Georgian Young Lawyers' Association

MONITORING CRIMINAL TRIALS IN KUTAISI AND TBILISI CITY AND APPELLATE COURTS

Monitoring Report №8
Period Covered: February - October, 2015
March, 2016
Tbilisi, Georgia

The monitoring project is made possible by the generous support of the American People through the United States Agency for International Development (USAID). The contents are the responsibility of GYLA and do not necessarily reflect the views of USAID, the United States Government or East West Management Institute, Inc. (EWMI).

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GYLA Georgian Young Lawyers' Association

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

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GYLA thanks Georgian Court System for its cooperation in the process of court monitoring.

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Summary of Observations

- Throughout the course of the monitoring (February-October 2015), the courts have shown improved approaches towards separate specific issues. The use of preventative measures involving imprisonment slightly decreased as a proportion of the preventative measures that were imposed as a whole. However, the number of decisions on preventative measures which were unsubstantiated also increased as a proportion of decisions on this issue as a whole. In addition, instances of applying unsubstantiated bails became frequent, either because the use of bail was disproportionate to the circumstances of the case or it was applied without examining the financial status of the defendant.
- Some of the prosecution's motions for preventive measures remain unsubstantiated, especially motions concerning the use of bail, since in nearly all cases the prosecution possessed no information on the financial and property status of the defendant. The courts' more frequent attempts to examine the defendants' financial and property conditions can be regarded as a positive development. However, even in cases where the courts did examine the financial and property conditions of the defendants, not all the courts' subsequent decisions were properly substantiated.
- Negative changes were found in the application of various types of preventive measures – unlike during the previous reporting period, judges granted preventive measures other than bail and imprisonment less frequently. However, compared to the previous reporting period, the percentage of cases where no preventive measure was imposed on the defendant slightly increased.
- Since the start of the monitoring (October 2011) it was the third occasion when the GYLA observed the termination of a criminal prosecution at the stage of the pre-trial hearing. In this reporting period the court terminated three cases involving three defendants.
- Similar to the previous reporting periods, no problems with the attendance at the jury selection hearings were observed and all interested persons had access to the jury selection hearings.

- Similar to the previous reporting periods, courts failed to publicize the schedule of the first appearance sessions.
- Similar to the previous reporting periods, pre-trial hearings were mostly conducted routinely. The courts mostly agreed to the prosecution's motions on a submission of evidence. The defense usually refrained from submitting its own evidence as well as from objecting to the admissibility of evidence submitted by the prosecution. The defense, however, seemed more active in this reporting period.
- Unlike the previous reporting period 4 cases were observed when the judge questioned witnesses without parties' prior consent thus violating the equality of arms and the principle of adversarial proceedings.
- Nothing has changed with regard to search and seizure. Still there is a reason to believe that law enforcement authorities fail to observe the prohibition of search and seizure without a prior warrant, except in cases of urgent necessity, which shall be duly substantiated by the law enforcement authorities. Court decisions on the legalization of search and seizure conducted under urgent necessity still lacked reasoning.
- For the third time since the start of the monitoring (from October 2011 through October 2015) two cases were found where the judge deemed the sentence envisaged in the plea-agreement unfair and refused to approve it. Compared to the past three monitoring periods explanations of the rights of defendants pleading guilty worsened. Judges put less effort into explaining to the defendants their rights against ill-treatment and did not examine whether a plea-agreement was reached through ill-treatment the defendant had been subjected to. Percentage share of plea- agreements imposing fine was further reduced, though the average amount of fine increased compared to the previous reporting period.
- No significant changes were observed with regard to the specific rights of a defendant. However, judges sometimes failed to or incompletely explained rights of a defendant.
- Judges have an inconsistent approach towards maintaining order in the courtroom. In some cases the court was inadequately lenient and effective conduct of the hearing was put

at risk, while in other cases a judge managed to implement necessary measures for keeping order.

- Starting court hearings on time remained a problem. Often judges were late to the hearing.

MAIN TRENDS

First Appearance Hearings (Preventive Measures)

Compared to previous monitoring period (August 2014 – January 2015) in this reporting period which covers the period from February 2015 through October 2015:

- The percentage of defendants for whom the prosecution requested imprisonment as a preventive measure decreased from 56% to 54%.
- The percentage of defendants who were ordered imprisonment as a preventive measure decreased 42% to 40%
- The percentage of defendants who were ordered bail as a preventive measure increased from 52% to 55%
- The percentage of defendants who were ordered other alternative preventive measures decreased from 6% to 5%
- The percentage of defendants who were left without any preventive measure increased from 3% to 6%

- **Courts still use mainly two types of preventive measure – an imprisonment and a bail.** Unlike previous reporting period the percentage of the use of other alternative preventive measures slightly decreased and the court applied alternative preventive measure in 18 (5%) cases. In previous reporting period courts applied preventive measures other than bail or imprisonment in 25 (6%) cases.
- In this reporting period three instances were observed where the court found the arrest report illegal, ordered a bail and released the defendants from the courtroom. Since the start of the monitoring (October 2011) this has been a third occasion when the court found arrest report illegal.
- This reporting period (February-October 2015) revealed 11 instances (3%) when the defendants were left without any preventive measure despite prosecution's motion.

- Similarly, in 11 instances (3%) the prosecution did not motion for the use of preventive measure. However, in 7 instances out of those 11, defendants were already in custody for other offences, and this was a reason why the prosecution did not motion for the use of preventive measure. Only two instances were observed where defendants were not ordered any preventive measure and the prosecution still did not motion for the use of preventive measure. In remaining two cases the prosecution withdrew the motions.
- **Overall 22 defendants were left without any preventive measure.** Despite the fact that in 7 cases the reason of leaving defendants without any preventive measure was that they remained in custody for other offences, the remaining 15 (4%) instances prove that there is slight increase in the number of defendants who were left without any preventive measure. In previous reporting period 13 (3%) defendants were left without any preventive measure. GYLA remains hopeful that prosecutors and courts will maintain this trend and will motion and use preventive measures only where appropriate.
- In this reporting period prosecution motioned for the use of other alternative measures in 2 (0.5%) cases (personal guarantee and agreement on not to leave the country and proper conduct) and the court upheld the motions in both cases.
- The tendency of making substantiated decisions concerning the use of preventive measures that has started since January 2013 has now changed. In this reporting period 12% of the decisions on imprisonment and the use of bail were unsubstantiated. The courts substantiated only 88% of the decisions on imprisonment. Similarly, only 88% of the decisions on bail were substantiated. In the previous reporting period 96% of the court decisions on imprisonment and 95% of the court decisions on bail were substantiated.
- It is noteworthy that the decisions on the use of bail in cases of domestic violence were unsubstantiated. In this reporting period out of 5 cases of domestic violence that were heard at the first appearance sessions, 3 (60%) defendants were ordered bail in minimal amount which based on factual circumstances would not likely have restraining effect. In addition, these decisions on the use of bail are manifestly unfounded. With these

decisions judges compromised the life and health of women, victims of domestic violence.

- In this reporting period for the purposes of more thorough study the GYLA submitted Freedom of Information requests (hereinafter – FOI requests) to the Tbilisi City Court (hereinafter - TCC) requesting interim decisions on the first appearances and the use of preventive measures that took place in February, May, July and October 2015. Out of those 15 decisions, 5 (33%) lacked reasoning, since the court was too abstract in terms of the goals of the preventive measure, too general in terms of the existing risks and provided scarce information about the facts of the case.
- In this reporting period court upheld all imprisonment decisions in the cases concerning periodic revision of imprisonment decisions, required by the amendments introduced to the Criminal Procedure Code (hereinafter – CPC). Although the issue whether the court decisions were right is beyond the scope of the monitoring, the given statistical data raises doubts about mere formalistic approach of courts towards the issue of periodic revision of imprisonment decisions.
- Monitoring of the first appearance sessions illustrated that the prosecutors referred to removed or expunged convictions. They often argued that it was the defendant's individual characteristic, a person is prone to commit crime, though in some cases they refrained from focusing on the criminal records of the defendants which created impression, as though the defendant was still under conviction. It should be mentioned that consideration of a person's past criminal record without explaining reasons for such consideration can create an impression that a defendant is guilty of committing the crime which can lead to a judge's belief that the person committed the crime.
- The tendency that has been observed since the last three reporting periods is that judges appeared to give more consideration to the financial and property status of a defendant when imposing preventive measures, instead of automatically upholding preventative measures requested by the prosecution. **However, though judges were more active, the fact of asking questions to the defendants did not necessarily mean**

that all decisions on the use of preventive measures were properly substantiated:

- In 29% of instances where the prosecution requested imprisonment, the court ordered bail;
- In 1 (0,5%) case where the prosecution requested imprisonment, the court left a defendant without any preventive measure;
- In 2 (1%) instances, where prosecution requested imprisonment, the court ordered personal guarantee and agreement on not to leave the country and proper conduct;
- In 70% of instances where the prosecution requested bail, the court reduced requested amount of the bail. However not all decisions on those reductions were substantiated;
- In 7% of cases where the prosecution requested bail defendants were released under agreement of proper conduct and not to leave the country, while in 2% of cases they were released under personal guarantee instead of a bail requested by the prosecution;
- In 7% of cases where the prosecution requested bail, the defendants were released without any preventive measure.

Pre-trial Hearings

- Unlike the previous monitoring period three cases were observed when the judge terminated criminal prosecution at the pre-trial hearing and did not forward the case for merit hearing.
- Similar to the previous reporting periods, courts routinely granted prosecution motions to present evidence. As for defense, it seemed more active than in the previous reporting period. Compared to the previous reporting period, objections of the defense to the prosecution's motions increased from 6% to 14 %. In this reporting period the defense filed motions for submission of evidence in 33 (24%) out of 135 instances. During the previous reporting period defense filed the same motions in 20% of the cases, while in the period before that reporting period it was 23%. The defense mainly agreed with prosecution's motions.

Plea Agreement Hearings

- Compared to initial reporting periods, judges seemed more active at plea agreement hearings and did not automatically approve prosecution's motions on plea agreements. Since the start of the monitoring (October, 2011) the third case was observed when the judge asked additional questions at plea agreement session and expressed interest in fairness and lawfulness of plea agreement conditions. Since fairness and lawfulness of 2 plea agreements seemed less convincing for the judge he did not approve them. GYLA assesses these two cases positively and remains hopeful that in the future judges will be more active in identifying lawfulness and fairness of plea agreements and will approve them only after proper examination.
- In 7 (6%) instances, the judge failed to explain to the defendant that his complaint about torture, inhuman or degrading treatment will not hinder approval of plea-agreement concluded pursuant to the law.
- For the past five monitoring periods, number of plea-agreements imposing fine gradually decreased. The last indicator equaled 39%, while in the previous reporting periods the percentage of the plea-agreements imposing fine were 68%[1], 50%[2], 49%[3], 44%[4] and 41%[5]. However, the average amount of fine imposed by the plea-agreements has increased considerably and reached 4560 GEL. In the previous reporting period the average amount of fine imposed by plea-agreements was 3.538 GEL.
- The percentage of the use of ordering community labor in plea-agreements significantly increased from 7% to 15%. It should be noted that after the Parliamentary Elections of October 2012 the indicator increased from 1% to 7%, though in the following periods the condition remained unchanged,

[1] July-December 2012

[2] January-June 2013

[3] July-December 2013

[4] January-August 2014

[5] August 2014-January 2015

except the last reporting period where the use of abovementioned sentence significantly increased.

Jury Trials

In this reporting period due to the high public interest towards the case and the composition of the court the GYLA monitored a jury trial involving 18 hearings on one case.

- In 7 (39%) instances, no information was provided on the official web-site of the TCC about scheduled hearings;
- Jurors were actively involved in the proceedings.
- Two instances were observed in the reporting period when jurors were shown in the news program on f one of the TV channels which constitutes a violation of law.
- Jurors delivered guilty verdict 10 vs 2. However, at the sentencing trial the jury recommended to reduce the sentence.

Other Key Findings

- Similarly to the previous reporting periods the defense remained passive compared to the prosecution. The defense was active only at the first appearance stage.
- Out of finalized 53 cases which were heard on merits the defendants were convicted in 48 cases, acquitted in 3 cases and in 2 cases the defendants were acquitted on some counts. In the previous reporting period, the defendants were convicted in all 56 cases.
- The positive trend of the past three monitoring periods in terms of explaining the rights to the defendants during the plea agreements has changed and a relative regress was observed in this reporting period.
- In this reporting period the situation has not changed in terms of search and seizures. Out of 27 motions on search and seizure, the court issued advance permit on its conduct only in 5 (19%) cases. In other 22 (81%) cases the court legalized searches and seizures conducted by the prosecution. This raises doubts about compliance of law enforcement authori-

ties and the court with their obligation not to conduct or legalize searches and seizures on the bases of urgent necessity that are not appropriately justified.

- The GYLA retrieved interim decisions of the courts on legalization of searches and seizures conducted with urgent necessity and which have not been appealed to the Investigative Panel of the Appelate Court in order to assess their substantiation. The GYLA received only 15 interim decisions in response. But 2 out of those 15 decisions concerned issuance of permit on the conduct of search and seizure which the GYLA did not request. Consequently, out of 13 interim decisions on legalization of searches and seizures conducted with urgent necessity 10 (77%) interim decisions were manifestly unsubstantiated.
- There continues to be a problem with starting court sessions on time. Save for the first appearances and trials with jury participation, the situation has significantly worsened, namely 41% of other sessions started with more than 5 minutes delay, while in the previous monitoring period only 23% of sessions started with more than 5 minutes delay.

INTRODUCTION

Georgian Young Lawyers' Association (GYLA) has been carrying out its court monitoring project since October 2011. The GYLA initially implemented its monitoring project in the Criminal Panel of the TCC. On December 1, 2012, the GYLA broadened the scope of the monitoring project to also include Kutaisi City Court. In March 2014 monitoring was launched in Batumi City Court. Identical methods of monitoring were utilized in all three cities.

The GYLA's first and second trial monitoring reports cover the period from October 2011 to March 2012[6]. Third monitoring report covers the period from July 2012 to December 2012[7]. Fourth monitoring report covers the period from January 2013 to June 2013[8]. Fifth monitoring report covers the period from July 2013 to December 2013[9]. Sixth monitoring report covers the period from January 2014 to August 15, 2014[10]. Along with the sixth report, the GYLA also submitted three year summary findings[11], revealing problems in courts during this period, changes, trends and challenges in courts. Further, in June GYLA submitted its seventh report, covering the period from August 15, 2014 to January 2015[12].

This is the GYLA's eighth trial monitoring report, covering the period of February - October 2015. Similar to previous reporting periods, the purpose of monitoring criminal case proceedings was to increase their transparency, reflect the actual process in courtrooms, and provide relevant information to the public. This report also presents recommendations based on the newly discovered problems. The recommendations aim at improving the criminal justice system.

During February – October 2015, the GYLA monitored 1090 court hearings including:

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

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

[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] Three Years Summary Findings https://goo.gl/6RIIXo

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

- 300 - First appearance hearings;
- 159 - Pre-trial hearings;
- 113 - Plea agreement hearings;
- 473 - Main hearings;
- 18 - Jury trials;
- 14 - Appellate hearings;
- 13 - Jury selection hearings.

Of those 1090 hearings 700 took place in Tbilisi City Court (TCC), 12 – in Tbilisi Appellate Court, 376 in Kutaisi City Court (KCC) and 2 hearings – in Kutaisi Appellate Court. This report does not assess jury selection hearings and appellate hearings separately since no different trends has been observed in the monitoring period.

Methodology

The information in this report was obtained by monitors through direct monitoring of hearings. The GYLA's monitors did not communicate with the parties, and did not review case materials or final decisions of the courts.

Similar to the previous reporting periods, the GYLA's monitors utilized questionnaires prepared specifically for the monitoring project. Information gathered by the monitors and compliance of courts' activities with international standards, the Constitution of Georgia and applicable procedures and laws was evaluated by the GYLA's analyst and the lawyers.

The questionnaires included both closed-ended questions requiring a "yes/no" answer and open-ended questions that allowed monitors to explain their observations. Further, similar to the previous reporting period GYLA's monitors made transcripts of trial discussions and particularly important motions in certain cases, giving more clarity and context to their observations. Through this process monitors were able to collect objective, measurable data and identify other important facts. The attached charts may not fully reflect more subjective information; however, the GYLA's conclusions are based on the analysis of all of the information gathered by the monitors.

In addition to main methodology, that analyses information acquired

by the GYLA in the courtrooms, in this reporting period the GYLA made also FOI requests for interim court decisions for more thorough study of specific issues of interest. Namely the GYLA requested from the courts interim decisions on first appearances and the use of preventive measures which was conducted in February, May, July and October 2015[13]. Also, the GYLA requested interim decisions on the legalization of search and seizure conducted in the reporting period with the urgent necessity that has not been appealed by the parties to the Investigative Panel of the Appellate Court[14]. In response the GYLA received from the court overall 30 interim decisions[15]. Out of those 30 interim decisions 15 concern first appearances of defendants and 15 concern searches and seizures. It should be mentioned that out of 15 search and seizure decisions sent by the court 2 decisions concerned issuance of permits for the conduct of search and seizure which was not our request or field of study.

Also, for the first time the report covers sessions of the jury trial and outcomes of the monitoring of jury trials.

In this reporting period at the first appearance sessions unsubstantiated and inadequate approach of judges towards several cases of domestic violence was observed which is presented in the report separately.

The aim of the monitoring has not been to study facts of the cases, statements made by the parties to the cases and the case materials. Namely, the GYLA did not assess the issues that concerned particular circumstances of the crime and defined guilt or innocence of a defendant.

In view of the length and different stages of criminal proceedings, GYLA's monitors typically attended individual court hearings rather than monitored one trial from start to end. However, attendance at the hearings of the "high profile cases"– where defendants are former political appointees, was an exception.

The GYLA also chose to monitor cases involving gross violations of human rights, cases of high public interest, or cases with other distinguished characteristics. The GYLA monitored these cases through

[13] The FOI Request from November 9, 2015 #ჰ-04/573.15

[14] *Ibid.*

[15] Tbilisi City Court letter from November 12, 2015 #1-01245/27391

attending all court hearings held on the cases to the extent possible.

The GYLA monitored the high profile and other distinguished cases in the Appellate Courts as well.

Structure of the Report

The report consists of five main parts: The first part presents key observations related to rights on different stages of criminal proceedings and court hearings (the first appearance hearings, pre-trial hearings, plea agreement hearings and jury trials).

The report then provides basic issues and related trends identified during the monitoring. These issues are: the right to reasoned judgment, lack of guarantees for the protection of witnesses, prohibition against ill-treatment, the right to public hearing, equality of arms and principle of adversarial proceeding and the right to defense.

The third part of the report describes conduct of parties in a court. It illustrates irregularities which expressly contradict procedural law or norms of ethic.

The fourth part reviews technical gaps of the court process.

The concluding part of the report submits recommendations drafted on the basis of identified problems.

The GYLA remains hopeful that the information obtained through the monitoring process will help create a clearer picture of the current situation in Georgia's courts and serve as a useful source of information for the ongoing debates on judicial reform.

A. OBSERVATIONS OF PARTICULAR STAGES OF CRIMINAL PROCEEDINGS

1. First Appearance Hearings

According to the Article 198 of the CPC, during defendant's first appearance the Court considers the issue of what measure should be used to insure defendant's further appearance before the court, will not either commit a crime while awaiting resolution of the case or interfere with the prosecution of the case. This preventive measure must

be substantiated, meaning that the preventative measure imposed must correspond to the goals of the legislation.

Use of preventive measure bears preventive-safeguarding character aimed at preventing interference in proper administration of justice, rather than to justify guilt of an individual. [16]

Various types of preventative measures are available to the court. These include: imprisonment, bail, personal guarantee, agreement on not to leave the country and proper conduct, and supervision of the conduct of a military serviceman by commanders–in-chief and juvenile police supervision.

Article 198(3) of the CPC provides the following: when filing a motion to apply a preventive measure, the prosecutor must justify the reason behind his/her choice of preventive measure and the inappropriateness of the use of a less restrictive preventive measure. Accordingly, prosecution bears the burden of prove in the use of preventive measure. The defense is not obliged to submit evidence against the prosecution's motion. Further, article 198(5) of the CPC provides the following: when deciding on the application of a preventive measure and the type of the preventive measure, the court shall take into consideration the defendant's individual character, scope of activities, age, health condition, family and financial status, whether the defendant has violated previously applied preventive measure and other circumstances.

The decision of the court concerning the use of the preventative measure must be substantiated, as the substantiation of the decision is a part of the right to a fair trial guaranteed by the Criminal Procedure Code[17] and reinforced by the number of different judgments of the European Court of Human Rights.[18]

1.1. General Trends

During the reporting period the GYLA monitored 300 first appearance hearings (226 in the TCC and 74 in the KCC) concerning 350 defen-

[16] The Constitutional Court of Georgia 26/06/2015 minute of the session №646ბ II-40.

[17] Article 194.2 of the CPC stipulates that "a court's decision shall be well-grounded;"

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

dants.[19] Compared to the previous monitoring periods (since October 2011), general situation has improved considerably. However, some previous troubling practices still remain and situation has not changed considerably since the last reporting period. Further, it should be noted that courts approach in terms of standards and criteria of applying preventive measures is not uniform.

Courts still mainly use two types of preventive measures. **95% of the preventive measures applied are bail and imprisonment. The percentage of the use of alternative preventive measures is still very low.** Namely, 5% of defendants were ordered preventive measures other than the bail or imprisonment. In the previous reporting period the number or the use of alternative preventive measures constituted 6%.

It should be noted that in this reporting period the instances of request by the prosecution for the use of alternative preventive measures as well as the motions for the schedule of pre-trial hearings without using any preventive measure was observed. Out of 350 defendants the prosecution motioned for the use of preventive measures other than bail or imprisonment for 2 defendants, which was upheld by the court.

This monitoring period revealed 11 (3%) instances of leaving defendants without any preventive measure despite the prosecutions motion to use imprisonment (in 1 case) and a bail (in 10 cases). In addition, similar to the previous monitoring period the instances were observed when the prosecution did not motion for the use of preventive measure and requested the court to schedule a date of pre-trial hearing. Out of 350 defendants the prosecution did not motion for the use of preventive measure for 11 (3%) defendants. However, in 7 instances out of those 11 the defendants were already in custody for other offence or were ordered preventive measure for other charges and this was the reason why the prosecution did not motion for the use of preventive measure. Only 2 cases were observed when the defendants were not ordered any preventive measure and the prosecution still did not motion for the use of preventive measure. In remaining 2 instances the prosecution withdrew the motions.

Positive trend that started three years ago in terms of substantiation of preventive measures continued in this reporting period, though

[19] More than one defendant participated in some first appearance hearings.

has not improved considerably. After the October 2012 parliamentary elections, courts changed their attitude to the prosecution sometimes rejecting the prosecution's motion for preventive measures. During the following monitoring periods this trend in favor of the defense continued. The courts were relatively active in examining motions for preventive measures, and were not merely bound by the prosecution's demand. Although current monitoring period revealed slight increase in the number of unsubstantiated decisions, no significant changes were observed. Judges revealed more efforts with a view to determine reasons of prosecution's motions and defense position. In the course of motivation, judges frequently applied factual (material) and formal (procedural) grounds for applying preventive measures. In their turn prosecution attempted to submit to the court more reasoned motions, though sometimes their motions seemed abstract. Although the prosecution indicated reasons and grounds for applying the preventive measure, the arguments were brought unreasonably and were not linked to concrete factual circumstances of the case.

Current statistics differ considerably from the same statistics of the previous monitoring periods when judges automatically granted prosecution's motions. In this reporting period judges asked questions and attempted to find out more information about the personality and family conditions of the defendants. However, the fact of asking questions did not necessarily mean that the decisions were duly substantiated.

Though in this reporting period prosecution requested imprisonment in more than half of the cases, 188 (54%) defendants out of 350, the prosecution tried to better substantiate motions for imprisonment. When requesting bail as preventive measure prosecution's motions still lacked substantiation, since in almost all cases they possessed no information about the defendant's financial status. However, in such cases, court played its positive role and attempted to acquire information from the defendants. It should be noticed that in some cases the prosecutors performed their duties and obligations conscientiously and submitted to the court information on immovable property in a defendant's possession based on the data acquired from the public registry. In some bail cases, when prosecution requested imprisonment, court failed to investigate financial status of the defendant. It should be noted that the best situation in this regard was observed in the TCC. Often judges of the KCC were passive and demonstrated no additional efforts for acquiring necessary information.

We should note that at the first appearance hearing, the prosecutor must justify the reason behind his/her choice of preventive measure and the inappropriateness of a less restrictive preventive measure. During the reporting period, prosecutors mostly noted about ineffectiveness and inappropriateness of applying less restrictive preventive measure without duly substantiating this measure. Consequently, this indication by the prosecution about ineffectiveness and inappropriateness of the use of less restrictive measure was merely formalistic.

Situation has not changed in terms of defending the accused at the first appearance sessions. However, when requesting imprisonment and bail the defense less frequently agreed with the prosecution's position and attempted to substantiate its position with certain argumentation. Nevertheless, there were still some cases when the defense objected the prosecution's charges formally and did not bring any valid argumentation for its support. Out of 350 defendants only in cases of 84 (24%) defendants the defense motioned for the use of other preventive measure than the bail.[20] Out of those 84 instances the court upheld 15 (18%) of the defense motions. It should be noted that this is almost the same as in the previous reporting period when the defense motioned for the use of restrictive measures other than the bail only in 75 (19%) cases and the court upheld 14 (19%) of those motions. However it should be mentioned that the defense becomes more and more active in this regard. The GYLA remains hopeful that the defense will become more active and will motion for the use of less restrictive preventive measures more frequently and most importantly, the defense will better ground its motions instead of applying merely formalistic approach towards the use of preventive measures, and accordingly, the courts will use the preventive measures other than the bail and imprisonment in all possible instances.

A court ordered imprisonment to 40% of defendants (130 out of 350) and bail to 55% (180 from 350).

As opposed to the last reporting period, cases of ordering bail as preventive measure increased, namely 55% of defendants were ordered

[20] In 58 (69%) instances the defense requested to leave the defendant without any preventive measure, in 12 (14%) of the cases the defense motioned for the use of personal guarantee, in 4 (5%) cases the defense motioned for the use of agreement not to leave the country and proper conduct, in 10 (12%) cases the defense motioned for any preventive measure less restrictive than the bail.

bail. Further, in some cases, court ordered bail even though prosecution motioned for imprisonment.

The court applied agreement on not to leave the country and proper conduct in cases of 13 defendants and seven of them were not presented by the lawyer. It should be noted that the prosecution requested this preventive measure only in one case, while in other 11 cases out of 12 cases the prosecution requested bail and in 1 case the prosecution requested imprisonment.

As for the personal guarantee, a court used this preventive measure only in 5 cases and one defendant was not presented by the lawyer. It should be noted, that defense asked this preventive measure only in one case. As for other 4 defendants, in one case prosecution demanded the use of imprisonment and in 3 cases the prosecution motioned for bail.

The GYLA evaluates the abovementioned cases positively and remains hopeful that prosecutors and judges will be more active to apply alternative preventive measures and will leave defendants without any preventive measure when there is no such necessity.

First appearance sessions revealed instances when prosecutors noted about removed and expunged convictions. Frequently they alleged that it was individual characteristic of a defendant, though sometimes they ignored the fact. There was an impression that defendants were still under past conviction which poses a threat for presumption of innocence. In addition, often the prosecution failed to specify the type of past criminal record. It should be noted that in cases where the defendant was represented by the defense s/he reported about removed or expunged convictions, otherwise the judge tried to clarify the issue by posing questions.

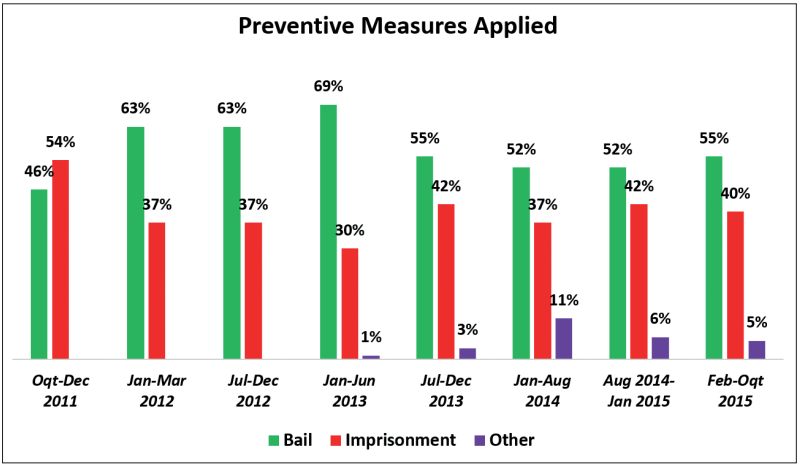
Although the argument concerns individual features of a defendant, it is still inadmissible to note about removed or expunged convictions, since for re-socialization purposes it is important that previous criminal record of the defendant is forgotten. In addition, making general reference to the criminal record of the defendant is not relevant and courts shall discuss and assess if it is possible and appropriate to compare past convictions with gravity and nature of the new charges.

The use of a defendant's previous criminal record would be valid, for instance, for sentencing purposes, for the assessment of the risk of potential future criminal activities and, where it has evidentiary value for

the specific crime being tried.[21]

The chart below illustrates the situation over the course of the monitoring in terms of applying preventive measures (from October 2011 through October, 2015).

Chart №1



1.2. Specific Preventive Measures

1.2.1. Bail

Bail is a preventive measure by which the aim to assure the defendant's return and prevent the commission of future crimes or interference with the prosecution of a case is achieved by requiring that the defendant deposits funds in order to be released. The bail is returned to the defendant or an individual who has paid the bail (according to the currency rate by the time of paying the bail) or arrest is removed from the property within a month after delivering a judgement by the court provided that the defendant has duly fulfilled his obligations and the applied preventive measure has not been replaced by the stricter one.[22]

[21] OSCE trial monitoring report, Warsaw December 9, 2014 p. 68, Par: 100.

[22] Article 200 of the CPC of Georgia.

When applying bail, the prosecutor must justify the reason behind his/her choice of preventive measure and the court must take into account a variety of factors, including the defendant's character, financial status and other significant features, even where such circumstances are not provided by the prosecutor. Moreover, the defense is not obligated to present information about these circumstances, as it is the prosecution that must justify the relevance and proportionality of the preventive measure sought.

Therefore, the appropriateness of a bail depends on the substantiation of its necessity.

Findings

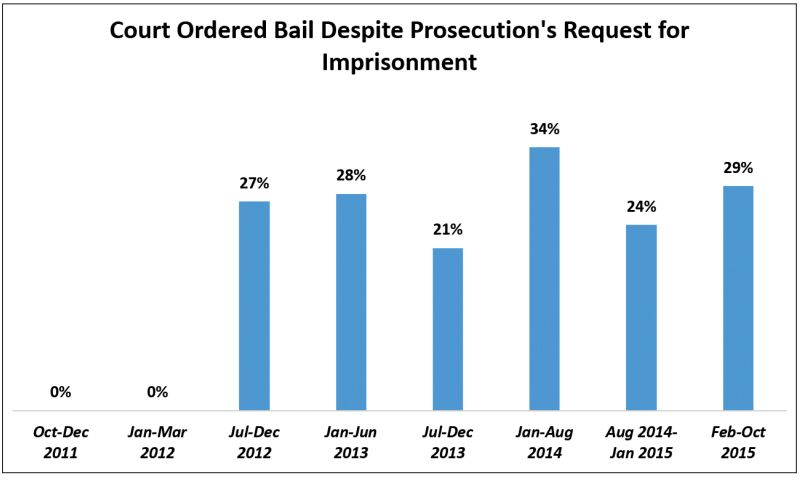
Current statistics are considerably different from what we found during initial periods of the monitoring. In particular, judges no longer grant prosecution motions for preventive measures automatically, rather, they order defendants preventive measures based on more thorough discussions. However, 22 (12%) decisions on the use of bail were not substantiated.

It should be noted that situation has not improved considerably since the last reporting period. The bail was granted to 55% of defendants, while previously the indicator was 52%. Further, in certain cases, when the prosecution demanded imprisonment, court ordered a bail. However, not all those decisions on the use of the bail were substantiated.

During the reporting period, a bail was applied as a preventive measure in 29% of instances where the prosecution demanded imprisonment (in case of 54 defendants out of 188). It should be noted that in the last reporting period, court used the bail only in 24% of cases where the prosecution demanded imprisonment. The highest indicator when the court applied the bail despite the prosecution's demand for the imprisonment was observed in January-August reporting period of 2014 (34%).

The chart below illustrates the situation over the course of the monitoring in terms of applying a bail even when the prosecution requested imprisonment (from October 2011 through October, 2015).

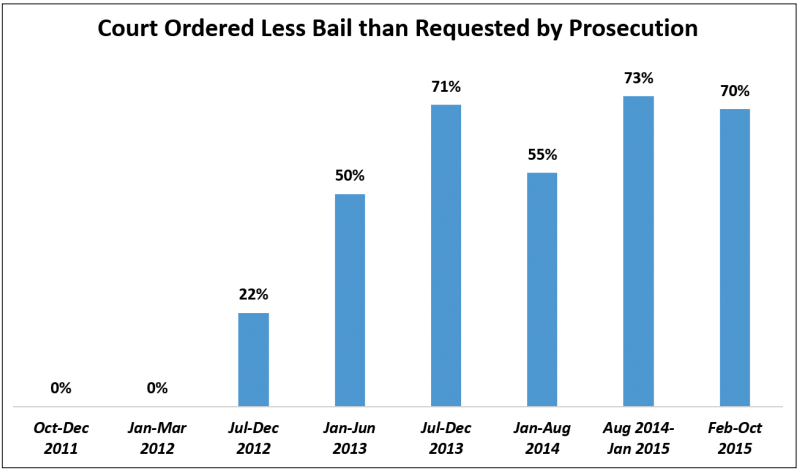
Chart №2



In this reporting period the prosecution demanded bail in 43% of cases (in case of 149 defendants out of 350). The indicator is almost the same as it was in previous reporting period (42%). Out of the requested 149 bails court granted 125. From 125 (84%) motions granted by the court, it reduced the bail demanded by the prosecution in 104 (83%) cases. In 24 (16%) additional cases, the court rejected prosecution's motions for bail, including it did not order any preventive measures against defendants in 10 (42%) cases and ordered an agreement of proper conduct and not to leave the country in 11 (46%) cases and personal guarantee in 3 (13%) cases. These instances has been positively assessed by the GYLA.

The chart below illustrates the situation over the course of the monitoring (from October 2011 through October 2015) in terms of ordering less amount of bail than requested by the prosecution.

Chart №3



Maximum amount ordered in bail during the reporting period constituted 20,000 GEL, while 1,000 GEL remained the minimum amount.

Despite the positive changes, certain flaws were detected in the use of the bail.

Order of the bail as a preventive measure should be proportionate and substantiated, meaning that the bail should be proportionate to the financial capacity of the defendant concerned and the crime alleged. The decision should be made on the basis of the analysis of all relevant circumstances, so that the judge is convinced that defendant has the financial capacity to post the amount of bail ordered. If the defendant cannot post the bail imposed, it must be replaced by the stricter preventive measure – the imprisonment. Therefore, the use of unsubstantiated bails may equal the imprisonment.

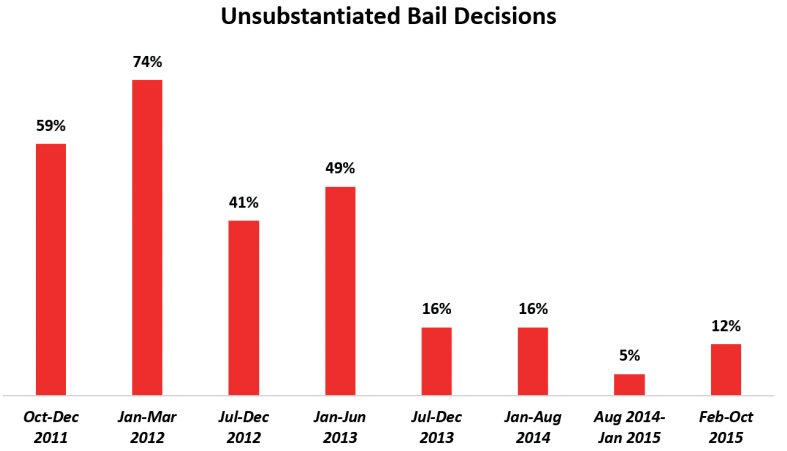
Also, it is important that the amount of bail is realistic, the amount that the defendant can afford to pay and is of a restrictive effect. Namely, the bail ordered shall constitute a significant loss for the defendant which will make him observe the bail conditions. Consequently, the low amount of the bail cannot guarantee the proper conduct of the defendant, while too big amount of the bail will have merely formal

character[23] and in fact equals to imprisonment.

During the reporting period, number of unsubstantiated bails increased. Out of 180 decisions setting the bail, GYLA believes that 22 (or 12%) were unsubstantiated, indicator of unsubstantiated bails doubled compared to the last reporting period.

The chart below illustrates results throughout the monitoring period (from October 2011 through October, 2015).

Chart №4



The GYLA believes that the bail is unsubstantiated if:

- The judges decide to grant the prosecution's motion for bail even if the prosecution did not provide adequate substantiation which shall be based on charges brought, personal characteristics of the defendant, his/her financial status and other facts relevant to the case. Failure of the judges to examine these circumstances is even more damaging in cases where the defendant is not presented by the lawyer.

[23] Commentaries of the Criminal Procedure Code, edit.Giorgi Giorgadze, Tbilisi, 2015, pp. 577-578

- When a judge releases a defendant on bail against prosecution's motion for imprisonment but without examining financial status of the defendant.

Below are provided examples of unsubstantiated bail:

- The person was charged with the less serious offence provided by Article 276.1 of the Criminal Code[24]. The prosecutor ordered bail in the amount of 2000 GEL as a preventive measure, however s/he pointed only to the threat of committing new offence and possibility to harass or intimidate the witness by the defendant; the prosecutor's substantiation is not clear in terms of possible commission of a new crime, since the case concerns negligent crime, which is an accidental happening; thus the prosecutor's argumentation is unsubstantiated. The opinion that preventive measure shall be used against negligent crime, cannot be correct, since it is impossible to predict the commission of negligence, due to the specifics of the accusation.[25] The prosecutor's argumentation concerning the risk to influence the witnesses is also unsubstantiated, since the prosecution did not indicate specific factual circumstances, which would confirm the threat of intimidation of witnesses. Besides, as European Court of Human Rights defines, the possible obstruction to establish the truth on the case shall not be taken into consideration by the Court *in abstracto*. There should be particular factual circumstances, based on which the defendant's possible influence of witnesses shall be confirmed.[26] The Court ordered the bail in the amount of 1500 GEL, which cannot be considered reasonable and lawful decision on imposition of less strict preventive measure. The defendant was taxi driver, which was the only source of income for him. Besides, he had health problems and had unemployed adult son. He had no previous convictions and stated at the hearing that he could not afford to pay the amount of the bail

[24] Violation of safety or operation rules of auto vehicle, tram, trolleybus, tractor, or other mechanical transportation by the driver which caused less serious damage to health.

[25] The Commentaries on Criminal Procedure Code of Georgia, the group of authors, editor Giorgi Giorgadze, Tbilisi 2015, p 569

[26] *Trzaska v. Poland*, no. 25792/94, para: 65 (11 July, 2000).

imposed by the court. In such conditions, when other alternative preventive measures exist (for example personal guarantee) or there is a possibility to leave a defendant without any preventive measure, the use of bail is manifestly unsubstantiated.

It should be mentioned that in another case which concerned the same article 276 of the CPC, the prosecutor motioned for the use of personal guarantee as a preventive measure. Similar to the case mentioned above, the prosecution pointed to the existence of a risk to continue criminal activities by the defendant and the gravity of the crime itself. Consequently, in cases with similar crimes and similar substantiation the court applied unequal and inconsistent approaches. Besides, the use of personal guarantee in the given case confirms that the goals of preventive measures could have been met by using the measures lighter than the bail.

- A person was charged with the crime of inflicting the damage to the property of others which caused significant harm. At the first appearance hearing the prosecutor motioned for bail in the amount of 2000 GEL. The prosecution stated on the hearing that two cases were underway against the defendant: one in Batumi City Court and another in Tbilisi City Court. Though the prosecution did not declare the convictions for which the defendant was charged. According to the prosecution hearing of the case for which the imprisonment was used was close to the end and the person could be have been released, thus the use of preventive measure was necessary. In addition the prosecutor stated that the defendant was aggressive and he did not reimburse the damage caused to the victim. The prosecution did not present any realistic explanation for the support of its position. Despite this fact the Court partially upheld the prosecutor's motion and ordered the bail in the amount of 1500 GEL, which the GYLA considers unsubstantiated and lacking reasonable grounds. It should be noted that the imprisonment as a preventive measure was used against the defendant in another case. In one of the cases the European Court of Human Rights stated that, while justifying preventive measure the state shall clarify the offence (actions) due to which criminal proceedings against the person were initiated.

Especially, if the charge is not confirmed by the court decision. National Courts shall discuss and assess, whether the offences committed by the defendant previously are comparable to new charges taking into account the nature and the gravity of the accusation.[27]

- The person was accused of the crime of food falsification, in particular, changing the quality of the item deceptively, committed with mercenary purposes, which could impose damage to life or health; as well as for selling of products dangerous for human life or health. Criminal action was a realization of fish by the director of the enterprise without adherence to the respective rules, in particular s/he did not provide disinfection works and laboratory tests. The prosecutor requested bail in the amount of 20 000 GEL. Prosecution failed to use relevant arguments for supporting its request and just formally indicated to gravity of the offense and a threat of committing new crime, for the fear of expected punishment. Even though serious offence is committed, the prosecutor shall justify particular circumstances, impeding achievement of the goals of preventive measure. As it became clear at the trial, the defendant cooperated with the investigation, he had no previous convictions, nor existence of complaints for falsification were revealed at the trial. In view of this, the defendant requested for minimal amount of bail, since he did not have sufficient financial resources for paying mentioned amount. Nevertheless, the Court fully granted mentioned motion and imposed payment of 20 000 GEL to the defendant without considering his financial conditions. Despite the fact that no property title was registered on the name of the defendant the prosecutor motioned for bail of greater amount. The European Court of Human Rights has explained in its several judgments that while determining the amount of bail the property of a person and his/her relations with the person ensuring the bail payment shall be assessed.[28] The state shall determine bail with the same diligence as make the decision on the need for using

[27] *Popkov v. Russia*, no. 32327/06, para: 60 (15 May, 2008).

[28] *Neumeister v. Austria*, no. 1936/63, para: 18 (27 June, 1968); *Iwanczuk v. Poland*, no. 25196/94, Para: 66-70 (15 November, 2001).

imprisonment as preventive measure.[29]

- A person was accused for violation of traffic rules, which caused grave damage of health, which is less serious offence and envisages fine, restriction of freedom up to 5 years, imprisonment from 3 to 5 years or deprivation of the right to occupy a public position or activity for the term of up to 3 years. The prosecutor motioned for bail in the amount of 2000 GEL. However, s/he did not indicate any grounds for using preventive measure. Despite the fact that the prosecution did not present any substantiation, the Court fully upheld the prosecution's motion. This decision is manifestly unsubstantiated as the court automatically upheld the prosecution's motion.

1.2.1.1. Examples of unsubstantiated bail in the domestic violence cases:

According to article 126[1] the violence towards the family member, systematic insult, blackmailing, degrading treatment, which caused physical pain or suffer but did not result in the crimes envisaged by the articles 117, 118, or 120 of the Criminal Code, constites a crime of domestic violence, In this reporting period out of 5 cases heard by the court 3 (60%) defendants were ordered minimal amount of bail, which, based on factual circumstances, could not have restrictive effect. In addition, those decisions on the use of the bail were manifestly unsubstantiated.

These cases are even more important due to the critical situation in terms of domestic violence, which are frequently resulted with death of the victim due to the indifferent approach or lack of response by the government. With these decisions the court put under potential risk the life and health of the women victims of the crimes. The court did not adequately assess the given situations, considered the aims of the use of preventive measures very generally and did not pay proper attention to the specificities and sensitivity of the crimes committed.

[29] *Iwanczuk V. Poland,* no. 25196/94, Para: 66-70 (15 November, 2001).

Below are presented examples of unsubstantiated use of the bails in the cases of domestic violence

- The defendant punched his ex-wife in the face and hit her with a mobile phone in the eye area, leaving the victim with injuries without damage to health. Prosecutor motioned for the use of bail in the amount of 2000 GEL and justified reasonability of its use. At the trial it became clear that the defendant and the applicant had tense relationship. In addition, since 2007 the defendant has been working for the law enforcement agency. Initially, police drafted the report on the scene, however after continuation of the violence restrictive order was issued. The mechanism, though, appeared insufficient for stopping the defendant. In response, the defense reported that although there was a conflict between the parties, there was not risk of escalation. He added that civil dispute ended some days ago and they had settled. In view of above, the defense motioned for personal guarantee. The judge granted partially prosecution's motion and ordered fine in the amount of 1000 GEL. The GYLA believes that the decision is not adequate and relevant in terms of the defendant's previous conduct and the fine used will not have restrictive effect. He has a lever to repeat violence against the victim. Further, applied restrictive measure appeared ineffective, accordingly there was still a risk to continue criminal conduct. Notably, the defendant commited violence against his ex-wife after the civil proceeding mentioned was over, which means that settlement on the civil case was insufficient for stopping conflicting situation.
- A person was charged with the crime of domestic violence, namely, he insulted ex-wife in the street and hit her in the face severely. The prosecutor motioned for imprisonment as preventive measure and substantiated his motion effectively. As it became clear from the trial, the applicant had called the police several times and restrictive order had been issued, though it appeared insufficient means to guarantee the defendant's proper conduct. The causes of the incident had not been eradicated. In response to the foregoing the defendant stated that he was employed and had his private business company, had no former convictions and wanted to settle relationships with his wife. The judge ordered bail in the amount of 1000 GEL,

which could not have restrictive effect, since there was a real threat of continuing criminal conduct. Namely there was high possibly that the violence could be repeated against the applicant. The defendant is not a Georgian citizen, he has not permanent residence in Georgia and defendant's children are witnesses in the case. Further, in view of the financial status of the defendant, the amount of fine imposed fell short of the aims of preventive measure.

- The defendant abused his wife physically and the victim suffered physical pain. The prosecutor motioned for bail in the amount of 3000 GEL, though court partially satisfied the motion and ordered 1000 GEL which cannot be considered as an effective preventive measure. The defendant revealed aggression against the applicant earlier as well. Further, there was a real risk of influencing the victims, since one of the witnesses was defendant's daughter who testified against her father. In addition, the defendant's neighbors were also in the list of witnesses. Besides, the applicant and respondent lived together by the time. At the trial the judge found out that the defendant used to leave state boarders quite often, as a tourist. In that particular moment the defendant was intending to go to the seaside. Abovementioned factual circumstances prove the financial capability of the defendant.

1.2.1.2. Examination of lawfulness of the arrest by the court

The reporting period revealed three instances when the Court considered an arrest illegal, released the defendant from the courtroom and ordered the bail, despite the prosecution's motion for imprisonment. This has been the third case since the start of the monitoring in October 2011. The GYLA welcomes the fact and hopes that in the future judges will use this opportunity more frequently and will order imprisonment as a preventive measure only when necessary. Often judges did not attempt to study in depth the reasonability of the arrest, therefore the GYLA's monitors could not identify particular procedure that had been used for the arrest of the person – was it with prior permission of the court or with urgent necessity. However, there were facts when judges asked only general questions about circumstances of the arrest and payed attention to the grounds for the arrest only if the defense

raised the issue of lawfulness of the arrest. It should be mentioned that the defense rarely raised the issue of lawfulness of the arrest.

It also should be noted that at the first appearance session, the judge shall check lawfulness of the arrest if parties challenge it or not. In number of its decisions ECtHR noted that the court is obliged to check not only compliance of the arrest with procedural rules of national legislation, but also to find out reasonability of the doubt that was the cause for individual's arrest and inspect its lawfulness.[30]

The arrest reports overruled by the courts

- A person was accused of illegal appropriation of other's movable property, for purpose of misappropriation, premeditated theft committed by the group. The prosecutor requested imprisonment for both defendants. On the contrary to that the defense stated that there were no grounds for using imprisonment, since arrest was not lawful and compliant with procedural legislation. The judge asked prosecutor about the detention circumstances. As it appeared the defendants were summoned to the police station in connection with the theft of candelabras, however after showing up in police station the defendants confessed to committing of absolutely different offence, in particular theft of water pipes about which the prosecutor's office did not have any information. The defendants were arrested following their confession, based on urgent necessity, since the prosecutor alleged that there was threat of absconding. In view of this, the judge fulfilled his/her duty and ordered the defendants bail in the amount of 5000 GEL each and released them from illegal imprisonment. However, the amount imposed as a bail was not substantiated. As it became clear from the hearing, one of the defendants was socially vulnerable, had a 2 years old child, was the only breadwinner of his family and his wife had serious health problems and they could not afford to buy medicines. Despite the abovementioned circumstances the judge did not consider tough finan-

[30] *Nikolaishvili v Georgia*, no.37048/04, para: 92 (13 January, 2009); *Brogan and others v the UK*, no. 11386/85, para: 65 (29 November, 1988); *Navarra v. France*, no. 13190/87, para: 28 (23 November, 1993).

cial condition of the defendant and did not take into account the defense's motion for bail in the amount of 2000 GEL.

- A person was charged with theft. The prosecutor requested imprisonment and pointed to previous conviction of the defendant, as well as to the threat of committing new crime and destruction of evidences. To the judge's question on the grounds for urgent necessity of arrest, the prosecutor responded that defendant committed the offence in the period of suspended sentence and as soon as he realizes expected serious punishment he will try to flee. The judge asked the prosecutor, how the defendant could know about the expected serious punishment. The judge also mentioned that there was no standard of reasonable doubt required for the arrest of a person, since he showed up at the police station willingly as soon as he was summoned. As it was found out at the court hearing, the prosecutor had not checked whether the defendant used to show up at the probation bureau in accordance with the law and whether he had records on any violations. After that, the judge asked questions about financial status of the defendant, considered imprisonment illegal, ordered bail and released the defendant immediately from the courtroom.

Positive example of overruled arrest report and the use of the bail

A person was accused for deliberate obstruction of justice, expressed in giving contradicting testimonies. The prosecutor requested imprisonment and pointed out the grounds for the use of preventive measure. The judge studied in details the issue of lawfulness of the arrest conducted with urgent necessity. Besides, the judge studied the arguments for using preventive measure provided by the prosecutor and studied property condition of the defendant. Taking into consideration all the above mentioned, s/he found the arrest report unlawful, rejected the prosecutor's motion for the use of imprisonment as a preventive measure and ordered bail in the amount of 3000 GEL.

1.2.2. Imprisonment

Imprisonment is a deprivation of liberty. Accordingly, application of this measure – particularly before a defendant is found guilty of the crime he/she is charged with – must be considered in relation to an individual's right to liberty, one of the most important rights in a democratic society.

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

Under these provisions, the only grounds for imprisoning a defendant before a final determination of guilt are: a) a threat of absconding; b) a threat of obstruction of justice and c) to avoid the commission of a new crime. Imprisonment shall be applied if all other measures are ineffective. Further, preference should be given to the less strict preventive measure. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. As stated by ECtHR, continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.[31] In addition, reassessment of proportionality of imprisonment sentenced on periodic basis is another key element of the right to liberty both under the ECHR as well as national procedure legislation. The point is that court under the human rights convention and ECHR case law is obliged to review time to time the imprisonment under the party's request, and that denial to consider such request is also the matter of the right to liberty.

The GYLA welcomes the amendment introduced to the CPC on July 8, 2015 envisaging periodic review of the imprisonment used by the court as a preventive measure. As per prima Article 230, when imprisonment is applied as a preventive measure, the judge, before delivery of the final verdict, shall upon his own initiative periodically, at least once in two months, review if the imprisonment should stay. The European Court of Human Rights stated that courts should reassess the imprisonment decisions with established intervals with a view to ensure defendants release from the imprisonment at the presence of

[31] *Labita v. Italy*, no. 26772/95, para: 152 (6 April, 2000).

adequate circumstances.[32] Further, national courts should take into account change of conditions which have affected the initial decision of imprisonment. In the reporting period the GYLA observed some cases when the judge reviewed imprisonment decisions, however he left applied preventive measure unchanged in all cases. Despite the fact that we have not studied whether the court rulings were justified, the given data raises doubts that judges review the use of preventive measure only formally. In addition it should be noted that judges showed inconsistent approach in terms of revision of imprisonment decisions. Namely, in some cases, the judge, prior to making the decision listened justifications from parties about leaving a defendant in prison, while in other instances the judge ignored parties' opinions and made decision independently which also had pro-formal nature.

The GYLA remains hopeful that in the future judges will study the circumstances and the grounds for leaving a defendant in imprisonment in more details, since extension of imprisonment term beyond two month period requires more valid and relevant argumentation.

Findings

Out of 350 defendants presented at the first appearance hearings, the prosecution requested imprisonment for 188 defendants (54%). The court granted prosecution's motion in 130 cases (69%).

The charts below illustrate the situation over the entire monitoring (From October 2011 to October 2015).

[32] *I.A. v. France*, no. 1/1998/904/1116, para: 111 (23 september, 1998).

Chart №5

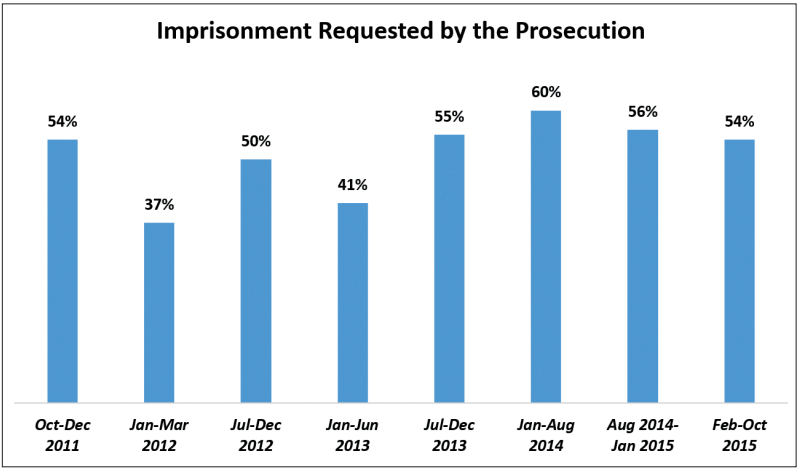
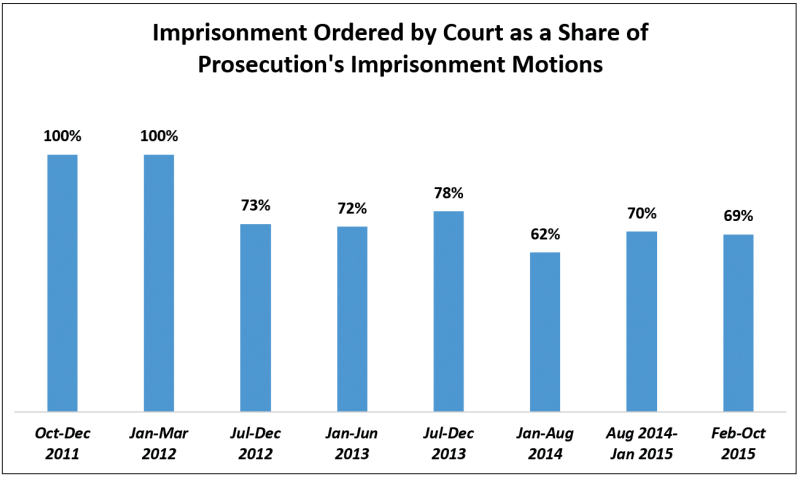


Chart №6



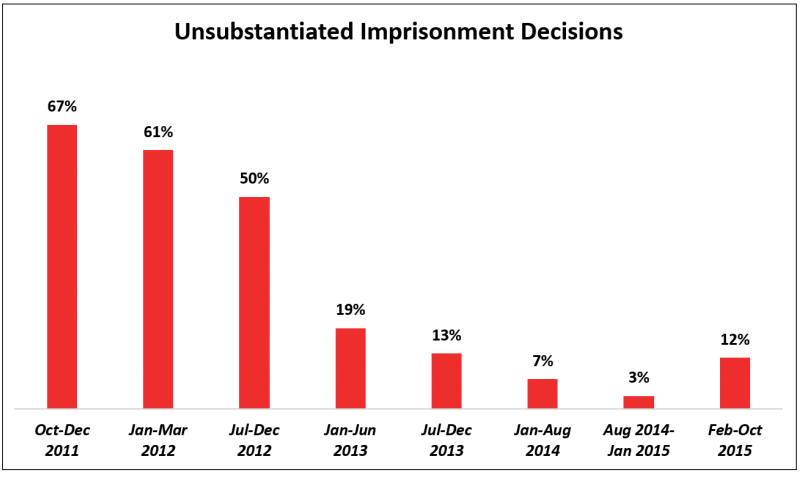
As opposed to the previous monitoring period, there is an insignificant change in the percentage of upheld prosecution's motions on imprisonment. The lowest indicator when the court upheld the prosecution's

motions on imprisonment was observed in the January-August 2014 reporting period.

This reporting period revealed regress in terms of substantiation of the use of imprisonment as a preventive measure. The GYLA finds that out of 130 imprisonment decisions monitored during this monitoring period 16 (12%) decisions are manifestly unsubstantiated as the prosecution did not have enough evidence to prove the necessity of the use of imprisonment. The prosecution was pointing out the general threats and did not bring specific factual circumstances which could hinder the fulfillment of the objectives of a preventive measure. Further, the judges were also passive and did not put additional efforts while deciding on the use of preventive measure. It should be noted that the number of unsubstantiated imprisonments exceeds four times the figure recorded in the previous monitoring period (3%).

The chart below illustrates the situation over the entire monitoring period (From October 2011 through October 2015).

Chart №7



Below are provided examples of unsubstantiated imprisonments

- A person was charged with contempt of the Court, insulting a judge. The offense is punishable by a fine, corrective work for the term from one to two years or/and imprisonment – up to

2 years. For this charge the prosecutor motioned for the use of imprisonment as a preventive measure and indicated that the person was accused of other serious crime on which the proceedings were underway. Besides, the prosecutor formally mentioned the threat of absconding with the fear of expected punishment, however did not prove mentioned reasoning with factual circumstances. The Court granted the motion of the prosecution and ordered imprisonment, which was manifestly unsubstantiated. The Court did not assess at what extent previous accusation and the facts were serious and relevant to current proceeding. It is to be mentioned, that the defendant was not presented by the council which reduces the possibility of effective protection of his rights. The European Court of Human Rights clearly defines that the pre-trial detention shall be in any case reasonable and urgent.[33] As for the threat of absconding, it is of course significant, but cannot be only reason for using imprisonment. It is necessary to prove how important such factor is in particular circumstances and the prosecution shall present particular evidence of defendant's intention to flee. The threat of avoiding justice shall not be defined only by severity of expected punishment.[34]

- A person was charged with the intentional less serious damage to health. The prosecutor indicated to the risk of influencing witnesses while justifying the use of preventive measure, however failed to give argument for existence of such threat. Besides, the prosecution mentioned in general the threat to flee. In response to that the defense requested bail in the amount of 3000 GEL. The Court ordered imprisonment against the defendant without any substantiation, while the use of the bail defined in larger amount would be fully appropriate preventive measure.

[33] Pacuria v. Georgia, no. 30779/04, para: 62-65 (6 November, 2007).

[34] *W. v. Switzerland*, no. 14379/88, para: 33 (26 January, 1993).

An example of unsubstantiated imprisonment in the high profile case

In one of the high profile cases which happened near the Parliament of Georgia in Kutaisi[35] the Court ordered imprisonment for all three defendants. Kakhaber Gabunia and Nikoloz Narsia were charged with premeditated hooliganism committed by the group against the government official and Mirian Deisadze was accused of the crime of beating. Attendance of interested people at the trial was limited due to the small size of the courtroom. The session was not conducted in the big courtroom, although it was available at that moment and the public interest was great to the hearing. The prosecution requested imprisonment against all three defendants and indicated the fact of crossing state border several times, the prosecution made a general remark about the threat of nonappearance before the Court and to influence witnesses with fear of expected punishment. In response to that the defense explained that the defendants have no past convictions. Besides, they have often crossed the state border but it was always lawful and they always return to the country. In addition, it was mentioned that the defendants did not flee from investigation and were arrested at public places and home. In view of this, the defense requested for the use of personal guarantee as a preventive measure and in addition proposed to the Court to that the defendants' would submit their ID cards and passports to the Court as a guarantee that they would not leave the country.

Nevertheless, the Court granted the prosecutor's motion and used imprisonment against all three defendants. The GYLA retrieved the Court's decision which is manifestly unsubstantiated. The Court generally indicates the grounds for using preventive measure and does not explain factual circumstances. It does not discuss particular evidences that would prove the threats to the fulfillment of the objectives of preventive measure. Although defendants often crossed the state border, imprisonment is not always the best way to prevent the defendant from fleeing, since this objective could have been achieved by the deprivation of passport of the citizen of Georgia or travel documents.[36]

[35] On October 2, 2015 the representatives of the UNM and the organization Free Zone were arrested on the charges of physical insult towards the MP Davit Lortkipanidze

[36] Comment on Criminal Procedural Code of Georgia, the group of authors, editor Giorgi Giorgadze, Tbilisi 2015, p 595

Moreover, in the given case no record of illegal border crossing was presented which once again proves that deprivation of travel documents could neutralize the threat of fleeing. We think that the use of less strict preventive measure could effectively ensure proper behavior of the defendants[37].

1.2.3. Personal Guarantee

When applying personal guarantee as a preventive measure, responsible individuals undertake written obligation for ensuring due conduct of the defendant and his/her appearance before an investigator, prosecutor or a court.

Out of the first appearance hearings monitored in this reporting period, the defense proposed a personal guarantee as the preventive measure for 5 defendants. Out of those 5 cases the prosecution requested the use of the personal guarantee only in one case which was upheld by the court. In 12 instances the defense motioned for the use of personal guarantee and the court upheld the motions only in 4 (33%) cases.

It should be noted that since the start of the monitoring (October 2011) it has been second case when the prosecutor was initiator of the use of personal guarantee as a preventive measure.

1.2.4. Agreement on not to leave the country and proper conduct

An agreement on not to leave the country and proper conduct may be used as a preventive measure if the defendant is charged with a crime which envisages imprisonment for less than a year.[38] During this monitoring period the GYLA monitored 72 defendants who were eligible for this preventive measure, but the court considered appropriate to use this measure only in 13 (18%) cases.

[37] The Office of the Public defender also responded to this case and stated that the use of imprisonment as a preventive measure for the participants of the demonstration held in front of the Parliament of Georgia in Kutaisi is unsubstantiated and raises doubts about selective justice. See: http://www.ombudsman.ge/en/news/public-defenders-statement-on-the-protesters-detained-in-front-of-parliament-building-in-kutaisi.page

[38] Article 202 of the Criminal Procedure Code of Georgia.

In the last reporting period, court applied agreement on proper conduct and not to leave the country in 23 (27%) cases from possible 85. It should be noted that in this reporting period the share of applying this preventive measure is reduced significantly as it was observed only in 18% of the cases while in the last reporting period the percentage of the use of this preventive measure was 27%.

The GYLA remains hopeful that the courts will apply the measure more frequently in all relevant cases where legal and factual grounds for the use of such measure exist.

It should be noted that out of the mentioned 13 cases of preventive measure 10 were applied for illegal manufacturing, purchase or storage of drugs, its analogy of precursor for personal use, or for its consumption without a prescription. In one case, the preventive measure was ordered for the charges of physical abuse, while in other two cases it was applied in domestic violence cases.

In this reporting period it was the first occasion that the prosecutor motioned for agreement on not to leave the country and proper conduct.

Positive Example of Using Agreement on Not To Leave the Country and Proper Conduct

A defendant was charged with drug related crime (Article 273 of the Criminal Code of Georgia). The prosecution demanded bail in the amount of 2000 GEL. As a reasoning the prosecution only indicated to the administrative violation committed by the defendant which concerned the use of drugs. The judge fulfilled his obligations comprehensively and asked the defendant questions about his financial status and found out that he was not able to pay even 500 GEL. In view of this the judge ordered agreement on not to leave the country and proper conduct as a preventive measure.

1.3. Standards of substantiation of the preventive measures applied by the courts

With the aim of more thorough study of the issue of substantiation of the decisions on preventive measures the GYLA requested public information from the TCC, namely the interim decisions concerning first

appearance sessions and hearings on ordering preventive measures[39]. The Court submitted overall 15 such decisions[40].

Following interesting developments were revealed while studying the court decisions

- 15 court decisions were delivered with involvement of 18 defendants. The imprisonment as a preventive measure was applied to 8 individuals. Court ordered bail in other 8 cases and applied agreement on not to leave the country and proper conduct in case of two individuals.
- The GYLA thinks that 5 decisions were unsubstantiated (imprisonment was applied in the cases of 5 defendants and one defendant was ordered a bail). The prosecution failed to submit relevant reasoning which could have confirmed use of concrete preventive measure. Further, the court decisions also lacked substantiation since they mentioned the purpose for the use of preventive measure abstractly and factual circumstances of the case were not assessed adequately. The interim decision mainly contained stereotypical formulations and only terminology of the CPC. In its case law the ECtHR expressly provides that reasoning of the motion should not be abstract without considering all circumstances of the case. The decision on the application of preventive measure shall contain adequate and sufficient substantiation and shall concern specifics of the given case.It should be noted that in two cases where imprisonment was applied the defendant was a foreigner and it was the main reason for applying preventive measure with a view to avoid the risk of absconding. However, citizenship of a defendant is insufficient for substantiation of this risk to flee.[41] Ease of crossing the state boarder cannot justify the risk of absconding. Some subjective criteria should also be taken into account and existence of subjective intent along with objective chances of absconding should also be confirmed.[42]

[39] The letter of the GYLA from November 9, 2015 #ჰ-04/573.15

[40] The letter of the TCC from November 12, 2015 #1-01245/27391

[41] *Aleksandr Makarov v. Russia*, no. 15217/07, para: 126-128 (12 March, 2009).

[42] Commentaries to the CPC, editor: Giorgi Giorgadze, Tbilisi 2015, pg. 594.

- As opposed to the abovementioned, this reporting period also revealed two positive cases when the judge studied factual circumstances in details, dismissed prosecution's motion about use of the bail in the amount of 2000 GEL and applied agreement on not to leave the country and proper conduct as a preventive measure.

1.4. Publishing the First Appearance Session Calendars

The monitoring of the first appearances also revealed a procedural problem related to the violation of a defendant's and the public's right to a public hearing. The right of a defendant to a public hearing is guaranteed by the Constitution of Georgia[43], the European Convention on Human Rights,[44] and the Criminal Procedure Code of Georgia.[45]

To make this right effective it is not sufficient for the public to merely have the right to attend the criminal proceeding; the public has the right to be informed in advance about the proceeding so that it has the opportunity to attend. Therefore, the right to a public trial obligates the court to publish in advance the date and place of the first appearance, the full name and surname of a defendant, and the articles with which the defendant is charged.

A court hearing meets publicity requirement only when the society has easy access to the information on the date and place of sessions.[46]

Out of 300 first appearance hearings monitored by the GYLA information about scheduled sessions was not published in advance (226 hearings were held in the TCC and 74 in the KCC). Though before some sessions bailiffs announced information about time and place of the hearing in the KCC, it is insufficient measure to effectively ensure publicity of the hearing.

Failure to publish calendar of the first appearance sessions in advance has been observed since the GYLA began monitoring in October 2011 and was reflected in all monitoring reports. Despite the GYLA's focus

[43] Article 85 of the Constitution of Georgia.

[44] Article 6.1 of the ECHR.

[45] Article 10 of the CPC.

[46] Commentaries to the CPC, editor: Giorgi Giorgadze, Tbilisi, 2015, pg 92. .

on the problem this problem remains unchanged. Representatives of the judiciary previously claimed that the reason was technical associated with the fact that the first appearances are held within 24 hours from the arrest, and expressed readiness to resolve the technical problems. Nevertheless, no progress has been observed over the period of 4 years.

During the previous monitoring period the GYLA also monitored hearings in Batumi City Court which successfully managed to publish the first appearance session calendar in advance on the monitor placed in the hall of the court. Positive practice of the Batumi City Court proves that advance publication of information about the first appearances is technically manageable.

2. Pre-Trial Hearings

At a pre-trial hearing the court rules on the admissibility of evidences that will be examined at the main hearing of the case. This stage is of extreme importance as the verdict at the main hearing will be based on the evidences deemed admissible by the court at the pre-trial hearing. In addition, the issue of termination of the persecution or continuation of the proceeding for examination on merits is decided at the pre-trial stage.[47] The grounds for the termination of the prosecution of the case is lack of evidences as well as violation of procedural law.

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

Although pre-trial hearing usually concerns admissibility of evidences, parties are allowed to submit other motions too.

Findings

In the reporting period the GYLA monitored 159 first appearance sessions. As opposed to previous reporting period the GYLA observed

[47] The court shall terminate the criminal proceeding, if it establishes with high probability that evidences submitted by the prosecution are insufficient for proving the guilt.

three cases when the court terminated the case at the pre-trial hearing. In the high profile case the defense motioned for termination of criminal proceeding against David Chedia[48] since only phone messages had been submitted as evidence and it was insufficient for concrete criminal act. The court granted the motion and terminated criminal proceeding against the defendant. Further, in Giorgi Ghoniashvili's case[49] the lawyer stated that there was high probability for proving the guilt; therefore he refrained from submitting motion on termination of criminal proceeding against the defendant. This fact proves negligent, unethical, and nonprofessional attitude of the defense towards the case. The defense revealed lack of respect towards the role of the defense in criminal procedure which violates right to an effective and professional defense.

According to the observations of the current monitoring, defense seemed more active, though it was still passive compared to the prosecution. In the reporting period objections of the defense on the prosecution's motions increased from 6% to 14%. The defense was more active in so called high-profile cases, where defendants were former high officials,[50] or when there was a public outcry over the case. [51]

Although in the reporting period the defense seemed more active, the result of the monitoring is still unsatisfactory in this regard. The GYLA believes that lawyers should pay adequate attention to the issues, since passive role of the defense damages the interests of a defendant.

Otherwise, observations of the current monitoring period are nearly identical to previous reporting periods. The courts mostly upheld prosecution motions to submit evidences and the defense agreed to the prosecution's motions.

Out of the 159 pre-trial hearings 17 were postponed and 2 were closed. It should be noted that in both cases the judge announced about closing of the hearing, since the case materials included state secret.

[48] Former head of the State Property Agency of the Tbilisi City Hall

[49] Close relative of Giorgi Ugulava who was detained on the charges of illegal provision of financial support to the UNM

[50] Defendants: Giorgi Ugulava, Giorgi Ghoniashvili, Alexandre Gogokhia, David Chedia, Bachana Akhalaia, Megis Kardava, Nikoloz Dzimceishvili, Jokia Bodokia, Mikheil Saakashvili, David Kezerashvili, Ivane Merabishvili.

[51] Giorgi Okropiridze, charged with false denunciation.

From the remaining 140 hearings, in 134 cases the prosecution motioned to submit evidences, and in 6 cases prosecutor did not submit motion about admissibility of evidences, since the court ruled on the admissibility of evidences at the previous court hearing. In 126 cases (94%) the court fully granted all motions of the prosecution about admissibility of evidences and in 1 (0.7%) case the court partially upheld the motion of the prosecution. In 4 cases (3%) the judge did not deliver decision on pre-trial hearing, while 2 trials were postponed before the judge made the decision. It should be noted that in one case the judge did not satisfy prosecutor's motion on admissibility of evidence.

The defense objected to 19 out of 134 prosecution's motions. From these 19 objections, the court did not upheld 13 (68%). Out of the remaining six cases, in two cases the hearings were postponed and objection of the defense was satisfied at the next hearing, 1 was satisfied partially, and three were postponed before the judge made a decision.

Positive example of rejecting the prosecution's motion on admissibility of evidences

A person was accused of theft. At the pretrial session the judge, based on respective certificate, found out that the defendant had mental disorder and required consultation with psychiatrist. It was found out during the proceeding that a council was not appointed at the investigation stage, despite of being subject to legal aid. The defendant was not able to read the case materials and provide information about the facts. The reason for the mentioned was the mental health problems hindering effective defense. In the given circumstances the judge adhered to the requirements of fair trial, rejected prosecution's motion on admission of evidences and terminated criminal procedure, since fundamental right for comprehensive implementation of right to defense was violated.

The defense motioned to submit evidence in only 33 out of 135 (24%) cases[52]. In 18 (55%) out of 33 cases prosecution agreed to the motions and court upheld the motions. In addition, the court fully granted 7

[52] Out of 159 sessions 20 were postponed until the defense stated motion on submission of evidences, 2 sessions were postponed and at the stage of starting the monitoring it was not determined if defense has stated similar motion, and 2 sessions were closed.

(47%) out of 15 (45%) of the remaining defense motions to submit evidence. The court partially upheld 4 (27%) motions and did not make decision at the hearing on 4 (27%) motions.

3. Plea Agreement Hearings

A plea agreement is a type of expedited proceeding at which the defense and the prosecution conclude an agreement as to punishment if the defendant pleads guilty to the particular charge.

After introducing the amendments of June 24, 2014 to the Criminal Procedure Code the agreement on punishment was removed which means that the defendant is not allowed to conclude a plea agreement without pleading guilty.

Under the Article 213 of the Criminal Procedure Code, if a judge finds the evidences presented sufficient to rule on the case without holding a main hearing, and if the judge is satisfied with the prosecutions answers that the sentence determined by the prosecution is fair and lawful, the judge rules on the case without hearing it on merits.

In order to ensure that the sentence is fair, a judge must consider the actual circumstances involved, taking into consideration the individual characteristics of the defendant, the circumstances in which the crime was committed, and the agreed-to punishment. The law does not specify how fair punishment shall be guaranteed. However, based on general principles of sentencing, e.g. when ordering a fine a judge can look into financial capacity of a defendant; whether the defendant is able to pay the fine; whether the fine is proportionate to the damage inflicted; circumstances under which the crime was committed and anticipated measure of punishment. Further, the judge can also make changes in the plea agreement if the parties consent. In particular, under the law if a judge believes that evidence is insufficient to deliver a verdict without main hearing or rules that a plea agreement falls short of other stipulations of the Criminal Procedure Code of Georgia, the judge may offer the parties to modify provisions of the plea agreement during the trial, which shall be agreed with supervising prosecutor. If court is not satisfied with the conditions of modified plea agreement it does not approve the agreement and remands the case to the prosecutor.

Findings:

The situation has not changed in the monitoring period. Similar to the last reporting period the court's involvement in the review of plea agreements was more active than in earlier periods. While in the previous reporting periods, in the process of reviewing plea agreements judges limited themselves to their procedural obligations only and only formally asked defendants whether they agreed to the plea bargain or not.

In the reporting period the GYLA monitored 113 plea agreement sessions, where court delivered final judgment. It should be noted that mostly (in 64 cases) plea agreements were made on the cases of theft and drug related crimes.

In the present reporting period the judge refused to approve two plea agreements, believing that their provisions were unfair and illegal. In other 111 cases (98%) the judge approved the plea agreements. Also, at three trials the judges asked questions in an attempt to examine whether the punishment was fair. In another case the judge attempted to alter conditions of plea agreement, though agreement was not reached with a prosecutor and conditions remained unchanged. In one case the judge announced a break and asked the prosecutor to specify conditions of plea agreement. Further, in another case, prior to the start of the trial, the judge pointed out that the confiscation of driving license, applied as an additional sentence in the previous judgment, was not added to the applied sentence. The prosecutor corrected this irregularity. In the other case, the judge announced break twice, since he could not receive the convincing answer from the defendant in terms of pleading guilty in submitted charges. The judge explained that he was not obliged to approve the plea agreement and the defendant had chance to exercise the right of merit hearing. Finally, the judge explained the rights envisaged by the Article 112 of CPC and approved the plea agreement after receiving adequate and convincing response from the defendant.

Unlike the last reporting period, the judge did not play a role in determination of adequate sentence at the plea agreement hearings despite the fact that several attempts of the judge were observed.

In addition, there were 7 instances when the judge failed to explain to the defendant that filing a complaint on torture, inhuman or degrading

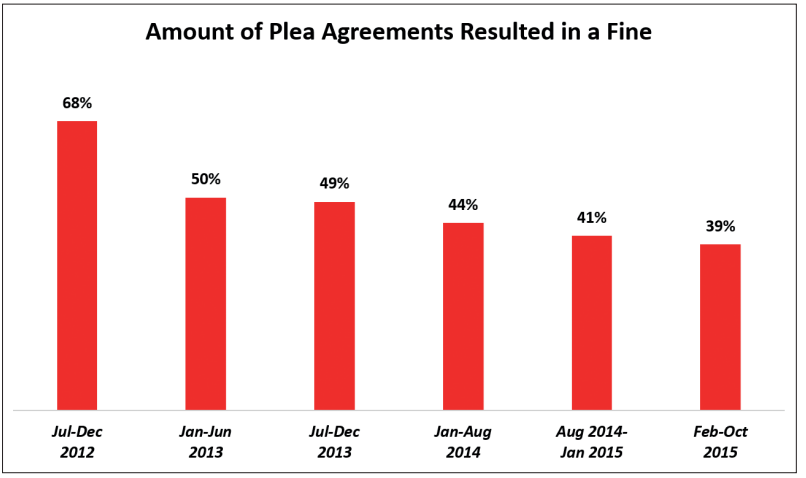
treatment or punishment will not hinder approval of the plea agreement made in accordance with the law. Further, in two other cases the judge fell short to explain the procedures and the grounds for appeal of the plea agreement.

The following interesting developments were observed in the application of sentences at the plea agreement sessions:

Compared to the previous reporting period the percentage of plea agreements in which the fine was determined as a sentence declined slightly. This is continuation of the trend that has been observed by the GYLA since the start of the monitoring on the issue (since 2012).

The chart below illustrates the situation in the reporting periods when the GYLA observed frequency of applying fines in the plea agreements (July 2012- October 2015).

Chart №8

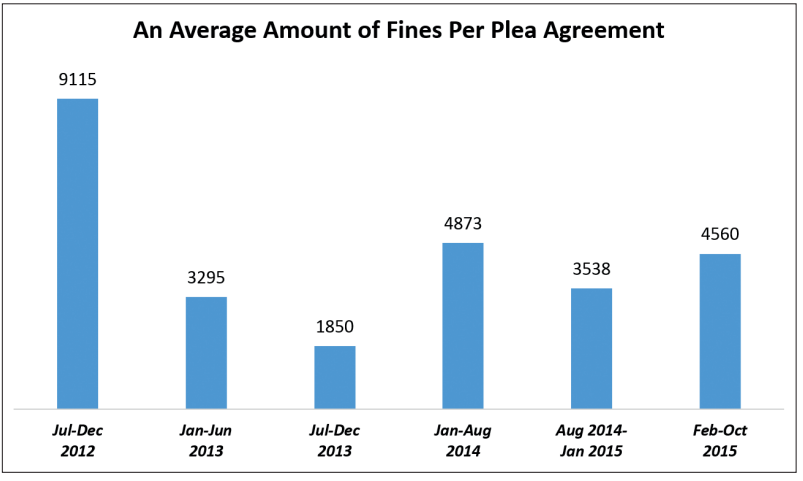


As for the total amount of fines imposed by the plea agreements, this number was reduced compared to the last reporting period. Namely, 43 plea agreements resulted in a total of 196,000 GEL in fines. In the last reporting period the amount of total fine imposed by plea-agreements was 276.000 GEL, however, the average amount of fines increased. In the last reporting period the average amount of fines imposed by the plea-agreements constituted 3.538 GEL, and in this reporting period

the average amount of fines imposed by the plea-agreements constitutes 4.560 GEL.

The chart below illustrates the average amount of fines imposed by the plea agreements in the period from July 2012 through October 2014.

Chart №9

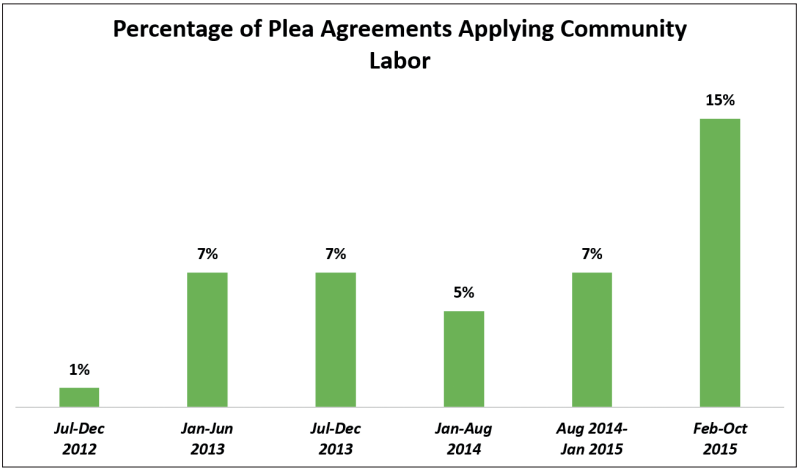


Similar to the previous monitoring period in this reporting period the range of fines was between 1000 GEL and 30000 GEL.

In the reporting period percentage of applying community labor increased significantly from 7% to 15%. It should be noted that in the third monitoring period (July-December 2012) the use of community labor was only 1%. The percentage of applying community labor increased to 7% only in the fourth monitoring period (January –June, 2013). Since then the indicator declined, and the tendency of increase of the percentage of the use of community labor was observed in the reporting period of January-August 2014.

The chart below illustrates situation in the past monitoring periods where the GYLA observed frequency of applying community labor in plea agreements (July 2012-October 2015).

Chart №10



According to article 212.5 of the CPC the judge approves the plea agreement only concluded according to the law and is not obliged to approve the plea agreement concluded between the defendant and the prosecution. This right of a judge is an important tool for a court to oversee fairness of the provisions of a plea agreement and in case of abuse of power to refuse to approve the agreement.

Cases in which the judge did not approve the plea-agreement:

- A person was accused of theft that caused significant damage. The case concerned misappropriation of 5 boxes of tomatoes at the Desertiri Market which caused damage in the amount of 225 GEL to the victim. At the session the judge asked questions to the defendant to determine the circumstances envisaged by the Article 112 of CPC, but the defendant was not able to answer the questions. As it was found out at the hearing the defendant did not have reading and writing skills and had some psychological problems. The plea agreement provisions envisaged the fine in the amount of 2000 GEL as an additional sentence. The judge showed interest in the mentioned issue. According to the defendant's mother, the family could not afford to pay fine and offered the prosecutor to clarify the condi-

tions of plea agreement, since considered unfair the amount of fine envisaged as an additional punishment. For this purpose, the judge announced the break, however after the break the prosecutor refused to change the provisions of the agreement. In these circumstances the judge did not approve the plea agreement and remanded the case to the prosecutor, since the defendant did not understand and was not able to answer the questions asked by the judge. Besides, the judge found unreasonable the sentence of fine due to the social and financial conditions of the defendant.

- A person was accused of theft causing significant damage. The case concerned misappropriation of the construction materials on Tbilisi Sea territory and the damage caused by the crime constituted 2864.31 GEL. As it was found out at the trial the defendant had difficulties in reading and writing. The process of submitting charges and making plea agreement was attended by a stranger who signed the document instead of the defendant. The judge asked the defendant all questions envisaged by the CPC and established that the defendant did not have understanding of what was going on around him. He did not understand meaning and restrictive nature of the punishment. Although, the judge explained several times that he had a right to reject the plea agreement, on the judge's question whether he could reject the plea agreement, he answered that he could not. On the contrary to that the lawyer said that the defendant fully understood the conditions of plea agreement, but he was worried about being at the Court. Finally, the judge did not approve the plea agreement.

Besides the abovementioned cases, three other cases were recorded, where the judge asked additional questions, and expressed interest in fairness and lawfulness of the conditions of the plea agreement. In two cases the judge tried to make particular contribution in determination of the sentence since considered sentence suggested by the prosecution too severe, but after the refusal of the prosecutor and the defendant's convincing consent the judge approved the plea agreement.

In this reporting period one case was recorded when the prosecutor did not submit to the court the list of evidences. With regard to abovementioned the judge asked the prosecutor: *what would you do if I did not approve the plea agreement? Do not be too confident since the plea*

agreement might not be approved. It should be mentioned that such prejudiced attitude of the party towards the court that it will approve any plea agreement the prosecution presents at the trial, discredits the Court, makes the trail useless and represents disrespect to the particular judge, since the parties pre determine the decision of the court, while the judge may refuse to approve the plea agreement.

Cases where the judge could have refused to approve the plea-agreement based on the minor violation clause:

It should be mentioned that during this monitoring period several minor criminal violations were recorded at the plea agreement hearings that caused little damage. According to the article 7.2. of the Criminal Code although a case contains formal signs of a crime envisaged by the criminal code it cannot be regarded as a criminal offence due to the minor character of the violation committed which did not cause such a damage or did not pose a risk of such a damage which would make it necessary to hold a person responsible. 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. It does not have the proper degree of social threat which makes an act a crime. For example:

- In one of the cases a person was charged with the crime of theft, which is less serious offence and is punishable by fine or by the restriction of freedom from one to three years or by jail sentence for the same term. The damage imposed by the action of the defendant was 56 GEL. Community service for 150 hours and suspended sentence for 1 year and 6 months were imposed as punishment with the plea agreement.
- A person was charged with theft, which is less serious offense. The defendant unlawfully misappropriated clock which cost 25 GEL. The plea agreement defined suspended sentence for 1 year and 6 months.

It should be mentioned that on one of the trials the judge offered the prosecutor to apply the procedure of deferred prosecution envisaged by the criminal code and dismiss the defendant off the charges, however after the refusal of the prosecutor and investigation of respective circumstances the judge approved the plea agreement.

We think that it would be reasonable if the judge did not approved

the plea agreement and apply article 7.2. of the Criminal Code instead since an action that formally contains signs of a crime but due to its minor importance and minor damage inflicted there is no a necessity to regard it as a criminal offence.[53] According to the TCC decision from December 30, 2015 the principle of legality means: **"every act that is criminalized shall be envisaged by the criminal code and when the Code contains specific indication to wat shall and shall not be regarded as a crime, the prosecution must pay proper attention to this requirement and properly assess the damage or the threat to damage which could have been inflicted by the act."** In addition there are alternative measures other than the measure envisaged by the article 7 of the criminal code, that can be more effective for an offender than rendering a gulty verdict. Article 168^1 of the Criminal procedure Code states that a prosecutor can refuse to initiate or can terminate an investigation for less severe or severe crimes if a person follows all conditions established by the law.

The GYLA hopes that in the future the judges will more actively use article 7.2 of the Criminal Code in all possible cases. It should be mentioned that the use of the abovementioned mechanism is conditional to several circumstances: judges can free a person from criminal responsibility after they thoroughly study the amount of the damage inflicted, the seriousness of the offence committed, the stage of the crime, the personality of a defendant, the degree of social danger caused by the crime, and after consideration of all those conditions will decide on criminal liability. The damage shall be assessed in every particular case individually and the meaning of the damage for the victim and the public interest must be taken into account. We also hope that the prosecutors too will actively use alternative measures to criminal prosecution that is helpful for rational management of prosecutorial as well as judicial resources.

4. Jury Trials

Criminal Procedure Code provides that if defendant is charged with offence that may be subject to jury trial, the judge should explain to the defendant relevant provisions and rights related to the jury trial. In addition, the judge ascertains if the defendant is willing to be tried by the

[53] Commentaries of the Criminal Code of Georgia, Otar Gamkrelidze, Tbilisi, 2008, p.91.

jury.[54] For the first time in the reporting period the GYLA monitored one high-profile case held with jury participation.[55]

Findings

In the reporting period the GYLA's monitors attended 18 main hearings held on the case. Out of those 18 sessions information about 11 (61%) sessions was announced publicly, as for other 7 (39%) hearings information was not placed on the official web-page of the TCC, though the GYLA's monitors had chance to attend the session, since hearings were conducted intensely and the monitors were able to learn about the scheduled time and date of the next hearing at the trial[56].

It should be noted that at the main hearing one main and one reserve juror declared about self-recusal, though they were unwilling to review the motion publicly. As a result, the judge discussed the case with parties, upheld both motions and jurors were relieved of jury obligations. Consequently, 8 women and 4 men were left in the jury.

It should be noted that jurors were actively involved in the process of the hearing. They often posed questions to the witnesses to get additional information about facts of the case. The judge explained to the jury their rights and obligations clearly and in details. Further, the judge clarified the essence and purpose of the first appearance and pre-trial sessions. Notably, at one of the hearings the defense submitted written evidence which had large volume and prosecutor was reading it quickly. The judge interrupted the prosecutor several times asking to read slowly and distinctly, with a view to make it easily understandable to jury.

The GYLA observed the court's inconsistent approach about closing of sessions. At one of the hearing the defense motioned about expert opinion issued by the US Federal Bureau of Investigation. By the decision of

[54] Para 3, Article 219 of the CPC

[55] The case concerned Zurab Zhvania's former security members: Koba Kharshiladze and Mikheil Dzadzamia charged with offence as per Article 342 of CPC edition 2005.

[56] In one case the judge was late; in another case delayed start was the reason of juries. There was also a fact when another hearing was held in the same courtroom and it inhibited start of the session on time. In the rest 7 cases monitors were unaware of the reasons of delayed start.

the judge this part of the session was closed, since as he explained, the motion and accordingly these documents could have contained personal data about the victim of a crime. At another hearing, the defense motioned for closing the session partially, since defendant's testimony could disclose the victim's and other individuals' personal data. The judge did not grant the motion and explained that victims' successor had no objections in terms of reviewing the case publicly. As a result, interrogation of the defendant was conducted publicly, at the open session.

It is interesting to note that at one of the sessions the judge made a remark to the journalists since the image of one jury member appeared in the news on the TV Rustavi 2. The chairman explained that it was prohibited to disclose juror's identity and in case of repeating the fact, he would fine the TV Company and restrict its rights to record the session. Some sessions later similar fact was observed again, namely the news program of the Rustavi 2 showed faces of three jurors. As a result, prior to the start of the session, the judge declared about restriction of the TV recording and asked the TV Company to leave the court room. The issue of fining the Rustavi 2 was not determined at the session. It should be noted that at the same hearing the judge did not satisfy the address of the PR manager of the prosecution about filming the session and explained that upon request, the court was able to submit video recording of the hearing with covered images of the jury. The abovementioned case constitutes the violation of article 13^1.5 of the Organic Law on General Courts which states that "in jury trials the photo-video coverage of the hearing shall be held so that the identity, external characteristics or other personal data of jurors is not revealed."

After the main hearing, the jury delivered guilty verdict after 3 hours and 30 minutes with the vote ten vs. two. They also participated in the sentencing session and applied to court with recommendation to mitigate the sentence to both defendants.

B. Other key findings

1. Right to Reasoned Decision

The right to a fair trial is an internationally recognized right of a defendant which requires duly reasoned judgment of the court.[57] It serves

[57] Article 194.2 of the CPC stipulates that "a court's decision shall be well-grounded".

interests of the justice which cannot be achieved unless the court decision is well substantiated. It is important that the obligation of reasoning includes any court ruling not only the final judgment of the court.[58]

To assess the reasoning of decisions the GYLA monitored number of searches and seizures conducted at the prosecution stage which were conducted without prior approval by a judge and justified on the grounds of urgent necessity. In addition, with the aim to conduct thorough study of the issue the GYLA retrieved from the TCC decisions which concerned lawfulness of conducted investigative actions carried out without judge's prior consent[59]. The GYLA thinks this is a whole new area that requires separate research that is outside the scope of the court monitoring project. Nevertheless, submitted statistics and the interim decisions retrieved from the court allows to understand the situation in georgian courts.

Search and seizure is an investigative action curtailing the right to privacy; the law therefore provides for the court's control of searches and seizures. All motions for search and seizure must be examined by the court and a reasonable decision on the motion must be delivered.

Articles 119-120 of the Criminal Procedure Code strictly outline the preconditions for search and seizure: probable cause to believe that evidence of a crime will be obtained as a result of the search and a court's warrant. Search and seizure without a court's warrant is also allowed, but only in extraordinary cases when there is an urgent necessity to do so. However, he judge must then either legalize or overrule the search and seizure and find the relevant evidence inadmissible.

The Constitution of Georgia protects the right to privacy, family life and residence.[60] For the conduct of all investigative actions which restrict private property and its inviolability special procedures are established and are placed under court supervision not to prejudice the legitimate interests and rights of a property owner.[61] The condition of urgent necessity is regarded as an alternative to the restriction of a right

[58] Treksel Sh. Human Rights in Criminal Procedure, Tbilisi, 2009, pg 126.

[59] The interim decisions were retrieved rendomly that does not concern information received through the monitoring process and the statistical data

[60] Ruling of Investigative Panel of Tbilisi Appellate Court, №1c/1277-14, 17 December, 2014, Pg. 3.

[61] Ruling of Investigation Panel of Tbilisi Appellate Court N 1c- 218, 18 April, 2013, pg. 2-3.

with the court decision. "Urgent necessity" is a situation when for the objective reasons public interests guaranteed by the Constitution cannot be reached without immediate restriction of the private interests. Urgency indicates of the shortage of time when it is impossible to get judge's order for restriction of right and immediate action is needed.[62]

Findings

In this reporting period the situation has changed slightly with regard to the search and seizures, however the GYLA still observed apparent violations of the right to a motivated (reasoned) decision.

As in the previous reporting periods, in nearly all cases observed by the GYLA searches and seizures were justified by the urgent necessity and legalized later by court. Namely, out of 27 cases of search and seizure that were considered by the TCC only 5 (19%) were performed with a court's prior warrant, while the remaining 22 (81%) cases were legalized later by the court. It should be noted that 4 cases of search and seizure conducted upon court's advance warrant were observed in high-profile cases, with involvement of former high officials.[63]

Since search and seizures restrict individual's privacy, the law enforcement agencies should show appropriate precautions prior to conduct of the measures. The fact that statistically they have applied to the court for advance warrant only in 19% of cases reveals their attitude to individual's privacy and abuse of procedural authority since the exceptional norm turned into a rule and a measure of frequent use.

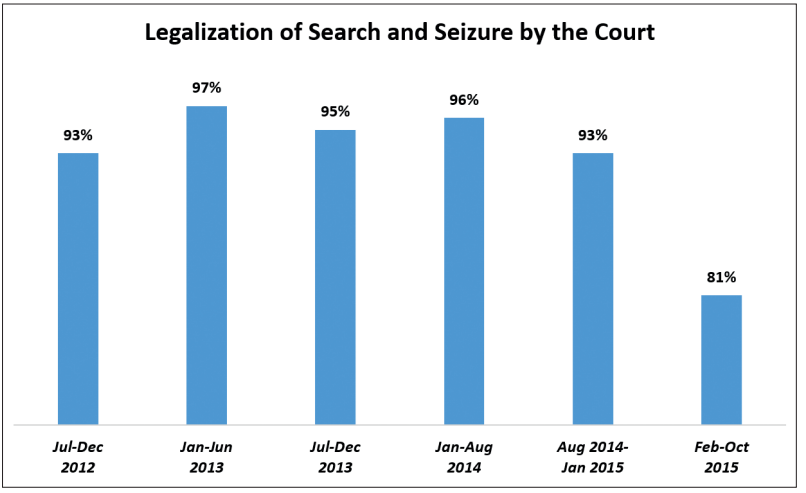
The GYLA was unable to determine whether the after-the-fact legalizations of searches and seizures were substantiated due to the fact that they are not discussed in open court. However, the fact that 81% of searches were only justified after having been performed, engenders doubt as to the compliance of law enforcement authorities and the court with their obligations not to conduct or legalize searches that are not appropriately justified on the basis of urgent necessity.

[62] Judgment of the Constitutional Court of Georgia December 26, 2007 №1/3/407, II. Par. 25.

[63] Defendants: Giorgi Ugulava, Giorgi Ghoniashvili, Alexandre Gogokhia, David Chedia, Bachana Akhalaia, Megis Kardava, Nikoloz Dzimtseishvili, Mikheil Saakashvili, Zurav Adeishvili, David Kezerashvili and Ivane Merabishvili.

The chart below illustrates the situation of conducted searches and seizures throughout the monitoring period during which the GYLA observed frequency of legalization of forgoing investigative actions.

Chart №11



The GYLA retrieved from the TCC statistical data about search and seizure conducted in the reporting period.[64]

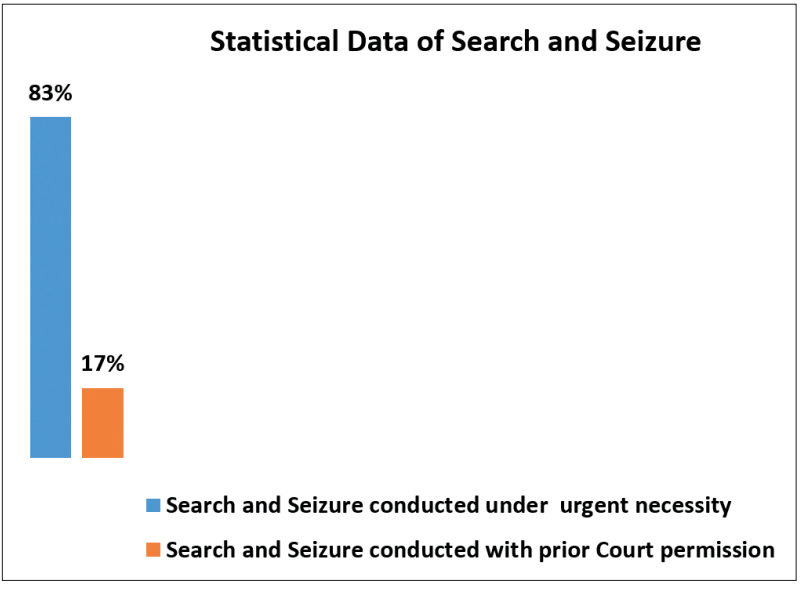
According to the statistical data provided[65], search and seizures were conducted with court's advance warrant in 495 cases and under urgent necessity in 2340 cases, where the court legalized conducted investigative action in 1472 cases.

The chart below illustrates the situation in the TCC about search and seizure cases.

[64] The letter of the GYLA from December 14, 2015 #ზ-04/625.15

[65] The letter of the TCC from December 18, 2015 #1-04294/30723

Chart №12



It should be noted that the monitoring team requested search and seizure decisions from the TCC which concerned legalization of the foregoing investigative actions conducted under urgent necessity that were not appealed to the Investigative Panel of the Appellate Court[66] for more thorough study and assessment of substantiation of those decisions. The court provided overall 15 decisions[67]. However two decisions concerned issuance of permits for the conduct of search and seizure which did not constitute the field of our study. Therefore, the GYLA assessed overall 13 interim decisions that concern legalization of search and seizure conducted by the prosecution without prior court permission.

The Study of Interim Decisions Revealed the Following Interesting Findings:

[66] The letter of the GYLA from November 9, 2015 #ზ-04/573.15

[67] The letter from the TCC dated from November 12, 2015 #1-01245/27391

- 10 (77%) decisions on the grant of the motions are manifestly unsubstantiated and fail to meet the national and international standards about motivation of the court decision. The decisions do not describe factual circumstances that could generate justified doubt for conduct of the investigative action without judge's advance warrant. It should be noted that each case is different and requires individual approach, though only dates and personal data were changed in different decisions made by the same judge. In view of this, level of substantiation is diminished. It is important that the court decision about legalization of search and seizure conducted under the urgent necessity may be appealed to the investigative panel of the Appellate Court. However, the party is factually deprived of the chance to challenge lawfulness of court decision since the reasons on which it is based is not stated there. To effectively challenging the decision it is necessary to know its reasoning.[68] Without reasoning it is be impossible to differentiate correct decision from an arbitrary one. Further, even if the decision which does not state the reasons is not arbitrary, it is perceived as arbitrary by the public. It is important that not only parties are convinced in the correct conduct of the court, but also public has feeling that the hearing was fair. In the number of its judgments the ECHR stated that judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in light of the circumstances of the case.[69]
- In 2 cases the court refused to legalize search and seizure conducted under urgent necessity since the investigative action was implemented under the individual's consent and it did not require advance court warrant or further court control.
- It should be noted that in the remaining one case the court did not grant prosecution's motion on legalization of the search conducted under urgent necessity since it considered that

[68] Trekseli, Human Rights in Criminal Procedure, Tbilisi, 2009, pg 126.

[69] *Hirvisaari v. Finland*, no. 49684/99, par: 30 (27 September, 2001); *Garcia Ruiz v. Spain*, no. 30544/96, par: 26 (January, 1999).

there were no facts and information that could have justified necessity of conducting the investigative action without court's advance warrant.

2. Lack of guarantees for the protection of witnesses

At the main hearing where witness was questioned it was clearly illustrated that witness protection measures are not fully ensured by the Criminal Procedure Legislation. In the process of witness examination the defense asked why he refrained from disclosing information in the prosecution[70]. In response the witness declared that he was afraid that the same would happen with him as it was with individuals who were in the car.[71] At that moment one of the defendants addressed the witness: "Aren't you afraid of our friends?" Further, the witness was questioned under permanent humiliation and insult. There was obvious pressure on the witness from the side of defense. Since the issue has not arisen on the court hearing, the GYLA was not able to find out if the witness was properly informed about the existing protection mechanisms and whether they were used in the case of this victim.

Regretfully, the judge was passive and made no reaction. For instance he did not instruct the prosecutor about necessity to use the special measures of protection. It should be noted that as per procedural legislation, the judge lacks opportunity to carry out relevant measure for security of a witness. The CPC grants this power totally to the prosecutor (Articles 67-71 of CPC). This is the gap of the legislation, since it fails to regulate comprehensively the grounds and the scope of competent persons for using special protection measure for parties to the process and a witness.

Recommendation of the Committee of Ministers on the protection of witnesses and collaborators of justice calls on the state[72] 1) to apply witness protection measures when such need arises; 2) to use witness protection measure in the urgent necessity, even when such measure is not officially adopted.

[70] The case concerned offence committed in 2006.

[71] It should be mentioned that the witness was talking about the fact that concerned the killing of several people in the car.

[72] Recommendation of the Committee of Ministers #9, on the protection of witnesses and collaborates of justice, April 20, 2005.

Article 67 of the Criminal Procedure Code which defines grounds for use of special protection measure for the parties to the process including the witness, falls short to meet the foregoing principles. Namely, for the detailed list, protection measure cannot be used in all cases where it is necessary. Article 68 of the CPC, defining the competent persons, does not comply with the recommendations of the Committee of Ministers. Namely, according to the norm, the authority to implement the special protection measure is granted to the investigative body and to its supervisory agencies – the police and the prosecution.

Despite the fact that only one such case arose during the monitoring, this case still proves that there is a gap in the legislation and inconsistency with relevant international standards.

It should be noted that the witness protection is "state's obligation according to international standards rather than manifestation of good will to the witness."[73] For this gap a witness fails to enjoy witness guarantees ensured by the legislation and above example is clear illustration of this.

3. Prohibition of Ill-Treatment

Ill-treatment is prohibited by the Constitution of Georgia, the ECHR and the Criminal Procedure Code. The prohibition provides protection against torture and degrading treatment.

For realization of this right, the defendant must be aware of his right to be protected from ill-treatment and have the right to file a claim for ill-treatment with an impartial judge. Logically, this imposes on the court an obligation to inform the defendant of these rights. The obligation is particularly important when the defendant is in custody and the state has a complete physical control over the defendant.

As a result, the GYLA would like to highlight a legal gap related to the ill-treatment of defendants. Under the Criminal Procedure Code, a judge is authorized only to explain to the defendant his/her right against ill-treatment and to hear alleged facts of ill-treatment. The law

[73] OSCE Trial Monitoring Report Warsaw, December 9, 2014, pg 133, Par 255; See reference: Special reporter report about independence of judges and defense counsels, XVII session of the Human Rights Council, April 29, 2011, Para 62.

does not establish a procedure through which a judge can take meaningful action when ill-treatment is alleged; instead, a judge is only empowered to declare whether ill-treatment took place.

Findings

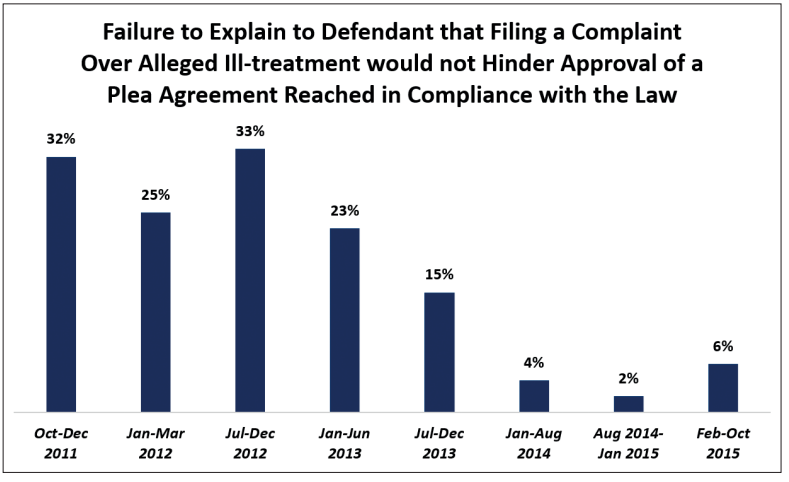
Compared to the last monitoring period, the judge explained to the defendants the right to file a complaint over alleged ill-treatment in a significantly lower percentage of cases:

- Out of the first appearance sessions monitored, judges failed to explain to the defendants their right to file a complaint over alleged ill-treatment and did not inquire whether the defendant was subject to ill-treatment in 48 out of 300 hearings (16%). During the previous reporting period, judges failed to do so only in 24 out of 339 hearings (5%). It should be noted that it was 28% in the beginning of the monitoring (October –December, 2011).

Considerably improved trend of the last three monitoring periods in terms of explaining plea- agreement rights improved slightly and the reporting period recorded a slight regress. In the last reporting period, in 170 cases (0,5%) monitored, the court failed to inquire whether a plea agreement has been reached through coercion, pressure, deception or any illegal promise only in one case. This reporting period illustrated the same picture, namely out of 111 sessions where plea-agreement was reached (0,5%), the judge failed to explain the right only in one case.

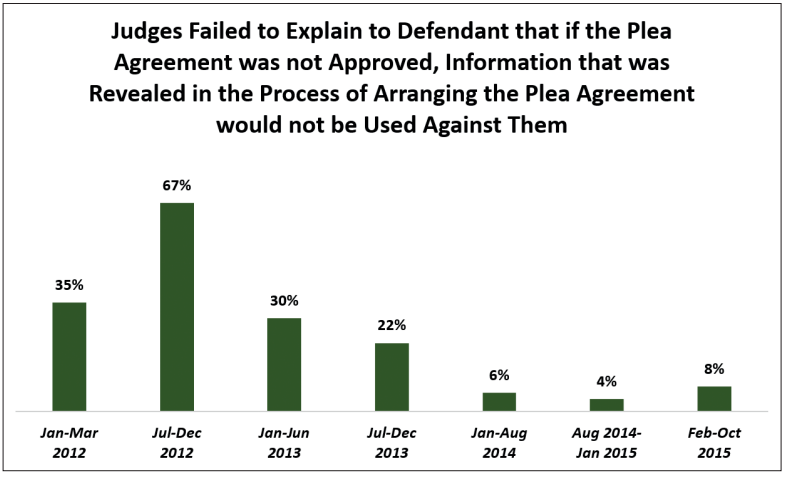
The GYLA found out that during this monitoring period in 6% of the plea agreements (7 of 111 cases) judges failed to explain to the defendants that filing a complaint over alleged ill-treatment would not hinder approval of the plea agreement reached in compliance with the law. In the last reporting period the indicator was only 2% (3 instances out of 170). The chart below illustrates the results of the whole period of monitoring (October, 2011 - October 2015, 2014).

Chart №13



In 8% of cases where a plea agreement was reached (9 of 111), judges failed to explain to the defendant that if the plea agreement was not approved information that was revealed in the process of arranging the plea agreement would not be used against him. This result exceeds the trend of the last reporting period two times. The chart below illustrates results of the whole monitoring period.

Chart №14



Lack of judicial authority in the process of investigation of ill treatments and the gap in the legislation with regard to the effective investigation of claims was still vivid in the following cases:

- An individual was charged with drug related crime. At the first appearance the defendant reported that when arrested someone had hit him in a face, though he was unaware who the offender was. The judge, however, only explained that the defendant could protect his right with the lawyer's assistance.
- At the first appearance session the defendant reported that policemen abused him verbally and physically. The judge advised to write a complaint and to apply to relevant agencies. Also the judge instructed the prosecutor to pay attention to the issue.
- At the first appearance session, the defendants alleged that after being taken to the police department they had been under pressure. They reported that police was beating them with batons and told that it was retribution for police resistance. The judge asked the prosecutor whether he knew about the incident, but he received a negative response. The prosecutor replied that the defendants invented this in order to evade responsibility, and injuries were caused during the arrest. Finally, the judge called on the prosecutor to investigate the issue.

These examples illustrate the lack of authority of a judge in revealing facts of alleged ill-treatment and shows necessity of increasing judge's role in this direction in a manner that grants relevant legislative levers to request investigation of alleged facts of ill-treatment and punishment of offenders in compliance with the law when such cases are observed.

Reporting period also revealed one positive case when the judge examined in details the fact of alleged ill-treatment.

Positive Example of Judge's Reaction

An individual was charged with the crime of theft. At the first appearance session the defendant alleged that police abused him physically. The prosecutor rejected defendant's statement and stated that these were self-inflicted injuries. The prosecutor suggested to show the video material illustrating the fact. The defendant agreed with the prose-

cutor's initiative. The video showed that the defendant threatened police that he would blame them in alleged physical violence. It should be noted that in the case concerned, the judge, in view of defendant's best interests, went beyond his minimal obligations and examined comprehensively the fact of alleged ill-treatment. As a result of inquires it was established that no ill-treatment occurred.

4. Equality of Arms and the Adversarial Process

Equality of arms and the adversarial process are key principles of criminal proceedings, reinforced by Article 42 of the Constitution of Georgia, Article 6 of the ECHR, and Articles 9 and 25 of the Criminal Procedure Code of Georgia.

The meaning of these principles is that the parties to a proceeding have an equal right to submit evidence in the case and to present their case under equal conditions.[74] In the criminal procedure both the defense and the prosecution must have opportunity to examine evidences submitted by another party and to express opinions thereto.[75] To safeguard this right the judge must ensure equality of arms during the trial, meaning that s/he must provide both parties with an equal opportunity to examine evidence without interference. Further, the judge should not exceed the scope of the charges, but should be bound by the positions presented by the parties.

The principle of equality of arms is of particular importance in criminal proceedings, where the prosecution has the resources and power of the state behind it and the defense does not have such advantage and opportunities.

Findings

The GYLA's monitoring has found that judges were mostly acting within the scope of their powers, ensuring that everyone had equal opportunity to represent their interests.

[74] See Article 42.6 of the Constitution of Georgia:

[75] *Laukkanen and Manninen v. Finland*, no. 50230/99, par: 34 (3 February, 2004); *Rowe and Davis v. the United Kingdom*, no. 28901/95, par: 60 (16 February, 2000).

In the majority of the cases judges did not get involved in questioning of witnesses, were able to protect order in courtrooms and ensure equality of parties.

Nevertheless, the GYLA found certain flaws. In four instances (including two instances in high-profile proceedings against former Tbilisi Mayor Giorgi Ugulava and Davit Kezerashvili) the judge questioned a witness without prior consent of parties, grossly violating equality of arms and the principle of adversarial proceedings. In response to the judge's questions (except for the one about his name) the witness stated that he did not remember anything. The judge got angry and said that he was perplexed by a "complete amnesia" of the witness and wanted to know why he had forgotten everything.

In another case, the judge was often asking questions to a witness without prior permission of the parties. These were not clarifying questions but rather it seemed that the judge was interrogating the witness. In addition, during one of the main hearings observed, the judge often interfered in questioning of a witness.

In several cases the judge grossly violated equality of arms and the principle of adversarial proceeding; in particular,

- In one of the high-profile cases against former Tbilisi Mayor Giorgi Ugulava and Davit Kezerashvili, the judge overruled prosecution's objections without hearing what the objection was.
- In a high-profile case against Giorgi Ugulava and others, prosecution motioned for scheduling several hearings beforehand and at the earliest time possible in order to finish the examination of evidences as soon as possible. To that end, the prosecution proposed several dates to the judge. The defense objected part of the motion and offered alternative dates to the judge, stating that because other hearings had already been scheduled in the same period and also they needed more time to prepare for the case. In addition, Giorgi Ugulava declared that he would refuse to appear at the subsequent hearings if the judge did not take the defense's position into consideration. The judge rejected the motion, saying that "of course" the prosecution's motion would be granted. The judge's words sounded as if he did not care about the defense's interests. By demonstrating clear bias in favor of the prosecution, the judge

grossly violated equality of arms and the principle of adversarial proceedings;

- We found that in one of the main hearings the judge violated the principle of adversarial proceedings. In particular, a defense counsel expressed his concern over the fact that a witness responded to a question that he had previously objected. The judge said that he was still able to influence the question that was already answered[76] but he refused to specify what he meant.
- In another case a judge instructed the prosecution to quote a statement given by the witness during the investigation and to do so without asking a leading question. He did it because of the prosecutor's use of leading questions - in particular, they read full excerpts from witness testimonies, asking them "it is true, isn't it?" Regrettably, the defense was not objecting.

During the reporting period the GYLA noted several instances of judges failing to explain rights of a defendant, which raised doubts about ability of defendants to exercise their rights. ***For instance:***

- During the first appearance session the judge asked the defendant whether he was aware of his rights and if he wished to receive explanation about these rights. As the defendant responded that he was aware of the rights and did not need any further explanation, the judge did not explain any of his rights. Notably, to protect rights of the defendant the law expressly obligates a judge to provide comprehensive explanation of defendant's rights whether or not the defendant is asking for the explanation.
- During another initial appearance the judge asked the defendant whether he could afford to pay the bail requested by the prosecutor. The defendant responded that he had no choice. The judge took it as the defendant's consent and said: "I see, so you agree." He did not explain the defendant's right to request decrease of the amount of bail or use more lenient preventive measure.

In contrast, we found positive instances of judges promoting meaningful

[76] In this case the judge meant the procedure for finding inadmissible the testimony of the witness and motion to not consider the mentioned circumstance of the case

*equality of arms and observance of the principle of adversarial proceedings. F**or instance:***

- During five initial appearances defendants without defense counsels received complete and comprehensive explanation from judges about types of preventive measures, their right to request a preventive measure and subsequent outcomes.

The GYLA also found inconsistent approach of courts towards keeping an order in courtrooms. In the number of instances the courts demonstrated inadequate leniency, which had a negative impact on the effectiveness of proceedings, while in some other cases courts took adequate measures to protect order in the courtrooms. **For instance:**

- In the high-profile case against Mikheil Saakashvili, Giorgi Ugulava, Ivane Merabishvili, Zurab Adeishvili and Davit Kezerashvili, there was a noise in the courtroom. Giorgi Ugulava and Ivane Merabishvili declared during the trial that they did not care what the court wanted and refused to participate in the "farce". Their conduct made it impossible to normally proceed. They verbally insulted the judge, laughed at him and expressed clear disrespect. Giorgi Ugulava declared during the trial that to him the courtroom was a venue for appointments and press conferences. Regardless, the judge did not respond in any way or try to take legal measures to protect order in the courtroom. Notably, during another hearing of the very same case[77] Ivane Merabishvili made threats against the government. The judge stopped his speech because his remarks were incorrect. Merabishvili responded by calling him "impolite" but the judge did not take any measures in response. He closed the hearing for several minutes but only because the parties were going to discuss information that contained state secret.
- At a main hearing a witness was insulted and laughed during examination. The judge was unable to control the situation. Defendants were screaming at the witness. The prosecutor asked the judge to instruct the defense not to scream at the witness but the judge responded that he did not need any instructions from the prosecution, and that if someone disturbed order he

[77] Different judges presided over the different hearings

would take adequate measures in response. The defendants and their counsels were laughing at the witness because he was speaking with a rural accent. The judge reproved one of the counsels after he laughed aloud. During another hearing of the same case, insulting shouts were heard in the courtroom during interrogation of a witness. Defendants interrogated the witness aggressively. The judge reacted in some cases, giving them reproofs, while in other cases he did not react at all.

- During the interrogation of the victim at a main hearing audience was very loud. Swear words and other abusive shouts were heard in the courtroom. At the end of the interrogation, as the witness was leaving the courtroom the audience started shouting abusive remarks, followed by turmoil. Unfortunately the judge could not control the audience or try to keep an order. However, at the following hearing the judge strictly demanded an order and said that he would close the hearing if he heard a single abusive remark from the audience. This way, the judge was able to keep an order in the courtroom.

The foregoing examples illustrate that judges are often reluctant to use sanctions for contempt of court to restore an order in the courtroom, which hinders the establishment of the public trust and respect towards the criminal justice system.

- In contrast, during one of the main hearings, when a victim's assignee was insulting the defendant while the defendant was questioning the witness, the judge gave him a verbal warning and explained that if he continued to violate the order, he would be expelled from the courtroom. This way, the judge was able to restore order in the courtroom; however, the defendant was not allowed to continue. In particular, after warning the victim's assignee, the judge did not ask the defense if they had any other questions for the witness and turned to the prosecutor, asking if he wanted to re-examine the witness.
- During another main hearing a witness was bashing the prosecutor, which disturbed order in the courtroom. The judge urged the witness to stay calm and maintain order.
- During another main hearing the judge used excessive measures against a member of the audience who violated order in the courtroom by protesting the defense's closing argument. The judge expelled him without a warning.

Other findings:

- Out of 473 main hearings attended by monitors of the GYLA 3 were held behind closed doors and 164 were postponed. In remaining 306 cases witnesses were questioned in 180 (59%). Overall **439 witnesses were questioned.** Among them 391 witnesses (328 ordinary and 63 experts) were submitted by prosecution, while 48 (47 ordinary and 1 expert) by defense. In 180 cases of witness questioning the judge asked questions in 17. In 4 cases the judge violated procedural requirements when asking questions to witness without consent of parties. The data has improved since the initial reporting period, when judges often asked questions with violation of procedural requirements, though some regress was noticed in terms of the last reporting period where no procedural violation was observed from the side of the judge.
- Similar to previous monitoring period, at some merit hearings, court failed to ensure separation of witnesses already examined and to be examined, that should be ensured by the court.[78] Witnesses were standing outside, sharing with each other what kind of statement they gave. Nothing has been done to prevent this.
- At one merit hearing parties have examined the video evidence, which was recorded in Russian, though no translation was provided. It should be noted that the right to an interpretation and translation extends not only to the statements made by the parties at the open hearing but also to the translation of the case materials.

5. Right to a Public Hearing

The right to a public hearing is a vital safeguard for the interests of defendants and society as a whole guaranteed at the national and international level. Access to hearings ensures public scrutiny of individual proceedings. It also allows for greater transparency of the judicial

[78] Para.2, Article 18 of the CPC stipulates that "a witness should be questioned in isolation from other witnesses. Further, court should take measures for preventing witnesses summoned for questioning in the same case from communicating with one another before the questioning is over."

proceeding which contributes to the greater public trust, the greater accountability, and the wider debate on the justice system.[79]

The right requires that the court ensure that proceedings are conducted in a way that if a representative of public attends, s/he has no trouble hearing or understanding what takes place. This also means equal access to everyone to attend proceedings. The court must also make the verdict public, indicating punishment, the applicable legislation on which the verdict was based, and the right of a defendant to appeal the decision.[80]

It should be noted that amendments were introduced to the Organic Law of Georgia on Common Courts in May, 2013 which ensure more publicity of trials. As a result, the public broadcaster and other TV companies were given opportunity to carry out video and audio recording of the court hearings.[81]

Findings

Monitoring revealed some cases that hindered effective exercise of the right to a public hearing. Namely, lack of information about date and place of sessions, small court rooms, entry and exit issues in the court halls and announced judgments by the court.

Monitoring revealed that the right to a public hearing was usually observed. Similar to previous reporting period, the major exception was reported at the first appearance hearings in the TCC, where information about the hearings was never provided in advance.

Moreover in 102 out of the 772 (13%) hearings[82] that did not involve first appearances and jury trials, no advance information was published about the date and time of the hearings. In previous reporting period, in 12% of the cases the information on scheduled hearings was not published in advance that did not involve first appearance.

[79] OSCE trial monitoring report, Warsaw December 9, 2014 pg 54, par.64.

[80] Article 277.1 of the CPC

[81] Organic Law of Georgia on Common Courts (is enacted since May 1, 2013).

[82] 772 sessions include pre-trial, plea agreement, main and appeal hearings. as well as the sessions for jury selection.

It should be noted that in 8 (5%) instances the pre-trial sessions[83] information was not published in advance. In plea-agreement sessions the similar problem was observed in 81 (72%) instances [84] and in main hearings there were 13 (3%) instances when no information was published in advance about scheduled court hearings.[85]

It should be noted that during the reporting period there were cases when judges and other participants of the trial spoke indistinctly so that people in the courtroom could not hear the voices. This constitutes a violation of a right to a public hearing since despite the attendance on the trial was not restricted the public did not have an opportunity to hear the trial.

The monitoring on the right to a public hearing revealed the following interesting outcomes:

- From 670 cases information published was incomplete or incorrect only in 7 cases (1%). In 6 (0.8%) instances the wrong courtroom was indicated. There was also 1 (0.1%) instance when the trial took place in Tbilisi Appellate Court instead of the TCC, though no information was provided on the monitor. Unlike this monitoring period, during the past monitoring period all notices provided comprehensive information about the place and time of the session and about the defendants and the charges.
- In all 13 open hearings of jury selection, information was published in advance and individuals had opportunity to attend them without restriction. This is continuation of the positive trend that started since the last reporting period. The GYLA assesses positively resolution of the problem by the court and remains hopeful that no obstacles will be observed in the future.
- In 38 (4%) of 1072 instances (these do not imply jury trials) not all interested people were able to attend the sessions. In 11 (29%) instances the reason was the small size of a courtroom where relatives and other interested individuals were unable to attend the session. All were high profile cases (1

[83] 1 case was observed in the TCC, 7 - in the KCC.

[84] 75 cases were observed in the TCC and 6 in the KCC.

[85] All the cases were recorded in the KCC.

–Irakli Pirtskhalava, Giorgi Tsaadze, Levan Berodze, Grigol Kvinikadze, Kakhaber Nakani, 1- Bachana Akhalaia[86] and Megis Kardava, 1-Mirian Deisadze, Kakhaber Gabunia, Nikoloz Narsia[87], 3- Giorgi Sosanashvili[88] , 5- Kakhaber Prodiashvili [89]).

- 53 (11%) of the 473 main hearings observed[90] ended with the public announcement of a final judgment. Out of those 53 judgments 3 (6%) were acquittals, 48 (91%) were convictions, and two were acquittals on some counts. It is interesting to note that two acquittals were delivered on high-profile cases[91] and other 47 one – on ordinary case.[92] One guilty verdict was rendered on high profile case, and the remaining 47 guilty verdicts were rendered on ordinary cases. Both cases of partial acquittals and convictions were high profile cases.[93]
- Notably, 1 convicting judgment was delivered by juries on high profile case (Mikheil Dzadzamia's and Koba Kharshiladze's case, former security members of Zurab Zhvania[94]). We have discussed the details of the case above.

[86] Former Defence Minister, before the head of the penitentiary system

[87] Activists of the united national movement detained in Kutaisi in front of the Parliament.

[88] Giorgi Sosanashvili was charged with intentional murder of Yuri Vazagashvili. Court found him guilty in submitted charges (Para 1, clause c, Article 109 of the CPC and Para 3, clause b and c of the same Article, as well as Para 1 and 2 of Article 236). As far as the final judgment is concerned, Sosanashvili's case was left beyond the monitoring report, since part of the session, including announcing of the verdict did not take place in the reporting period.

[89] Kakhaber Frodiashvili was charged with David Kharazishvili's intentional murder.

[90] Three hearings were closed .

[91] The aquitted person was Levan Chachua, one of the experts in Zurab Jvania's case. Levan Chachua was charged with the crime invisaged by the article 342.1. of the Criminal Code. Also, Roland Akhalaia was aquitted in two accounts of abuse of power. This GYLA is monitoring the case in the Appellate Court.

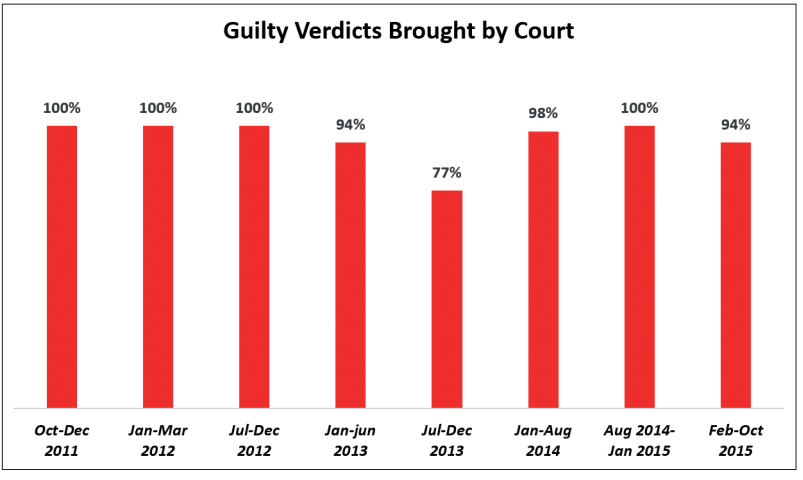
[92] Kathaber Prodiashvili was found guilty who is serving a sentence for premeditated murder of 19 years old David Kharazishvili. Currently the GYLA is monitoring this case in the Appellate Court.

[93] Defendants: Irakli Pirtskhalava, Giorgi Tsaadze, Levan Berodze, Griogol Kvinikadze, Kakhaber Nakani. It should be noted that Irakli Pirtsklava was acquitted as per Para. 3 Article 369 and Article 25 of the CPC. The second case concerned Giorgi Ugulava and David Kezerashvili on the episode of legalization of illegal income. Court delivered acquittal in case of both individuals.

[94] Former Speaker of the Parliament of Georgia

The chart below illustrates situation throughout the whole monitoring period (October 2011 – October 2015).

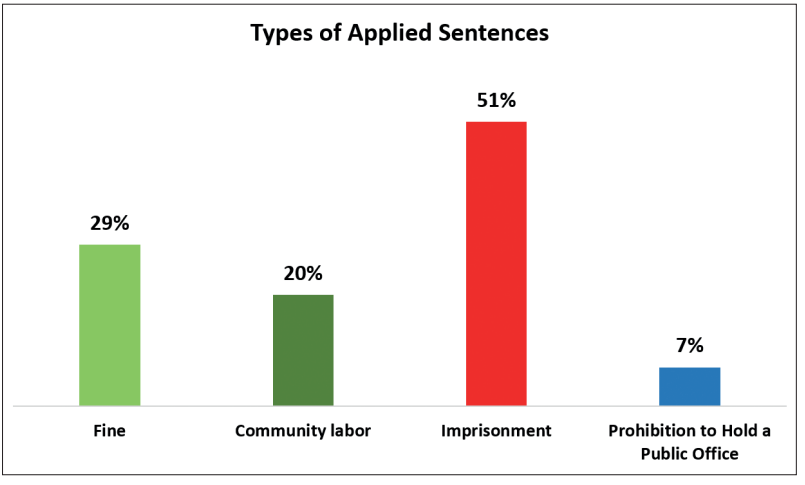
Chart №15[95]



The chart below illustrates the types and number of punishments applied after convicting judgments. Some judgments were delivered against several defendants. 48 convicting judgments and two partially convicting and partially acquitting judgments were delivered in cases involving 55 defendants. Among them 16 (29%) defendants were ordered fine, community labor was applied with other 11 (20%) defendants, while 28 (51%) individuals were sentenced to restriction of freedom. It should be noted that in 4 instances the sentences that were used are imprisonment and prohibition to hold a public office. The chart below - illustrates indicators of each sentence applied after convicting judgments.

[95] Partial acquittals and convictions are also included in the statistic of convicting judgments of this reporting period.

Chart №16



6. Right to defense

The defendant's right to defense is of critical importance in criminal proceedings, and is guaranteed under the Article 42 of the Constitution of Georgia and the Article 6 of the ECHR. In addition, Article 45 of the Criminal Procedure Code requires that the defendant have a lawyer when s/he has no opportunity to exercise the right effectively before the prosecution. Typically, compulsory defense may be applied when various reasons hinder the defendant from duly defending himself/herself, or when the gravity of punishment envisaged for committed offence raises the necessity of effective defense.[96]

For an effective realization of the right to defense, the defense should be given adequate time and opportunity to prepare its position. Further, the defense attorney should use all available legal means for defending the client.

[96] Commentaries to the CPC, group of authors, editor: Giorgi Giorgadze, Tbilisi, 2015, pg. 202.

Findings of the Monitoring

The monitoring clearly suggests that the right to legal representation was protected and defense counsel was present during trials where presence of attorney was required by law. In all cases where requirement for mandatory defense was revealed through the monitoring, the state defense counsel was provided.

It should be noted that out of 300 first appearance hearings monitored in the reporting period the defense was present only in 176 (59%) instances. Out of those 176 in 8 (5%) instances the defense was provided by the state and in 23 (13%) instances the defense was required by law. In all other instances the defense was provided by the defendant or the monitors could not identify the grounds for the provision of the defense. In other 124 (41%) sessions the defendant tried to perform a self-defense without a defense counsel and in most of such cases the defendant agreed to the prosecution's motions. The defendants mostly opposed to the amount of the bail and requested to reduce its amount.

In addition, judges granted most of the defense motions for postponement of hearing because they needed more time to study the case file and prepare. Notably, the prosecution did not object to such motions.

In one of the high-profile cases involving former Mayor of Tbilisi Giorgi Ugulava and Davit Kezerashvili, the defense motioned for postponement of hearing and requested 14 days to study the case file. The prosecutor objected and stated that the defense was trying to delay the process again. Eventually, the judge explained that both parties were given adequate time to present their closing arguments, and announced a four-hour break to allow the defense to prepare their speech. Notably, after four hours the judge postponed the hearing to give the defense time to work on their closing argument. At the following hearing the defense motioned for postponement stating that Constitutional Court had rendered its judgment about illegal imprisonment of Giorgi Ugulava, and therefore they had to address another judge who had sentenced the defendant to the imprisonment. The prosecution objected stating that the motion aimed to delay the proceedings. The judge granted the motion and postponed the hearing until the following day. He also urged the defense to present their closing arguments by then. During the following hearing the defense presented another motion for postponement; in particular, counsel appointed by the state said that he was not prepared for his closing argument because he had only

two weeks to prepare. The defendant supported the counsel's motion and requested postponement for a week, saying that he was very emotional after his release from prison based on the Constitutional Court's decision and could not concentrate. The prosecution objected. Eventually, the judge rejected the motion and the defense presented their closing arguments. Notably, the judge protected the defendant's right to legal representation; however, clearly the defense had filed motions for postponement in an attempt to delay the proceedings.

We identified instances of violation of the right to legal representation as a result of the judge's failure to take adequate measures:

- During a pre-trial hearing a counsel presented a motion for admissibility of evidence but because he had not filed a written motion the judge refused to hear it, stating that he could not make a decision about a verbal motion. In many other cases judges have accepted verbal motions of defense explaining that although motions must be filed in court in written, it is important to protect the right to legal representation.

In contrast, we found instances of positive reactions by the judges:

- The defendant did not appear during the pre-trial hearing due to health problems. Although the defense counsel stated that the defendant did not object to conducting the hearing in his absence, the judge postponed the hearing and instructed the defense counsel that next time he should provide defendant's written consent to conduct hearing in his absence. The counsel requested postponement for a few hours to obtain the written consent. The judge agreed.
- During the main hearing defendant complained about poor services of his counsel, stating that the counsel did not pay enough attention and requested his recusal. The judge explained that the counsel was there at his request; therefore, he could decline his services any time, choose a different counsel or the court would provide a state counsel.
- During another hearing where an investigator was questioned as a witness, the defense asked him about the reason why he failed to conduct a number of investigating measures to collect exonerating evidence. The witness responded that he was following tactics of the investigation. The defense asked him why examination of another weapon of the defendant wasn't

performed. The witness responded that he did not have any information about it. The prosecution objected to the question but the judge overruled the objection stating that an investigator should collect both exculpatory and exonerating evidence, while the defense has the right to ask about the reason of investigator's failure to perform an investigating measure that may have led to discovery of exonerating evidence.

During the monitoring the GYLA found instances of lack of communication between defense counsels and defendants. ***For instance:***

- During the high-profile case against Bachana Akhalaia[97], counsels were to present an opening statement; instead, the defendant stated that he was skeptical towards the court and that he did not plead guilty to any of the charges. The judge asked if the defendant's speech was the defense's opening statement. The counsels responded that it wasn't and that they were going to make an opening statement. Hearing their response, the defendant started screaming: "I don't need your [empty speech] about Articles" and left the courtroom. The counsels requested postponement to coordinate with the defendant. The judge granted their request.
- We found the lack of counsel-client coordination in another high-profile case against Giorgi Sosanashvili. State-appointed defense counsel declared that the defendant waived his right to remain silent, while to judge's question the defendant responded that he invoked his right to remain silent. The counsel failed to coordinate with the defendant on the issue of changing preventive measure. In addition, when the judge asked the counsel to explain the reason why he wasn't examining the written evidence together with the prosecution, the counsel responded that he did not have the case files with him because he did not need them. In addition, counsel demonstrated lack of knowledge about the case materials during interrogation of an expert witness. Notably, the counsel not only failed to pay attention to the prosecution's closing argument but he also dozed off a few times. Later he asked for a permission to leave the courtroom during the prosecution's closing argu-

[97] Former Defense Minister, before the Head of the Penitentiary System

ment, explaining that because closing arguments are based on re-evaluation of evidence and assessment of evidence by the prosecution, there was no need for him to be present and hear the arguments. Regardless, the judge refused to give him a permission to leave the courtroom. This example also proves the lack of competence and poor qualification of the defense performed.

Instances of lack of defense qualification and passive participation in the proceedings:

- In one of the high profile cases, in his closing argument the counsel was talking about evidence that had not been examined before, and the prosecution objected. The judge instructed the counsel to only talk about evidence that had been examined during the trial.

C. CONDUCT OF PARTIES DURING CRIMINAL TRIALS

During the monitoring the GYLA detected a number of instances of unethical and illegal actions by parties and courts. Although each of these cases speaks to violation of certain rights, above all they suggest lack of professionalism and competence of trial parties. The present section does not include facts related to interpretation of norms or legal (even unreasonable) use of discretionary powers by parties.

The Court

In this reporting period the unethical and illegal conduct of judges was observed which hinders the judicial reputation and limits the full and effective realization of rights by the parties.

It should be noted that according to the Bangalore Principles on judicial conduct the judge shall maintain order and etiquette in all court sessions. The judge must be patient and polite to the parties, jurors, witnesses, defense counsels and other persons with whom the judge interacts. Also, a judge should call the representatives of the parties, court personnel, and others who are under the control and guidance of the judge, on the similar conduct[98].

[98] Bangalore Principles of Judicial Conduct 2001, Value 6. Competence and Diligence.

During a plea agreement hearing, a technical error was found in prosecutor's motion about provisions of Article 59 of the Criminal Code of Georgia. Judge took an unnethical action against prosecutor by saying: "what is this mumbo jumbo?"

In addition, during two pre-trial hearings the judge took an informal and hostile action against a counsel and an interpreter:

- In the first case when the interpreter was talking to a defendant not only the judge but also the counsel and the prosecutor were laughing. Because the defendant was placed behind bars, interpreter was having a hard time communicating with him. The judge told guards in the courtroom: "get him out! Let him sit next to the interpreter!" It is interesting that the guards refused the request but the judge did not say anything.
- On the contrary to the abovementioned, during another main hearing a witness was interrogated over Skype and with the help of an interpreter. Because defendant could not hear the witness well, judge told guards to place him near the projector screen and the computer, so that he could hear the witness' testimony. This way the judge created all conditions for the defendant to understand the proceedings.
- During another pre-trial hearing a judge warned a counsel to speak standing up, citing a relevant provision from procedural legislation that requires litigants to stand up when speaking to a judge, but the counsel soon forgot about it and the judge's response was: "old habits die hard!" The counsel apologized and stood up.

During the first appearance session the judge took an informal action against defendant. Throughout the hearing the judge was cynical towards the defendant: he asked if the defendant was a drug addicted, to which the defendant responded that he wasn't using drugs. The judge laughed and asked again: "maybe police officers forced you to take anything?" The defendant responded that they hadn't. The judge laughed again in response.

At the end of a preliminary hearing the judge said that that the prosecutor often filed ill-prepared motions, forcing him to release detainees because of the errors found in the motions. In addition, following the hearing the judge suggested to the prosecutor that the next time he should print out procedural provisions related to arrest with larger font.

During initial appearance, a judge violated presumption of innocence: two individuals were charged with robbery; none of them had any prior conviction. When deciding about which preventive measure to use, the judge stated that he has formed his idea and believes that after a person decides to attack someone for seizing his property and crosses that line, there will always be a risk that he will repeat the crime. Guilt or innocence of a person is decided during a main hearing, based on evidence examined by the parties. Therefore, judge should refrain from making statements that will lead public to believe that the defendant is guilty. The UN Human rights Committee emphasizes that "treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule, which should be applied to all accused without distinction of any kind."[99]

A main hearing started 25 minutes late. Parties made their opening statements. Prosecutor had brought two witnesses for interrogation but judge said that witnesses are not interrogated the same day that opening statements are made. After the prosecutor insisted, judge allowed interrogation of one of the witnesses. We believe that had the judge not been 25 minutes late and had the hearing been opened on time, it would have been possible to interrogate both witnesses. In addition, only part of the hearing was recorded on audio; in particular, because the prosecutor had presented his opening statement in written, it was no longer recorded and microphones were switched on only after the defense counsel started making his opening statement.

The Prosecutor

In the reporting period, in some cases the prosecution revealed incompetent and negligent conduct. Also in some instances the prosecutor did not know particular norms of criminal procedure.

During a pre-trial hearing judge asked a prosecutor how much time he needed to prepare for the main hearing and offered him to agree on a date of the hearing. The prosecutor responded that he would need 10-

[99] OSCE Trial Monitoring Report Georgia, Warsaw, December 9, 2014, p.67, para.99; reference to General Comment No.21, Article 10: Humane Treatment of Persons Deprived of Their Liberty", United Nations Human Rights Committee, UN Doc CCPR/C/GC/21, 10 April 1992, para 4.

15 days. The judge said that he could not give him 15 days to prepare; the prosecutor had apparently forgotten that a main hearing must commence within no more than 14 days from the end of the pre-trial hearing, unless otherwise established by court based on a motion of a party or additional reasonable time is required to select jurors. Notably, neither of the parties motioned for extension or reduction of the term and the case was not tried by jurors either.

During a main hearing the prosecutor asked the judge for advice as to which sequence was appropriate for examining evidence – whether he should interrogate witnesses first or submit written documents. The judge explained that parties themselves should determine appropriate sequence.

During another main hearing prosecutor's closing arguments contained certain factual errors. In particular, he was saying that the victim was attacked by three people. Judge corrected him by saying that there was only one person sitting in defendant's chair in the courtroom. Prosecutor often used the term "manslaughter", whereas the case in question involved a murder.

In addition, during three initial appearances the GYLA detected incompetent or careless actions of prosecutors.

- During initial appearance the judge asked the prosecutor when the bill of indictment was issued. The prosecutor responded that it was issued on the 30th and transferred on the 31st. The judge rebuked the prosecutor because the verdict said otherwise. The prosecutor tried to explain himself by saying that it as a technical error. The judge announced a recess and told the prosecutor to clarify the issue but he couldn't and withdrew the motion.
- During another initial appearance, the judge asked the defendant about his date of birth. It turned out that case filed contained a different date, so did the defendant's ID card. The prosecutor requested a recess to clarify the issue. It turned out that the bill of indictment had been delivered for other defendant. The prosecutor was forced to withdraw the case.
- During another initial appearance, prosecutor filed a motion for a plea bargain; however, he didn't have full information about the defendant's previous convictions. The prosecutor requested a recess to get the information but he couldn't and

was forced to withdraw the motion for plea bargain; it was followed by deliberations about preventive measure. It turned out that the plea bargain had been prepared by a different prosecutor, who did not appear at the trial. The judge reprimanded the prosecutor and told him that next time he should come prepared.

Defense Counsel

In this reporting period, in some cases the defense counsel showed unethical conduct towards the colleagues. Also, the defense counsel showed incompetent and negligent attitude/approach towards particular procedural issues.

During a pre-trial hearing among other motions the defense requested admission of a list of witnesses for questioning. It turned out that because of the counsel's incompetence and negligence, the prosecution had not been provided with a record of interviews of two witnesses, as prescribed by law. The judge found violation of the rule of exchanging evidence and declared that defense would not be allowed to interrogate the said two witnesses during the main hearing.

D. PUNCTUALITY OF COURT HEARINGS

the GYLA's monitoring revealed problems with punctuality of court hearings that might be caused by overloaded courts or mismanagement of the judiciary. In the reporting period 314 (41%) of 772 hearings that does not involve first appearance sessions started with more than 5 minutes delay. In the last reporting period only 23% of hearings started with more than 5 minutes delay, which speaks about critical regress. In view of this the timeliness of court proceedings is still problematic, which reveals improper court management problem.

From the listed 314 sessions:

- In 147 cases (47%) the judge was late (in 16 cases (11%) the reason was his participation in another court session);
- In 60 cases (20%) the other session continued in the same courtroom. the indicator doubled compared to the last reporting period, which also speaks about insufficient court resources;

- In 21 cases (7%) the defendant was late;
- In 24 cases (8 %) the lawyer was late (in one case the reason was his participation in the another court session);
- In 12 cases (4%) the prosecutor was late;
- In 1 case (0.3%) one of the parties was present at another hearing;
- In 2 cases (0.6%) the technical gap was the reason of delay;
- In the rest 47 cases (15%) other reasons were observed.

In the reporting period monitoring team observed a case when the court had a session with attendance of all judges and all the hearings were postponed for that reason.

RECOMMENDATIONS

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

1. Judges should discharge 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 that the prosecution submit adequately substantiated motions for the use of preventive measure, and impose them with the burden of proof, especially in cases involving bail.
2. Judges should better substantiate decisions about the use of preventive measure and indicate in the ruling factual circumstances that necessitated application of the concrete preventive measure.
3. Imprisonment as preventive measure must be applied only as a last resort when all other measures are ineffective.
4. When applying preventive measure the courts should take into account gravity of the offence, possible sentence, financial status of the defendant and all other circumstances envisaged by the law, with a view to avoid use of disproportional preventive measure.
5. Defendants who are not presented by the council should be pro-

vided with a comprehensive explanation of all relevant preventive measures and their use. Further, judges must play more active role in defining if other preventive measure lighter than the bail and imprisonment can ensure the objectives of the use of preventive measure.

6. Judges must undertake a more active role in the process of conclusion of plea agreement and approve only those agreements that are fair and legitimate in order to eliminate any suspicions about proportionality of the sentence and the crime.
7. During examination of witnesses judges must abide by legal rules and ask questions to witnesses only when parties permit with a view to respect equality of arms and the principle of adversary proceeding. Further the judge should ask only direct questions. Court should maintain its neutral role and should not interfere in competence of any of the parties.
8. Lawyers must defend their clients in a qualified, active and credible manner at all stages of court proceedings.
9. Judges must apply all proportionate measures to ensure that order in the courtroom is observed and the parties are able to present their positions fully during the trial.
10. Judges must explain defendant's rights in a comprehensive and comprehensible manner.
11. Law must be amended to broaden authority of judges to combat alleged ill-treatment of defendants. Namely, the judges must be granted the authority to make require the investigation into all alleged facts of ill-treatment and the investigative body should be obliged to follow this requirement. Further, prosecutors must respond adequately when such cases are observed.
12. Relevant norms of the CPC concerning witness protection measures should be improved: namely the grounds for the use of this measure should be broadened and the authority of the prosecution and the Ministry of Interior to implement this measure must be transferred to other agency that will autonomous and separated from the investigative functions.
13. Judges and law enforcement authorities must act more responsibly when conducting and deciding on the search and seizure. The law enforcement authorities must use the measure without court's warrant only as a last resort while judges must approve

search and seizure without a warrant only based on a thorough examination of its lawfulness. Further, the court must properly reason its judgment about legalization of search and seizure conducted under urgent necessity.

14. The High Council of Justice of Georgia should develop the common strategy and system for the courts that publish trial calendars on the monitors with a view to ensure advance publication of complete and correct information about scheduled court hearings, including hearings on preventative measures.
15. The courts should reduce delay in starting the hearings with a view to ensure examination of the cases within a reasonable time without interruptions. Further the judge should use the authority to close the court hearing reasonably, when it is necessary for the protection of the party's interests.