, 1996.
254 The erstwhile National Crime Squad in the United Kingdom was overseen by the National Crime Squad Service Authority, which consisted of a mix of independent persons and members from the executive branch. The successor to the squad, the National Crime Agency, a non-ministerial government department, which leads the country's investigations into serious and organized crime, maintains such oversight through the NCA Board. National Crime Agency, "How we are run," website, www.nationalcrimeagency.gov.uk/about-us/how-we-are-run The NCA Board comprises executives and nonexecutive members as well as observers, which include a trade-union representative, a Home Office official, and others appointed by the Chairperson. The board's functions are both advisory (setting strategic direction for the agency) and supervisory (scrutinising performance, ensuring strong corporate governance, and setting standards, ethics, and values for how the agency does its work and the culture it promotes). See UK Government, "Terms of Reference of the Board of the National Crime Agency," webpage, www.nationalcrimeagency.gov.uk/publications/539-nca-board-terms-of-reference/file. In addition, the agency is subject to external and independent scrutiny by various inspectorate bodies as well as the Independent Police Complaints Commission and various committees of Parliament.

- **Create an independent complaints body to receive and inquire into any complaint of misconduct or infringement of rights by the investigative mechanism as well as any allegation of improper influence or interference regarding the conduct of an investigation.**

An independent complaints body ought to be attached to the proposed board or, alternatively, it could be a separate body that enjoys jurisdiction over the conduct of the investigative agency.[255] A complaints body would allow members of the public to complain about infringements of rights caused by an investigation. It should also allow any member of the investigative body who can provide evidence of any improper influence or interference, whether of a political or any other nature, regarding the conducting of an investigation to complain as well.[256]

- **The subject matter jurisdiction should include serious crimes committed by public officials as well as other crimes considered to be priority crimes because of their considerable impact or threat to society.**

Consideration should be given to including other crimes in the jurisdiction of the independent investigative mechanism. Crimes considered to be priority crimes because of their impact or threat to society, extent, sensitivity, and/or complexity should be considered for inclusion. It is likely that other serious crimes, particularly those committed by state officials or powerful individuals or bodies connected to the state will similarly require the attention of an independent and credible investigation.

Given that the establishment of an independent investigation body will require the allocation of substantial resources in terms of personnel, training, materials, and finance, it would be unfortunate if the only independent criminal investigation in Georgia was restricted to a narrow set of crimes, albeit very serious ones, committed by public officials.

- **Provide the independent investigative mechanism with the temporal mandate to investigate both past and future cases that fall within its subject-matter jurisdiction and develop an investigative strategy that will avoid overwhelming the mechanism with cases.**

Several respondents who spoke with ICTJ wished to see past violations investigated by an independent and credible body. Excluding past crimes from the remit of the independent mechanism would effectively mean neglecting such crimes and their associated victims. While in theory such crimes could still be pursued by the existing investigative bodies and the Prosecutor's Office, in reality this is unlikely to happen, given the poor track record of past efforts. It would have a seriously debilitating impact on the rule of law and may violate the right to equal treatment under the Constitution, because victims of the same crimes would be treated substantively differently. Such an approach may also place Georgia in violation of certain treaty obligations.[257]

In relation to the concern that it may be too late to pursue cases from the past because evidence is no longer available, generally speaking, there is invariably a deficiency of evidence prior to the commencement of serious and methodical investigations. While older cases are more challenging, it is for an actual investigation to determine whether evidence exists or not. In this regard it is noted that prosecution authorities in countries such as Argentina, Germany,

255 It could perhaps be headed by a respected retired judge and be backed up by the power to refer a complaint to the Prosecutor's Office, where such a complaint discloses evidence of a criminal offence.
256 The head of the complaints mechanism should be permitted to request information from the body, and such a request ought not to be refused under any circumstances.
257 OHCHR, Status of Ratification Interactive Dashboard, webpage, http://indicators.ohchr.org/

and Guatemala have brought very significant cases to trial from the 1980s, 1970s, and even as far back as the mid-twentieth century.[258]

While ICTJ shares the concern that the proposed mechanism not be overwhelmed by its caseload, there are viable means of avoiding this through the development of appropriate investigative strategies. The departure point would need to be the acceptance that not every single complaint can be investigated.[259] Identifying the most appropriate cases for prosecution will involve devising an appropriate gravity threshold and applying relevant considerations. Presumably the most egregious of cases should be prioritized. Ultimately the mechanism will have to match its caseload to its available resources and personnel.

In the context of Georgia it is quite likely that a comparatively small number of perpetrators in various institutions committed many crimes against many victims. Thus, it follows that not every case has to be pursued to in order to ensure that the bulk of perpetrators face justice. Moreover, it stands to reason that cases against senior-ranking perpetrators, those in positions of great influence, authority, leadership, or command should be prioritized.[260]

On Sequencing

Few transitional justice programs are done simultaneously and invariably their operational periods differ. Some measures, like criminal prosecutions, can take place many years, even decades, later. Questions of timing are inevitably dependent on a range of factors, such as political will, public mobilization (or the lack thereof), and the availability of capacity and resources. In Georgia, some or all of these factors have at different times prevented transitional justice programs from proceeding. The measures recommended in this report lend themselves to a degree of sequencing. The proposed national dialogue and a national documentation project could take place first, aimed at informing and facilitating the work of all subsequent initiatives.

The balance of the proposed measures could, in theory, commence as soon as they could be put into place. It would make sense for the proposed truth commission to be established as early as possible, as its findings and recommendations are intended to feed into institutional reforms across all sectors.

While the initial three measures could potentially have fairly short operational periods, the remaining measures will either be longer term or permanent in nature. Remedying miscarriages of justice requires a case-by-case consideration and presumably will only stop once all complaints have been finalized. The independent investigation agency is intended to be a permanent body that provides Georgia with a special capacity to handle endemic abuses and complex crimes. Reparations requires considerable public education and an inclusive registration process. The marshalling of resources and the rollout of the program is undoubtedly a long-term exercise. Institutional reforms are by their nature long-term projects.

These longer-term measures can conceivably take pace in parallel to each other. Indeed, there may be great value in each mechanism, in appropriate circumstances, exchanging information and referring information and cases to each other.

258 Jo-Marie Burt, "CREOMPAZ Hearings Conclude; Tribunal to Determine if Case Goes to Trial," *International Justice Monitor*, June 7, 2016, www.ijmonitor.org/2016/06/creompaz-hearings-conclude-tribunal-to-determine-if-case-goes-to-trial/; Uki Goñi, "Operation Condor conspiracy faces day of judgment in Argentina court," *The Guardian*, May 26, 2016, www.theguardian.com/world/2016/may/26/operation-condor-trial-argentina-court-death-squads; Kate Connolly, "Auschwitz guard jailed for five years in Holocaust murder trial," *The Guardian*, June 17, 2008, www.theguardian.com/world/2016/jun/17/auschwitz-guard-reinhold-hanning-jailed-holocaust-auschwitz

259 Typically, investigative strategies sit between the extremes of investigating every case and doing nothing. Any strategy must necessarily limit the number of cases to be considered for in-depth investigation and prosecution. It should take into account Georgia's history of violations, including past investigative and prosecutorial strategies.

260 Such individuals either instructed such crimes to proceed, set policies that allowed them, or declined to stop them.

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