Georgian Young Lawyers' Association

MONITORING CRIMINAL TRIALS IN TBILISI, KUTAISI, BATUMI, GORI AND TELAVI COURTS

Monitoring Report №11
Period covered: September 2016 - February 2017

Tbilisi 2017

USAID FROM THE AMERICAN PEOPLE

EAST • WEST MANAGEMENT INSTITUTE
Promoting Rule of Law in Georgia (PROLoG)

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GYLA IDENTIFIED THE FOLLOWING KEY FINDINGS DURING THE MONITORING:

The monitoring showed that instead of creating opportunities for development of the justice system, the current issues and challenges reveal that violations of human rights or unreasonable interference in criminal proceedings may become a systemic problem.

- Still very low is the percentage of application of alternative preventive measures, and mainly a bail and imprisonment are used. Namely, imprisonment and bail were applied in 94% of the cases, while alternative preventive measures were applied in 4% of the cases;
- Still remains problematic the unsubstantiated imposition of imprisonment and bail as preventive measures. In particular, in 14% of the cases[1] the imprisonment was unsubstantiated and was not used as an absolute necessary measure as required by the legislation.[2]Also, the percentage of unsubstantiated decisions on the imposition of bail has increased to 31%;[3]
- It seems that the gravity of crime and severity of penalty is still the main basis for imposition of a preventive measure, which contradicts the Criminal Procedure Code and relevant international standards;
- Frequently prosecutors do not have information or adequate reasoning regarding the amount of bail requested. In particular, when requesting the use of a bail for 87% of the defendants, the prosecution did not pay attention to their financial capabilities or failed to provide sufficient substantiation. In some cases, this was caused by the prosecutors' unawareness of personal duties and responsibility;
- Despite the cases of alleged torture / ill-treatment revealed during court proceedings, the role of the court continues to be limited. The judge does not have sufficient legal tools to appropriately respond to such cases. Also, in a number of cases the prosecution avoided initiating the investigation although information on alleged torture / ill-treatment was made public at the trial;
- Still challenging is the lack of proper judicial control over the legaliza-

[1] In the previous reporting period, the rate of unsubstantiated detention was 10%.

[2] Criminal Procedure Code of Georgia, Article 205.

[3] In the previous reporting period, the rate of unsubstantiated bail was 28%.

tion of arrest, which may be due to faulty legislation. Usually judges do not review the legality of the arrest of the defendant;

- Frequent searches and seizures conducted under "urgent necessity" still remain a systematic problem. Mostly, these investigative activities are carried out with complete disregard of the basic regulations. In 99% of the cases, the searches and seizures were carried out under urgent necessity, which the court later recognized as legal;
- Substantive hearings of cases are often adjourned as soon as they are opened or are delayed thus leaving the impression that the trials are deliberately prolonged;
- In 28% of the main hearing cases judges provided an incomplete explanation of rights or failed to explain rights to the defendants;
- Only guilty verdicts were delivered in all cases observed during the court monitoring;
- It is true that the explanation of rights to defendants by the judges during plea agreements has improved, however, there are still a number of problems and shortcomings which are related to the lack of reasoning and lawfulness of the proposed sentence;
- On transport-related crimes resulting in death of humans or damage to health, often a plea agreement is concluded in such a manner that the position of victims or victims' heirs/successors at the court sessions are not stated;
- On all transport-related crimes resulting in plea agreements non-custodial sanctions were applied against the offenders. It is true that investigation of the content of sentence and decisions is beyond the scope of this study, but the fact that in all cases light sanctions were used (a suspended sentence and or fine), raises questions whether these measures will be effective in preventing such crimes.
- Plea agreements on the offences against life, bodily health and property were mainly concluded without the Prosecutor's mentioning the victim's position or interests, and therefore, with no discussion thereof;
- During the reporting period, visually degrading measures were applied to some prisoner defendants, namely, placing defendants in a metal cage, wooden or glass enclosure, and application of handcuffs during the hearings, where such necessity was not revealed;

- Certain provisions of drug-related offences are not well regulated, which in most cases leads to the violation of the law and non-uniform approaches from the judges.
- GYLA dedicated its 10th special report to violence against women and domestic violence, which covers the reporting period from August 2016 to January 2017.[4] The following key findings were identified in that report:
- Courts still have significant gaps in their activities and in some cases unreasonably lenient preventive measures are applied. **In comparison to the previous reporting period, the percentage of inappropriately applied preventive measures significantly increased with respect to cases of violence against women and domestic crimes.** Namely, unreasonably lenient preventive measures were applied in 8 out of 17 cases where bail was imposed (47%).[5] This fails to ensure the prevention of repeated acts of violence and the safety of victims;
- In none of the cases related to violence against women that were identified during the monitoring were the crimes classified as crimes committed on discrimination grounds (no reference was made to Article 53(3^1) of the Criminal Code of Georgia). As in the previous reporting period, the prosecution did not focus on possible discrimination motives in any of the cases related to violence against women. Despite circumstances pointing to a discrimination motive, the prosecution and judges carry out their analysis without considering such motives.

INTRODUCTION

The aim of the report is to identify practical and legislative gaps, including positive trends by analyzing the cases of criminal trials which reveal ups and downs of the judicial system.

It is important to protect the rights and interests of process participants in the criminal proceedings to the maximum extent. However, in some cases, these standards were not complied with due to legislative and practical gaps. Georgian Young Lawyers' Association (GYLA), like in the previous re-

[4] Cases of domestic violence, household crimes and violence against women,http://bit.ly/2sPbn44.

[5] In the previous reporting period, unreasonably lenient preventive measures were applied in 2 out of 10 cases where bail was imposed (20%).

ports, examined the shortcomings identified during court trials, including positive trends, by attending court hearings and processing the information gained.

The report is based on the examples of the national legislation and best practice of courts, as well as international approaches and recommendations.

The report describes the trends of using preventive measures, the practice and gaps of imposition of imprisonment and bail, and also, alleged facts of ill-treatment and the state response mechanisms. The report focuses on the search and seizure practice,and the effectiveness of the judicial control over the legalization of detention. There are also highlighted certain shortcomings and trends revealed during plea agreements and preliminary court hearings. The report also looks at the trends identified during the main hearings of particular cases.

Finally, the report also includes relevant recommendations for solving the issues identified during the monitoring process. The main purpose of the recommendations is to facilitate the improvement of the criminal justice system.

METHODOLOGY

Georgian Young Lawyers' Association (GYLA) has been implementing the court monitoring project since October 2011. GYLA originally implemented the monitoring project in the Criminal Cases Panel of Tbilisi City Court. On December 1, 2012, GYLA expanded the scope of the monitoring and covered Kutaisi City Court as well. In March 2014, the monitoring was launched in Batumi City Court. In September 2016, the Telavi and Gori courts were added to the monitoring process. In all five cities the identical methodology of monitoring was applied.

The first and second reports of the monitoring prepared by GYLA cover the period from October 2011 to March 2012.[6] The third report covers the period from July to December 2012.[7]The fourth report covers the pe-

[6] The First Trial Monitoring Report: https://goo.gl/XzPmqh;SecondTrial Monitoring Report: https://goo.gl/nMoeXj.

[7] Third Trial Monitoring Report: https://gyla.ge/files/monitoringis%20angariSi3.pdf.

riod from January to June 2013.[8] The fifth report covers the period - from July to December 2013,[9] the sixth report covers the period from January to August 15, 2014.[10] Together with the sixth monitoring report, GYLA submitted three year summary monitoring report, which includes the issues, changes, trends and challenges to the court identified during the period.[11]In addition, in June GYLA presented the seventh report, which covered the period from August 15, 2014 to January 2015,[12] and on March 10th, the 8th report was presented, which included the data from February 2015 to October 2015.[13] The presentation of the 9th report was held on December 8, which covered the reporting period from February to July 2016.[14] This eleventh monitoring report of the court trials prepared by GYLA, includes the period from September 2016 to February 2017.

GYLA dedicated its 10th special report to violence against women and domestic violence, which covers the reporting period from August 2016 to January 2017.[15]

All the information provided in the report has been obtained by attending and observing the court hearings. GYLA monitors did not communicate with the parties and did not discuss case materials or final decisions.

Like in the previous monitoring periods, GYLA's monitors used questionnaires prepared especially for the monitoring project. The information gathered by the monitors, and the compliance of courts' activities with international standards, the Constitution of Georgia and the current legislation were evaluated by GYLA's analysts and lawyers.

The questionnaires included both close-ended questions requiring a"yes/no" answer as well as open-ended questions which allowed monitors to explain extensively and provide their observations. In addition, similar to the previous reporting periods, GYLA's monitors, in certain cases, made transcripts of trial discussions and particularly important motions giving

[8] Fourth Trial Monitoring Report: https://goo.gl/qvdpMY.

[9] Fifth Trial Monitoring Report: https://goo.gl/rt2jp3.

[10] Sixth Trial Monitoring Report: https://goo.gl/ylt9FY.

[11] Summary of three years of the Court Monitoring: https://goo.gl/6RIIXo.

[12] Seventh Trial Monitoring Report: https://goo.gl/7WsVEk.

[13] Eighth Trial Monitoring Report: http://bit.ly/2dX5hrH.

[14] Ninth Trial Monitoring Report: http://bit.ly/2m6TwTJ.

[15] Cases of domestic violence, household crimes and violence against women,http://bit.ly/2sPbn44.

more clarity and context to their observations. Through this process the monitors were able to collect objective, measurable data and, at the same time, to identify other important facts. The annexes to this report may not fully reflect these somewhat subjective evaluations, however, GYLA's conclusions are in overall based on the analysis of all the information gathered by the monitors.

Of course the report cannot review and analyze all trials or sessions in courts, though the information presented contains important and noteworthy information for members of the judiciary, Prosecutor's Office and bar association, as well as legislative and executive representatives. Furthermore, the purpose of the trial monitoring is not to examine factual circumstances of cases, statements made by session participants and the contents of case materials. In addition, GYLA has not analyzed the issues which were related to the circumstances of a certain crime which determined the guilt or innocence of a person.

Taking into account the duration and various stages of criminal proceedings, asa rule, GYLA's monitors, through a random selection attended specific court hearings rather than all court sessions. However, the following exceptions were made:

- so-called "high profile" cases, in which the defendants were former political figures;
- also, GYLA monitored the cases which were selected according to gross violation of rights, high public interest and other special factors;

GYLA's monitors attended the whole stage of reviews of the above cases as much as possible not only at city courts but also at courts of appeals.

From September 2016 to February 2017 inclusive, GYLA monitored 1190 court sessions. **Among them** are:

- 269 - First appearance hearings;
- 277 - Pre-trial hearings;
- 210 - Plea agreement hearings;
- 427- Main hearings;
- 7 - Appellate sessions.

GYLA hopes that the information obtained during the monitoring will give a clearer image of the situation in Georgian courts and will contribute positively to ongoing debates on the judicial reforms.

I. TRENDS IDENTIFIED DURING FIRST APPEARANCE HEARINGS- GENERAL OVERVIEW

1. Introduction

Pursuant to Article 198 of the Criminal Procedure Code of Georgia (CPC), at the first appearance of the defendant at the session, with other procedures, the court shall consider the issue of which restraint measure shall be used to ensure that the accused does not avoid appearing before the court, prevent his/her further criminal activities and to ensure the execution of justice until the final judgment is delivered. The measure of restraint shall be substantiated, which means that the use of a preventive measure shall comply with the objectives as prescribed by the law.

The use of a preventive measure has a preventative character and its purpose is not to prove the guilt of a person but to prevent the hindrance of proper execution of justice.[16]

The Court may use one of the several measures of restraint provided in the Criminal Procedure Code of Georgia: imprisonment, bail, personal guarantee, an agreement not to leave the country and adequate conduct, supervision of the command of the behaviour of a military service member and remand detention of a juvenile accused.

According to Article 198.3of the CPC, when filing a motion for applying a measure of restraint, the prosecutor shall be obliged to provide reasons for the appropriateness of the requested measure of restraint, and inappropriateness of another, less severe measure of restraint. Therefore, the burden of proof of preventive measures is imposed on the prosecution. The defense is not obliged to submit any evidences against the prosecutor's motion. According to Article 198.5of CPC,when deciding the issue of imposition of a measure of restraint and its specific type, the court shall take into consideration the personality, occupation, age, health status, marital and financial status of the accused, violation of any of the previously applied measures of restraint and other circumstances.

Also, the Court's decision on the use of any measure of restraint shall be substantiated, since at every stage of the proceedings a reasonable decision is a part of the right to a fair trial as guaranteed by the Criminal

[16] The protocol record of 26/06/2015 the Constitutional Court of Georgia. №646b II-40.

Procedure Code of Georgia [17]and supported by a number of decisions by European Court of Human Rights.[18]Thus, the use of any preventive measure shall not be based on the feelings, instincts, pre-established views or pre-existing relationships.

At the same time, it is important that at all stages of the proceedings, including when resolving the issue of preventive measures, defense lawyers shall wisely and consistently protect and act in the best interests of the defendant and use all legal means and methods to do so.[19]

During the monitoring, GYLA once again identified deficiencies in the work of judges, prosecutors and lawyers who, despite the sound legislation, are less responsible and considerate to the adherence of the high standards of human rights at the first appearance sessions.

2. Analysis of court sessions

The courts, in general, still use two types of restraint measures - bail and imprisonment. Unlike the previous reporting period, the percentage of the use of alternative preventive measures slightly decreased.[20] In addition, unlike the previous reporting period, the percentage of unsubstantiated decisions on the use of imprisonment and bail has slightly increased. In particular, 14% of the decisions on the use of detention were unsubstantiated,[21] and 31% of the decisions on the application of a bail was unsubstantiated and overly strict.

The chart below illustrates the situation in connection with the use of preventive measures throughout the monitoring period (from October 2011 to February 2017, inclusive).

[17] Criminal Procedure Code of Georgia. Article 194.2

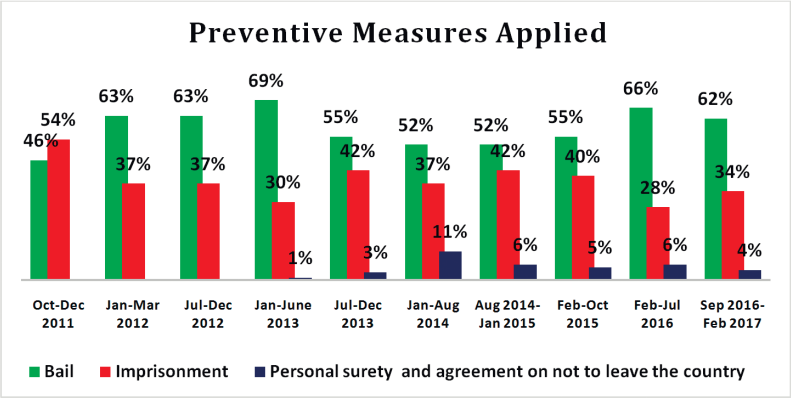
[18] E.g., *Hiro Balani v. Spain*, no. 18064/91, 9 December, 1994, §27.

[19] Criminal Procedure Code of Georgia. Article 44.

[20] In the previous reporting period, other types of preventive measures were used in 6% of the cases, while in this reporting period –the rate of other preventive measures was only 4%.

[21] In the previous reporting period, 10% of the decisions on the use of detention were substantiated.

ChartN№1



2.1. Approaches of Prosecution

Like the previous reporting period, the Prosecutor's Office tried to better substantiate the motions on the imposition of the preventive measures, but unfortunately, there were still cases where the prosecutor's motions were abstract and of formulaic character. Although the prosecution indicated the purpose and grounds for the use of the preventive measures, the arguments were sometimes proposed blindly and not related to the specific factual circumstances of the case. The impression was that sometimes the prosecution focused more on the gravity and character of the crime rather than the threats and risks required to achieve the goals of the preventive measure. The prosecution's motions were more substantiated when requesting detention than in the case of a bail offering. Furthermore, the prosecution often had no information or appropriate reasoning on the financial status of defendants.

2.2. Court's Approach

Court decisions included some positive examples which can be considered to be part of the best and most positive practice, however,the increase in the percentage of unsubstantiated decisions on the imposition of imprisonment and bail indicate the overall negative trend in this area. Sometimes, when providing the reasoning on the application of the preventive measures, the court abstractedly evaluated the threats, which does not

constitute a reasonable assumption standard whereby the use of a specific preventive measure may be proved.

Due to the approaches of the court and the Prosecutor's Office, there is an impression that the gravity of crime and severity of penalty is still the main basis for imposition of a preventive measure instead of the purpose and grounds for the use of the preventive measures.

2.3. Position of the defense

There are some gaps in respect of defense as well. There were occasions when the attorneys were unprepared and passive thus damaging the interests of defendants.

Unfortunately, there were cases where instead of protecting the defendants' genuine interests, defense lawyers formally opposed the prosecution, showed up unprepared at court sessions or positively evaluated the prosecutor's motions. The individual cases allowed the defense to request the court to use a less strict preventive measure than the prosecutor demanded, but failed to do so leaving the impression that the defense was ineffective and failed to make reasonable effort to protect the defendant's best interests.

The examples given below illustrate the aforementioned:

- At one of the first appearance hearings, the defense lawyer failed to state his position. The lawyer messed the sentences up and explained that the reason for that was his being away from the city. Several times the lawyer said that he had not examined the case materials and could not say anything about the case.
- Another defense lawyer who showed up unprepared at the first appearance hearing demanded to close the court session since as he noted the case materials contained the information that the defendant was unwilling to disclose. However, the attorney failed to produce a motion in a written form. The lawyer failed also to refer to the appropriate provision of the law and said that he did not have the relevant Code with him. The judge offered his own Code, but the defense lawyer said that he would have difficulty in finding the exact provision in the Code as he did not remember it. Due to

such unreasonable and unsubstantiated explanations given by the lawyer the judge did not grant the motion.

- At another first appearance hearing, where the Prosecutor's Office requested the imposition of imprisonment on the defendant and submitted relevant arguments, the defense lawyer declared: "I regret to say *but I share more than half of the Prosecutor's arguments."* The similar approval was expressed by the attorneys to the Prosecutor's motion in another case where the prosecution demanded bail. The defense lawyers declared: "*We are grateful, and satisfied with the position of the prosecutor"* (they expressed their satisfaction as the prosecutor requested a bail and not imprisonment).

II. USE OF IMPRISONMENT AS A PREVENTIVE MEASURE

1. Introduction

Imprisonment is a deprivation of liberty. Accordingly, the right to liberty is guaranteed by the Constitution of Georgia, the European Convention on Human Rights and the Code of Criminal Procedure of Georgia.

According to the above normative acts, imprisonment is the extreme measure and the grounds for imprisoning a defendant before final determination of guilt are as follows: a) a risk of absconding by a defendant; b) a risk of hindrance to administration of justice; and c) prevention of the commission of a new crime. Imprisonment may be applied only when all other measures are ineffective. In addition, the existence of the above risks must be proved by understandable, convincing and relevant circumstances and evidence. And the burden of proof on the imposition of detention shall always rest on the prosecution. A prosecutor must present facts and information to the highest extent possible which will persuade an objective observer that there may be the sufficient grounds for the application of a preventive measure.

The preventive measure must not be of punitive nature, so it is important to pay more attention not to the gravity of a crime but to proper evaluation of existing threats and risks. For example, whether there is a threat that without imposition of the preventive measure, the accused may abscond, destroy evidence and commit a new crime, etc.

In its turn,the courts must properly evaluate the motions submitted by the prosecution, take into consideration the degree of risks and threats and substantiate the decisions made on the imposition of imprisonment. The court's use of imprisonment may be unsubstantiated when the decision does not relate to factual circumstances, is based on abstract estimation of risks and when the purpose of the preventive measures might be achieved with other lighter preventive measures.

Furthermore, preference should be always given to the less strict forms of restriction of rights and freedoms. As specified by the European Court of Human Rights, imprisonment of a defendant may be justified only if there are true signs of public interest, which, notwithstanding the presumption of innocence, over weigh the requirements of liberty of a person.[22]Also, preliminary detention must be in all cases reasonable and necessary.[23]In addition, according to the recommendation of the Committee of Ministers of the Council of Europe, imprisonment must be applied as an exceptional measure. Also it must not be obligatory and must not be used for the purpose of punishment.[24]

During the reporting period, the GYLA revealed the facts of evading the above-mentioned regulations and standards when the Prosecutor's Office failed to properly support the application of the imprisonment, but the court granted such motions.

2. **Analysis of court sessions**

Since the severity of the offense in some cases was a crucial factor for the application of imprisonment, the impression was created that this measure was used for punitive rather than preventive purposes, such as, for prevention of the commission of a new crime, prevention of absconding and destruction of evidence, etc.

During this reporting period, the percentage of unsubstantiated decisions in relation to imprisonment slightly increased and accounted for 14% in total.[25] In particular, 13 decisions from those 90taken on the imposition of

[22] *Labita v. Italy*, no. 26772/95, 6 April, 2000, §152.

[23] *Pacuria v. Georgia*, no. 30779/04, 6 November, 2007, §62-65.

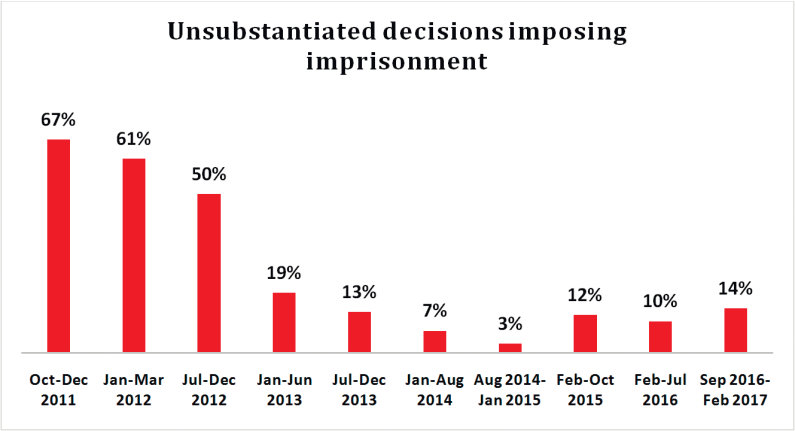
[24] Recommendation №R (80)11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial.

[25] 10% of the decisions on the imposition of imprisonment in the previous reporting period was unsubstantiated.

detention was unsubstantiated and overly strict. Unfortunately, it is still an issue for the prosecution and the judicial authorities to perceive imprisonment as an extreme measure and that the severity of the crime and the strictness of the sentence must not be the only factors used to justify its application.

The chart below shows the results of the entire monitoring period.

ChartN№2



It is true that like in the previous reporting period, the prosecution tried to justify the motions on application of imprisonment and tipically provided adequate arguments for that. However, in some cases, the prosecution's request for the imposition of imprisonment was unsubstantiated and only limited itself to abstract referencing to the circumstances. Moreover, the grounds provided by the prosecution on the basis of referring to all the risks specified in the law, without sufficient justification, does not increase the degree of the substantiation of the motion. Sometimes, the prosecution addressed to gravity of the offence and severity of the sentence to provide grounds for the imprisonment and did not mention the relevance of existing threats and risks. In such cases, judges often refused to uphold motions, however, there were cases when the courts imposed imprisonment despite the prosecution's failure to present sufficient grounds and adequate evaluation of the circumstances.

Examples below illustrate the aforementioned:

- A person was charged with a drug offense punishable by imprisonment from eight to twenty years or life sentence.[26] The prosecutor demanded the application of imprisonment as a preventive measure. The prosecution only referred to the risk of committing a new crime, the severity of the crime, the risk of destruction of evidence and risk of absconding due to the severity of the sentence. No specific circumstances or factual evidence to prove the above arguments were presented.

The defense lawyer did not agree with the proposed conditions and appealed to the court for imposition of a bail in the amount of 10000 GEL, also offered to seize the passport and identity card of the accused. The court hearing revealed that the accused had never been convicted and admitted to committing a crime. Nevertheless, the judge took into account the prosecutor's arguments and applied the imprisonment. Such approaches of the Prosecutor's Office and the court leave the impression that the gravity of the crime and the severity of the sentence in the above case were key factors for the application of imprisonment, while the application of the bail, even in a large amount, would have been a sufficient measure to achieve the purpose of the preventive measures.

- In another case concerning a charge[27] of handing over the place for prostitution purposes, the prosecution demanded the imposition of a preventive measure in the form of imprisonment. The prosecutor only pointed out the risk of continuation of the criminal activity and risk of influencing the witnesses, though failed to provide convincing and credible grounds to prove it. The defense offered the court to apply a bail in the amount of 25,000 GEL and noted that the area of the hotel was sealed and practically it was impossible to resume the criminal activities, and added that the defendant had never been convicted.

Despite the above facts and circumstances, the judge sentenced the accused to imprisonment though the bail offered would have been completely adequate for achieving the goals of the preventive measure. In

[26] The crime envisaged in Article 260 (6) (a) of the Criminal Code of Georgia-Illegal manufacturing, production, purchase, storage, transportation, transfer or sale of drugs, their analogues, precursors or new psychoactive substances.

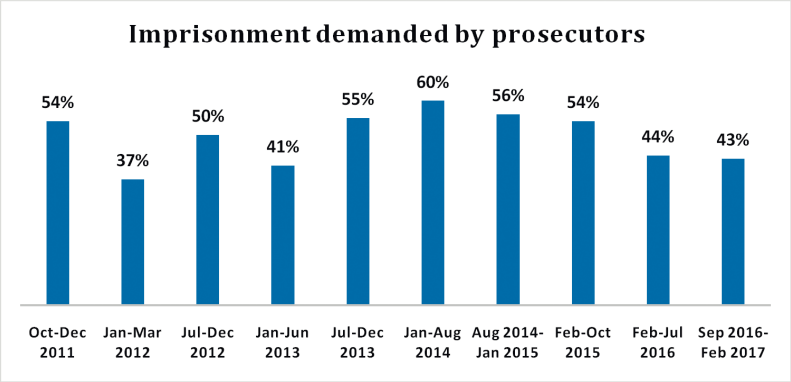
[27] The crime provided under Article 254 of the Criminal Code of Georgia.

the light of the fact that the prosecutor did not substantiate the inefficiency of application of the less strict preventive measure as required by the law,[28] the degree of unsubstantiated character of imprisonment has further increased.

It should be noted that demands from the prosecution for the imposition of imprisonment have not increased and the percentage of imprisonment is almost the same as in the previous reporting period.[29] In particular, the prosecution demanded application of the imprisonment for 43% of the defendants.[30]

The chart below illustrates the frequency of application of imprisonment demanded by prosecutors during the entire period of monitoring (from October 2011 to February 2017 inclusive)

ChartN№3



Although the percentage indicator of Prosecutor's Office demands for application of imprisonment has not changed, the percentage of granting by the courts of the prosecution's motions for the imposition of imprison-

[28] In accordance with Article 198(3) of the Criminal Procedure Code of Georgia, upon the submission of a motion on application of a preventive measure, the Prosecutor shall prove the effectiveness of the preventive measure requested and ineffectiveness of the use of other, less strict measures of restraint.

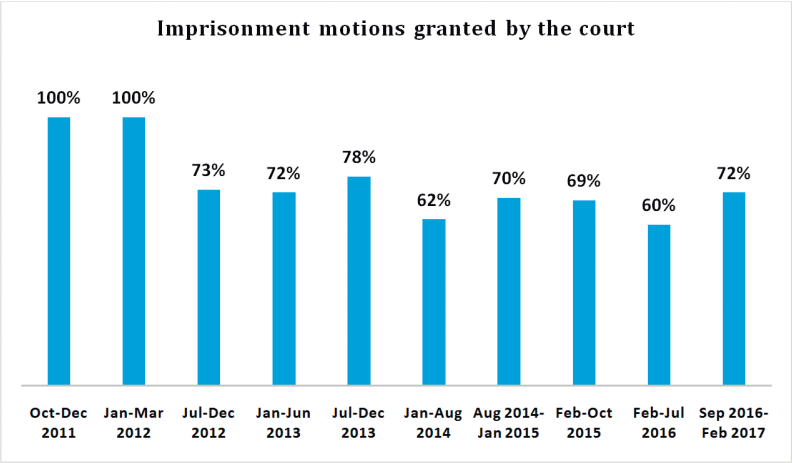
[29] In the previous reporting period, prosecutors requested the application of imprisonment for 44% of the defendants.

[30] The Prosecutor's Office demanded the imprisonment for 125 defendants out of 290.

ment has increased. In the previous reporting period, the court granted the prosecution's motions in 60% of cases, during this reporting period this percentage is 72%. In 27% of the remaining 28%, the court did not grant the motion of the imprisonment[31] and used the bail, and 1% is the indicator when defendants were left without the preventive measure although the prosecutor demanded the imposition of the imprisonment. As in the previous reporting period, also during this reporting period there have been no cases where the prosecutor requested the use of imprisonment and the court used another alternative preventive measures other than the bail.

The chart below illustrates the tendency of granting by courts the motions for the imprisonment during the entire monitoring period (from October 2011 to February 2017 inclusive)

ChartN№4



Thus, the imprisonment as a preventive measure, in some cases, is unreasonably used. Sometimes, the substantiation is based on stereotypical formulations and is not supported with convincing and real arguments to justify the detention of an accused.

[31] From 125 defendants for whom the prosecutor demanded the application of imprisonment, the judge applied the imprisonment for 90 defendants, the bail in 34 cases and 1 defendant was left without a measure of restraint.

III. APPLICATION OF BAIL AS A PREVENTIVE MEASURE

1. Introduction

Bail is a preventive measure, the purpose of which is to ensure the defendant's return to the court and prevent further criminal activities or interference with proper administration of justice. In the case of imposition of the bail,a defendant shall pay a certain amount of money instead of being imprisoned before a final decision is rendered on the case and to ensure defendant's proper conduct. The minimum amount of bail is GEL 1000; and the defendant or the person, who pays the bail or equivalent immovable property in favor of the defendant, shall be repaid the amount of the bail in full (taking into account the rate at the time the bail was posted), or the lien shall be lifted from the property within one month after the execution of a court judgment. The above regulation shall be applied if a defendant has fulfilled his/her obligation precisely and honestly, and a preventive measure, applied to him/her, has not been replaced by a more severe preventive measure.[32] The bail amount shall be determined by taking into consideration the material and property status of the accused. The Article 200 of the Criminal Procedure Code of Georgia explicitly obliges the Prosecutor to find out the financial (property) status of the defendant before demanding a bail (the amount). Moreover, the court shall be obliged to take into account the financial status of the defendant along with other circumstances[33] when determining the bail and its amount. The court shall also pay attention to the circumstances when the Prosecutor's Office does not provide relevant information. Furthermore, the defense side is not obliged to submit information since it is the responsibility of the prosecution to substantiate the expediency and proportionality of the preventive measure. Besides, it is important that the imposition of bail on a defendant be proportional and substantiated. This means that a bail must be substantiated and proportional to the financial status of a defendant and the alleged crime. To examine the issue of a preventive measure, all relevant circumstances must be analyzed in order for a judge to be convinced that a defendant can afford to pay an imposed bail. If the imposed bail cannot be paid, the bail may be replaced by a more severe preventive measure, such as imprisonment. Therefore, an unsubstantiated and excessively large amount of bail may be actually equal to the im-

[32] Article 200 of the Criminal Procedure Code of Georgia.

[33] For example, personality of the accused, his / her occupation, age, health status, etc.

prisonment of a person. Imposition of an unsubstantiated and excessively large amount of bail bears especially high risks in case of application of a preventive measure with a guarantee of remand. It is also important that bail must have a restraining effect, namely the loss of the property must be a significant financial loss for a defendant, as a result of which he/she will try to fulfill the bail conditions.[34]

In addition to the national legislation, the European Court of Human Rights has determined in several of its decisions that in the process of determining the bail amount a person's property and his/her relations with the person who pays the bail must be assessed.[35] Also, the states shall discuss this issue with the same diligence as the issue of necessity of imposition of imprisonment as a preventive measure.[36]

GYLA has identified the cases of violation of the above-mentioned regulations and standards, when the prosecution requested the imposition of a bail though failed to provide any information on the material status of the defendant. Frequently, the prosecution limits itself to the substantiation of the imposition of the bail and avoids saying anything about the amount of the bail. It is true that the court tried to determine the financial capabilities of a person, but in certain cases the bail was not an appropriate measure.

2. Analysis of court sessions

The court monitoring has shown that the percentage of unsubstantiated decisions on the use of a bail has increased more and is 31%.[37] Sometimes, prosecutors failed to substantiate the necessity of the imposition of the bail and, in contrast to imprisonment, demonstrated less effort to justify its need. In some specific cases, the prosecution did not even speak about the purpose and risks of the preventive measure and only read out the content of the prosecution. Also, sometimes, even though the prosecutor referred to abstract nature of the risks, the judge upheld motions and

[34] Comment on Criminal Procedure Code of Georgia, Group of Authors, Edited: Giorgi Giorgadze, Tbilisi, 2015, 577-578.

[35] *Neumeister v. Austria*, no.1936/63, 27 June, 1968, §18; *Iwanczuk v. Poland*, no. 25196/94,15 November, 2001, §66-70.

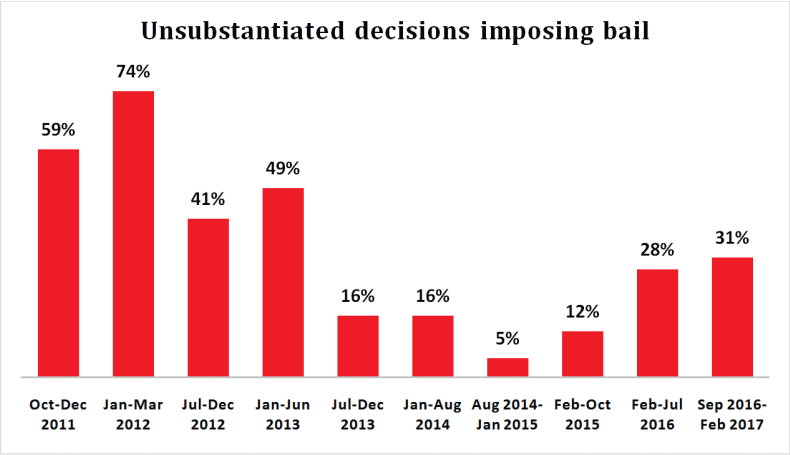
[36] *Iwanczuk V. Poland*, no. 25196/94,15 November, 2001, §66-70.

[37] In the previous reporting period, the use of the bail in 28% of cases was unsubstantiated.

was less enthusiastic to examine the thoroughness and expediency of this measure.[38]

The chart given below shows the tendency of imposition of unsubstantiated bail during the entire monitoring period (from October 2011 to February 2017 inclusive).

ChartN№5



[38] The organization believes that the bail is unsubstantiated when for example, judges support the prosecution's motion on the imposition of a bail without proper justification and reasoning,which shall be based on the guilt, personality of the accused, his/her financial status and other important circumstances of a case. Non-examination of these circumstances by judges is even more damaging when a defendant does not have a defense lawyer; despite the prosecution's demand for the imposition of the bail instead of imprisonment, judges do not examine the defendant's financial status and other essential circumstances for imposing a bail; Although defense agrees with the prosecutor on the imposition of the bail, despite the defense's consent on the imposition of the bail, GYLA still deemed unsubstantiated the imposed bail, as the defense's consent or desire to the payment of the bail amount must not exacerbate or neutralize those threats, for which prevention measures are applied.

The examples given below illustrate the aforementioned:

- A person was accused of committing theft, which is a less serious offense and punishable by imprisonment from three to five years. The prosecution demanded the application of the bail in the amount of 3,000 GEL and noted the risk of continuation of criminal activities and absconding, but could only substantiate the motion with the severity of the sentence and the character of the offense (the prosecutor explained that the defendant was accused of an intentional crime against property). The defense lawyer opposed with the proposed condition and noted that the defendant's income was 300 GEL and he supported 3 sick persons. S/he also said that the accused had health problems. In addition, it was also revealed that the defendant did not attempt to abscond during the detention. Finally, the judge granted the prosecutor's motion and imposed the bail in the amount of 1500 GEL. Despite the fact that the defense did not offer any specific preventive measure, we believe that the bail was a disproportionate measure. The accused had never been convicted in the past and had not even received any notice for an administrative offenses, and also had minor children. The defendant's permanent residence was in Tbilisi and therefore, the threat of his absconding and committing a new crime was groundless. Therefore, the imposed bail was an innapropriately harsh measure.
- Another case relates to the illegal use of drugs, in which the prosecutor demanded imposition of a preventive measure in the form of a bail in the amount of 1000 GEL with no reference to the financial status of the accused. The prosecution indicated only the risk of continuation of criminal activities, though failed to substantiate it and provide facts or arguments. The trial revealed that the defendant had not been convicted in the past and admitted to the offense. Nevertheless, the judge fully granted the prosecutor's motion and imposed the bail on the defendant, which was an unjustified measure.
- The prosecutor demanded the imposition of a preventive measure in the form of bail in the amount of 2000 GEL in the case of theft. According to the prosecution's explanation, the accused secretly seized a purse causing the damage to the owner in the amount of

15 GEL. The prosecutor noted only the threat of absconding and continuation of criminal activities, and substantiated it with the character of the crime and the expected strict punishment. The defense requested the application of a personal guarantee and presented 4 guarantors at the session who could under take relevant responsibilities for the actions and conduct of the defendant. The session also revealed that the defendant committed the crime due to the material hardship and his family was socially vulnerable. Finally, the judge shared the prosecutor's arguments and imposed the bail on the defendant in the amount of 1000 GEL, which is unjustified, as the personal surety, if applied, would have been completely sufficient to achieve the purpose of the preventive measure.

It is even more alarming and unreasonable is that sometimes the court when substantiating the imposition of a bail was asserting the details of the offense which left the impression that the application of the preventive measure had punitive character and the judge reprimanded the accused for the alleged offense.

The example given below illustrates the aforementioned:

At the first appearance hearing which was reviewing a case of violation of traffic safety or exploitation rules committed under the influence of alcohol and resulting in less severe damage to human health, the prosecutor requested the imposition of bail as a preventive measure in the amount of 2000 GEL and only read the essence of the charges (s/he did not discuss the purpose of the preventive measure and risks). The judge fully granted the motion of the prosecution and pointed that as the offence was committed under the influence of alcohol, non-application of the bail would encourage the accused to consume alcohol again.

It is true that this case belongs to the category of serious crimes, but the purpose of the preventive measure must not be the establishment of guilt or innocence of a person and less attention must be paid to severity and the category of the crime. These circumstances should be evaluated during the main hearing of the case.

Still particularly problematic is the substantiation of the amount of a bail. The prosecution often does not examine the solvency of defendants. In 87% of requests for bail, prosecutors failed to provide any grounds or proper reasoning on the financial status of defendants. In several cases, the court asked the prosecutors how they determined the amount of the bail, although the prosecution provided no convincing and appropriate arguments. The prosecutor only marked that the defendant did not belong to socially vulnerable group of persons, though had not investigated whether the defendant was able to pay the bail or the collateral of the property.

Especially alarming and disturbing is the fact that the amount of the bail requested by the prosecution was entirely based only on the gravity of the action and the personality of the accused and not his/her financial status. For example, at one of the hearings, the judge asked the prosecutor if the latter had any information about the financial status of the accused and the prosecution responded that s/he was guided by the severity and the character of the offense. In addition, the prosecutor also noted that s/he only had general information and unfortunately had not obtained any documents. Based on this, the prosecutor demanded the imposition of the bail in the amount of 7000 GEL. In another case, the defense lawyer asked the prosecutor whether the latter had any information about the financial status of the defendants, and the prosecutor replied that it was not his/her duty to investigate such matters.

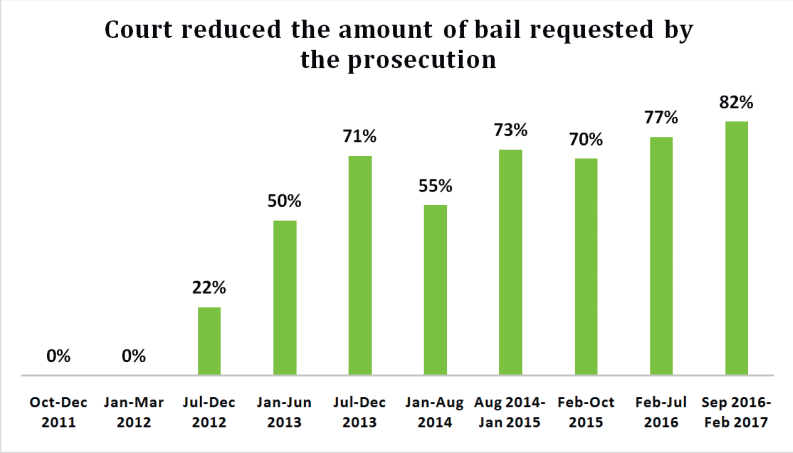
It is true that in such cases the court tried to establish independently the financial status of defendant, but it does not mean that decisions taken after such investigation [by the Court] were substantiated. There were also the cases when the defendant was imposed a bail without examination of his/her material status and the court did not show any interest in that direction.

In addition, it should be noted that the court often reduced the amount of bail requested by the prosecutor. In particular, in 82% of cases the court granted the prosecutor's motion on the imposition of a bail, and at the same time reduced the amount of the bail. The fact that the court, in most cases, reduces the bail amount requested by the prosecutor once again demonstrates that the prosecution does not to investigate defendant's material status and imposes an inadequately, disproportionately high amount of money on the defendant, which may incur even more burden on the person than it is required for the achievement of specific goals.

Moreover, the use of unreasonably high amounts of bail may result in so called" covered detention," where bail is ordered as a preventive measure but the defendant remains in prison because s/he cannot pay the bail. The application of unreasonably high bail cannot be justified because it does not guarantee the achievement of the purposes of the preventive measure, since there will be the expectation that the defendant will not be able to pay the bail and thus, his/her legal status will be improperly aggravated.

The chart given below shows the tendency of reduction by courts of the bail amount requested by the prosecution during the entire monitoring period (from October 2011 to February 2017 inclusive).

Chart№6



Despite the above mentioned negative cases, some positive and efficient approaches of the judges were also observed, where the courts adequately and conscientiously evaluated the prosecutor's motions and delivered decisions in favour of the accused.

The example given below illustrates the aforementioned:

A person was accused of attempted robbery. As the court trial revealed, the accused secretly seized 1 face cream, which cost 25.60 GEL. The prosecution requested the imposition of a bail in the amount of 2000 GEL and indicated the risk of continuation of criminal activities as the accused had been convicted (crime is unknown), but in 2013 was pardoned by the President.

The defendant objected to the motion and noted that he had two minor children, his wife was unemployed, they lived in a rented apartment and had no sufficient income to pay the bail amount. The accused offered the court the personal guarantee and noted that his wife would be able to act as his guarantor.

Finally, the judge thoroughly examined the material status of the accused, adequately evaluated the risks and imposed the personal surety for the defendant.

Prosecution's motions on the imposition of bail and the decisions made by the court

During this reporting period, the prosecutor demanded the imposition of bail on 54% of the defendants (157defendants out of 290). Unlike in the previous reporting period, the percentage of the demands for the imposition of bail has increased, as in the previous reporting period the demand for the bail was 51%. Out of these, the court granted 132 (84%) motions, but in 108 (82%) cases reduced the amount of bail. The amount of bail varied from 1000 to 100.000 GEL.

As for the remaining 25 (16%) cases, the court did not support the prosecution's order for the application of bail. Of this, 13 (52%) defendants were left without the preventive measure, in 10 (40%) cases an agreement was signed on not to leave the country and proper conduct, and in 2 (8%) cases - the personal guarantee was applied. The fact that alternative measures and no preventive measures were imposed on the defendants by the court should be evaluated positively.

In addition to non-application of preventive measures by the court, there were cases when the prosecutor did not motion for the application of a preventive measure. In total, 8 (3%) cases of this kind have been reported, but the reason for this was that the defendants either had already been

convicted or imposed imprisonment as a preventive measure for other offenses. In 1 case, the reason for rejecting the request for a restraint measure was not announced at the trial.

Thus, the above information shows that prosecution and judicial bodies neglect the requirement to substantiate the imposition of a bail, which leaves the impression that the applied bails impose more burden on the accused than it is necessary for the achievement of the purpose of the preventive measure. The unsubstantiated use of bail could amount to unintended imprisonment as a preventive measure.

IV. THE FACTS OF ALLEGED ILL-TREATMENT IMPLEMENTED BY LAW ENFORCEMENT AGENCIES

1. Introduction

Torture and ill-treatment is prohibited by the Constitution of Georgia, the ECHR and the Criminal Procedure Code of Georgia. The prohibition provides protection for a person against torture and degrading treatment. For adequate realization of this right, a person must be aware of his/her rights. Logically, this imposes on the court an obligation to inform the defendant of these rights, that the accused has the right to file a claim about torture or ill-treatment in any case of torture of ill-treatment and at the same time, the judge shall find out whether the defendant has any complaint or motion regarding the violation of his / her rights.[39] This obligation is of particular importance when a person is detained or is held in custody and is therefore subject to full physical control by the state. Thus, it is important that the supervision of the judge to be effective and as a neutral supervisor to assist the defendant to properly conduct appropriate procedures in the case of violation of his/her rights. According to the law, the judge is only authorized to do so and s/he does not have any additional tools to have an effective response on such facts.

Furthermore, when, in the event of trials, the prosecution becomes aware that an accused or another person may be a victim of torture / ill-treatment, he / she is obliged to initiate an investigation.[40]

[39] Criminal Procedure Code of Georgia, Article 197(1)("c" and "g").

[40] Criminal Procedure Code of Georgia, Articles 100 and 101.

GYLA,as a result of the court monitoring, observed that judges have in sufficient possibilities to respond to any facts of alleged ill-treatment,which is due to the faulty legislation. Furthermore, in some cases, the prosecution was inactive which was expressed in avoiding the initiation of the investigation.

2. Findings

Legislative gaps in respect of insufficient role of the judge in alleged ill-treatment cases still remain a problem. According to the Criminal Procedure Code of Georgia, the judge is only authorized to inform the defendant of his/her rights against the prohibition of ill-treatment and to hear the alleged facts of ill-treatment. The law does not provide for a procedure for the to carry out effective measures when there are signs of alleged torture or ill-treatment. The judge is only entitled to ask the accused whether he / she has been subject to ill-treatment, which is not sufficient and effective mechanism to have an adequate response to such facts.

At various stages of the proceedings, defendants or participants of the proceedings reported that they had become the victims of torture and ill-treatment from the law enforcement agencies, but sometimes the response of judges and prosecutors were ineffective and inadequate. For instance, 5 cases of this kind have been observed at the first appearance sessions. Alleged ill-treatment cases were also mentioned by participants at preliminary and main hearing sessions.

The examples given below illustrate the aforementioned:

These cases describe the scope of the alleged ill-treatment or torture against the defendants, as well as the court's formal and inadequate role in responding to such facts.

- A person was accused of attacking a policeman. At the first appearance hearing, the defendant declared that after being transferred to the police station, he was beaten with a wet towel and kicked,also, sworn and spat in the face. Moreover, the defendant's body showed the traces of injuries.

The prosecutor declared that he was aware of this fact but was not surprised by seeing the injuries on the accused's body as the person was charged with physical assault against the policeman and s/he thought the injuries were the outcome of the proportional use of force by the

law enforcement officials. The prosecution also explained that after learning the details from the defendants, s/he immediately informed the superior prosecutor thereupon, but the prosecutor did not provide explanation on the further response to the case.

Ultimately, the judge only declared that real measures should have been taken.

- In another case on which the preliminary hearing was in progress, the defendant declared that police officers physically assaulted him during the detention. In particular, when he decided to turn up at the police station to admit the crime, the law enforcement officials dragged the accused down to the river and threatened to drawn him unless he admitted to the crime.

In regard to this fact, the judge explained that the court is not a persecution body and the defendant has the right to file with the relevant agency. The judge only limited himself/herself to this explanation and did not call on the prosecutor to initiate an investigation or respond to the fact in any other way.

At the next stage of the above case proceedings (at the main hearing), the defendant again spoke about the alleged facts of torture and ill-treatment inflicted on him. According to the defendant, after admitting the crime, he was transferred to the police station where he was physically assaulted by several persons dressed in police uniforms. He [the defendant] added that he did not know what document he signed as he did not read it, because he wanted to put an end to his beating. The defendant also mentioned that he is still suffering from the injuries.

This time the judge was more active and urged the prosecutor to immediately investigate the case, as the facts brought by the defendant contained the signs of alleged torture. The judge also found out that the defendant had declared about the above at the preliminary trial hearing[41] and the prosecutor knew about it, but did not order an investigation.

[41] At the preliminary hearing the case was reviewed by another judge, accordingly, the judge conducting the substantive hearing of the case was not aware of the case circumstances.

During the main hearing one of the witnesses who was interrogated[42] on the case against Davit Akhalaia[43] and Giorgi Dgebuadze,[44] mentioned the fact of the alleged ill-treatment.

According to the witness, the Prosecutor's Office wanted to obtain the desired testimony and therefore,exerted the pressure against him.[45] He also declared he was threatened that unless he gave a relevant testimony, a case would be initiated. The witness mentioned that he filed with the Prosecutor's Office, but received no proper response.

The prosecution showed the interest towards the above facts and asked the witness why he had not revealed them publicly at the time of their occurrence, to which the witness replied that he was under constant pressure and could not say anything, and because of the pressure, when giving testimony he said that he had not been intimidated. In addition to these facts, the witness provided the names and surnames of the persons carrying out the alleged pressure.

The above examples once again indicate the formal role of the judge in identification of the facts of alleged ill-treatment and emphasize the need to increase the role and authority of the court in this regard. It is important that in respect to any cases like the above, the judge shall have relevant legal tools, request the initiation of an investigation and punishment of offenders in accordance with the legal provisions. Besides the judge's authority, it is also important that the revealed facts be addressed by an independent investigative agency which will have exclusive authority to investigate cases of torture and ill-treatment and bring proceedings against persons concerned.

Thus, the state does not provide effective and adequate response to the facts of the alleged torture or ill-treatment identified through the court trials, which alongside with the legislative gaps, is caused by inactivity of the Prosecutor's Office reflected in the failure to initiate investigations.

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[42] The Court found David Akhalaia and Giorgi Dgebuadze guilty.

[43] The former Head of Constitutional Security Department (CSD).

[44] The former official of Constitutional Security Department (CSD).

[45] The witness spoke about the alleged ill-treatment during the so-called Navtlugi Special Operation, which was reviewed by Judge Besik Bugianishvili. Within this case a separate proceeding was initiated against David Akhalaia and Giorgi Dgebuadze. The above witness was questioned for both cases. And the witness referred to the alleged pressure applied against him in the course of the first case.

V. SEARCHES AND SEIZURES CARRIED OUT ON THE GROUND OF URGENT NECESSITY AND COURT CONTROL

1. Introduction

The search and seizure procedure represents the massive interference in the right to privacy of a person, on the basis of which items, documents,- substances or other means containing information relevant to the case are searched, seized and applied to the case. Due to the mentioned and in accordance with the law, search and seizure is mainly conducted on the basis of a prior court warrant. However, if the situation of urgent necessity arises, when the delay of conducting search and seizure may result in devastating consequences, the mentioned investigative action may be performed without a court warrant, based on the order of the prosecutor or an investigator.[46] Thus, the law requires that the search and seizure shall be carried out only in exceptional cases, and the main requirement prior to the start of investigative actions shall be a court warrant.

It is important that the prosecution agencies, before execution of the search or seizure, shall use the general rule of conducting the investigative actions and apply for a court warrant in all possible cases. The above investigative action without court warrant shall be carried out in exceptional situations, when the delay may threaten the result of search or seizure.[47] In addition, the prosecutor shall substantiate the existence of the urgent necessity. Only hypothetical opinions or assumptions unrelated to the case based on criminal experiences, is not enough that the urgent necessity to be justified.

Besides the prosecution, the legislation also obliges the court, instead of abstract instructions, to check whether there was an urgent necessity and whether the prosecution authorities had the right to initiate investigative action without the prior permission of the judge. The liability of the justification applies not only to the judgment but also for any decision of the court,[48] including the judgments delivered concerning the search and seizure.

In order to examine the search and seizure practices conducted on the

[46] Criminal Procedure Code of Georgia, Articles 112 (1 and 2).

[47] Schwabe, I., Decisions of the German Federal Constitutional Court, Tbilisi, 2011, 238.

[48] Treksel, Sh, "Human Rights in Criminal Procedure," Tbilisi, 2009, 126.

grounds of urgent necessity, GYLA analyzed the cases of legalization of searches and seizures during the investigation, which were identified at preliminary hearings and conducted without the prior warrant of the judge.

2. Analysis of Court Sessions

The Prosecutor's Office still carries out searches and seizures without a warrant. Unlike the previous reporting period, the number of searches and seizures on the ground of urgent necessity as well as the percentage of legalization of such cases has even more increased. Consequently, the above mentioned requirement of the law on conducting searches and seizures in exceptional cases on the ground of pressing necessity is not fulfilled.

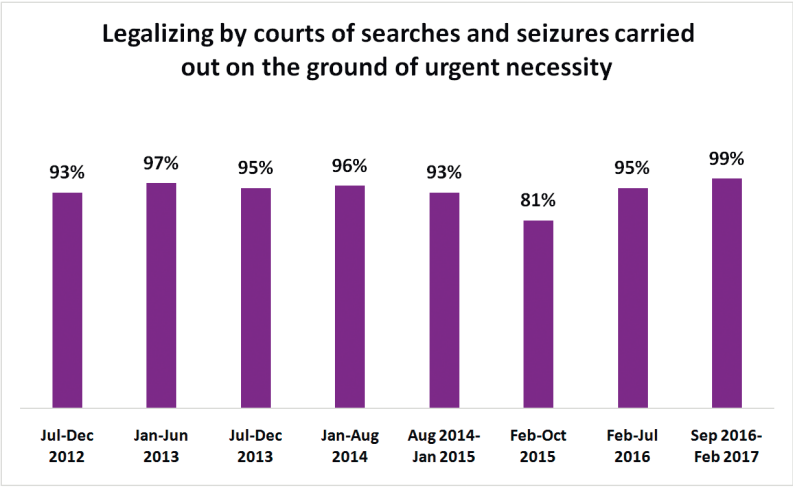
It is worth noting that the procedure, according to which searches and seizures were carried out, were not always identified at pre-trial sessions. In addition, in certain cases, we could only learn that searches and seizures were conducted on the ground of urgent necessity but the court's decision regarding these investigative actions was not announced.[49] It was even more difficult to find out these issues in Batumi City Court because, in some cases, the Prosecutor did not announce the list of evidence and limited himself/herself to a general overview of the motion.

However, based on the motions of the prosecution and other circumstances presented at the sessions, it has been revealed that the searches and seizures were carried out under prior court warrant only in 1 case out of 78,and 77 (99%) cases – on the ground of urgent necessity, which was later legalized by the court. The percentage of searches and seizures carried out on the ground of urgent necessity and legalized by the court was 95% in the previous reporting period.

The chart given below illustrates the situation relating to the legalization of searches and seizures conducted on the ground of urgent necessity during the periods of the monitoring when GYLA was observing the frequency of the lawfulness of the mentioned investigative actions.

[49] In 19 cases only the fact of search and seizure on the grounds of urgent necessity were identified, however, the contents of the court ruling was not announced at the session.

ChartN°7



Since search and seizure is an investigative action limiting the right to privacy, the enforcement bodies shall take appropriate measures prior to conducting this action. It is true that we had no possibility to get familiar with the content of the prosecutor's motions or study individual cases, but the fact that the law enforcement bodies applied to the court for obtaining the prior warrant only in 1 case (1%) raises questions towards the disrespectful treatment of the right to privacy and misuse of procedural powers.

In addition, it was impossible to determine if the legalization of searches and seizures conducted on the ground of urgent necessity was substantiated by the courts or not, since such facts are not generally reviewed through oral hearings. However, the fact that 99% of the investigative actions were conducted in a hasty manner and were only legalized after their completion, raises questions whether the law enforcement agencies and courts performed their duties, according to which they are not allowed to conduct or legalize investigative actions which are not properly substantiated and are conducted on the ground of urgent necessity.

Thus, there are doubts that the frequent use of the rule of exception by the Prosecutor's Office and subsequently,the legalization of all such cases by the court leads to misuse and dishonest application of the legislative provisions. There is a real threat that the strictly defined rule of exception

provided for in the law may become a frequently used norm in practice, which is obviously incompatible with the legislation.

VI. JUDICIAL CONTROL OVER THE LAWFULNESS OF ARRESTS

1. Introduction

Under the Criminal Procedure Law of Georgia, there are two forms of arrest: arrest of a person on the basis of a prior warrant of a judge, or with the motive of urgent necessity when there are appropriate grounds.

In order to obtain a prior warrant for arresting a person, a prosecutor shall file a motion with the court, which shall deliver a relevant ruling without oral hearing. The ruling may not be appealed.[50] If there is an urgent necessity of arresting a person as provided for by the law, a person shall be arrested without a judge's prior warrant and at the first appearance session the court shall review the lawfulness of the arrest as well as the substantiation of the arrest carried out due to urgent necessity.[51]

The legislation of Georgia does not provide for any special mechanisms for appealing the lawfulness of arrest. Therefore, one of the purposes of the first appearance hearing is to examine the lawfulness of the arrest by the courts. This obligation shall be imposed on a judge irrespective of whether the party disputes that issue or not. It is important that the arrest, carried out on the basis of a prior warrant of a judge as well as on the grounds of urgent necessity, be reviewed at first appearance sessions. This legal mechanism serves for the minimization of the risks of making arbitrary decisions by law enforcement bodies.[52] Judicial control of the arrest is the mechanism that will protect a person in case of gross violation of the law by the prosecution. It is especially risky when a person is arrested on the basis of a prior warrant of a judge because the defense is not allowed to put on the agenda the lawfulness of the ruling of the judge and the arrest, or to state his/her opinion regarding the above issues. If we assume that a judge has incorrectly issued the ruling on the arrest, which is not reviewed at the first appearance hearing, more restrictive measures may be applied

[50] Criminal Procedure Code of Georgia, Article 171(1).

[51] Criminal Procedure Code of Georgia, Article 171(2 and 3).

[52] Imprisonment as a measure for securing the bail, B. Niparishvili, journal "Justice and Law", 2016, №2, 53.

against a person due to such arrest.[53]

As a result of the observation of the first appearance hearings, GYLA identified legislative gaps in protection of the rights of the detainees. In particular, the law does not explicitly specify the role and powers of a judge in reviewing the lawfulness of the arrest.

2. Analysis of court sessions

It is still a problem for the court to take control of the lawfulness of arrest, as the courts often fail to examine the factual circumstances of the detention.

The court monitoring revealed that in the majority of cases courts tend to avoid reviewing and assessing the lawfulness of arrests, and mainly limit themselves to consideration of application of preventive measures.

This approach of the courts poses the risk of apparent arbitrariness from law enforcement agencies. Especially, if taken into account the fact that within 48 hours after the arrest of a person, before the accused first appears in the court, the Georgian legislation does not offer another mechanism for the assessment of the lawfulness of a person's arrest.[54]

The court's assessment of the lawfulness of the arrest is also important for the proper execution of reimbursement for the damage incurred as a result of an unlawful and unjustified arrest of a person.[55] However, the mentioned right has only formal character without exercising relevant judicial control over the necessity and legality of arrest.

The fact that the lawfulness of detention is not examined by courts is conditioned by legislative gaps to a certain extent. The legislation does not provide for clear and explicit indication that the lawfulness of the arrest conducted on the basis of the judge's prior warrant or due to urgent necessity shall be subject to further judicial review.

During this reporting period, 140 defendants out of 290 (48%) who appeared at the first appearance hearings had the status of arrested defen-

[53] For example, the arrest of a person allows imposition on him/her of a bail with a guarantee of remand

[54] Bokhashvili B., Mshvenieradze, G., Kandashvili, I., The Procedural Rights of Suspects in Georgia, Tbilisi, 2016, 19

[55] Criminal Procedure Code of Georgia, Article 176(5).

dants.[56] Since in the majority of the cases 116 (83%), neither did the court review the lawfulness of the arrest nor the parties raised this issue, we were unable to find out the procedure applied during the process of arrest: whether the arrest was conducted based on the judge's prior warrant or on the grounds of urgent necessity.

However, after statements of the parties and circumstances identified at court hearings we determined whether the basis for arrest in the remaining 24(17%) cases was the court warrant or the ground for urgent necessity. Namely,in 4(17%) cases court rulings were issued on the arrest of persons, however their lawfulness was not reviewed during the first appearance sessions, and in the remaining 20 (83%) cases, persons were arrested due to the ground of urgent necessity. However, judges had non-uniform approaches regarding the review of lawfulness of a person's detention. The court hearings revealed that in 4 cases the lawfulness of detention had already been examined and legalized by the judge before the first appearance session, which is irrelevant and ineffective practice.[57] With such approaches, the defense has no possibility to state their opinions regarding the content of the arrest and the procedure. Presumably, the ambiguous legislation has caused the judges' non-uniform and inaccurate approaches. In 11 cases out of the remaining 16 defendants who were arrested on the grounds of urgent necessity, the judge did not review the issue of detention and failed to evaluate the lawfulness of arrest.

However, along with the negative practice mentioned above, rare though positive cases have been also revealed. In particular, in 5 cases out of 20 arrests on the ground of urgent necessity, the judges evaluated the circumstances of detention. In 3 cases of the above, the judge considered the detention as lawful, and in 2 cases considered the arrest of a person unlawful as the defendant did not receive the record of the arrest and there was no urgent necessity for the detention. The above cases indicate that despite the inadequate legislation, judges still have the possibility to act in the best interests of defendants and, if desired, pay proper attention to the evaluation of the detention. At the same time, according to the European Court of Human Rights, any period of restriction of liberty,

[56] 7 defendants out of 288 did not show up at the session, and avoided the appearance before the court.

[57] Presumably, in the cases above,the investigative actions of search or seizure were carried out, and this caused that the lawfulness of detention on the ground on urgent necessity was evaluated prior to the first appearance session alongside with the search and seizure.

whatever short-term it may be, shall be substantiated by the authorities.[58]

The examples given below illustrate the aforementioned:

These examples describe the positive cases of implementation of judicial control and reviewing the lawfulness of the detention on the ground of urgent necessity.

- At a court hearing, the defense lawyer declared that the requirements of the law were violated, as the defendant had not been provided with the protocol of the arrest. According to the lawyer, if a person does not receive the arrest protocol and no notification has been signed by the detainee refusing to receive the record of arrest, then the accused shall be released from the detention.

The judge accepted the arguments of the defense and considered the arrest of the person unlawful on the basis that the defendant had not been handed over the records of the arrest.

- In another case the judge examined the lawfulness of the detention concerning the violence committed against Nika Gvaramia, General Director of Rustavi 2. The trial revealed that Rati Gachechiladze[59] was detained under the ground of the urgent necessity when he himself appeared before the investigating agency and admitted to committing a crime.

According to the prosecution, the person was arrested on the ground that the accused had fled after committing the crime, though later a witness identified him,[60] and it was the ground for the arrest of the person under the urgent necessity.

The court evaluated the lawfulness of Gachechiladze's arrest and considered the detention illegal as the person voluntarily showed up in the investigative agency at the time when the criminal prosecution was not yet initiated and expressed willingness to cooperate with the investigation. Consequently, the judge decided that there was no threat of absconding and the law enforcement agency had no reason to detain Gachechiladze under the grounds of urgent necessity.

[58] *Dubinskiy v. Russia*, no. 48929/08, July 3, 2014, §59.

[59] The court rendered a guilty verdict on this case.

[60] Criminal Procedure Code of Georgia, Article 171(2)(D).

Consequently, the frequent negative practice and the lack of positive cases indicate that the state is not efficient in protecting the rights of detained persons, which is due to the gap in the legislation.

VII. PROCEEDINGS OF PLEA AGREEMENT

1. Introduction

Unlike the previous reporting period, the situation is slightly improved in terms of the court exercising proper control over the conclusion of plea agreements, which is reflected in full explanation of the rights provided for in the law and refusal of approval of the plea agreements. However, there are still a number of issues and shortcomings revealed in the lack of examination of the lawfulness and fairness of ordered punishment. In most cases, the courts limit themselves to "dry" review of the components of the plea agreement and do not thoroughly examine the proposed conditions, for example, assessment of the sentence.

A plea agreement is a type of expedited proceedings at which the defendant pleads guilty to a particular charge and enters into an agreement with the prosecutor on the punishment, mitigation of conviction or its partial removal.

On 24 July, 2014 the law abolished the plea agreement on punishment, which means that without the defendant's admission of guilt reaching the plea agreement has become impossible.

In accordance with Article 213 of the Criminal Procedure Code of Georgia, if the judge considers that sufficient evidence has been provided to render a judgment without a main hearing and if the judge has received convincing answers from the defendant related to circumstances provided in the law, that the punishment requested by the prosecutor is lawful and fair, the judge may decide to render judgment without a main hearing.

For the purpose of ensuring the fairness of the punishment, a judge shall review the existing circumstances, the individual characteristics of a defendant, the motives for committing the crime and agreed charges. The law does not specify the method for ensuring the fairness of the punishment, however according to the general principles of imposition of punishment, there is a possibility to support the mentioned criteria. For instance, while imposing a penalty, a judge has the possibility to clarify:

the financial status of a defendant; his ability to pay the penalty; if the amount of the penalty is adequate to the inflicted damage; circumstances surrounding the commitment of a crime; and the severity of expected punishment. Apart from the mentioned, the judge has the right to make changes to plea agreements upon the consent of both parties. Namely, if, in accordance with the legislation, a judge considers that there is insufficient evidence to render a ruling without a main hearing or establishes that a plea agreement has been signed in violation of the requirements of the Criminal Procedure Code of Georgia, the judge should offer to the parties to alter the terms of the plea agreement, which should be agreed with a superior prosecutor. If the judge is not satisfied with the amended conditions of the plea agreement, s/he should refuse to approve it and return the case to the prosecutor.

During the monitoring period GYLA identified the challenges regarding the plea agreements. Despite the fact that the situation has improved in terms of explanation of the rights compared to the previous reporting period, there is still a number of shortcomings that are reflected in indifference of the court to lawfulness and fairness of punishment. Also, the percentage of penalties applied in plea agreement has increased. Moreover, the interests of victims are mainly neglected during the plea agreements. In this regard, in some cases defense lawyers do not seem to make every reasonable effort to protect the best interests of defendants.

2. Analysis of court sessions

2.1. Explanation of the rights provided in the Law

When entering into a plea agreement, the judge shall be obliged to inform the accused about the rights provided for in the law. Another aspect of the law requirs the judge to inform the defendant of his/her rights and obtain convincing answers to the questions asked, and the judge may refuse to approve a plea agreement unless s/he receives meaningful and convincing answers on the circumstances envisaged by the law.

Monitoring results

In comparison to the previous reporting period, the situation of fully informing defendants of the rights provided in the law has improved. Namely, in only 35(16%) cases, the judge failed to inform the defendant that if

the court does not approve a plea agreement, any information contained in such agreement and submitted by him/her during the review of a plea agreement may not be used against him/her. In the previous reporting period this number was 18%. In addition, only in 11 (5%) cases, the judge did not inform a defendant that filing a complaint about being subjected to torture, inhuman or degrading treatment would not interfere with the approval of a plea agreement concluded in compliance with the law. The number failing to explain the mentioned right was16% in the previous reporting period.

Despite the improvement in terms of informing defendants of their rights, it is not still satisfactory, as there are cases of insufficient explanation of individual rights. For example, in one case, the judge failed to inform the defendant any of the rights provided for under Article 212 of the CPC and within 10 minutes approved a plea agreement. The facts of non-fulfillment of this obligation by judges leave the impression that some judges formally review a plea agreement and do not exercise proper control over the law enforcement.

Also, there was a case which raised suspicion that with the defendant who was unable to deliver the answers to the questions asked by the judge a plea agreement was still planned to be concluded.

The example given below illustrates the aforementioned:

At one of the hearings of the plea agreement, the judge asked questions but the accused could not give relevant responses and his/her relatives helped him/her with the answers. For instance, the defendant could not name his/her date of birth, month, year and the place of residence. Despite this fact the judge did not have an appropriate response to the problem.

The prosecutor submitted a motion on approval of a plea agreement, after which the judge announced a 10-minute break. The judge did not explain the reasons for the break and asked the attendees to leave the courtroom, though allowed the prosecutor and the defense lawyer to stay.

There was a high likelihood that even at the resumed hearing the defendant would not be able to provide convincing and adequate answers to the rights envisaged by Article 212 of the Criminal Procedure Code of Georgia, which could become a hindrance for the approval of the plea agreement. Presumably, the judge and the participants had been

informed about these circumstances in advance, nevertheless, they still tried to approve the plea agreement. It was for this purpose that the break was announced and the attendees dismissed from the courtroom. In addition, the relatives and the attorney of the accused seemed unwilling about the GYLA's monitor to attend the process. The break lasted longer than 10 minutes. The GYLA's monitor was standing at the court hall for about 40 minutes, yet the process was not resumed.

2.2. Courts' approaches towards the fairness and lawfulness of punishment

In accordance with Article 212(5) of the Criminal Procedure Code of Georgia, a judge shall make a decision on the plea agreement on the basis of the law and shall not be obliged to approve the agreement concluded between a defendant and a prosecutor. This right of a judge serves as an important tool for controlling the fairness and lawfulness of plea agreements and may be used by the judge not to approve the agreement in the case of abusing the plea agreement.

It is true that the legislation does not give a judge the right to automatically alleviate or change the punishment, though this does not justify the judge's consent on the imposition of excessively light or severe punishment on the basis that the prosecution submitted the motion under such conditions. One of the significant components of fair trial is the imposition of punishment and accordingly a judge shall closely observe the process of determining the punishment and prevent the imposition of an inadequate sanction.[61]

Monitoring results

Despite the fact that the legislation provides judges with this significant right, in the majority of cases they did not inquire whether the punishment determined by the parties was fair and lawful in this reporting period. Moreover, the judges approved 208 (99%) plea agreements out of 210 motions submitted by the prosecutor[62] and in only 6(3%) cases the judge

[61] Guiding principles of the form of judgments in criminal law cases, its justification and functionality of the style of texts, Tbilisi, 2015, 63.

[62] In one case, when reviewing a plea agreement a break was announced, which was never resumed. Below are given further details about this session.

mentioned that s/he assumed that the sentence was fair and it was a useful decision for the defendant, and in 1(0.5%) case the judge doubted the lawfulness of the punishment and made the prosecutor change the terms.

Sometimes judges attempt to intervene in the process of reviewing the plea agreements, but these attempts do not include the effective use of all existing judicial powers. Specifically, when considering one of the plea agreements, the defendant appealed to the judge and asked for a reduction of the hours of community service imposed on her as a punishment measure. The judge explained that if the defendant disagreed with the terms she could refuse to sign the plea agreement. The judge further added that she had no right to make any amendments in the part of the sentence. The accused hesitated, though finally agreed to sign the plea agreement with the proposed terms. As it turned out from the trial, the accused lived with her children and was the only breadwinner of the family. Presumably, this was the reason why she initially did not want to agree to the conditions offered in the plea agreement.

In the case above, although the judge warned the accused several times of the consequences in case of refusal to approve the plea agreement and identified the true will of the defendant, the judge's interference was not effective and complete. According to the legislation, the judge has the right to offer to the prosecution to change the terms of the plea agreement, but the judge did not exercise this right.

In practice, rendering a guilty verdict despite the insignificance of offense and application of punishment disproportionate with the damage is still an issue. According to Article 7, paragraph 2 of the Criminal Code of Georgia, an act that, although formally containing the signs of an act provided for by this Code, has not caused, due to its insignificance, such harm or has not created the risk of such harm that would require criminal prosecution of its perpetrator, shall not be deemed a crime. This regulation is based on the absence of social adequacy of the crime, as the act conducted formally constitutes a crime but substantially it does not amount to a criminal act and it does not have the proper degree of social threat which makes an act a crime.

The example given below illustrates the aforementioned:

> The Prosecutor's Office accused the defendants of illegal fishing, which is a less serious offense. As it turned out from the trial, the amount of the damage caused by the crime amounted to 1.32 GEL. No violations committed by the defendants in the past were revealed. Finally, as a result of the plea agreement the accused persons were fined in the amount of 1000 GEL.

In the above case it would be advisable that the judge did not approve the plea agreement and applied the provision set forth in the Article 7 (2) of the Criminal Code of Georgia. It is important that judges should properly assess the extent of damage inflicted, the severity of the alleged offense, the stage of its commission, the personality of an accused, the degree of threat to public due to such act, and by taking into account all of these circumstances, to effectively utilize the legislative norm that requires a person's release from criminal responsibility.

Besides the court, prosecution has also the right not to initiate and / or terminate a criminal prosecution and use alternate mechanisms, such as diversion.[63] The principle of lawfulness implies that all the actions that the State deems as the offense shall be provided for under the Criminal Code, and when the Code specifically defines a crime, the prosecution shall pay a due attention to this provision and correctly evaluate a damage or any threat of damage which would arise as a result of the action.[64]

However, in contrast to the above, as shown below, there have been some positive facts when the judge referred the prosecutor's attention to the technical faults and asked the prosecution to correct the mistakes made in estimation of the guilt. There was another case when the judge did not approve the plea agreement. Therefore, this are the decisions taken in favor of the defendant's best interests.

[63] Criminal Procedure Code of Georgia, Article 168[1]

[64] Tbilisi City Court Ruling of 30 December 2015.

The example given below illustrates the aforementioned:

A person was charged with committing a crime under Article 260 (1) of the Criminal Code of Georgia.[65] At the first appearance session the prosecutor motioned to the court for a plea agreement against the accused and demanded the imposition of 2000 GEL as a penalty. The judge addressed to the prosecutor and explained that he could not approve the plea agreement under those conditions, and further s/he [judge] explained that the sentence was not specified in Article 260(1) of the Criminal Code of Georgia. Thus, the imposition of a lighter sentence would be unjustified and would deteriorate the legal status of the defendant. The judge offered the prosecution to clarify the terms of the plea agreement.

The prosecutor asked for a break, after which s/he declared that the plea agreement would not change, therefore, the judge refused to approve the plea agreement.

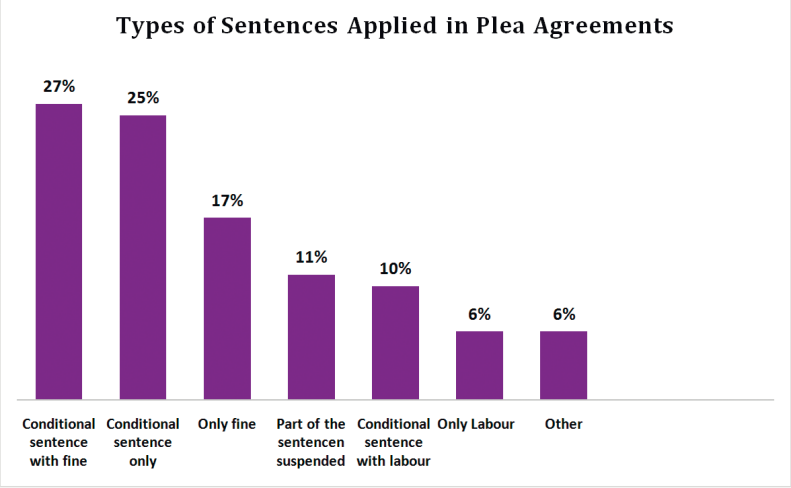
2.3. Charges applied under plea agreements

The court monitoring has shown that, as a result of plea agreement, there are frequent cases of imposition of probationary sentences that are used independently or together with other punishments.

The chart below illustrates the percentage of the sentences imposed on the basis of plea agreements.

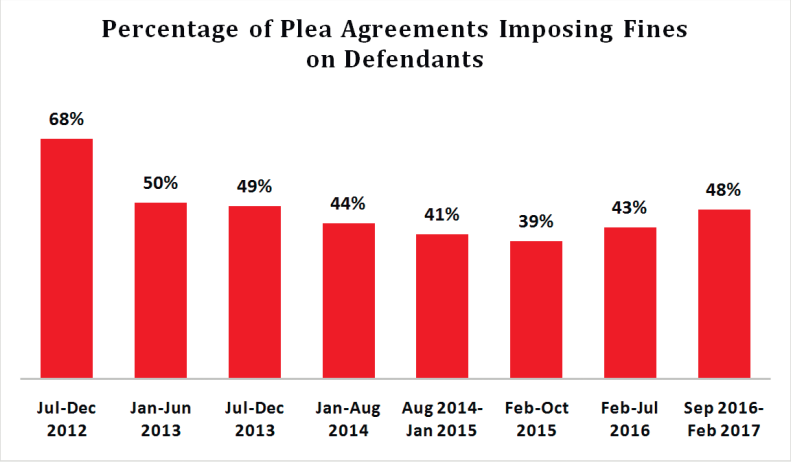
[65] Unlawful production, manufacture, purchase, storage, transportation or transfer of narcotic drugs, their analogies or precursors.

ChartN№8



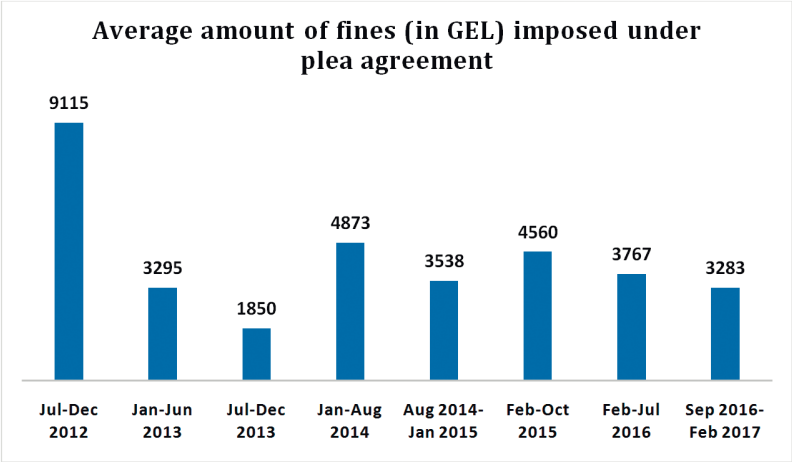
In comparison to the previous reporting period, the percentage of the defendants who were imposed penalties under plea agreements has increased. It is worth noting that the trend has been downward with regard to the imposed penalties from January 2013 to October 2015; however, this trend has changed since February 2016 and the imposition of fines have increased by 5%.

ChartN№9



As for the total number of fines imposed under plea agreements, their rate has also increased in comparison to the previous reporting period. Namely,104 plea agreements were concluded imposing penalty on defendants, which accounted for a total of GEL 341.491. In the previous reporting period this amount was 211.000 GEL. However, the average amount of fines imposed under plea agreements is almost the same and accounts for GEL 3.283 while in the previous reporting period it equaled to GEL3.767.

ChartN№10

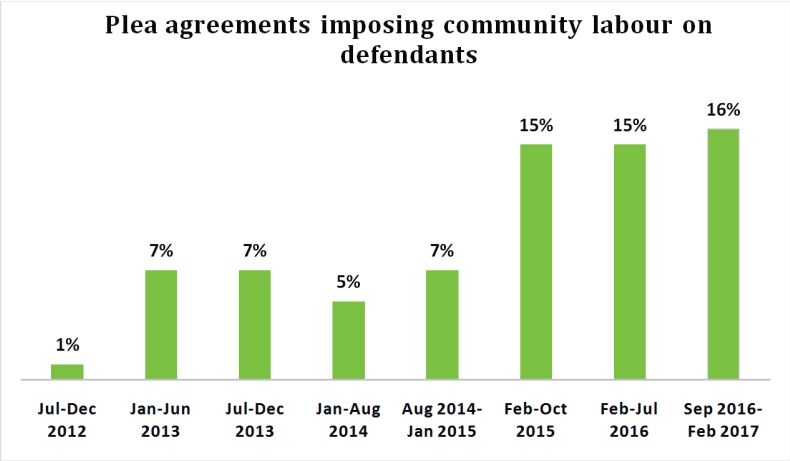


In this reporting period the amount of penalties ranged between GEL 500 and GEL 25 000.

The percentage of applying community labour almost has not changed. In the previous reporting period the penalties were applied in 15% cases, whereas in this reporting period it was set at 16%.

The chart below illustrates the frequency of the application of community labour under plea agreements during the GYLA monitoring period (from July 2012 to February 2017).

ChartN№11



Penalties imposed for illegal use of drugs

More than half of the persons charged with drug offenses received plea agreements with the liability of a fine.

40 (65%) defendants out of 62 who signed the plea agreement for drug offenses were imposed the payment of a penalty. For 19 (32%) defendants other types of sentences were applied, and 2 (3%) defendants concluded plea agreements without the imposition of a penalty.

Despite the above-mentioned negative trend reflected in imposition of fines in favor of the state budget, there have been two positive cases when the defendants were not imposed a penalty which indicates the approaches in their best interests. The reason for leaving the defendant without a penalty is the decision of the Constitutional Court of Georgia which considered that the sanction of deprivation of liberty for the purchase / storage of 70 grams of marijuana for personal consumption was unconstitutional. Some of the judges explained the decision of the Constitutional Court more broadly, from the perspective of human rights. Accordingly, pursuant to the court decision, since Article 260(1) of the CCG does not provide for other penalties, it would be unfair to impose even lighter sentences not to say anything about the unlawful restriction of liberty. Moreover, the court shall impose a sentence on an offender within the scope

provided for in the relevant article of the Criminal Code of Georgia.[66] If the crime envisaged in Article 260(1) of the Criminal Code is left without a sentence, the judge shall not have the necessary grounds for determination of the sanction. It is interesting that for the offense mentioned in the first paragraph of Article 260 of the Criminal Code of Georgia the court delivered guilty verdicts without imposing a sentence on two almost completed cases.

The court shall render a judgment of conviction without imposing a sentence only if the accused has died by the time of rendering the judgment,[67] also, if there is no punishment for the offense, it can not be regarded as a criminal offense. Therefore, however it is true that such cases are tailored to the best interests of a defendant, such decisions still constitute a violation of other articles of the law and the Parliament shall regulate the issue. According to one part of lawyers, the Constitutional Court abolished only the normative provision of Article 260 (1) of the Criminal Code of Georgia, under which deprivation of liberty as a punishment was lawful for the illegal purchase or storage of narcotic drug "dried marijuana". Consequently, for the offense provided for in Article 260 (1) of the Criminal Code of Georgia they consider it right to impose a sentence other than the restriction of liberty, even in the minimum amount of fine.[68]

2.4. Considering the interests of victims in the crimes committed against life, health and property

According to the law, the prosecutor shall, before entering into a plea agreement, consult the victim and notify him/her of the conclusion of the plea agreement, and prepare the relevant protocol record.[69] The victim has no possibilities to influence the plea agreement procedure or to appeal against the agreement reached between the parties, although s/he can provide the Court with a written or oral information about the damage s/he has been suffered as a result of the offense.[70] It is true that the victim's refusal is not an obstacle for the conclusion of a plea agreement, but

[66] Criminal Code of Georgia, Article 53(1)

[67] Criminal Procedure Code of Georgia, Article 269(3) (c) and paragraph 6 of the same Article.

[68] The decision of the Chamber of Criminal Cases of the Supreme Court of Georgia, №3925ა3-15, 24 March 2016.

[69] Criminal Procedure Code of Georgia, 217(1).

[70] Criminal Procedure Code of Georgia, 217(1[1]and 2)

the prosecutor should actively cooperate with the victim in the process of making a decision and take into consideration his/her position.

Monitoring results

The interests of victims in the process of reviewing a plea agreement at the court hearing and the involvement of victims in the proceedings are fragmented or neglected. The above mentioned is due to the lack of sensitivity of prosecutors and judges alongside with the legislative gaps and shortcomings of the practice. Of the plea agreements approved by the court, 95 cases were related to crimes against life, bodily health and property, but in 65 (68%) of these cases, the plea agreements were approved without the prosecutor's reviewing the position or interests of the victims and therefore they were not considered at the hearings as well. In only 6 (6%) cases the issue of returning to the victim of the items seized were announced and only in 24 (25%) cases the prosecution presented the protocol record of the consultation with the victim or voiced his/her position regarding the punishment of a person.

Monitoring results on traffic related crimes

14 cases of those plea agreements approved by the court related to traffic crimes, which resulted in the damage of human health or death. In most cases (10 cases - 71%), plea agreements were concluded in the manner that the victim's position, compensation for damage or consultation about the matter were not discussed. The interest of the victims was not even highlighted in the case of the death of three persons. As for the imposed punishments, in all cases non-custodial sanctions were used against the offenders such as a suspended sentence and / or fine. It is noteworthy that the fair sentence is of great importance in the implementation of general deliberate measures in order to prevent other persons from committing the same crime. At the same time, prevention of road accidents shall be a part of the state's legal policy.[71] **It is true that investigation of the content of sentence and decisions is beyond the scope of this study, but the fact that in all cases lenient and light sanctions were used, raises the questions whether these measures will be effective in general prevention in terms of such types of crimes.**

[71] Judgment of the Chamber of Criminal Cases of the Tbilisi Court of Appeals, №1/b-204-14, 28 May 2014.

2.5. Participation of defense counsel in conclusion of plea agreements

The right to defend the accused is a key guarantee during criminal proceedings. In specific cases, including when signing plea agreements, legislation requires an accused to have a defence counsel, as sometimes the accused cannot challenge the prosecution appropriately.[72] From the moment of the offer of a plea agreement, the main duty of the defense attorney is to provide qualified legal counsel for the accused. It is true that the defense counsel does not have the opportunity to prove the innocence of a person at court hearings or use favorable conditions for the defendant, but defense counsel's support is expressed in providing legal assistance and qualified counseling. The defense counsel is obliged to timely and accurately inform the defendant about his/her rights, possible risks, penalties and the judicial procedures to be provided.

Monitoring results

As a result of attending the court proceedings, sometimes unethical, faulty activities of defense counsel and unscrupulous attitude towards the best interests of defendants have been identified. In certain cases, incompetent and negligent behavior of the defense attorneys was revealed in respect of separate procedural issues.

The examples given below illustrate the aforementioned:

- At one of the plea agreement hearings, the defense counsel told the court that s/he had consultations with the defendant in relation to the plea agreement and informed him/her about the rights envisaged by the law. However, prior to the proceedings it turned out that the defense counsel was seeing her/his defendant first time at the court hearing as the attorney addressed to the defendant: *"I was not able to see you until the trial, I had a very busy week."*
- At one of the hearings of the plea agreement, the defense counsel was busy with his/her mobile phone, leaving the impression that s/he was not listening to the process. The negligent counsel produced a paper plane and started playing with it. However, the judge failed to notice such inappropriate action of the defense counsel in the courtroom.

[72] Criminal Procedure Code of Georgia, Article 45 (f).

Thus, the above-mentioned cases indicate unhealthy attitude towards the practice of concluding plea agreements and complete disregard to all components which are important for the protection of the rights of proceeding participants.

VIII. ADMISSIBILITY OF EVIDENCE AT PRE-TRIAL SESSIONS

1. Introduction

At preliminary hearings, the court examines the admissibility of evidence that will be reviewed at the main hearing of the case. This stage is of vital importance as verdicts delivered at main hearings will be based on the evidence deemed admissible by the court at the preliminary hearings. In addition, at this stage the decision is made on the termination of criminal persecution or the continuation of the proceedings with the examination of the case on merits.[73] It should be noted that not only insufficient evidence but also substantial violation of the procedural law can create the grounds for the termination of the prosecution.

The court's rulings on pre-trial motions shall be impartial and without prejudice to interests of either party. The right of a defendant to impartial proceedings has been recognized by Article 84 of the Constitution of Georgia, Article 6 of the ECHR, and is guaranteed by the Criminal Procedure Code of Georgia.

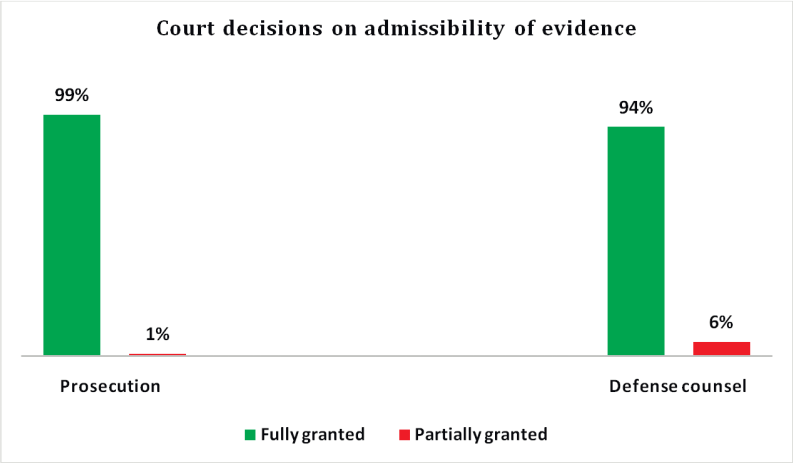
Although preliminary sessions usually review the admissibility of evidence, parties are allowed to submit other motions as well.

2. Analysis of court sessions

At pre-trial hearings, in the part of the admissibility of evidence, partiality of judges or biased attitude towards one of the parties was not observed in the large majority of cases. The courts, in general, equally granted the motions of both the prosecution and the defense counsel on the admissibility of evidence.

[73] The court shall terminate the criminal proceedings if it discovers a high degree of likelihood that the evidence submitted by the Prosecutor's Office fail to establish the commission of a crime by the accused.

ChartN№12



In some cases, the judges delivered decisions in favour of defense and tried to defend the interests of the accused. For example, at one of the hearings the accused person, who had no defense counsel, submitted a motion on the recognition of admissibility of a health status certificate as the evidence. The prosecutor did not support the motion and explained that the above evidence was not submitted to the prosecutor within the timeframe established by the law. The judge found out that the defendant did not know if the evidence had to be submitted to the prosecution, but, despite the fact that the rule of exchange of evidences was violated, the judge granted the motion of the defendant and attached the certificate on health status to the case. However, one case was observed when the judge violated the principles of equality and adversariality and deprived the defense counsel of one of the most important procedural rights.

The example given below illustrates the aforementioned:

At one of the preliminary hearings, the defense demanded to challenge the judgment delivered by the judge on another case, but the judge chuckled and asked the lawyer with a smile how he was going to examine the evidence.*"What? Will you interrogate the judge?"* After that, the attorney no longer demanded to challenge the judge's ruling. In these circumstances, the judge not only rejected to grant the motion of the party, but even discouraged thereof to make a motion and deprived it of one of the important procedural rights.

It is noteworthy that the defense was less active with respect to participation in the review of admissibility of evidence submitted by the Prosecutor's Office as well as the admissibility of the defense's evidence.

The instances of termination of criminal prosecution

During this reporting period two cases were detected of termination of criminal prosecution - in one case the proceeding was suspended under the initiative of the judge due to insufficiency of the evidence against the accused, and in the other, the prosecutor submitted a motion to terminate the persecution which the judge granted.[74]

2.1. Motions of the prosecution on the admissibility of evidence

The prosecution side, where it was possible,[75] in 273 cases, submitted motions on the admissibility of evidence.

The position of the defense counsel on the prosecution's motions concerning the admissibility of evidence:

- In 266 (**97%)**cases fully supported the recognition of admissibility of evidence;
- In 4 (**2%)** cases partially supported to the prosecution on the admissibility of evidence;
- In 3 (**1%)** cases fully opposed with the prosecutor's motions.

In comparison with the previous reporting period, the defense counsel is less active with respect to the motions submitted by the prosecution on admissibility of evidence. In particular, the defense side's objection to the prosecutor's motions has reduced from 8% to 3%.

As regards the decisions made by the courts, motions of the prosecutor were fully granted in 270 (99%) cases, and in 2 cases (1%) partially.[76]

[74] The prosecutor presented a report of the forensic psychiatric examination according to which the defendant was not capable of making decisions and was unable to understand the legitimacy of his actions. The judge dismissed the accused from the courtroom and appointed a compulsory psychiatric treatment for a term of 1 year.

[75] In 2 cases out of 277 preliminary hearings, the criminal prosecution was terminated,though the admissibility of the evidence was not reviewed, and 2 cases were adjourned until the prosecution submitted a motion.

[76] In 1 case, the judge adjourned the session and did not review the issue of admissibility of the evidence.

2.2. Motions of the defense on the admissibility of evidence

The defense provided evidence in the court only for 47 cases (17%) and requested recognition of their admissibility.[77] The prosecution fully agreed to the defense on admissibility of evidence in 32 cases (68%), partially supported in 9 (19%) cases, and in 6 (13%) cases - motioned an inadmissibility of evidence of the defense.

As for the court decisions, majority of the motions, in particular, 44 (94%) cases were fully granted and 3 (6%) cases - partially. Court mostly does not upheld the prosecution's arguments against the admissibility of defence's evidences.

In comparison with the previous reporting period, the defense has been less active in terms of recognition of the admissibility of evidence.[78]

Thus, preliminary hearings, like in the previous reporting periods, were conducted routinely. The courts did not specifically demonstrate any biased or unfair attitudes towards either party. Also, there have been identified no cases of refusal of the motions of the prosecution or the defense on the admissibility of evidence.

[77] Since 2 hearings out of those 277 were adjourned, for 2 cases the criminal prosecution was terminated, though the admissibility of evidences was not reviewed, and in 1 session was only reviewed the prosecution's motion on the admissibility of the evidence, and then the session was adjourned, the defense counsel had a real possibility only in 272 preliminary hearings to motion a recognition of admissibility of evidence.

[78] In the previous reporting period, the defense raised a motion on admissibility of evidence in 31% cases. Now this indicator is reduced to 17%.

IX. TRENDS IDENTIFIED DURING THE HEARINGS ON THE MERITS

1. Delayed court hearings

1.1. Introduction

The right to expedite justice within reasonable term is an important right stipulated in a number of international treaties or acts. This right is protected by the European Convention on the Protection of Human Rights and Fundamental Freedoms,[79] as well as the International Covenant on Civil and Political Rights[80] and the Universal Declaration of Human Rights.[81] In addition, the decision of the Council of Ministers 5/06is also important, under which the states shall "pay attention to [...] effective implementation of justice and to proper management of the judicial system."[82] The importance of implementing expedite justice is also highlighted by the United Nations Human Rights Committee.[83]

The issue of expedite justice has repeatedly become the subject of discussion of the European Court of Human Rights.[84] According to the case law, the court also established that the local legislation shall ensure a separate trial that would be an effective means for avoiding the delay of the process and the absence of such protection would be in itself a violation of Article 13.[85]

According to the Criminal Procedure Code of Georgia, the accused has the right to the expediency of justice, which should be implemented within the timeframe prescribed by the law. In addition, a person has the right to relinquish this right if so required for the proper preparation of the defense. The court is obliged to prioritize the review of the criminal case in which the accused has been remanded to custody.[86] According to the

[79] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 (1)

[80] International Covenant on Civil and Political Rights, Article 14 (3) (c)

[81] Universal Declaration of Human Rights, Article 10

[82] Decision of the Council of Ministers 5/06, Fourteenth Meeting of the Council of Ministers in Brussels, (2006)(4).

[83] General Comment No.32, the quote from the paper, Article 113, par. 27 and 35

[84] ECHR , Philis v. Greece (no. 2) judgment of 27 June 1997, Portington v. Greece judgment of 23 September 1998, PANEK v. POLAND, Application no. 38663/97

[85] ECHR, KUDŁA v. POLAND, Application no. 30210/96

[86] Criminal Procedure Code of Georgia, Article 8 (2,3).

same Code, a court of the first instance shall render a judgment not later than 24 months after the judge in the preliminary proceedings makes a decision to refer the case for a main hearing.[87]

Sometimes, criminal cases are delayed for years and no concrete judgments are delivered and justice is not properly implemented. Considering the cases with complete ignorance of the timeframes violates both the terms provided for in the Criminal Procedure Code of Georgia, as well as important international standards of expedient and effective justice.

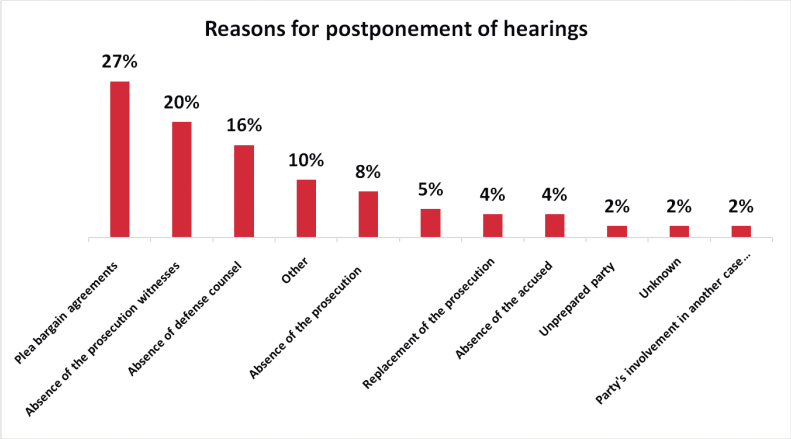
GYLA's monitoring revealed that in almost half of the cases and the court hearings were delayed or adjourned, which are the most serious factors for unreasonable delay of case deliberations.

1.2. Postponement of court trials

During the reporting period many cases of postponement of proceedings were observed, which were not reasonably substantiated, and sometimes, we can say, served for the case delay.

From 434 main court hearings attended by the GYLA's monitors, 207 cases (48%) were adjourned immediately they started, so that none of the procedures prescribed in the law were implemented.

ChartN№13



[87] Criminal Procedure Code of Georgia, Article 185(6)

- As regards the reasons for adjourning the hearings, the seemingly objective circumstance- negotiations for plea agreements prevail - 27% (55 hearings), although many cases have revealed that in most cases the negotiation on plea agreement is a pretext for delaying the process and not a real cause. It is true that in certain cases when there is a real interest for conclusion of a plea agreement, both parties demonstrate inadequate eagerness to the issue and do not try to carry out the negotiation process fast and without delay.

GYLA's monitor attended three court hearings of one case. All three court hearings on the case were adjourned,two of them under the plea agreement pretext. It is noteworthy that the first trial was postponed for 40 days, after which the parties showed up at the trial and announced that they needed additional time for negotiations, thus the hearing was again adjourned for another 30 days, but even within this timeframe the agreement was not reached, and the following court session was again postponed due to the prosecutor's absence.

In another case, the judge explained that the court hearings were permanently postponed for more than a year, as the parties motioned for a plea agreement. Because of this, the judge ordered the parties to decide finally whether they were going to enter into a plea agreement or not.

- Another reason for frequent posponment of the court hearings is absence of the prosecution's witnesses - 20% (41 hearings). It is noteworthy that the prosecutor mainly declared that s/he was unable to present witnesses, and discussion of other additional reasons or submission of any evidence did not occur. In some of these cases, several court hearings were adjourned in a row due to the above reason.

Should be noted there was one case where all 4 court sessions which the GYLA's monitor attended were adjourned immediately after the opening. In one occasion, it was due to the prosecutor's absence, in 2 occasions – absence of the prosecutor's witnesses, and in one occasion -the absence of the defense lawyer.

According to the Criminal Procedure Code of Georgia, the parties shall be obliged to ensure the appearance of their witnesses before the court.[88] If

[88] Criminal Procedure Code of Georgia, Article 228 (1)

a witness refuses to appear before the court, a party may file a motion requesting to summon its witness to a court session and if granted,the court shall summon the latter, and if the person summoned fails to appear in the court, he/she may be compelled to appear.[89]

Consequently, if the prosecutor fails to present his/her witnesses before the court, s/he shall use the tools envisaged by the law in order to prevent the process delay. In addition, it is often unknown whether the prosecutor summoned witnesses within a reasonable period of time or whether the party showed in difference or negligence to presentation of witnesses.

- Another common reason is the absence of defense counsel - 16% (32 hearings). It is noteworthy that in some cases the reason of the absence of the defense lawyer remained unknown, and none of the measures[90] envisaged in the law were imposed by the judges although non-appearance of defense lawyers at the court hearings was a regular fact. The Criminal Procedure Law of Georgia only envisages non-appearance of a participant of criminal proceedings due to a valid reason[91] therefore in each case it is important to examine the reasons for the absence of a party. There were also cases - 5% (10 court sessions), when the lawyers in the case were replaced by other attorneys. Newly appointed attorneys typically require a certain period of time to familiarize with case materials, which in turn prolongs the process. Of course, the defendant has the right to change the lawyer, but the application of the right should not cause the process prolongation. This is directly required under the Criminal Procedure Law of Georgia.[92]

[89] Criminal Procedure Code of Georgia, Article 149

[90] Criminal Procedure Code of Georgia, Article 190(1), If a defense lawyer does not appear at a court session, the court shall provide the accused with a defense lawyer at the expense of the State, in the manner prescribed by this Code and shall adjourn the hearing for a reasonable period, but for not longer than 10 days. The court may once again adjourn the hearing at the next session for not more than 5 days, provided that the defense files a reasoned motion indicating an objective reason for the non-appearance of the defense lawyer. If the motion is not filed, or if a filed motion is rejected or if the defense lawyer fails to appear after the motion has been granted, the session shall be resumed with the participation of a defense lawyer from a relevant legal aid service.

[91] Criminal Procedure Code of Georgia, Article 3 (18)

[92] Criminal Procedure Code of Georgia, Article 42(1), It shall be impermissible to adjourn a court hearing on the grounds of replacing a defense counsel if it serves to prolong and imped e the court hearing".

In one case the absence of the defense lawyer raised suspicions of a deliberate delay. The GYLA's monitor attended six court hearings on one case out of which five sessions were adjourned due to the absence of the attorneys, and one with the purpose of negotiating a plea agreement.

- other reasons - 10% (21 court hearings) includes the reasons such as technical faults, allocation of a public attorney,replacement of attorney, health condition of a participant, prosecutor's training, etc.
- There were cases when the hearings were adjourned due to the prosecutor's absence - 8% (16 hearings). Here,as usual, no questions were raised about the issue and no proper investigation of the reasons of the absence as well as no measures envisaged in the law in case of unreasonable non-appearance was carried out.[93] The similar outcome occurs when instead of the prosecutor reviewing the case another prosecutor shows up who declares that s/he is not acquainted with the case materials and requests the adjournment of the hearing, which, as a rule, is supported immediately - 4% (9 court hearings).
- There were cases - 4% (9 court hearings), when non-convicted defendants failed to appear before the court, in a number of cases they had defense lawyers but they declared that it was unknown for them whether defendants wanted to continue the hearing without them attending it or not, which is why sessions were adjourned and no explanations provided.
- In several cases - 2% (5 court hearings) the reasons for adjourning the hearings were unprepared parties (in 3 occasions – prosecutors, in 2 occassions – defense). At the trial sessions the parties declared that they had not prepared the introductory or final word. This expressly reveals an irresponsible attitude towards the justice.
- There were cases when the reason for adjourning the hearings remains unknown for the monitors - 2% (5 court hearings). Sometimes the reason for adjourning the process is participation in other proceedings- 2% (4 court hearings).

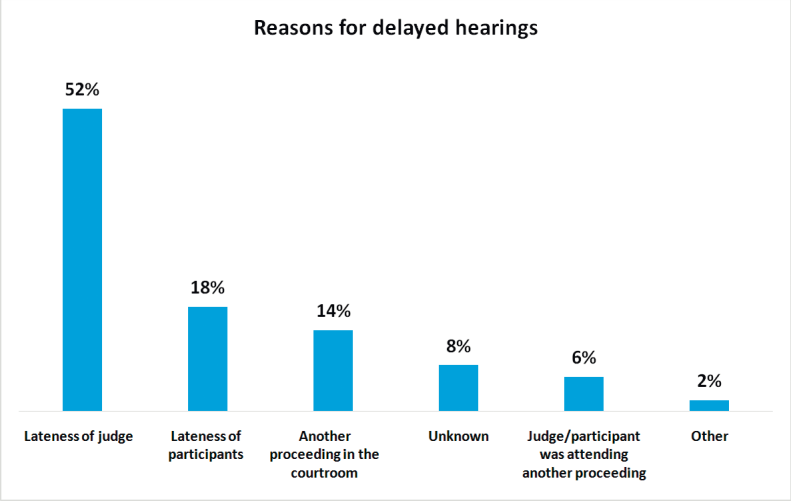
[93] Criminal Procedure Code of Georgia, Article 190 (3),If a prosecutor fails to appear, the court shall adjourn the hearing for a reasonable period, but for not longer than 10 days, and notify the Chief Prosecutor's Office of Georgia and the superior prosecutor accordingly; the superior prosecutor shall be obliged to ensure the participation of the prosecutor at the next session, and notify the court of the reason for non-appearance.

1.2.2. Punctuality of court hearings

As regards the delay, GYLA's court monitoring has shown that in 40% of 434 cases (174 hearings) the hearing did not start on time. In 10% (45 hearings) of the cases, GYLA's monitors were not able to find out whether hearing started on time or not. Sometimes court sessions were delayed for more than one hour.

It is noteworthy that the delay of hearings usually is not discussed. Neither parties nor judges make any relevant explanations about the delay and generally the above is perceived as a less important matter. However, delaying the hearings for more than one hour leads to a number of problems[94] and ultimately contributes to the process prolongation.

ChartN№14



As for the reasons of the delay, according to the results of the monitoring, the delay in most of the cases, namely in 52% (90 court sessions), was due to the lateness of judges.[95]

[94] When the process is delayed, the time during which the appropriate procedural actions have to be performed is lost. Due to the courts' case load, judges have heavy schedules with several hearings in one day which results in expedited completion of the delayed proceedings or delayed start of the scheduled processes.

[95] This number does not include the cases when the judge attended other proceedings,as they are listed separately.

Next, the lateness of participants - 18% (31 court sessions) and other proceedings held in the courtroom - 14% (24 court sessions). There were cases when the reason for the delay of the hearings for the monitors remained unknown - 8% (14 court sessions). In some cases, the delay was due to the valid reasons such as: the judge or any other participant of the proceeding were attending other proceedings - 6% (11 hearings). Other reasons of the delay- 2% (4 processes) include the reasons such as technical faults, late appearance of interpreters or witnesses, etc.

Finally, we believe that late appearance of parties and adjourning the hearings impedes the implementation of expedient justice and provides a serious basis for delaying of processes.

2. Equality of Arms and the Adversarial Process

2.1. Introduction

Equality of arms and the adversarial process are the key principles of criminal proceedings, reinforced by the Constitution of Georgia[96] and the provisions of the Criminal Procedure Code of Georgia.[97] The current Criminal Procedure Code of Georgia is based on the principles of equality of arms and the adversarial process meaning that the collection and presentation of evidence is the responsibility of the parties. A court shall be prohibited from independently obtaining and examining evidence that proves the guilt or supports the defense.[98] Also, the judge is not permitted to interrogate witnesses. In exceptional cases, a judge may ask clarifying questions if so required for ensuring a fair trial. Even in this case, the law does not allow the judge complete discretion, but is restricted by the consent of the parties. This is justified with the ground that the judge in the adversarial criminal proceedings plays the role of a neutral arbitrator, which contradicts the interrogating a witness, as a question may serve the interests of either party.

During the reporting period, the monitoring of the trials revealed that the judges do not exercise the right to ask a question in the majority of cases, but there were cases reported when the judge asked questions to the wit-

[96] Constitution of Georgia, Article 85(c)

[97] Criminal Procedure Code of Georgia, Article 9

[98] Criminal Procedure Code of Georgia, Article 25 (2)

nesses without the consent of the parties or otherwise interfered with the party's competences.

2.2. Analysis of court hearings

The judge asked questions to witnesses in a total of 32 cases. It is noteworthy that in 12 cases (37%) questioning was carried out in full compliance with the law, in particular,after obtaining the parties' consents, and the questions in their character were serving for clarification purposes. However, there were still violations, namely 8 questions (26%) were for clarification, but the judge failed to ask the parties for the permission. Some questions, namely, 12 questions (37%)were not for clarification, but were completely new questions, and actually it constituted an interrogation of the witness by the judge.

In one of the cases, the judge not only conducted an interrogation of a witness without the consent of the parties, but stated his assessment of the specific circumstances.

There were also cases when the judge otherwise interfered with the competences of the parties. For example, in one of the fraud cases the judge became dissatisfied with the way the prosecutor was interrogating the witness and declared that s/he could not understand anything and demanded from the prosecutor to question the witness properly. The judge also noted for the prosecutor to submit the documents at the following trial on which the witness was talking. Moreover, at the end of the interrogation the prosecutor declared twice that he completed the questioning of the witness, but s/he still resumed the interrogation based on the judge's remarks, which once again damaged the defendant's interests. The same judge interrupted the prosecutor questioning the victim and asked the witness five questions without the prior consent of the parties.

In one of the cases, the judge became involved in a dispute with the prosecutor, namely,s/he asked for the explanation of why s/he had the attorney's motion, the resolution of the prosecution, the verdict, the interim decision of the court, and the other related documents in the list of evidence. This behavior of the judge contains the elements of the inquisitorial process. The judge even told the prosecutor: *"Let's see how you will examine the lawyer's motion?! How are you going to you examine the judgment, by interrogating the judge?!"* We believe that this attitude towards the overall strategy of the party or the proceedings is somewhat beyond the principles of neutrality and judicial due conduct.

There was a case when the question asked by the defense lawyer was objected by the prosecutor,and the judge instead of granting or rejecting the objection, directly asked the same question to the witness. There were a number of cases where the judge did not allow the other party to state its position concerning the filed motion and made a decision contrary to the Criminal Procedure Law of Georgia.

Finally, we can say that there have been some cases of violation of adversariality and equality of arms expressed in unlawful use of the right to question or interference in the competences of either party.

3. Judge's responsibility to inform parties on their rights

3.1. Introduction

In criminal proceedings, participants of the process are equipped with a number of rights and responsibilities. Unlike other participants of the proceedings, the accused as the key subject of the proceedings, enjoys specific and exclusive rights, such as the right to silence, the right to protection against self-incrimination, the rights of defense counsel etc. One of the most important parts of the role of the judge is to provide the accused with a full and comprehensive explanation of the above rights. The accused that in a number of cases may not have a defense lawyer is unlikely to have full information about his/her rights. It is important that the judge, who should facilitate the parties to safeguard their rights, fully and clearly inform the participants of the trial their rights, especially to defendants.

3.2. Analysis of court sessions

It is noteworthy that in the reporting period judges generally complied with the formal side of the proceedings and announced the information about the case to be reviewed as well as the substance of the prosecution and the identities of the parties, the rights as well were explained more or less completely.

69 cases required the explanation of the rights (since the rights are informed to the parties only at the first appearance sessions and not before every hearing). In 28% (19 hearings) of those 69 cases, judges provided incomplete explanation of rights or failed to explain rights to the defendants. In 72% (50 hearings), a comprehensive explanation of the rights was provided for the defendants.

There were the cases when judges failed to inform defendants of their rights to defense counsel, the right to testimony as witnesses, the right to defend themselves and others, which contradicts the criminal procedure law of Georgia.[99] In two cases, the judge only informed the accused of the right to challenge. There was a case when the accused who admitted to the crime was not informed that s/he was not limited to acknowledging the guilt in the investigation, which could seriously damage the interests of the defendant and contradicts the law.[100]

In one of the cases the judge declared that both defendants would be informed simultaneously of their rights which directly contradicts the criminal procedure law of Georgia.[101]

There were also cases (2 cases) when the rights were completely explained, but the explanation was given in very professional language, which led to the doubts whether the accused could understand the meaning of the explanation or not.

4. Maintenance of Order by judges

4.1. Introduction

An important obligation of the judge is to keep the order in the courtroom.[102] Criminal Procedure Law of Georgia provides judges with a number of judicial rights,[103] to keep the order in the court room, which in turn is of crucial importance for the process to be complete and fair.

4.2. Analysis of court sessions

During the reporting period, there were the cases when the judges were unable to properly maintain the order that hindered the proper administration of the proceedings.

In the course of one case, the defense lawyer roughly and loudly addressed the witness several times on which the prosecutor made a state-

[99] Criminal Procedure Code of Georgia, Article 230

[100] Criminal Procedure Code of Georgia, Article 230(2)

[101] Criminal Procedure Code of Georgia, Article 230(1)

[102] Criminal Procedure Code of Georgia, Article 23

[103] Criminal Procedure Code of Georgia, Article 85(2)

ment. Namely, the prosecutor requested the court to take appropriate measures as the lawyer shouted at the witness and did not allow him/her to respond and by doing so, according to the prosecution the principle of adversariality was violated since it was impossible to physically hear the answers given by the witness. It should be noted that the judge was too lenient to the issue, which partly threatened the principles of adversariality of the parties and the equality of arms. The similar fact was observed in another case where the judge did not act adequately and could not properly defend the witness's interests and was unable to maintain proper order in the hearing room.

In addition, there were cases in which the judges not only were unable to ensure proper maintenance of the order in the court room, but they themselves demonstrated inadequate judicial conduct in the court.

In one of the cases, the judge shouted at the defense lawyers: "Keep silent both of you now, I can't stand listening to you any longer" and hit the table. There was another a case when the judge started shouting at the prosecutor. In the same case,an attendee of the hearing expressed his/her dissatisfaction towards the witness in response of which the bailiff directly approached the person and expelled him/her from the hall, while the judge had no reaction to the fact. It should be noted that the bailiff had no right to expel the person present at the court session without the judge's instruction. The Criminal Procedure Law of Georgia vests this right only in the president of the session, so the bailiff should have carried out the above act not on his/her initiative but based on the judge's decision.

5. Use of visually degrading measures against defendants

One of the forms of violation of presumption of innocence is the use of visually degrading conditions against defendants, since the application of such security measures created an impression that defendants were dangerous criminals from which the society needed to be protected, which harmed the principle of presumption of innocence.[104] The above issue has been pointed out in the OSCE/ODIHR Trial Monitoring Report. According to the United Nations Human Rights Committee, any person charged with a crime shall be treated in accordance with the principles of presumption of innocence, which implies that"defendants shall not be hand locked and

[104] OSCE/ODIHR, Trial Monitoring Report Georgia,(108)

placed in the enclosure during court proceedings or present before the court as dangerous criminals."[105]

The European Court of Human Rights refers in some of its decisions to issues of treatment of defendants during the proceedings, which could potentially contradict the presumption of innocence and cause degrading treatment towards a person. For instance, in one case it has been established that the use of iron cage in the court trial can lead "an average observer to believe that an extremely dangerous criminal is on trial"[106] and the Court concluded that such measure would never be justified by the provision of Article 3 of the European Court of Human Rights, because it amounted to the degrading treatment."[107]

During the reporting period, the use of visually degrading measures were observed in respect of prisoners accused. In a total of 99 cases prisoner defendants were presented at the main trial, and in 41% of the cases (41 hearings) were used different types of visually degrading measures, including placement in metal cage during the session (30 hearings), wood and glass enclosures (7 hearings) and handlocks (4 hearings).

Although in most cases the use of the above-mentioned measures against the defendants could have been related to safety precautions, the proceedings left the impression that the risks that could be the basis for the use of such measures had not been adequately measured and evaluated at an individual level. In particular, the behavior of defendants was not inadequate or aggressive before the court, nor there were any criminal background or other circumstances that would pose a potential threat. Moreover, the above measures are mainly used in Tbilisi and rarely in other cities. This raises doubts that the measures are used without the evaluation and assessment of risk in individual cases.

Thus, the measures above should be allowed only when there is a clear and real threat to the attempted escape or other unlawful act from the defendants.

[105] General comments N.32, quote from the paper, Article 113,(30).

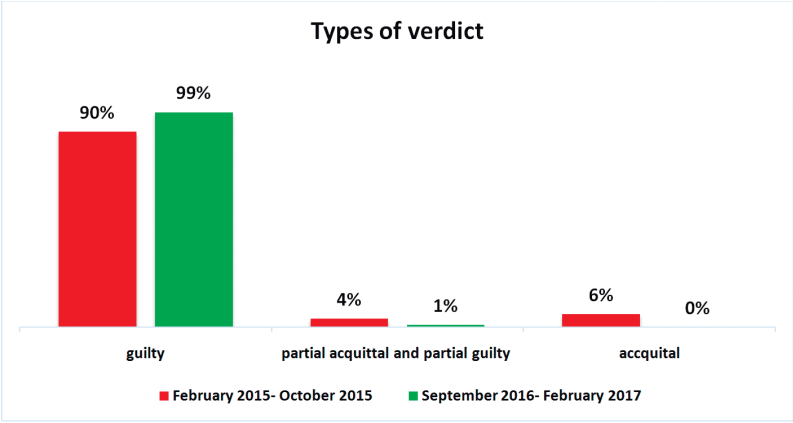
[106] Piruzyan v. Armenia,ECtHR, 26 June 2012, Article 73.

[107] OSCE/ODIHR, Trial Monitoring Report Georgia,Article 99.

6. Verdict

Within the trial monitoring, GYLA's monitors attended 434 main hearing sessions, and for 67 cases, verdicts were delivered. In 99% of these cases, a guilty verdict was issued, and for1 case a partial acquittal and partial guilty sentence. GYLA recorded no accquitals during the 11th court monitoring period.

ChartN№15



RECOMMENDATIONS:

Based on the findings of the latest and all previous monitoring report, GYLA has prepared the following recommendations:

1. For Common Courts

- Judges should exercise their discretionary powers more often with respect to imposition of preventive measures. They should increase application of less severe measures (alternative measures vis-à-vis the imprisonment and the bail) where applicable and in cases where the prosecution fails to substantiate necessity of using a preventive measure they should refrain from using such measures at all. Courts must also demand from the prosecution to submit adequately substantiated motions for the use of preventive measure, and impose on the prosecution the burden of proof;
- Imprisonment as a preventive measure must be applied only as a last resort when all other less strict preventive measures prove to be ineffective. Preference should be always given to lighter forms of preventive measure;
- The Court should only after the thorough examination of motions legalize the search and seizure on the grounds of urgent necessity;
- In all cases,judges should perform their duties with due observance during plea agreement sessions. In all cases, judges should comprehensively inform defendants of their rights provided for by the legislation and examine the fairness and legitimacy of the sentence determined by the parties in order to eliminate any suspicions about the proportionality of the sentence and the crime;
- In order to avoid delayed proceedings, the court should thoroughly examine the reasons for the delay or absence of either party and in case of any unreasonable excuse, impose the sanctions envisaged by the law;
- The judge in any case should observe the principles of neutrality and avoid the interference into the role of the parties or exceed the powers. In addition, while exercising the right to interrogate a witness, the judge must strictly follow the requirements of the law;
- Judges must inform defendant's of their rights in a comprehensive an comprehensible manner;

- Judges must apply all proportionate measures to ensure that the order in the courtroom is observed and the parties are able to present their positions fully during the trial;
- The courts must assess individual risks, and only where and when necessary apply visually degrading measures.

2. For the Prosecutor's Office

- Prosecutors should better substantiate the necessity and expediency of application of a concrete preventive measure. Simultaneously,- prosecutors should explain why the application of other less severe measures cannot ensure the achievement of specific purposes"
- Prosecutors should substantiate the amount of ordered bail and examine the material and financial status of defendants;
- The Prosecutor's Office in all cases must initiate an investigation into the alleged torture / ill-treatment;
- The investigation and prosecution authorities should carry out searches and seizures without a prior court warrant only in exceptional cases under the urgent necessity;
- The Prosecution, when signing a plea agreement with the defendant, must pay proper attention to the victim's position and announce such information at the court hearing only after having the consultations with the victim.

3. For the Parliament of Georgia

- The Parliament of Georgia should adopt a law aimed at increasing the role of the judge to combat the alleged torture / ill-treatment. A judge shall be entitled to demand from the investigative agencies to examine each case of ill-treatment, and this should be obligatory;
- The Parliament of Georgia should create an independent investigative body with the exclusive power to investigate and prosecute any alleged ill-treatment cases. Moreover, the law should provide for the right of a judge to apply in writing to the Investigative Commission upon learning that the trial participants have been subjected to torture or ill-treatment;

- The law should regulate the mechanisms and procedures for the review of the lawfulness of arrests. The law should determine the obligation of judges to examine at the first appearance sessions the lawfulness of arrests both on the basis of a prior warrant and on the ground of urgent necessity;
- The law should revise Article 260 (1) of the Criminal Code of Georgia (Drug offense) and, according to the decision of the Constitutional Court of Georgia, appropriate penalties must be established.

4. For the Georgian Bar Association

- Lawyers should defend their clients in a qualified, active,careful and credible manner at all stages of court proceedings. For this purpose,the Georgian Bar Association should ensure their permanent retraining and advanced professional training in different areas of criminal proceedings (for example, with respect to standards of application of preventive measures, the rules on obtaining and recognition of admissibility of evidences, etc.).