

Georgian Young Lawyers' Association



RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS

**(LEGISLATION OF GEORGIA,
PRACTICE AND INTERNATIONAL APPROACHES)**

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Foreword

We, the human rights organisations and their representatives, face harsh reality when an oppressed person, who has been deprived justice, approaches us for assistance, but we are nearly helpless as no such opportunity is provided by law. Such examples involve cases when we are approached by victims of alleged crimes or their legal successors, asking us to assist in the case. Even in the cases, when we are able to represent the interests of a victim during the investigation and in the court considering the available resources of GYLA, this status provides us with no legal leverage to influence the course of the case. The problem mainly lies in legislation.

In Georgia the rights of victims have been significantly limited by the transformation of the legal system from inquisitorial to adversarial. Instead of the status of the party in criminal proceedings, a victim now has only the status of a participant of the process. It is worth nothing that in practice victims rarely have the opportunity to enjoy the rights granted by law. A number of examples provided in the present research will illustrate vividly the fact that they are refused to be granted the status of a victim, and those with the status of a victim are provided with information relating to the ongoing investigation in part or in a delayed manner or are not provided with information at all. Such cases reduce the engagement of their legal successors in the process of justice administration to a minimum. The legitimacy of the investigation may become controversy without the engagement of victims in the process. In addition, the belief in the idea of justice, as well as the confidence in the state, may be discredited.

We face this reality in the situation when international law and common practice exercised by states recognises the restoration of the rights of a victim as the main purpose of justice, and the rights of a victim as one of the important direction of human rights law. In accordance with the mandatory and non-mandatory documents of the UN, the legislation of European and Inter-American Courts of Human Rights, and common law, a victim is a subject to special care. The rights of a victim is also an important concept under the EU legislation.

The objective of the present research is to provide an analysis of the legal status of victims of crimes based on a systematic review of practical implications. The present research is the first of its kind on the mentioned issue since the adversarial system of criminal justice replaced the inquisitorial criminal law. In addition, the objective of the present research is to analyse not only the framework provided by the legislation but also to understand the real picture of rights enjoyed by victims in practice.

The research will reveal that the state should make changes to legislation and practice in terms of victim's rights. In addition, it must be underlined that just as it is unacceptable to represent the idea of justice by the revenge of a victim, the execution of justice is impossible without the admission of damage inflicted on a victim and restoration of breached rights. Therefore, the situation relating to victims under the current legislation and practice in Georgia cannot be justified.

The Georgian Young Lawyers' Association keeps actively advocating for changes in victim's rights. By the present research, we want to get their voices heard across the relevant state authorities, especially the legislative body, as well as communities of experts, media and general public. We hope that this research, which has been prepared on a pro-bono basis, will become the subject of public interest and will promote the development and implementation of state policy towards the expansion and respect of victim's rights.

Hereby, let me express my deep gratitude to each person, victims or their legal successors who, despite the serious traumas inflicted on them, and often extremely complicated psychological and emotional state, manage to reach us in search of law and justice. Their determination and fighting spirit gives us the opportunity to understand first and then show others the existing problems, to work for making changes to achieve the sustainable and dignified future of these persons and others.

Yours Faithfully,

Ana Natsvlishvili

I. Introduction

On 1 October 2010 the new Criminal Procedure Code, which has brought fundamental changes in the system of criminal proceedings, came into force in Georgia. Within the framework of this reform, the adversarial system of criminal justice replaced the inquisitorial proceedings.

The new Criminal Procedure Code included a number of progressive innovations. Georgia has fostered the legal model based on adversarial procedures observed in common law system countries, which provides for strengthening the positions of the defence and ensuring better guarantees for defendants.

The reform also covered the victim's rights. The new Criminal Procedure Code resulted in the deprivation of a number of victim's rights and the change of victim's legal status to the status of a participant in proceedings.

A victim, who has been the active party enjoying broad authority in criminal proceedings for many years, nowadays according to the present Criminal Procedure Code, a victim has minimum authority. However, the mentioned status of a victim does not correspond with the modern policy of criminal law and international approaches.

The role of a victim as a participant of a process has dramatically changed and the legislative guarantees for the protection of a victim's rights have decreased sharply. As a result, we have to face the reality that achieving any kind of rehabilitation of a victim or restoration of justice by the means of criminal proceedings under the nearly limitless discretion of a prosecutor depends on the good will of law enforcement bodies, as, in a number of cases, a victim has no legislative leverage to defend his/her rights.

The objective of this research is to evaluate the criminal procedure legislation adopted in 2010, on the basis of which a victim is not considered as a party to proceedings and enjoys only minimum legal guarantees. In addition, the research aims to review the changes made to legislation in 2014, which represents an attempt to better regulate victim's rights. The research aims at analysing gaps and challenges accompanying the realisation of new regulations in practice, and at discussing how the mentioned was reflected on the victim's rights and his/her participation in legal proceedings on the basis of specific examples and statistics. In addition, for the purpose of full understanding of the institute of the status of a victim, it has been reviewed in the frame of the Criminal Procedure Code of 1998.

II. Methodology

The research is based on the study and analysis of legislative regulations and international standards currently in force. Namely, for the purpose of approaching a problem from different perspectives, the research includes the analysis of the best practices and reforms and the comparative data of norms established in foreign countries. In addition, the research includes the examination of information/rulings acquired/obtained by means of requesting public information and case materials studied by GYLA¹, where GYLA provided legal aid or consultations. The opinions and findings presented in this report are mainly based on these observations. In addition, in-depth interviews have been conducted with practising lawyers², who have expressed their opinion on gaps and challenges they face on a daily basis as well as solutions to these problems. The information provided by them points out the gaps in existing practice and legislation in individual cases.

We have prepared relevant recommendations concerning the gaps, which have been identified in the process and presented them in the final part of the research. We hope, that the mentioned recommendations will contribute to the improvement of situation related to the victims' rights and the effective engagement of victims in criminal proceedings, taking into consideration the adversarial principle of criminal justice.

III. Rights of victims in accordance with the legislation of Georgia

1. Victim's procedural role in accordance with the Criminal Procedure Code of 1998

The Criminal Procedure Code of Georgia which was adopted on 20 February 1998 strengthened the principles of continental law and considered launching subsidiary, private-public and private prosecution together with public prosecution³. The main task of criminal proceedings was the protection of victim's interests and rights together with the protection of other parties⁴. The body administrating criminal proceedings was limited and partially depended on the actions and views of a victim. Namely, the victim was a party, who defended the position of the prosecution. Victims

¹ The cases discussed in the report illustrate the circumstances existing through May 2016.

² Ekaterine Khutsishvili, Public Defender Office, head of the Department of Criminal Justice; Levan Vepkhvadze, GYLA lawyer, a guest lecturer at the Georgian-American University; Jemal Chkadua, GYLA lawyer.

³ Criminal Procedure (Institutes of the General Part), Volume II, under the editorship of R. Gogshelidze, Tbilisi, 2009, 46.

⁴ The Criminal Procedure Code of 1998, Article 1.

enjoyed such a wide range of rights that they could act as a **subsidiary prosecutor**. If during the criminal proceedings a prosecutor refused to prosecute but a victim disagreed with him/her refusal, the case was not closed and the victim acted as the prosecutor in the criminal case. In addition, in the cases of private prosecution (such as: Article 125 of the Criminal Code of Georgia - Battery, Article 120 of the Criminal Code of Georgia - Intentional less grave bodily injury) the criminal prosecution was initiated only on the basis of a victim's complaint and generally was settled after mediation between the victim and the offender. In addition, mediation was only allowed before the judge left for the deliberation room in all types of courts, including the courts of first instance as well as the courts of appeals and the courts of cassation. During the mediation process, the parties must have agreed on compensating court charges, otherwise the court would allocate them⁵. Despite the fact that during the private prosecution private persons were the opposing parties, it was possible for a prosecutor to participate as a public person in the review of the mentioned case before the court investigation was launched. The mentioned possibility existed in three cases: if there was a written request of the parties, if there was a written request of a victim or his/her representative to involve a prosecutor in the case and if the case was of special public interest⁶. 6. It is worth noting that participation in private prosecution was not the obligation but the power of a prosecutor; however, if the prosecutor was engaged in the mentioned process due to special public interest, irrespective of mediation between the parties, private prosecution was not terminated and the prosecutor exercised state prosecution.

Apart from the mentioned rights, in the case of any type of criminal prosecution, a victim could do the following: **Submit the evidence**⁷. **Appeal the verdict with the courts of appeal and the courts of cassation**⁸. **Request recusal**⁹. **Participate in investigative actions conducted under his/her motion**¹⁰. It is worth noting that the Criminal Procedure Code provided **for the possibility of submitting civil complaints** within the criminal proceedings. If the person filed a civil complaint after being recognised as a victim, the body (official) administering the proceedings issued a decision (ruling) recognising the victim as a claimant, but if a person filed a civil complaint before being recognised as a victim, the body (official) administering the proceedings was authorised to: issue one decision (ruling) by which it would grant a person the status of a victim and a claimant simultaneously, or issue separate decisions (rulings) recognising him/her as a victim and a claimant¹¹.

In accordance with the Criminal Procedure Code of 1998, **the ruling on the recognition of a person as a victim or his/her successor was issued by a prosecutor or an investigator**. Notably, **a judge of the court of first instance also had the right to recognise a person as a victim** before the court proceedings were initiated.

It is worth noting that the criminal procedure law recognised **the institute of a victim's representative**. The protection of the interests of a victim were considered in preliminary investigations and in court by the lawyer. Simultaneously, the legislation did not limit a victim to hire several lawyers¹². In addition, the Criminal Procedure Code insisted on the mandatory participation of a lawyer in the cases, when: a victim was a minor, a person with disability or a person of limited ability; a victim was unable to defend his/her interests due to poor health condition; also, if a person was declared as a victim of human trafficking or child trafficking¹³. The legal representatives of victims had the right to defend their interests¹⁴.

2. Review of new regulations adopted in 2010

The new Criminal Procedure Code which entirely changed the direction of criminal proceedings was enacted on 1 October 2010. The changes resulted in the deprivation of a number of rights from victims. The current legislation has a different approach to the legal status of a victim. A victim is not considered as a party anymore and mainly, has the rights and duties of a witness.

In accordance with Article 3(22) of the Criminal Procedure Code, **a victim means the State, a natural or legal person that has incurred or may have incurred moral, physical or material damage directly as a result of an offence**.

Accordingly, damage is a significant element for recognising a person as a victim, but it is not the one and only, hence

⁵ The Criminal Procedure Code of 1998, Article 27.

⁶ The Criminal Procedure Code of 1998, Article 27(4).

⁷ The Criminal Procedure Code of 1998, Article 69(e).

⁸ The Criminal Procedure Code of 1998, Article 69(m).

⁹ The Criminal Procedure Code of 1998, Article 69(c).

¹⁰ The Criminal Procedure Code of 1998, Article 69(i).

¹¹ Z. Meishvili., O. Jorbenadze., Comments on the Criminal Procedure Code of Georgia, Tbilisi, 2007, 184.

¹² The Criminal Procedure Code of 1998, Article 71(1).

¹³ The Criminal Procedure Code of 1998, Article 71(2).

¹⁴ The Criminal Procedure Code of 1998, Article 71(2).

the legislator provides for the recognition of a person as a victim if the threat of inflicting damage presents. However, despite the above, within the procedural-legal meaning, a person is granted the rights and duties of a victim only after a prosecutor issues a decision on the recognition of a victim¹⁵.

The fact of committing crime is not necessarily to be established or verified to grant the status of a victim, since only the court is authorised to determine the commission of a crime, and investigation is conducted for the purpose of obtaining evidence proving the crime. Accordingly, for the recognition of a person as a victim material and official grounds must co-exist. With respect to the new criminal procedure legislation, a victim is considered as a witness of the defence and, in accordance with common practice, he/she may be summoned to court by the decision of a prosecutor¹⁶. The procedural role of a victim is mainly limited to the function of a witness. However, unlike a witness, a victim is granted the right to obtain information on the time and place of conduct of procedural actions. This information is provided to a victim by a prosecutor upon his/her request¹⁷. The right to information means the possibility given to a victim to be kept informed on the ongoing investigation and court proceedings and their results. The information includes technical issues on the one hand and notifications on factual and legal circumstances on the other.

After a prosecutor has recognised as a victim the person harmed as a result of a crime, the victim may enjoy the following rights: **to know the charges brought against the defendant; to receive a copy of a decision (ruling) terminating criminal prosecution or investigation, a copy of a verdict or other final decision of a court; to be provided with the explanation of his/her rights and duties.**

In addition, a victim must be notified on the date and place of such procedural actions as: **the first appearance of a defendant before a magistrate, a pre-trial session, a main court session, a sentencing hearing and sessions in the courts of appeal or cassation.**

In addition to the above mentioned rights, the new Criminal Procedure Code **determines the right of a victim to obtain copies of decisions/rulings on the termination of investigation and/or criminal prosecution, verdicts and other final decisions of a court. In addition, he/she may, according to the civil procedure, file a claim requesting compensation for the damage** caused as a result of a crime.

Since a victim may undergo a secondary victimisation during the criminal proceedings¹⁸ and due to this he/she may be inflicted damage, a legislator must create **individual protection mechanisms** for him/her, his/her close relative or family member. The mentioned mechanisms include the usage of special measures, such as: taking measures preventing the location¹⁹, changing the identity and issuing new documents, taking safety measures²⁰, changing temporarily or permanently the place of residence or relocating to another state²¹.

In addition, together with other rights, a victim has the right to be reimbursed the cost of participation in proceedings and receive back the temporary seized property, which was deposited as a bail due to necessity to investigation and trial.

3. Attempt for the expansion of victim's rights: legislative changes made in 2014

On 19 November 2013²² a draft law, which provided for the expansion of victim's rights was adopted; however, not all regulations/aspects from the set of changes were reflected in the legislation²³.

On the basis of the draft law, the changes implemented in 2014 resulted in providing more legal guarantees and powers to victims, namely: **A victim is given the right to get acquainted with case materials unless this contradicts the interests of an investigation, and, in the case of extremely grievous crime, appeal to the court against specific decisions of a prosecutor**²⁴. In addition, a person, who has been inflicted a certain damage as a result of a crime, may request from a prosecutor to be granted a procedural status of a victim.

¹⁵ The Criminal Procedure Code of 1998, Article 56(5).

¹⁶ The Criminal Procedure of Georgia, General Part, under the editorship of J. Gakhokidze, M. Mamniashvili and I. Gabisonia, Tbilisi, 2013, 207.

¹⁷ The Criminal Procedure Code, Article 58.

¹⁸ Secondary victimisation refers to the possibility of inflicting damage on a victim again as a result of participation in the justice procedure.

¹⁹ The alteration or deletion of information containing the data identifying and verifying a victim (name, surname, address, workplace, occupation, etc.) from the civil register or other type of records.

²⁰ Personal protection, emergency call, etc.

²¹ The Criminal Procedure Code, Article 68(3).

²² <https://matsne.gov.ge/ka/document/view/2083578>

²³ For example, the draft law considered the right of a victim to obtain the copies of criminal case materials fully or partially, unless this contradicted the interests of an investigation; a judge reviewing the criminal case had the possibility to order a defendant to pay a victim a compensation no less than GEL 100 and no more than GEL 500, etc.

²⁴ The decision of a prosecutor refusing to recognise a person as a victim (a legal successor of a victim), to terminate the investigation or criminal prosecution or to initiate a prosecution.

A victim is granted the right to get acquainted with the criminal case materials no later than within 10 days before the pre-trial session²⁵. In addition, upon the consent of a judge, a victim may attend a partially or fully closed court session²⁶. The mentioned regulation provides a victim with the opportunity to be informed on the issues reviewed at the session despite the fact that the session is partially or fully closed.

A detailed information must be given to a victim on the above-mentioned rights and duties. The present issue has been regulated under the new regulations which entered into force in 2014. The criminal procedure legislation relates the explanation of rights on recognition as a victim to the issuance of a decision. In accordance with Article 56(5¹) of the Criminal Procedure Code, a prosecutor or, upon his/her instructions, an investigator, shall familiarise the victim with the decision on the recognition of a person as a victim and explain to him/her all the rights provided for by the criminal procedure legislation, and the procedures related to the exercise of those rights, and shall draft a report to that effect. The report shall be signed by the victim in order to confirm the fact of being familiarised with the rights and receiving the decision.

4. Gaps and challenges in legislation and practice relating to victim's specific rights

The state of a victim still remains a problem, despite the fact that we have obtained a totally new model and, on the one hand, a victim has been deprived of all rights due to the new Criminal Procedure Code and, on the other hand, the legislative database has been relatively improved due to 2014 changes. Victim's interests are less shared and satisfied under the nearly limitless discretion of a prosecutor.

The rate of applications submitted to the Georgian Young Lawyers' Association by criminal case victims, who appeal against the inefficiency and non-objectiveness of investigation or an incomplete and delayed investigation, is high. Moreover, there are frequent cases when applicants are refused to be recognised as a victim as well as rejected the possibility to get acquainted with the case materials. Sometimes, despite the fact that all evidence presents in the case, the imposition of charges are delayed²⁷. 8 cases studied by GYLA has revealed that the persons who were inflicted a damage as a result of a crime were not timely granted a procedural status of a victim, were not given the right to get acquainted with the case materials; also, the investigation was conducted inefficiently and incompletely as a result of misinterpretation of existing norms, legislative gaps and inadequate/indifferent attitude towards the issue.

It must be admitted that the persons who were inflicted the damage as a result of a crime have the status of a witness at the initial stage. According to the explanation of GYLA lawyer, the first problem they are facing is the question whether the investigation will be launched on the basis of their application. "There were cases, when the signs of crime were evident but the investigation was not launched."²⁸GYLA lawyer explains that "several days ago a minor citizen was on outing together with his friend, where he lost his belongings (a laptop, a purse and perfume). When she informed the investigation bodies on this fact, she was told that she would never have the lost items returned and recommended to change the factual circumstances and state that her belongings were lost not on the outing but in the city, namely in the chemist's. She was asked to claim that she had left them in the chemist's and when she had returned she had not been able to find them. The investigation suggested this version in order to conduct less investigative actions. Namely, they would not have to visit the scene of theft outside the city and search the car of a minor, where she had kept her belongings and which had been broken into. In addition, they would not need to interrogate witnesses, etc."²⁹

4.1. Grounds for recognising a person as a victim and the mechanisms for appealing against specific decisions of a prosecutor.

It is worth noting that according to the 2014 legislative changes, in addition to the initiative and willingness of a prosecutor; a victim also has an opportunity to submit an application to a prosecutor for being recognised as a victim. The mentioned changes must be assessed positively; however, the final decision on the recognition of a person as a victim must be made by a prosecutor. If a prosecutor does not satisfy the application within 48 hours upon its submission, a victim and his/her legal successor has the right to appeal, only once, the refusal with a superior prosecutor within 10 days³⁰. The answer of a superior prosecutor is final and no court control is exercised over it, except in the case of the extremely grievous crimes. In the latter case, a person has the right to appeal the decision of a superior prosecutor

²⁵ The Criminal Procedure Code, Part 1(j).

²⁶ The Criminal Procedure Code, Article 182(41).

²⁷ Levan Vepkhvadze, GYLA lawyer, guest lecturer at the Georgian-American University.

²⁸ Jemal Chkadua, GYLA lawyer.

²⁹ Jemal Chkadua, GYLA lawyer.

³⁰ The Criminal Procedure Code, Article 95(6).

with the district (city) court according to the place of investigation³¹.

“In the majority of cases, an inferior prosecutor agrees the decision on refusal to recognise a person as a victim with a superior prosecutor, and in the case of appeal, the superior prosecutor leaves this decision unchanged. In addition, the substantiation of a prosecutor to leave the decision unchanged is lower than the minimum requirement. Thus, in practice, we are informed only on the opinion of a superior prosecutor, that he/she agrees with the issued decision and no other substantiation of his decision exists.”³²

It is worth noting that the practice revealed the case when a prosecutor violated a requirement under the Criminal Procedure Code and did not render a decision within 48 hours after a citizen’s application for recognition or refusal to recognise a person as a legal successor³³. Despite this fact, Tbilisi City Court found that “although the procedural document which is required under the Criminal Procedure Code and the issue of lawfulness (annulment or leaving in force) of which should be reviewed by the court is not available at the moment. However, considering the fact that we must not neglect the rights of a victim’s legal successor provided by the procedural legislation, including not to limit the right of a victim’s legal successor to appeal against the decision of a prosecutor on the refusal to recognise him/her as a legal successor, we must review the mentioned complaint.”³⁴

In addition, in accordance with Article 106 of the Criminal Procedure Code of Georgia, a victim may appeal, once only, a decision of a prosecutor terminating an investigation and/or a criminal prosecution to a superior prosecutor. In accordance with Article 168 of the same code, a refusal to initiate criminal prosecution must be appealed to a superior prosecutor. In both cases, the decision of a superior prosecutor is final and is not subject to appeal; however, in accordance with the 2014 legislative changes, a victim was given the opportunity not to be satisfied with appealing to a superior prosecutor only once in the case of an extremely grievous crime. In such case, a victim has the right to appeal against the prosecutor’s decision, with which he/she has not been satisfied to district (city) court according to the place of investigation. However, if a person was recognised as a victim of less grievous or grievous crime, the mechanism for conducting the court control over the lawfulness of a prosecutor’s decision does not exist and a victim has the right to appeal against this decision only to a superior prosecutor. **It is worth noting that according to the established practice the decision is pre-arranged with a superior prosecutor; therefore, an appeal submitted in such a manner, generally, results in nothing and has only pretended character**³⁵. Besides, one of the main tasks of the investigation is classifying the case correctly, therefore **the appealing of the case to the court should not be determined by the severity of a crime** because in the course of the investigation the classification of a crime may change at any given time. It is important not to deprive a victim of the right to seek justice with the judge. It is obvious to us and we certainly agree with the position of a legislator that the court control is an effective mechanism which prevents the misuse of prosecutorial discretion by a prosecutor. Such practice is not uncommon for European countries as well (e.g. France)³⁶; however, the criteria which provide for the possibility of filing appeals in the case of extremely grievous crimes are illegible and obscure. Moreover, in fact, the number of decisions terminating or initiating prosecution within the prosecutorial discretion, relating to the commission of less grievous and grievous crimes may outnumber those relating to extremely grievous crime.³⁷

Discretionary prosecution does not mean that a prosecutor has the right to exercise all three powers of governance. This immense mechanism should be put in a frame. Exercising strong and public court control is the only way to force a prosecutor stay impartial while making a discretionary decision.³⁸ All in all, a victim has the right not only to be notified that justice has been realised, but he/she also has to witness and believe in its realisation.

Case of citizen G.T.

The present case clearly reveals the problems relating to granting a status of a victim of improper treatment, to conducting an investigation in a reasonable period of time and to classification of actions. On 3 August 2015 citizen G.T.

³¹ The Criminal Procedure Code, Article 56(5).

³² Levan Vepkhvadze, GYLA lawyer, guest lecturer at the Georgian-American University.

³³ In accordance with Article 3(16) of the Criminal Procedure Code of Georgia, a prosecutor’s decision on any issue is a decree which may be appealed by any person and which was not made on the mentioned criminal case by a prosecutor.

³⁴ Ruling No 3/8106 of Tbilisi City Court of 22 April 2015.

³⁵ Extraordinary Report of the Public Defender on the Issues of Investigation Efficiency, Tbilisi, 2014, 60.

³⁶ Boulloc B., Stefani G., Levasseur G., Procédure pénale, 23e édition, Paris, 2012, 589-590. French legislation on criminal procedure provides for the right of a victim to appeal the decision of a prosecutor on refusal to initiate or terminate criminal prosecution to the court (the investigation chamber).

³⁷ B. Meurmishvili Initiation and Conduct of Criminal Prosecution in Georgian Criminal Proceedings (at the Stage of Investigation), Tbilisi, 2014, 191.

³⁸ G. Meparishvili Legal Journalism in relation with the Discretion Principles, Tbilisi, 2014, 24

was detained according to the administrative procedure for committing an offence under Articles 166³⁹ and 173⁴⁰ of the Administrative Offences Code of Georgia. According to the documents provided by an applicant, the order of administrative detention, which was drawn up at 00:05, 3 August 2015, indicated that the person under administrative custody had red spots under his right and left eye and wounds on both limbs. G.T. was placed in the temporary detention facility at 01:09. The report on the external examination of the detainee states that G.T. had scratches on the back, a bruise and a red spot under the right eye and abrasion of the lip. In addition, a medical notice attached to the case indicates that at 14:20, 4 August 2015, G.T. approached the ambulatory centre of a referral hospital and was diagnosed with clavicle fracture, swelling, limited range of motion of left shoulder joint. The medical notice also indicates that the damages were in active phase and according to the explanation of the patient the damages were inflicted by a third person. According to G.T., he received injuries in the process of administrative detention and the police officers exceeded their official powers. Due to this fact, an investigation was initiated under Article 333(3)(b) of the Criminal Code of Georgia, which is classified as a grievous crime⁴¹ and means exceeding official powers by using violence or a weapon. Despite many applications, G.T. was not granted the status of a victim⁴². 42 The Prosecutor's Office has explained: "We have no grounds under the obtained evidence of the case to assume that G.T. was inflicted damage, which would become the basis for granting him the status of a victim." The lawyer representing the interests of G.T. repeatedly appealed to the Prosecutor's Office and requested granting the procedural status of a witness to his client, however his application was not satisfied by the Prosecutor's Office on the ground that the application was filed by an incompetent person, despite the fact that the defence protocol had been attached to the case of G.T.

It is worth noting that, when a detainee is under the control of state bodies, the presumption of firm fact emerges towards the damages incurred during such detention. Thus, the proof of burden lies with the state bodies, which means that they have the obligation to present satisfactory and convincing explanation. **In addition, legitimate questions exist about the commission of an alleged crime by law enforcement officers in relation with the present case. Consequently, a prosecutor is obliged to conduct an investigation with special care and efficiency in this case to fully establish circumstances of the case and, if the commission of a crime is determined, impose liability on relevant person/persons.**

Case of citizen M.M.⁴³

The given case vividly reveals the problems of granting the procedural status of a victim and determining the right classification of the case. Citizen M.M. explains that on 11 May 2015 she was physically abused and subject to an attempt to rape. According to her statement, she met D.L. through a social networking site. Several days earlier, he phoned her and asked for permission to visit her at her place. Since the man came in her flat drunk, M.M. asked him to leave her place and went to open the entrance door. She explained that while she was opening the door, the man approached her from the back and hit her with a wooden candle stick. M.M. fell and lost consciousness. When she regained consciousness she found herself lying on the floor and D.L. was sitting on her and forcing her into perverted sex. The man tried to strangle her after she refused. A neighbour called for police because she heard noise. According to M.M., the culprit was still at her place when police arrived, but nobody arrested him, and she was transported to hospital. The citizen explains that during the act of violence the man declared that he was a security officer and nobody would punish him. M.M. underwent medical-forensic examination. Levan Samkharauli National Forensics Bureau classified her damages as "light injury". As M.M. disagreed with their opinion, she underwent independent medical-forensic examination, which provided different results. According to the latter examination report, the damages were classified as "less severe injury". She had traumatic brain injury. In addition, the examination report stated that citizen M.M. suffered from post-traumatic epilepsy as a result of violence and despite being treated she frequently has epileptic seizures. Having taken the mentioned facts into consideration, Levan Samkharauli National Forensics Bureau re-examined her. However, the result are not still provided even though the examination took place 8 months ago. Meanwhile, the applicant has been granted a disability status of the second category. According to the citizen, the investigation is conducted under Article 125(1) of the Criminal Code of Georgia, which refers to battery or other violence that has caused physical pain to the victim. The victim disagrees with the given classification of the crime and believes that this was an attempt to murder and rape her. It is worth noting that M.M. has not been recognised as a victim. Accordingly, she has no information on ongoing investigation and conducted investigative actions⁴⁴.

³⁹ Disorderly conduct.

⁴⁰ Non-compliance with a lawful order or demand of a law-enforcement officer, military service person, officer of the Special State Protection Service or enforcement police officer or commission of any other illegal act against such person.

⁴¹ Exceeding official powers by using violence or a weapon is punishable by deprivation of liberty for a term of 5 to 8 years and by deprivation of the right to occupy an official position or to carry out a particular activity for a term of 3 years.

⁴² As in force by May 2016.

⁴³ See a television footage relating to the case of M.M.: <http://rustavi2.com/ka/video/15358?v=2>

⁴⁴ It is true that the cases discussed in this research include the data up to May 2016, however since the engagement of GYLA lawyer in the process in June 2016, citizen M.M. was recognised as a victim and the criminal action was reclassified as an intentional less grave bodily injury and an expert examination was scheduled.

4.1.1. Right of being recognised as a victim and the right to appeal in relation to crimes under Article 115 of the Criminal Code of Georgia

The problem relating to the mechanism for filing an appeal in the case of less grievous or grievous crimes is more acute with respect to crimes under Article 115 of the Criminal Code of Georgia, according to which the incitement to suicide or attempted suicide shall be punished.

It is worth noting that the Prosecutor's Office has different approach towards the recognition of a person as a victim. There are cases when the Prosecutor's Office does not recognise a person as a victim or his/her legal successor in the case of crimes under Article 115 of the Criminal Code of Georgia, and in a number of cases the Prosecutor's Offices refuses to grant the respective procedural status to such persons. Accordingly, various and differentiated approaches exist to people who are in the same situation and subject to the cases initiated under the same articles. Prosecutors frequently explain that the reason behind the recognition of a person as a victim lies in the high public interest in the case⁴⁵, which raises suspicion of arbitrariness and misuse of powers.

Under common practice, in some cases, including the cases occurred in penitentiary establishments, which resulted in the death of a person, the investigation is initiated under Article 115 of the Criminal Code of Georgia. However, in consideration of the severity of punishment for such a crime⁴⁶, close relatives of the deceased person have no right to appeal to the court against the final decision of a superior prosecutor. Thus, according to past experience, the level of trust of the population in the decisions of a superior prosecutor is low⁴⁷, as the legislation does not provide for the review of a prosecutor's final decision by the independent body, or the court, in this case.

According to official statistics provided by the Ministry of Internal Affairs of Georgia⁴⁸, an investigation was initiated on 1952 criminal cases under Article 115 of the Criminal Code of Georgia between January 2015 and December 2015. However, the information relating to the number of persons who were granted the status of a victim or a victim's legal successor is not available, which implies that no statistics is kept with respect to such data in the mentioned entities. Nobody gathered the mentioned information even when we applied in writing requesting the public information.⁴⁹

Case of citizen L.A.

The case below reveals the causal connection between unlawful actions of police officers and fatal consequences, which are not properly investigated. In addition, legal successors of a victim are not provided with a clearly substantiated refusal to grant them a relevant status. Moreover, this case demonstrates the absence of legislative guarantees relating to grievous or less grievous crimes. The applicant states that on 17 July 2015 her spouse was taken to undergo a drug test. He was not able to urinate, and as a result he was given three pills of diuretic medicine by the officers of the law enforcement body. The results of the drug test were negative. According to the applicant, his spouse felt sick after leaving the drug testing facility and died in several hours. The family members of the deceased person state that the reason for his death was the overdose of diuretic medicine, which he had been given during the test. An investigation was initiated in connection with this case in accordance with Article 115 of the Criminal Code of Georgia. Neither M.G., a spouse of L.A., nor any other next of kin has been recognised as a legal successor of a victim. In this case, they have no legislative leverage to participate in court disputes on granting a respective procedural status. In addition, despite several attempts, the Prosecutor's Office refused to provide the case materials to the relatives of the deceased and the lawyer representing their interests. It is worth noting that a forensic examination has been scheduled to determine the reasons of death, but the results are not available yet.

4.1.2. Analysis of common practice and statistics with respect to the right to appeal in Georgia

For the purposes of conducting the analysis of practical use of the right to appeal a prosecutor's individual decision, GYLA has applied in writing to the Chief Prosecutor's Office of Georgia. GYLA has also sent written requests to the city courts of Tbilisi, Kutaisi, Batumi, Rustavi and district courts of Gori, Zugdidi, Mtskheta and Telavi.

⁴⁵ Levan Vepkhvadze, GYLA lawyer, guest lecturer at the Georgian-American University.

⁴⁶ The crime committed under Article 115 of the Criminal Code of Georgia shall be punished by restriction of liberty for up to 5 years or by deprivation of liberty for a term of 2 to 4 years.

⁴⁷ Report of the Public Defender of Georgia on Situation of Human Rights and Freedoms Protection in Georgia, Tbilisi, 2014, 347.

⁴⁸ Letter of 18 May 2016 of the Ministry of Internal Affairs of Georgia, No 1211242.

⁴⁹ Application No 3-04/235-16 of GYLA on Requesting Public Information, 26 April 2016.

4.1.2.1. Filing an appeal with a superior prosecutor

According to the letter sent by the Chief Prosecutor's Office of Georgia⁵⁰, a prosecutor does not have/does not maintain public records and statistical data on filing appeals against the prosecutor's decision on the refusal to grant the status of a victim(a victim's legal successor), on the refusal to terminate an investigation and/or criminal prosecution or to initiate criminal prosecution. In addition, the cases of cancellation of decisions on recognising a person as a victim/a legal successor of a victim in accordance with the procedure under Article 26(6) of the Criminal Procedure Code of Georgia.⁵¹

Thus, we are deprived of the opportunity to analyse the frequency of appeals filed with a superior prosecutor by a victim and the statistics of satisfying or refusing to satisfy such applications.

Case of citizen D.G.

The case below depicts the inefficiency of filing an appeal against the refusal to grant the status of a victim with a superior prosecutor in a number of cases. On 16 October 2015, L.G., a brother of citizen D.G. applied to the Investigation Unit of the Tbilisi Prosecutor's Office and asked to recognise him as a legal successor of a victim on the following basis: At night, on 13-14 June 2015, in Tbilisi, due to the flooding caused by the overflow of the river Vere a brother of the applicant D.G. died. According to L.G., the death of his brother was conditioned by the inactivity of the relevant services of the Ministry of the Internal Affairs of Georgia, which did not close the road between the Hero Square and the Tamarashvili Street. According to the information provided by the applicant, the investigation was launched on the given case under Article 116 of Criminal Code of Georgia⁵² in June 2015. In October 2015, citizen L.G. applied to the Tbilisi Prosecutor's Office for recognising him as a legal successor of a victim. However, the Prosecutor's Office refused to grant him the relevant procedural status due to the absence of grounds for recognition as a victim.⁵³ The applicant appealed against this decision to a superior prosecutor, but the latter left in force the initial decision and refused to grant the applicant the status of a legal successor on the grounds that the opinion of a person cannot create the basis for establishing the presence or absence of the fact. In addition "the preconditions justifying the supposition that the crime was committed do not present."⁵⁴

Thus, in the given case, the Prosecutor's Office emphasized not the fact that the damage was inflicted on a brother of a victim due to victim's death, but on the commission of a crime, which has to be supported by concrete evidence. **It must be admitted that the presence of established crime is not necessary for granting the status of a victim.**⁵⁵ Such interpretation of the norm interferes with the realisation of the rights of a victim of a crime. Only the court is authorised to determine whether the crime was committed.⁵⁶In addition, it is important that an investigation has been launched in connection with this criminal case and is conducted under Article 116 of the Criminal Code of Georgia. The mentioned indicates that up to the present stage an investigation presumes that the death of a person was due to the crime.

4.1.2.2. Filing appeals with the court in the case of extremely grievous crimes

GYLA requested from the courts the statistical data⁵⁷ for the period between January 2015 and December 2015, relating to appeals against decisions on refusals to recognise a person as a victim or a legal successor of a victim and on refusals to terminate criminal prosecution or investigation or to initiate criminal prosecution.

The chart below reflects the situation in the mentioned courts between January 2015 and December 2015.⁵⁸

⁵⁰ Letter No 13/32693 of 24 May 2016 of the Chief Prosecutor's Office of Georgia.

⁵¹ GYLA letter No 3-04/226-16 of 20 April 2016.

⁵² Negligent homicide.

⁵³ Written reply No 13/01-65103 of 17 October 2016 of a prosecutor of the Investigation Unit of the Tbilisi Prosecutor's Office.

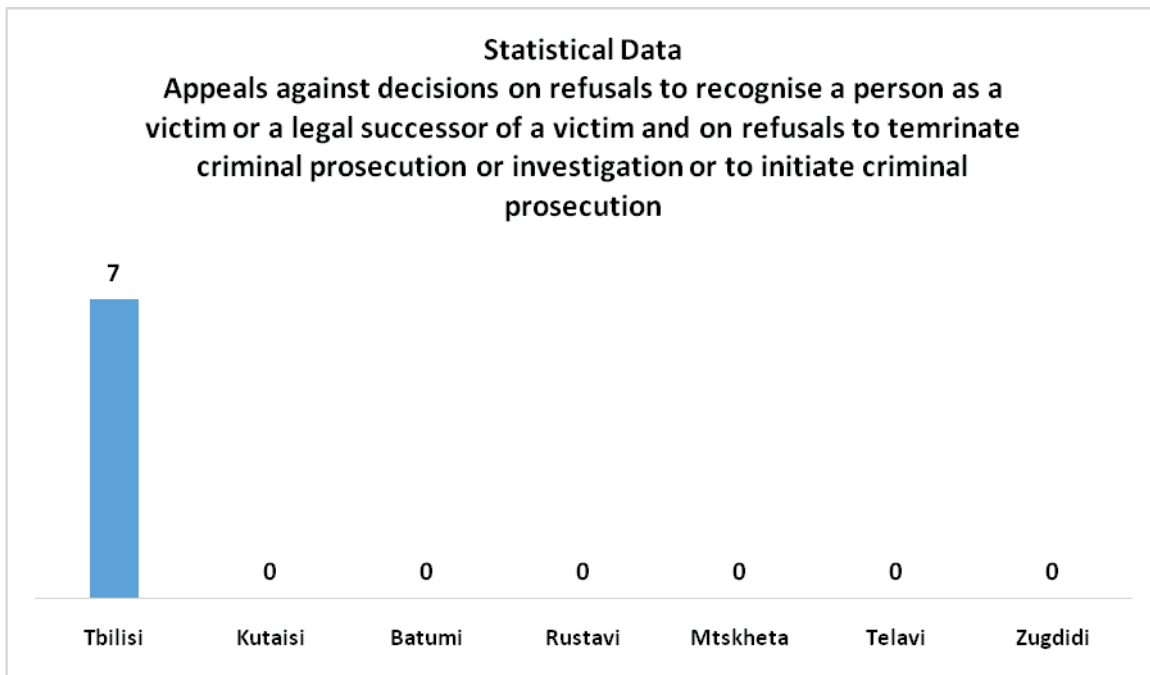
⁵⁴ Decision on refusal to satisfy the complaint No 3/01-67845.55 of citizen L.G. of 30 October 2015.

⁵⁵ **A victim is a person, who was inflicted or may have inflicted a damage due to commission of a crime. However, the mentioned does not mean that the fact of commission of a crime must be established or proved for the moment of granting a procedural status.**

⁵⁶ Report of the Public Defender of Georgia on Situation of Human Rights and Freedoms Protection in Georgia, Tbilisi, 2014, 348.

⁵⁷ **Letters sent by GYLA requesting public information:** Tbilisi City Court - letter No 04/199-16 of 25 March 2016, Kutaisi City Court - letter No 3-04/196-16 of 25 March, Rustavi City Court - letter No 04/192-16 of 28 March 2016, Batumi City Court - letter No 04/198-16 of 28 March of 2016, Gori City Court - letter No 3-04/194-16 of 22 March 2016, Telavi District Court - letter No 3-04/197-16 of 25 March of 2016, Zugdidi District Court - letter No 3-04/193-16 of 28 March 2016, Mtskheta District Court - letter No 3-04/195-16 of 22 March 2016.

⁵⁸ **Information provided by the courts:** letter No 1-0494/6523 of 28 March 2016 sent by Tbilisi City Court, letter No 7610 of 7 April 2016 sent by Kutaisi City Court, letter No 143/3 of 29 March 2016 sent by Rustavi City Court, letter No 10482/16-212 3/3 of 29 March 2016 sent by Batumi City Court, letter No 3/3-4093 of 30 March 2016 sent by Gori District Court, letter No 206 of 28 March 2016 sent by Telavi District Court, letter No 267 of 29 March 2016 sent by Zugdidi District Court, letter No 70 of 1 April 2016 sent by Mtskheta District Court.



7 cases were revealed in Tbilisi City Court; however in 4 cases the appeals referred to the complaints relating to the recognition of a person as a victim/a legal successor of a victim, 3 out of which were not reviewed, and 1 was satisfied. The rest 3 cases referred to the appeal which was submitted by a victim/a legal successor of a victim for the cancellation of a decision terminating criminal prosecution. Out of the mentioned 3 cases, 2 appeals were not reviewed and 1 was not satisfied. It is worth noting that in the cases when the appeal was not reviewed the courts did not render a ruling and the authors of the applications were notified in writing.⁵⁹

It must be admitted that GYLA also requested public information from Gori District Court; however, they explained that no statistical data was recorded and processed.⁶⁰

Thus, the data provided by the courts reveal that the practical use of the right to appeal almost does not take place and a person enjoys the opportunity to appeal against the individual decisions of a prosecutor only in rare cases.

4.2. Right to get acquainted with case materials and obtain information on criminal proceedings

According to the 2014 legislative changes, a victim has the right to get acquainted with criminal case materials unless this contradicts the interests of an investigation.⁶¹

If familiarising a victim with case materials contradicts the interests of an investigation, a prosecutor issues a substantiated decision on refusal to familiarise a victim with case materials. However, a prosecutor/an investigator is obliged to notify a victim immediately after the grounds for refusal are eliminated and transfer the information on the ongoing investigation and familiarise him/her with case materials.⁶² Thus, in this case, a victim does not need to apply for the second time and a prosecutor or an investigator has to make sure that the above-mentioned request of the victim is satisfied.

The fact that the concept of refusal to familiarise a victim with case materials on the grounds of investigation interests leaves room for a wide range of interpretations. The present regulation facilitates the development of malpractice. With this background, **it is essential to support the reasons for the refusal to familiarise a victim with case materials in order to exclude unsubstantiated decisions of a prosecutor.** To prevent the threat of deliberate and subjective attitude, the position/decision of a prosecutor and the reasons for the refusal to familiarise a victim with case materials must be transparent for the victim.⁶³

It is worth considering that despite being familiarised with case materials, a victim must be granted the op-

⁵⁹ Letter No 2-0167/1310757 of 4 April 2016 of Tbilisi City Court.

⁶⁰ Letter No 3/3-40 93 of 30 March 2016 of Gori District Court.

⁶¹ The Criminal Procedure Code, Article 57(h).

⁶² The Criminal Procedure Code, Article 57(2).

⁶³ Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms Protection in Georgia, Tbilisi, 2014, 351-352.

portunity to make photocopies of such materials in certain cases. However, a victim is deprived of such right under the current legislation and practice. If a prosecutor decides that transferring information on the case materials does not contradict the interests of an investigation, the reasons for not giving him the opportunity to make photocopies of such materials seem unconvincing.

Due to this fact, we believe that the law must provide for the opportunity to grant the right to make photocopies of case materials to a victim in certain cases. However, simultaneously, the Prosecutor's Office must have a legislative leverage, considering circumstances surrounding each specific case, to give substantiated refusal for making photocopies of materials if this contradicts the interests of an investigation.

Certainly, there is a possibility of violating the right to personal data of third persons by transferring the case materials to a victim; however, the mentioned threat may be diminished or neutralised by classifying case materials. The given action will ensure the protection of personal data of third persons on the one hand and the realisation of victim's rights on the other. A victim may wish to submit a civil complaint requesting the compensation of damages, but sometimes he/she is deprived of such possibility without the submission of case materials. Although a victim may file with a judge a motion requesting the case materials from the Prosecutor's Office through the procedure of civil proceedings, he/she must predetermine and pre-plan his/her strategy in order to achieve effective and fruitful discussion of the dispute. Therefore, obtaining the criminal case materials before filing a complaint with court is of great importance to him/her. In addition, a victim may wish to disclose the information on the occurred crime through media and try to influence the effectiveness and objectivity of an investigation by doing so. However, he/she would have no legal leverage to present the relevant information in a right and clear manner without having obtained the case materials in advance. In addition, a victim is unable to apply to the European Court of Human Rights and initiate a dispute on the delay and inefficiency of an investigation if he/she is limited to obtain case materials.

It must be admitted that such limitations of victim's human rights create problems to right defenders and experts to effectively defend the victim's interests.

"The Prosecutor's Office has all mechanisms for blockading a victim. Let's say, a victim believes that he/she has been inflicted more severe damage than it is stated in the report. He/she has no legal leverage to defend his/her interests, unlike a defendant, who can hire a lawyer, request a forensic examination, etc. A victim fully depends on the Prosecutor's Office. Samkharauli National Forensics Bureau often procrastinates the issuance of reports for a year, and in the meantime a patient's condition changes. Mothers of deceased persons approached me, but I was unable to provide any assistance due to the fact that they did not manage to submit proper documents, reports and interrogation protocols, because they did not have the right to obtain them."⁶⁴

Thus, it is important that during the investigation a victim/a legal successor of a victim is given the opportunity to have access to the ongoing investigation and to get involved in it. One of the principles of Article 2 of the European Convention on Human Rights (the right to life) provides for unconditioned and mandatory involvement of a victim or his/her legal successor in the ongoing investigation. Certainly, his/her participation does not mean transferring the right of criminal prosecution to a private person. **The main purpose of the participation of a victim or his/her legal successor in the ongoing investigation is the protection of their rights and legitimate interests under the adversary principle and other principles established by the Criminal Procedure Code of Georgia.**

Case of victims Sh.I., M.T. and A.R.

The case below clearly illustrates the problems relating to unsubstantiated refusal to familiarise victims with the criminal case materials. The Investigation Unit of the Tbilisi Prosecutor's Office has launched an investigation on the crimes provided for by Articles 151,⁶⁵333(3) (b) and (c),⁶⁶147,⁶⁷ and 341⁶⁸. A victim's lawyer requested case materials from the Prosecutor's Office.⁶⁹ However, the Tbilisi Prosecutor's Office, without providing any substantiation⁷⁰, refused to grant the victim the right to familiarise with case materials.⁷¹ The present decision was appealed to a superior prosecutor⁷² by the lawyer, who requested to terminate the refusal decision and grant the victim the right to familiarise

⁶⁴ See the interview with forensic expert Maia Nikoleishvili: http://www.sazogadoeba.ge/index.php?post_id=2293.

⁶⁵ Threat.

⁶⁶ Exceeding official powers by using violence or a weapon and by offending personal dignity of a victim.

⁶⁷ Intentional illegal detention or arrest.

⁶⁸ Official fraud.

⁶⁹ Statement No 33263 of 6 April ...

⁷⁰ The Prosecutor's Office did not mention any specific reasons behind refusing to grant to victims the right to familiarise with case materials. In addition, the response sent by the Prosecutor's Office did not indicate the fact that familiarising with the case materials may contradict with the interests of an investigation.

⁷¹ Decision No 13/01-23543 of 17 April 2015 of the Tbilisi Prosecutor's Office.

⁷² Complaint No 40407 of 27 April 2015.

with case materials. However, the superior prosecutor responded that “the decision is substantiated and legitimate, accordingly, no grounds exist for its termination.”⁷³ Thus, the superior prosecutor, without giving any substantiation, refused to satisfy the lawyer’s complaint and did not give the victim the right to familiarise with case materials.

The fact that a victim has no access to investigation materials may not be qualified as an effective involvement and engagement in the process of an investigation.

It is worth noting that a victim is notified on the first appearance of a defendant before a court, pre-trial and main court sessions, and on the imposition of measures of restraint and the release of a defendant/convict from the penitentiary facility only upon his/her request and this does not represent the obligation of the Prosecutor’s Office.⁷⁴ The present regulation is not effective and does not ensure the possibility to get information on holding the sessions in a timely and reasonable manner. Frequently, a victim has no opportunity to keep track of criminal proceedings due to the fact that in the majority of cases he/she does not have any knowledge of criminal procedure law. Sometimes prosecutors do not inform victims for the reason that the victims have not requested the information. It is worth noting that the purpose of any norm should be not worsening the condition of a person, but improving it.

The changes made to the legislation in 2014 worsened the right of victims to be informed and this right has become conditioned by his/her activity. In addition, due to the mentioned norms, the manner for requesting by victims of this information is incomprehensible and obscure: should they apply in writing to or phone a prosecutor. Frequently, a victim or his/her legal successor is unfamiliar with the procedural issues, such as: first appearance sessions, pre-trial and main sessions and their dates, therefore the probability that a victim (his/her legal successor) cannot obtain information on the different stages of criminal proceedings is high. Consequently, we face the reality that the Criminal Procedure Code practically excludes the participation of a victim in the investigation process and keeping a victim informed on criminal proceedings.

4.3. Prevention of secondary victimisation

One of the major issues in terms of prevention of a victim’s secondary victimisation is to interrogate him/her without facing or seeing a defendant.

It is worth noting that sometimes recalling the separate details of violence may cause intense emotional pain in a victim. Due to this fact, it is advisable to have a regulation in the form of a legislative norm which will enable a victim to give a testimony without facing a defendant. Although the criminal procedure law provides for the interrogation of a victim before magistrate judge at the investigation stage, to which a special protection measure applies,⁷⁵ this regulation does not ensure adequate guarantees to prevent secondary victimisation. There is a possibility that no special protection measure has to be applied to a victim, but the victim may wish to give a testimony in the absence of an alleged culprit. It is also worth considering that an opposing party may present at the interrogation conducted in the mentioned manner⁷⁶ except for special cases.⁷⁷ Therefore, there is a possibility that we cannot prevent the meeting of a victim and a defendant even within this regulation. **For the purpose of preventing the secondary victimisation, a distant interrogation of a victim and a defendant by means of technical equipment may be used.** Although the criminal procedure legislation provides for such norms,⁷⁸ instead of relying on the general norm, it will be appropriate to make a note on the given to the section relating to victim’s rights, based on the interests of a victim and to provide guarantees for his/her better protection. It is worth noting that a victim often experiences the feeling of fear, which may cause serious damage to his mental health, even though real physical oppression is not used against him/her and there is no objective threat to his/her life.⁷⁹ Accordingly, the creation of a favourable environment while testimony is given is essential, especially to sensitive victims.

4.4. Rights of a victim when concluding a plea bargain

It is worth noting that the rights of a victim are not considered in the process of concluding a plea bargain. In accordance with Article 217 of the Criminal Procedure Code, a prosecutor is obliged to provide consultations with a victim when concluding a plea bargain and notify him/her on the topic of a plea bargain. The above article provides

⁷³ Notice No 13/01-27946 of 1 May 2015 of the Tbilisi Prosecutor’s Office.

⁷⁴ Article 57(1)(i) of the Criminal Procedure Code of Georgia, and Article 58 of the same code.

⁷⁵ The Criminal Procedure Code, Article 114(d).

⁷⁶ “The interrogation shall be conducted with the participation of the parties”. The Criminal Procedure Code of Georgia, Article 114(1) and (9).

⁷⁷ A person may be interrogated as a witness before a magistrate judge if the fact and/or information, which would satisfy an objective person to conclude that a person has allegedly committed an offence, presents and this person refuses to participate in the interrogation. In such case, the defence does not attend the interrogation of a witness, Article 114(2) and (10) of the Criminal Procedure Code.

⁷⁸ The Criminal Procedure Code, Article 243(3).

⁷⁹ G. Tumanishvili, “A Victim in Contemporary Criminal Procedure Law”, Journal of Law, No 2, 2009, Tbilisi, 69.

for only the obligation to provide consultations and information, but does not include the consideration of a victim's viewpoints. It is obscure to understand the purpose of consultations with a victim if this does not yields any specific results for a victim. Although the refusal of a victim is not considered as an impeding circumstance for concluding a plea bargain, a prosecutor must actively cooperate with a victim during the decision-making process and consider his/her position.

According to the 2014 legislative changes, upon court's approval of a plea bargain, a victim was granted the right to provide written explanation or oral explanation at the court session on the damage inflicted to him/her as a result of a crime. It is worth noting that the given note does not fully regulate the material basis for recognising a person as a victim and focuses only on the fact of inflicting factual damage. **Although damage represents an important element in recognising a person as a victim, in the case of planning a crime or an attempt of a crime, a victim may be presented by the state or a natural or legal person who may have been inflicted damage.**⁸⁰ The legal meaning of the fact that a victim should report on the inflicted damage to the court seems obscure if this mechanism cannot bring favourable results to a victim. A victim has no right to request the compensation for damages from the judge of criminal proceedings and he/she has to file a civil complaint with such request through the independent claim procedure. Accordingly, without serving a specific purpose, the enjoyment of this right by a victim has only pretended character. Certainly, in accordance with the Criminal Procedure law, a victim has no right to appeal against a plea bargain and this regulation corresponds to the adversarial criminal proceedings; however, it is recommended to establish as a legislative norm the obligation of a judge to pay attention to a victim's position in terms of compensation for damages and to take this fact into consideration while approving a plea bargain. Especially under the conditions when the possibility to conclude a plea bargain exists with respect to any type of crime.

According to the official statistics of Tbilisi City Court, 3134 decisions were issued without main court sessions in the period between January 2015 and December 2015.⁸¹ Upon our request, we have obtained only 50 rulings from the court.⁸² 2 out of these rulings were similar and identical. 21 verdicts out of remaining 48 decisions, which referred to crimes, where a potential victim could only be the state, were issued at main sessions or were issued in 2014. Thus we have not studied such cases and decisions issued regarding those case, based on the purposes of our research.⁸³

A judge mentioned that a prosecutor conducted consultations with a victim and drew up a relevant report only in 6 out of 27 verdicts delivered without main court sessions. In the remaining 21 cases, including the cases of battery⁸⁴ and infliction of less severe damage on a person,⁸⁵ a judge did not take a victim's interests into consideration and did not emphasise (or did not indicate at all) the obligation of a prosecutor to provide consultations to a victim. **In addition, it is worth noting that none of the verdicts mentions the provisions under Article 217¹ of the Criminal Code of Georgia and, accordingly, it can be assumed that a victim did not exercise the right to apply to the court during the approval of a plea bargain or give oral explanation on the damage inflicted on him/her as a result of a crime.**

Accordingly, the existing practice with respect to the enjoyment of the mentioned right reveals that the adopted legislative change is rarely applied in practice and has only pretended character.

In addition, one of the verdicts of Tbilisi City Court must be assessed positively, where the court emphasises the necessity of giving the correct qualification to the fairness of punishment and underlines that the punishment must be mandatory and proportionate to achieve the enlightenment purposes of the law to make a culprit realise the threat in the case of the commission of a crime.⁸⁶ The verdict states that in the period of serving a sentence the term of punishment and the period spent in the prison are the remedies for the prevention of a crime. **"This gives an opportunity to a culprit to think about the impact his actions made on a victim, analyse past mistakes and change his/her lifestyle."**

⁸⁰ The Criminal Procedure Code, Article 56(4).

⁸¹ Letter No 1-0148/3782 of 1 March 2016 of Tbilisi City Court.

⁸² GYLA Statement No 8-04/57 of 18 February 2016.16.

⁸³ 21 verdicts referred to the following crimes: illegal manufacturing, production, purchase, storage, transportation, transfer or sale of drugs, their analogues, precursors or new psychoactive substances (Article 260 of the Criminal Code of Georgia); illegal manufacturing, production, purchase, storage, transportation, transfer or sale of psychotropic substances, their analogues or potent substances (Article 261 of the Criminal Code of Georgia); illegal manufacturing, purchase, storage or illegal consumption without medical prescription of drugs, their analogues or precursors in small quantity for personal consumption (Article 273 of the Criminal Code of Georgia); storage of prohibited items by a person placed in a liberty restriction facility (Article 3782 of the Criminal Code of Georgia); illegal making or sale of a pornographic work or other items (Article 255 of the Criminal Code of Georgia). 1 out of 21 verdicts was delivered in 2014, 2 verdicts were delivered on the basis of main court sessions, which has not been the subject of our request and examination.

⁸⁴ The crime provided for by Article 125(1) of the Criminal Code of Georgia.

⁸⁵ The crime provided for by Article 118 of the Criminal Code of Georgia.

⁸⁶ The verdict has been delivered without the main court session. This verdict is included in the number of 6 verdicts, where the judge underlines the importance of victim's interests.

This is the only verdict out of 27 examined decisions, where a judge underlined the victim's interests, admitted the harmful/negative impact of a crime on the state of a victim and considered the inflicted damage as one of the determinants for imposing charges and serving a sentence.

5. Victims of murder and improper treatment cases

In accordance with Article 56(3) of the Criminal Procedure Code of Georgia, in the case of an offence that caused the death of a victim, the rights and obligations of the victim shall be assigned to any of the close relatives of the victim (a legal successor of the victim). An investigator, prosecutor and judge may not deny a legal successor of the victim to exercise any of the rights granted to the victim.

In the cases of offences that resulted in the murder of a victim, the status of a legal successor of the victim must be granted to the family members of the victim in order to observe the principle of conducting a fair, efficient and transparent investigation.

Case of citizen Z.G.

The case below illustrates the procrastination and inefficiency relating to the investigation of a murder; also, the problem of granting a relevant procedural status to a legal successor of the victim.

On 6 February 2008, two corpses were found in the Ophthalmology Clinic "Naso" in Tbilisi. The criminal case was initiated under Article 109(3)(a) of the Criminal Code of Georgia, which refers to a murder in a manner that intentionally endangers the life of one or more persons. It is worth noting that a spouse of one of the deceased was recognised as a legal successor of a victim in this case within several months, while a mother of the other deceased has not been recognised as a legal successor of a victim up to the present time. Simultaneously, the citizen was not explained the reasons for the refusal to grant her a status of a legal successor of a victim. The mother of the deceased claims that the investigation has been pending for 8 years, however the investigation has not resulted in any specific consequences up to present and the final decision on this case has not been rendered. The mother of the deceased submitted an application to the Chief Prosecutor's Office requesting the examination of the pending criminal case in 2015. On 12 April 2016, the applicant was notified that the investigation was initiated under Article 109(3)(a) of the Criminal Code of Georgia and at the present stage there were no legal grounds for initiating criminal prosecution against the concrete person(s).⁸⁷

Despite the fact that nobody has been charged with the murder in a manner that intentionally endangers the life of other persons up to present, the mentioned fact does not represent a circumstance impeding the recognition of a victim's family member as his/her legal successor. In addition, a prosecutor has the opportunity to cancel the decision recognising a person as a victim or a legal successor of a victim if the grounds for this do not exist in the future.⁸⁸ Even in the cases when at a certain stage of an investigation the classification of a criminal case is changed, the given does not provide for the deprivation of the right of a victim/a legal successor of a victim to enjoy the right granted under the criminal law.⁸⁹ The family members of the deceased are not able to enjoy even the minor right granted under the criminal procedure legislation under the circumstances of absence of a victim's status.

Case of citizen B.M.

The mentioned case points out the inefficiency and incompleteness of the conducted investigation as well as the denial of the interests of a legal successor of a victim. On 25 May 2015, citizen B.M. was stabbed in the chest to death. The investigation brought charges against citizen R.K., who was found guilty and sentenced to imprisonment for a term of 13 years and 9 months. According to the explanation of the legal successor of the victim, the investigation and later the court hearing was conducted inefficiently and incompletely, hence the forensic examination revealed that the trace of blood presented in the nail sample of the corpse. The genetic test of blood revealed that one of the blood samples belonged to the convicted person and the other belong to a male stranger. The investigation compared the blood sample with the genetic sample of the witness K.Kh., who transported wounded B.M. to hospital, but the samples did not match. Despite the repeated attempts of the legal successor of the victim, who demanded that citizen L.T., who was present in the scene of crime and who was interrogated as a witness later, would undergo the relevant forensic examination, the investigation refused to satisfy his/her demand. The investigation refused to raise the issue of comparing the blood sample of the only eyewitness of the case L.Sh. with the blood sample taken from the nail of the deceased.

⁸⁷ According to the letter No 13/01-38569 of 21 2016 received from the Tbilisi Prosecutor's Office, an investigation is conducted under Article 109(3) (a) of the Criminal Code of Georgia, however the criminal prosecution against the specific person has not been initiated yet.

⁸⁸ The Criminal Procedure Code, Article 56(6).

⁸⁹ Ruling No 3/8106 of Tbilisi City Court of 22 April 2015.

According to the provided materials, the mentioned blood sample was not identified. According to the reply of the Prosecutor's Office, the case material do not confirm the guilt of citizen L.T.

If a victim applies to a prosecutor with a substantiated request for additional investigative actions, and/or investigative circumstances which he/she believes have not been conducted at the present stage after being acquainted with the case materials, the prosecution has to react accordingly and give substantiated answer to the mentioned request of a victim. Otherwise, the changes made to the procedure legislation with respect to familiarising with the case materials will have only pretended character and will not change the level of participation of a victim in the criminal proceedings. The mentioned example has revealed that sometimes the familiarisation with criminal case materials and involvement of a victim in the investigation process bears pretended character.

Within the framework of the current legislation and practice, the level of participation of family members of deceased persons in the investigation process depends fully on the opinion of investigation bodies. Accordingly, the mentioned regulation and current practice does not create the relevant guarantees which would build up trust among the public and family members of deceased persons towards the investigation of cases of murder.

In addition to the cases of murder, insufficient and scarce defence guarantees apply to victims in the cases of improper treatment.

Case of citizen A.O.

The example below illustrates the inefficiency of the conducted investigation relating to the case of improper treatment and reveals the problems of granting the procedural status of a victim. Citizen A.O. has been serving a sentence in the penitentiary facility No 8 since 2011. According to the applicant, in the period of serving his/her sentence (June 2011-August 2012) he underwent improper treatment from the officers of the penitentiary facility. It is worth noting that according to medical reports of A.O., at the moment of his placement in the penitentiary facility on 2 June 2011 he had no injuries. The applicant states that his fingers were broken as a result of battery and he has difficulties using them up to present. Upper teeth are broken as a result of battery. In addition, cigarettes were put out on his hands while he was beaten. According to the statement of A.O., in November 2011 he was beaten again and, as a result, his vertebrae became injured and he was unable to move and had to use a wheelchair. According to medical examination conducted on 9 November 2012, A.O. was diagnosed with lumbar spondylosis, right paracentral prolapse of L4 disc, and right mediolateral protrusion of L5 disc. The applicant also names the persons demonstrating improper treatment towards him. In addition, the facts of improper treatment towards A.O. by the officers of No 8 penitentiary facility are confirmed by his/her former cell mates. The respective materials reveal that with respect to the mentioned issue an investigation has been launched relating to the crime facts under Articles 144³(1)⁹⁰ and 333(1)⁹¹ in Tbilisi Gldani-Nadzaladevi District Prosecutor's Office. Presumably, the investigation was initiated in November 2012; however, no person has been imposed criminal liability up to present. Despite many attempts, A.O. has not been recognised as a victim and has no right to obtain information on the ongoing investigation and nobody familiarises him with criminal case materials. It is worth noting that with respect to the injuries inflicted on A.O. the investigation did not conduct appropriate medical examination, which would result in more effective investigation. Forensic medical evidence mainly have great importance for conducting an efficient investigation of improper treatment. The European Court of Human Rights believes that obtaining forensic medical evidence in a timely manner represents one of the most significant factors which contributes to carrying out an investigation successfully. Medical examination which is performed in a timely manner will give possibility to an expert to make accurate conclusions on the time and reasons of inflicted injuries.⁹²

In addition, the application requesting to recognise A.O. as a victim, which was sent to the Chief Prosecutor of Georgia in 2014, turned to be ineffective as well.

It is worth noting that one of the criteria for effectively investigating the facts of improper treatment is the participation of a victim in the investigation, as well as the establishment of public control over it.⁹³ It is significant to take into consideration that in the mentioned case a victim is in a vulnerable category. In addition, combating improper treatment, which includes the conduct of effective investigations, must be set as a priority by the state. **Based on the absolute and distinct character of this right, a victim must be granted more rights, as well as more privileges**

⁹⁰ Degrading or coercing a person, or exposing a person to inhuman, degrading and humiliating conditions, as a result of which he/she suffers severe physical and psychological pains, shall be punished by restriction of liberty for up to three years or by imprisonment for a term of two to five years.

⁹¹ Exceeding of official powers by an official or a person equal thereto that has resulted in the substantial violation of the rights of physical or legal persons, or of the lawful interests of the public or state, - shall be punished by a fine or imprisonment for up to three years, with deprivation of the right to hold an official position or to carry out a particular activity for up to three years.

⁹² Mammadov (Jalaloglu) v. Azerbaijan, no. 34445/05, 11 January 2007, § 74.

⁹³ El Masri v. The Former Yugoslav Republic of Macedonia, no. 39630/09, 13 December, 2012, § 142; Case of Husayn (Aby Zubaydah) v. Poland, no. 7511/13, 24 July, 2014, § 489; Tsintsabadze v. Georgia, no. 35403/06, 15 February 2011, § 76.

from the state, since it is essential to keep him/her informed on the actions of the state with respect to the investigation of such cases and imprisonment of convicted persons in such crimes.⁹⁴

Otherwise, the prohibition of inhuman and degrading treatment would be ineffective in practice and in a number of cases would enable public officers to violate the rights of persons under their control under the conditions of nearly absolute impunity.⁹⁵ In addition, the participation of a victim must be worthy. It must not bear fake and rhetorical character.⁹⁶

When a person is in good physical health at the moment of his/her imprisonment and later he is inflicted certain bodily injuries, it is important to identify the causes of mentioned injuries. Failure to take this action results in the violation of Article 3 of the Convention (prohibition of torture).⁹⁷

In all cases relating to torture and improper treatment it is important to introduce additional procedural mechanisms of protection, which include the right to appeal against the decision of a superior prosecutor to refuse the initiation of criminal prosecution.⁹⁸ Frequently in practice the investigation of cases relating to torture and improper treatment are initiated and conducted under Articles 332,⁹⁹ 333¹⁰⁰ and 144³¹⁰¹.¹⁰² The mentioned norms are not classified as extremely grievous crime due to the characteristics and the severity of punishment. Accordingly, victims of torture and improper treatment are not provided with the possibility to appeal to court against the final decisions of a prosecutor under the current legislation.

IV. Legal status of a victim - international experience

1. International vision relating to victim's rights

According to international standards, victims enjoy certain rights in criminal proceedings, which means the right of a victim to be treated with sympathy, including respect of their dignity¹⁰³ and their engagement into the investigation to the extent necessary for the protection of their legitimate interests.¹⁰⁴ They have the right to present their views and problems and achieve their consideration at the relevant stage of criminal proceedings in such a manner as not to violate the rights of a defendant as well as the national criminal system.¹⁰⁵

Victims of crime must have the right to be informed on their role in legal proceedings and on the limits, time frames and progress of criminal proceedings, especially where serious crimes are involved. **Namely, they have the right to be notified on decisions to initiate criminal proceedings or to refuse to initiate criminal proceedings, decisions relating to granting or refusing the right to appeal, as well as the right to access the court case materials.**¹⁰⁶

2. Concept of a victim of crime

In accordance with the resolution adopted by the General Assembly on 28 November 1985, "a victim means a person(s) who, individually or collectively, have suffered from harm, including physical or mental injury, emotional suffering or economic loss. In addition, victims of crimes are persons who have suffered from substantial impairment of their fundamental rights, through actions, acts or omissions that are in violation of criminal laws operative within the Member States, including those laws proscribing criminal abuse of power."¹⁰⁷ **A person may be considered a victim, under this Resolution, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also**

⁹⁴ Ekaterine Khutsishvili, Public Defender's Office, Head of the Department of Criminal Justice.

⁹⁵ Dvalishvili v. Georgia, no. 19634/07, 18 December 2012, §40.

⁹⁶ E. Svanidze. Effective investigation of ill-treatment, (Guidelines on European Standards), 120.

⁹⁷ DİKME v. TURKEY, no. 20869/92, 11 July, 2000, § 78; Mammadov (Jalaloglu) v. Azerbaijan, no. 34445/05, 11 January 2007, §60.

⁹⁸ Cf. Council of Europe Committee of Minister Recommendation, 2000 (19), §34.

⁹⁹ Abuse of official powers.

¹⁰⁰ Exceeding of official powers.

¹⁰¹ Inhuman or degrading treatment.

¹⁰² Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms Protection in Georgia, Tbilisi, 2015, 9, 551-553, 562.

¹⁰³ Article 4, UN Declaration on Victims of Crime.

¹⁰⁴ Hugh Jordan v the United Kingdom, ECtHR judgment of 4 May 2001, appl. no. 24746/94, §109.

¹⁰⁵ Article 6(b), UN Declaration on Victims of Crime; UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), article 21.

¹⁰⁶ Kelly and Others v. the United Kingdom, №30054/96, 4 August, 2001, § 118-136; Gorou v. Greece, №12686/03, 20 May, 2009, § 36-42.

¹⁰⁷ Declaration of General Assembly of United Nations about Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, § 1. The concept of "victim of crime" has the same meaning under Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012.

includes, where appropriate, the immediate family or dependants of the direct victim.¹⁰⁸

European Union Directive of 2012 establishing minimum standards on the rights of victims¹⁰⁹ pays particular attention to special legal status of victims of crimes and indicates that victims of crimes, including minors, persons with disabilities, victims of terrorism, victims of a crime committed with a discriminatory motive¹¹⁰ and victims of domestic violence,¹¹¹ should be provided with adequate and high quality protection by the state authorities.¹¹²

3. Victim's rights in the process of criminal prosecution by a prosecutor

A state often faces dilemma in the process of criminal proceedings: on the one pan of the scales the state interest to exercise justice quickly is placed, while on the other pan - victim's rights and his/her legitimate interests. The mentioned two interests contradict each other, especially in the cases when a state prosecutor makes decisions not to initiate or to terminate criminal prosecution. The state authority has the obligation to make a decision considering a fair balance between the interests and to ensure that these interests are not subject to ungrounded, excessive and inadequate restriction. **To achieve a fair balance, it is essential to provide victims of crime with effective and efficient protection and procedural and legal guarantees. For these purposes, victims must have the opportunity to appeal against the prosecutor's decision not to initiate or to terminate criminal prosecution. The state prosecutor's decision may be appealed to a person holding a higher position or to court.**¹¹³

According to Paragraphs 40 and 41 of EU directive of 2012, Member States were encouraged to establish appropriate conditions to enable the victims to appeal against the decision not to initiate or to terminate criminal prosecution. In addition the procedures relating to filing an appeal must be clear, transparent and must not include bureaucratic elements in order to enable a victim to enjoy the mentioned right without a representative.¹¹⁴ At the same time, limited financial resources may not hinder the review of the decision.¹¹⁵

It is worth noting that the EU directive of 2012, establishing minimum standards on the right of victims determines the competent state authorities that must review the victim's appeal against the decision not to initiate or to terminate criminal prosecution. According to the provisions of the mentioned directive, such appeals may be reviewed on the national level by the competent person/body, other than persons/bodies making the initial decision. If this decision was made by a supreme person/body, it may be reviewed by the representative of the same body but other than the person who made the initial decision. The decision must be made by an objective person and the review of a victim's complaint must be objective.¹¹⁶ For instance, in accordance with the Criminal Procedure Code of Germany, victims of crime are entitled to apply to a superior prosecutor first to request the cancellation of a subordinate prosecutor's decision. If the appeal to the superior prosecutor does not result in favourable consequences, he/she may appeal to the court.¹¹⁷ In some countries, victims of crime have the right to appeal directly to the court without applying to a superior prosecutor first. For instance, in Israel, victims of crime have the opportunity to appeal prosecutor's decisions with a general prosecutor. In France, if the court renders a decision in favour to a victim, a prosecutor is obliged to initiate prosecution. In Mexico, the right to appeal a prosecutor's decision not to initiate/to terminate criminal prosecution is guaranteed on the constitutional level.¹¹⁸

¹⁰⁸ *ibid.*, § 2.

¹⁰⁹ DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

¹¹⁰ For the purposes of the Directive, violence is based on a discriminatory motive if it is committed on the grounds of gender, gender identity or expression.

¹¹¹ For the purposes of the Directive, domestic violence is violence committed by a current or former spouse of the victim, or a person who is cohabiting with the victim as a spouse or other family member, with whom the victim has shared or is sharing common household.

¹¹² DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012, establishing minimum standards on the right, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, § 14-18.

¹¹³ THE ROLE OF PUBLIC PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM, Recommendation Rec (2000)19, Adopted by the committee of ministers of the council of Europe on 6 October 2000, § 34. The necessity of such guarantees is also indicated in the following documents: Recommendation N°R 85 (11) OF COUNCIL OF EUROPE COMMITTEE OF MINISTERS OF THE COMMITTEE TO MEMBER STATES ON THE POSITION OF THE VICTIM IN THE FRAMEWORK OF CRIMINAL LAW AND PROCEDURE, adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies, § B (7).

¹¹⁴ DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012, establishing minimum standards on the right, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, § 40.

¹¹⁵ *ibid.*, § 41.

¹¹⁶ DG JUSTICE GUIDANCE DOCUMENT relates to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of crime, and replacing Council Framework Decision 2001/220/JHA, EUROPEAN COMMISSION, DG JUSTICE, December 2013, 31.

¹¹⁷ Handbook on JUSTICE for VICTIMS, UN ODSSP, Centre for International Crime Prevention, New York, 1999, 38.

¹¹⁸ DG JUSTICE GUIDANCE DOCUMENT relates to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of crime, and replacing Council Framework Decision 2001/220/JHA, EUROPEAN COMMISSION, DG JUSTICE, December 2013, 30

4. Right of a victim to be informed on criminal proceedings

On the one hand, the right to get acquainted with case materials and obtain information on criminal proceedings at the stage of criminal proceedings represents a personal right of a victim and, on the other hand, the mentioned ensures control over investigation bodies and their accountability towards the society.

Based on the recommendation given by the Committee of Ministers of the Council of Europe, states shall ensure that victims are provided with access to information which is necessary for the protection of their interests and rights.¹¹⁹ In addition, information on criminal proceedings shall include at least the following:

- The information on a complaint submitted by a victim;
- The information on different stages of criminal proceedings;
- The information on the ruling/decision of the competent court and the information on punishment.¹²⁰

In addition, in accordance with the Directive of the European Parliament and the European Council, the competent bodies must ensure that victims of crime receive up-to-date information on their cases. The information must be sent to the appropriate address or through the e-mail which has been submitted by a victim to the competent authorities. In exceptional case, for example when the number of victims is quite large, the information on certain proceeding activities may be published in the press, on the official web-site of the competent body or by means of similar means of communication.¹²¹

Accordingly, victims of crime must be informed during criminal proceedings on their role and scope of competences, time and progress of criminal proceedings, especially in the cases when a person is a victim of serious crime.¹²²

5. Protection mechanisms against secondary victimisation of a victim

It is worth noting that sometimes a criminal action results in a victim's insecurity and in frequent cases the victim is in need of help. A victim of a crime is a person who engages in the realisation of criminal justice for the first time. At the initial stage, he/she may have to cooperate with the representatives of investigation bodies, later with lawyers and finally he/she may have to appear before the court. The procedure of realisation of justice can be confusing for a victim, especially in the cases when he/she is left beyond this procedure.¹²³ Therefore, the participation in this procedure may create the basis for the secondary victimisation of a victim.

In accordance with Directive 2012/26/EU of the European Parliament and the Council, the complex procedural rights and guarantees are established in the process of realisation of criminal justice.¹²⁴ This gives victims an opportunity to protect themselves from possible damage - **starting from the selection of persons accompanying them at the court trial and ending with the format of giving a testimony at the court session, which strengthens the feeling of being protected from defendants in victims.**¹²⁵

It is worth noting that in accordance with the procedure under Directive 2012/26/EU, 14 Member States provide separate waiting areas for victims in the courts.¹²⁶

The Council of Europe Joint Opinion on the Criminal Procedure Code of Georgia states that it would be better to include **specific provisions aimed at ensuring prevention of direct contact between perpetrators and victims of violence against women and domestic violence and to allow such victims to choose the gender of the criminal justice official dealing with them.**¹²⁷ At the same time, **it is important to enable victims to testify without being present in the courtroom, or without the presence of the alleged perpetrator, through the use of appropriate**

¹¹⁹ COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Recommendation Rec (2006)8 of the Committee of ministers to member states on assistance to crime victims (Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies), § 6.1.

¹²⁰ Ibid., § 6.5.

¹²¹ DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012, establishing minimum standards on the right, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, § 27, 29.

¹²² Declaration of General Assembly of United Nation about Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, § 6 (a).

¹²³ LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL, Victim Law Bulletin, Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System, 2013, 2-3.

¹²⁴ Also see the following in reference with the mentioned issue: RESOLUTION 2011/C187/01 of 10 June 2011 OF THE COUNCIL OF EUROPEAN UNION on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings.

¹²⁵ European Union Agency for Fundamental Rights, "Victims of crime in the EU: The extent and nature of support of victims", 2014, 47.

¹²⁶ Ibid.

¹²⁷ OSCE/ODIHR and Council of Europe Joint Opinion on the Criminal Procedure Code, Warsaw/Strasbourg, 2014, §82.

communication technologies.¹²⁸

Thus, the state should develop a mechanism to prevent the suffering and secondary victimisation of a victim during the process of realisation of criminal justice. The visual observation on a victim by the culprit may create the basis for his/her secondary victimisation. **In order to prevent the above mentioned, the state shall ensure the proper arrangement of buildings of courts and law enforcement bodies.**

6. Approaches practised by the European Court of Human Rights with respect to victims of murder and improper treatment

According to the practice of the European Court, a close relative of a deceased person must be given an opportunity to participate in the investigation detecting the reasons of death, in order not to violate Article 2 of the Convention. The participation of a victim's family member serves as a mechanism for the protection of their legitimate interests and the refusal to satisfy this request creates the basis for establishing the violation of Article 2 of the Convention by the court.

For detailed review, see OSCE/ODIHR Opinion on Draft Amendments to the Legal Framework on Preventing and Combating Domestic Violence in Georgia (17 December 2013).

In the case of "Saliman v. France" the court determined the violation of the procedural part of Article 2 due to the reason that a close relative was not allowed to familiarise with case materials and was not notified on the termination of criminal proceedings. In the case of "Ogur v. Turkey" the court considered as a violation the fact that a mother of a deceased had no access to case materials of Article 2 of the Convention. In addition, in accordance with the European Court of Human Rights, in all cases relating to murder, a close relative of a victim must be engaged in the investigation process to the extent necessary for the protection of their legitimate interests.¹²⁹

For the efficiency of the investigation the rendered decisions must rely on full, objective and impartial analysis of all relevant elements.¹³⁰ Despite the fact that the obligation of investigation refers to applicable measures and an absolute right of accusation or conviction does not exist, any gaps during the investigation, which hinders the establishment of circumstances surrounding the case and disclosure of liable persons, do not satisfy the requirements toward the efficiency of an investigation.¹³¹

Due to the importance of protection under Article 2 of the Convention, the court must investigate and examine the cases of murder accurately. An investigation must take into consideration not only the actions of official state representatives but also other circumstances surrounding the case. In one of the cases, the Government of Georgia confessed in the violation of positive obligations under Article 2 of the Convention, since the investigation, which lasted for several years, did not achieve any progress despite the repeated complaints filed by the applicant.¹³²

It is worth noting that the European Court of Human Rights, in its common law, admitted the importance of criminal proceedings in terms of the protection of rights under Articles 2 and 3 of the Convention. The Court explains that on the basis of Convention states are obliged to conduct efficient investigation and if necessary to initiate criminal proceedings if there are suspicious circumstances surrounding a person's death or improper treatment.¹³³

In the case of Khadisov and Tsechoyev the European Court of Human Rights determined the violation of Article 3, *inter alia*, due to the fact that victims did not have access to criminal case materials and were not properly informed on the progress of the investigation. In addition they did not have an opportunity to appeal effectively against the actions of investigation bodies and their failure to act before the court.¹³⁴

7. Compensation for damages incurred as a result of a crime (reparations)

Sometimes the trial and imprisonment of a convicted person does not mean the satisfaction of a victim's interests and compensation of damages inflicted on him/her as a result of a crime.¹³⁵

In addition to punishing a culprit, the reparation of a victim is mandatory.

¹²⁸ *ibid.*, §40. Also, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS №210). Signed by Georgia on 19 June 2014, §56(1(i)).

¹²⁹ *Enukidze and Girgvliani v. Georgia*, no.25091/07, 26 April 2011, § 243.

¹³⁰ *Tsintsabadze v. Georgia*, no.35403/06, 15 February 2011, § 75; 85.

¹³¹ *ibid.*, § 75.

¹³² *Case of citizen Zh.Dz.* Ruling of the European Court of Justice, Section 4, 9 September 2014.

¹³³ *Shtefan Trachsel*, *Human Rights in Criminal Justice*, Tbilisi, 2009, 60

¹³⁴ *Khadisov and Tsechoyev v. Russia*, no. 21519/02, 5 May 2009, § 122.

¹³⁵ T. Laliashvili "Ways to overcome past and legal mechanisms in Georgia" The magazine of Georgian Young Lawyers' Association "Lawyer", No 3, 2013, 56.

The reparation of a victim must be conducted in accordance with the standards adopted by the General Assembly of the United Nations. It is important to provide adequate, effective and timely reparations, which include restitution, compensation, rehabilitation, guarantees of non-reparation and satisfaction of victims.¹³⁶

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 recommends the Member States to create the mechanisms which encourage culprits to pay victims adequate compensation. For example, state authorities are recommended to consider an act of compensation as a positive element, which may be used favourably in the process of imposition of measures of restraint or punishment or early release from prison.¹³⁷

Victims of crime, in the majority of cases, do not have the possibility to get compensation from defendants, because the latter may not possess financial means necessary for compensation, or the state may fail to bring the alleged culprit before the court.¹³⁸ Therefore, the participation of state in the satisfaction of a victim and in the restoration of violated rights is important in such cases. In particular, when the full amount of the compensation cannot be covered to a victim by a culprit or other resources, the states must try to compensate the victim and his/her family members, who were inflicted severe physical or psychological damage. Namely, persons who are dependants of persons, who died or became physically or mentally handicapped as a result of victimisation.¹³⁹

V. Victim's rights under the criminal law of the US

The limited rights of victims in Georgia are often explained by the existence of the adversarial system of criminal law within which the parties enjoy the same possibilities and competences.

It is worth noting that the US has an adversarial system of criminal law; however, victim's rights under the US criminal procedure law is a great deal wider and the legislation itself is far more specified.

In accordance with the Criminal Procedure Code of the United States, a victim has the following rights:¹⁴⁰

1. The right to be reasonably protected from the alleged accused person;¹⁴¹
2. The right to reasonable, accurate, and timely notice on any public court hearings, or on the release of the accused on parole on the crime committed or escape by the perpetrator from a prison facility.
3. The right not to be excluded from any such public court hearings.¹⁴²
4. The right to be reasonably heard at any public proceeding in the city court involving release, plea, sentencing, or any release on parole.

Satisfaction means the performance of effective actions to prevent criminal actions, the comprehensive and adequate examination of facts, the ensuring of the relevant level of publicity, while considering the interests of a victim. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Right Law and Serious Violation of International Humanitarian Law, Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, § 9.

5. The reasonable right to confer with the attorney for the Government in the case.
6. The right to full and timely restitution as provided by law.
7. The right of review of their case within tight deadlines - the right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the victim's dignity and privacy.

¹³⁶ Restitution is directed towards the restoration of the victim's state prior to the violation of his/her rights; Compensation (Redress) means providing payment for damages incurred as a result of criminal actions. The mentioned may include psychological damage, loss of income from economic activity, doctor's practice, etc.; Rehabilitation means the restoration of the dignity and respect of a victim; Guarantees of non-reparation involves measures which are directed to the protection of human rights in the future;

¹³⁷ DIRECTIVE 2004/80/aEC victims of 29 April 2004 of THE COUNCIL OF THE EUROPEAN UNION on relating to compensation to crime victims, § 37.

¹³⁸ *ibid.*, § 10.

¹³⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN, § 12 (a).

¹⁴⁰ U.S. Code of Criminal Procedure, Title 18, Part II, chapter 237, § 3771.

¹⁴¹ The right to be reasonably protected from the accused refers to the right of victims of crime to be protected against the actions of the accused. The mentioned right, as a rule, is guaranteed on the constitutional and legislative level in the USA to ensure the adequate protection guarantees for physical and physiological safety and emotional health of victims of crime. In some US states victims of crime are given guaranteed access to information and/or notices to provide them with the opportunity to protect themselves adequately. For example, the mentioned right obliges the state authorities to transfer information to victims of crime on the following: release from imprisonment on bail, pre-trial session involving the release of the accused on parole or temporary release, premature release, final release or release due to mental health. In the majority of US states, one of the most important types of such information is the one relating to notifying victims of crime on the escape of an accused from a prison facility.

¹⁴² The right not to be excluded from any criminal proceedings means the right to attend the investigative actions relating to the realisation of criminal justice. In addition, it includes the right to attend any stage of court proceedings and sentencing hearings.

9. The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
10. The right to be informed of the rights under procedural rights and freedoms;
11. The right to get copies of reports and records made during the proceedings;
12. The right to permanent services of legal protection.

In recent years, one of the most vivid examples of the protection of victim's rights is the federal act "Criminal Victims' Right Act"¹⁴³, which clearly indicates that the "wide rights" of victims of crime which are stated in the mentioned section, present the inalienable rights, which cannot be refused even if victims have such desire. The mentioned provisions are directly addressed to state authorities and oblige them to treat victims of crime with respect in the implementation of procedural actions.¹⁴⁴

VI. Conclusions and recommendations

Thus, the present report clarifies and specifies the problems and gaps relating to the protection of victim's rights and respect in the legislation of Georgia.

Law enforcement bodies and court authorities sometimes act imperfectly in terms of the protection of victim's interests and rights.

The changes made in 2014 to the Criminal Procedure Code in terms of victim's rights definitely represent a step forward. However, despite this fact, practical and legislative problems still remain. The research revealed that in a number of cases granting the procedural status of a victim/a legal successor of a victim is often delayed. This issue is especially acute in cases of murder and improper treatment. In addition, sometimes despite being granted the status of a victim, the victim is deprived of access to criminal case materials and is unable to obtain their copies. The above mentioned is conditioned by practical and legislative gaps.

It is worth noting that a victim has no opportunity to appeal to court against a prosecutor's final decision relating to less grievous and grievous and dispute its legitimacy. In addition, notifying a victim on the dates of court sessions represents another significant gap, as a prosecutor does not have such obligation and the probability that victims may not determine the exact date of the session when they need to apply to the Prosecutor's Office for obtaining the mentioned information, is high. In addition, in individual cases courts do not pay proper attention to the indication of victim's interests in the rulings rendered without main sessions.

Moreover, within the limited legislation of Georgia, the status and the role of family members of a deceased person in criminal proceedings completely depends on the opinion of investigation bodies, which often result in ungrounded procrastination of the investigation. In addition, the rights of a deceased person is often denied, which provides basis for the violation of Article 2 of the Convention. A number of legitimate questions, relating to the major breaches in the process of investigation as well as the lack of reasonable measures to be taken to obtain evidence, exist in the cases examined by us.

It is worth admitting that statistical data which will enable the state authorities to generalise the problem and identify the gaps are not processed and recorded.

Taking into consideration the mentioned factors, it is necessary to take relevant measures directed to the improvement of the legislation and practice to ensure the adequate protection guarantees for victim's rights and legitimate interests in criminal proceedings. It addition, it is worth noting that the improvement of the procedural status of a victim does not limit the opportunities for the protection of a defendant and does not interfere with the realisation of justice on any case.

Thus, the state which has monopoly on trial of criminals and imposition of charges on them within the legislation, should not forget victims and their legitimate interests during the realisation of justice. In particular, the state must make the realisation of justice accessible and clear to victims and give them a practical possibility to enjoy the rights guaranteed under the Constitution. Otherwise, failure to fulfil the mentioned minimum obligation and the infringement of victim's interests will seriously damage the trust and respect of the society towards criminal proceedings and its participants. Recommendations

We are presenting the recommendations below, which we believe will improve the situation with respect to victim's rights and also protect the adversarial principle under the Criminal Procedure Code.

¹⁴³ CVRA - Criminal Victims' Right Act.

¹⁴⁴ LEGAL PUBLICATIONC PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS § CLARK LAW SCHOOL, Victim Law Bulletin, Fundamentals of Victims' rights: A Summary of 12 Common Victims' Rights, 2011, 1.

For the Parliament of Georgia:

- 1.The changes, which will increase victim's rights relating to the appeal against prosecutor's individual decisions, should be developed and introduced to the legislation. Namely, a victim should have the right to appeal to the court against a prosecutor's decision refusing to grant the status of a victim and to initiate an investigation or to terminate criminal prosecution/investigation with respect to crimes of any category.
- 2.By means of legislative changes, a victim, should be given an opportunity to obtain the copies of criminal case materials at the expense of the State unless this contradicts the interests of the investigation. In addition, a prosecutor's/an investigator's refusal to provide with the copies of case materials must be substantiated.
- 3.Victims must be notified on the important dates, such as: the first appearance of a defendant before a magistrate, pre-trial sessions, main court sessions, plea bargain sessions, sentence hearings and the sessions in the courts of appeal or cassation. Notification on the given information should be determined as the obligation of a prosecutor. Accordingly, the formulation of Article 58 of the Criminal Procedure Code of Georgia should be changed, which means, as a precondition, the repeal of provision on the request of victim for obtaining the above-mentioned information.
- 4.The provision of Article 57(1)(i) of the Criminal Code of Georgia must be changed and a victim must obtain information on measures of restraint applied to a defendant as well as information on the release of a defendant/convict from the penitentiary facility without making prior request on it, unless this poses a serious threat to a defendant/convict.
- 5.The legislative changes made to victim's rights must provide for the possibility of distant interrogation of a victim or for other alternative mechanisms excluding the attendance of a defendant upon a victim's request. The possibility of distant interrogation must be made widely available especially with respect to extremely sensitive victims, who may get psychological trauma while giving a testimony in the presence of audience in the court.
- 6.The following regulation should be established as a legislative amendment: A prosecutor must provide substantiation of decision to refuse to satisfy the requirements of a victim and provide relevant arguments if he/she does not consider the indications and opinions relating to additional investigative actions submitted by a victim.
- 7.The obligation of a judge to review victims opinions in the context of proportionality and adequacy of punishment must be set out in the cases when the ruling is rendered based on legislative changes without the main court session. Upon the presence of relevant grounds, refuse to approve a plea bargain and return a case to a prosecutor; if victim's interests are not assessed adequately and objectively in the proposed conditions. Otherwise, the regulation under Article 271¹ of the Criminal Procedure Code of Georgia will have only pretended character.
- 8.The provision of Article 271¹ of the Criminal Procedure Code of Georgia should be changed. Namely, it should have the following form: Upon the approval of a plea bargain, a victim has the right to apply to court in writing or by means of oral explanation at the court session and provide information on the damages, which have been or may have been inflicted on them.

For the Chief Prosecutor's Office of Georgia:

- 1.The Prosecutor's Office shall act in accordance with the norms provided under the legislation and in the case of relevant grounds grant a person a status of a victim/a legal successor of a victim at the initial stage of an investigation, which will encourage the possibility to obtain more evidence for proving the guilt of a person and emphasise the necessity of obtaining such evidence. In the cases relating to a person's death, the presence of a legal successor of a victim is especially important most of all based on the investigation interests.
- 2.The Prosecutor's Office shall ensure the conduct of a quick and efficient investigation relating to the facts of murder and improper treatment not only in the cases where the crime is allegedly committed by the state but also where the participants are private persons. They should provide effective measures for legal protection of victims and relatives of victims of such cases.
- 3.The prosecution bodies should provide substantiation for the refusal to grant access to a victim to case materials and indicate the specific grounds for such actions in all cases. At the same time, the restriction should be proportionate to the purpose. The position of investigation bodies and the grounds for restrictions should be transparent for victims.
- 4.The Chief Prosecutor's Office should maintain the statistics on the cases of victim's appeals to a superior prosecutor against a prosecutor's individual decisions and its results, in order to assess the frequency and effectiveness of the mechanism of a victim's appeal to a superior prosecutor.

For common courts:

- 1.Judges should provide for a prosecutor's obligation to consult and inform victims on decisions made without main court sessions due to victim's interests, where such obligation presents.
- 2.Judges must take into consideration the fact of failure to compensate the damages incurred as a result of a crime, especially upon the approval of a plea bargain.