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Georgian Young Lawyers' Association

MONITORING CRIMINAL TRIALS IN TBILISI AND KUTAISI CITY AND APPELLATE COURTS

Monitoring Report #9
Period Covered: February-july, 2016

TBILISI
2016

Georgian Young Lawyers' Association

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Introduction

The Georgian Young Lawyers' Association (GYLA) has been carrying out the court monitoring project since October 2011. Initially GYLA implemented its monitoring project at Tbilisi City Court Criminal Chamber. On 1 December 2012, GYLA broadened the scope of monitoring and included in the project Kutaisi City Court as well. In March 2014, monitoring was launched in Batumi City Court. Identical methods of monitoring have been applied in all three cities.

The first and second monitoring reports prepared by GYLA cover the period from October 2011 to March 2012 inclusive[1]. The third report covers the period from July to December 2012 inclusive[2]. The fourth report covers the period from January to June 2013 inclusive[3]. The fifth report covers the period from July to December 2013 inclusive[4], and the sixth report covers the period from January to 15 August 2014 inclusive[5]. Together with the sixth monitoring report, GYLA also presented three years' summary findings, revealing problems, changes, trends and existing challenges identified in courts during these periods[6]. Also, in June, GYLA presented the seventh report, which covered the period from 15 August 2014 to January 2015 inclusive[7], and on 10 March the presentation of the eighth monitoring report was held, covering the period from February 2015 to October 2015 inclusive[8].

This is GYLA's ninth trials monitoring report covering the period from February 2016 to July 2016.

Like previous reports, the purpose of monitoring criminal proceedings is to increase their transparency, reflect the actual process in courtrooms, and provide relevant information to the public. Relevant recommendations for solving the problems identified during the moni-

[1] First trial monitoring report: https://goo.gl/XzPmqh; Second court monitoring report: https://goo.gl/nMoeXj;

[2] Third trial monitoring report: https://gyla.ge/files/monitoringis%20angariSi3.pdf;

[3] Fourth trial monitoring report: https://goo.gl/qvdpMY;

[4] Fifth trial monitoring report: https://goo.gl/rt2jp3;

[5] Sixth trial monitoring report: https://goo.gl/ylt9FY;

[6] Results of three-year trial monitoring project – initial problems, changes in trends, and existing challenges: https://goo.gl/6RIIXo;

[7] Seventh trial monitoring report: https://goo.gl/7WsVEk;

[8] Eighth trial monitoring report: http://bit.ly/2dX5hrH;

toring process are also included in the report. The main purpose of the recommendations is to facilitate the improvement of the criminal justice system.

From February to July 2016 inclusive, GYLA monitored 886 court hearings **including**:

- 250 – first appearance sessions. Seventeen out of those sessions related to the cases of domestic violence and domestic crimes;
- 146 – pre-trial sessions;
- 111 – plea agreement sessions;
- 339 – hearings on merits. Sixty-six out of those hearings related to the cases of domestic violence and domestic crimes;
- 6 – sessions for jury selection and 16 hearings of the cases on merits by the jury;
- 18 – appellate hearings.

Out of those 886 hearings, 574 took place at Tbilisi City Court and Tbilisi Court of Appeals and 312 hearings took place in Kutaisi City Court. Besides, GYLA did not review jury selection sessions and appellate sessions in terms of separate statistics, since no different trend has been observed at the trials.

Methodology

All of the information in this report has been obtained as a result of attending and monitoring the hearings. GYLA's analysts and monitors did not communicate with the parties and did not discuss case materials or final decisions, except preventive measures applied and rulings on searches and seizures delivered by court.

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

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

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

During this reporting period the monitoring was carried out within the scope of the new methodology and updated questionnaires. Namely, vulnerable groups (women, persons with disabilities, foreigners, representatives of national and ethnic minorities, etc.) and criminal proceedings in relation to them were the subject of our special monitoring. The purpose of the monitoring was to determine the level of accuracy and adequacy of justice exercised in relation to them.

Also, in GYLA's opinion, monitoring of the hearings of criminal cases alone does not reflect the whole image regarding a range of issues. Namely, GYLA's monitoring shows that certain areas enable more than others to evaluate main gaps in court proceedings, but such evaluation can be made only as a result of the examination of court decisions and the general analysis of observations of hearings.

For this purpose, we requested from Tbilisi City Court public information on a random basis on the decisions rendered on 10 and 21 March, 15 and 29 April, and 5, 20 and 25 May of 2016[9] regarding first appearances and the application of preventive measures and on the recognition as lawful or unlawful of searches and seizures carried out in cases of urgent necessity.

The purpose of monitoring is not to examine factual circumstances of cases, statements made by session participants and the content of case materials. Namely, GYLA has not analyzed the issues related to the circumstances of a certain crime, which determined the guilt or innocence of a person.

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

- so-called 'high profile' cases, in which the defendants were former political figures;

[9] Particular dates on which the decisions were made have been selected by the GYLA on a random bases.

- also, GYLA monitored the cases which were selected according to gross violation of rights, high public interest and other special factors;
- GYLA monitored cases of domestic violence, domestic crime and violent crimes committed against women.

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

GYLA hopes that the information obtained during the monitoring will give a clearer image of the situation at Georgian courts and will contribute positively to ongoing debates on the judicial reform.In addition, the report contains information important for the Prosecutor's Office and the Georgian Bar Association.

Summary of monitoring results and main trends

The trend of improving the approaches of courts in certain areas has continued in this monitoring period (February-July 2016); however, there are still systemic and individual gaps both in the legislation and in practice.

Trends identified as a result of monitoring of the cases on domestic violence, domestic crimes and violence against women

- Sometimes courts do not adequately assess threats and risks related to these crimes and do not apply preventive measures. Namely, the imposition of bail in 2 (20%) cases out of 10 cases of on domestic violence and domestic crime was unreasonably lenient. In addition, the imposition of an agreement on not to leave the country and due conductin one case was unreasoned.
- **Also, although in most cases the court delivered judgements of conviction on the cases of domestic violence and domestic crime, the adequacy of punishmentis a problematic issue.** Out of 22 judgements of conviction, only community service was imposed on the defendants in 8(36%)cases, imprisonment was imposed on the defendantsin 8 (36%) cases; however, conditional sentence was imposed on them with the probation period[10]. **In**

[10] In some cases, fine or community service was imposed on the defendants as additional punishment.

6 (27%) cases out of 22 an actual sentence, namely imprisonment at a penitentiary facility, was imposed on the defendants.

- In the cases revealed as a result of the monitoring, except in one case, these crimes were not classified as crimes committed on discrimination grounds (no reference was made to Article 53(31) of the Criminal Code of Georgia). Also, there were cases identified, where, along with discrimination grounds, the correctness of classification (classification of crimes according to their gravity) is questioned.
- In addition, where facts allow so, the Prosecutor's Office does not take into account gender views and does not try to establish whether the crime was committed on discriminatory grounds or not.The prosecutor did not point out discriminatory grounds with respect to any case of domestic violence, domestic crime and violence against women.

Conduct of the participants of criminal proceedings and their attitude towards vulnerable groups

- During the reporting period, there were certain cases of stereotypical, stigma-based and unethical attitude of judges, prosecutors and lawyers towards vulnerable groups (women, foreigners, etc.). Such attitudes contained possible discriminatory approaches to a person and created barriers/obstacles for him/her to access justice.

Access to justice for foreign defendants

- During the monitoring, in the majority of cases, when defendants needed an interpreter's assistance, their rights have been exercised effectively and properly. However, there were exceptions identified. Namely, in 2 (5%) cases out of 43, the interpretertranslated for the defendant from time to time or did not translate at allthe issues discussed at the hearing. In such cases, the defendants could not perceive and understand the court proceedings, thereby the right of defendants to an interpreter's assistance was violated.

First appearance of a defendant at court and resolution of the issue of application ofa preventive measure

- Generally, courts are still using two types of preventive measures: bail and imprisonment. In comparison to the previous reporting period, the percentage of application of alternative preventive measures slightly increased from 5% to 6%. However, unlike in the previous reporting period, the percentage of cases, when defendants were not applied any preventive measure at all, slightly reduced from 6% to 4%.
- The percentage of unsubstantiated decisions to impose bail significantly increased (from 12% to 28%). However, the percentage of unsubstantiated decisions to impose imprisonment slightly reduced from 12% to 10%.
- A certain portion of motions of the Prosecutor's Office for applying preventive measures remain unsubstantiated, mainly those relating to the imposition of bail. In some cases, prosecutors demanded to impose very large amounts of bail without having substantiated either the appropriateness of application of this type of a preventive measureor the amount of money. Special gaps are identified with respect to the determination by prosecutors of the amount of bail, as almost in all cases they had no information on the financial status of defendants. In such cases, frequently the court tried to independently inquire about the material and financial status of defendants. However, it does not mean that all such decisions of judges were substantiated.This is proved by the fact that the court reduced the amount of bail in 72% of cases. In such cases, the court tried to establish the financial status of the defendant itself; however, this does not mean that all such decisions of the judge were substantiated.
- Despite similar circumstances different approaches were observed when requesting the use of pretrial detention by the prosecutors and applying particular measure of pretrial detention by the courts. This left an impression of administration of justice on a selective basis.
- During this reporting period, unlike in the previos period, in 4 cases the judge replaced the reviewed imprisonment with other preventive measures. However, all these cases took place at pretrial hearings. In all cases when imprisonment was reviewed at

main hearings, it remained in force, which may indicate to only formally applying the imprisonment review mechanism.

- The court monitoring revealed that at the first appearance sessions courts mostly avoid reviewing and assessing the lawfulness of arrests and limit themselves to merely deciding the preventive measure. Only one case was identified in this reporting period, when the court recognized the arrest of aperson due to urgent necessity to be unlawful, imposed bail on the defendant and released him/her from the courtroom. In the previous reporting period, three such cases were identified.
- Apart from the monitoring of courts, GYLA examined 50 court rulings on first appearances of defendants and on the application of preventive measures to them. This examination revealed the following major gaps:
  - Part of court decisions are still formulaicand unsubstantiated;
  - Courts do not consider the impossibility of applying less severepreventive measures;
  - In the largemajority ofthe rulings, prosecutors fail to substantiate the amount of bail.

Analysis of pre-trial sessions

- Like in the previous monitoring periods, pre-trial sessions are mostly conducted in a routine manner. However, it is worth noting that no case have been revealed when the court was biased or non-objective to any of the parties and equally granted the motions of both the prosecution and the defense on the admissibility of evidence.
- The level of activity of the defense reduced in the review of the admissibility of evidence presented by the Prosecutor's Office and increased in terms of requesting the admissibility of evidence of the defense.
- Although, unlike in the previous reporting period, no cases of full termination of criminal prosecution and of refusals to transfer cases for main hearings were identified, several cases were revealed when the judges terminated prosecution in connection with specific charges.

Examination by courts of the lawfulness of searches and seizures carried out on the ground of urgent necessity

- Unlike in the previous reporting period, the percentage of searches and seizures and theirlegalization by the court decisions significantly increased from 81% to 95%.
- Apart from court proceedings, GYLA has examined 46 court rulings on searches and seizures carried out on the ground of urgent necessity. This examination revealed the following major gaps:
  - Court rulings on searches and seizures carried out on the ground of urgent necessity are not substantiated properly, are often formulaic and in some cases decisions made did not comply with the official requirements of law. For example, some rulings did not mention the right and procedure for appealing the decision.
  - Different approaches wereobserved when an owner or communication party consents to the conduct of a search and seizure.

Approaches relating to the review and approval of plea agreements

- Effective judicial oversight towards the plea bargaining worsened,which is manifested in the incomplete explanation of rights provided for by the legislation and in the scarcity of discussions on the appropriateness of punishment presented. The situation in terms of explanation of rights related to plea agreements started to worsen in the previous reporting period and this negative trend still continues.
- Judges provided less information to defendants about their rights in terms of measures and actions to be implemented against their ill-treatment.This constitutes a violation of the requirements established by the criminal procedure law and the violation of the right to a public hearing.
- In all cases, the judges approved the plea agreements, unlike in the previous reporting period, when 2 cases of refusals to approve plea agreements were identified.

- The number of defendants who were imposed fines under the plea agreements increased from 39% to 43%.
- An inconsistent approach from the side of the Prosecutor's Office has been identified with regard to the facts of illegal use of narcotic drugs, in determination of the terms of plea agreements. Despite the fact that there are not different circumstances, in some cases prosecutors demanded more severe punishment and in some cases limited themselves to milder sanctions. This raises questions regarding the fairness and consistency of the Prosecutor's Office.

Public trials and judicial approaches regarding closing of sessions

- During the reporting period, the situation has been improved in terms of the right to a public trial at pre-trial and main hearings and, in most cases, practical and adequate exercise of that right was ensured. However, there is still a systematic problem with the first appearance sessions and information on those sessions is not published beforehand.
- There were individual cases identified when the proceedings were conducted at closed sessions without clear explanation of the reasons for not allowing the public to attend closed sessions, which constitues the neglect of the requirements of legislation.

I. ACCESS TO AND EFFICIENCY OF JUSTICE FOR VULNERABLE GROUPS

1. Trends identified as a result of monitoring of the cases on domestic violence, domestic crimes and violence against women

1.1. Brief overview of the legislation

Under Article 126[1] of the Criminal Code of Georgia violence, regular insult, blackmail, humiliation by one family member of another family member, which has resulted in physical pain or anguish and which has not entailed the consequences provided for by Articles 117, 118 or 120 of the Criminal Code of Georgia, has the content of domestic violence. Besides, commission of a certain crimes determined by the Criminal Code of Georgia, committed by one family member against another shall be considered as domestic crime. Criminal liability for a domestic crime shall be determined by reference to Article 11[1] of the Criminal Code of Georgia.

It should also be noted that international human rights law recognizes violence against women as a form of discrimination of women[11]. Also, according to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), "violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women"[12].

The trial monitoring shows that the above crimes are mainly committed against women, as a result of which those cases are especially important due to the great number and severity of the facts of domestic crime and violence against women, which, in in many cases led to women's death.

[11] UN Committee on the Elimination of Discrimination against Women, general recommendation No 19, 1992, paragraph 1, see also the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11.05.2011, Article 3(a); Opuz v. Turkey, Complaint No 33401/02, European Court of Human Rights, 09.06.2009, paragraph 200, see Dekanosidze T., Judgements on Femicide Cases, 2014, GYLA research, Tbilisi, 2016, 5;

[12] Istanbul Convention, Preamble, see: Dekanosidze T., judgements femicide cases, 2014, GYLA research, Tbilisi, 2016, 5;

GYLA thinks that generally this issue requires separate examination, which is beyond the purposes of this report. However, notwithstanding the above, the presented data enable to demonstrate the situation at Georgian courts in terms of the cases on domestic violence, domestic crime and violence against women.

During this reporting period, monitoring of the cases on domestic violence and violence against women was a priority for GYLA. Therefore, GYLA's monitor attended the whole stage of review of similar cases as far as possible[13].

1.2. Preventive measures applied in the cases of domestic violence and domestic crimes

The court monitoring revealed thatin certain cases the courts failed to adequately evaluate the existing cases, to pay attention to the specifics and sensitivity of the committed crimes, and imposed less severe preventive measures on the defendants, which posed potential risks to the lives and health of the women who were victims of violence.

Certainly, the existence of the fact of domestic crime or domestic violence does not automatically imply the necessity of imposition of a preventive measure or the most severe measure on a defendant, although it is important that, in addition to other circumstances, to evaluate the specifics of the crime and the matters of security of a victim which may be the basis for imposition of a preventive measureor a more severe measure.

[13] The whole stage means attendance at all sessions of the review of the case.

17(7%)out of theattended first appearance sessionswere related to the cases of domestic crime and domestic violence. In 10 cases out of the above the court imposed bail on a defendant, in 5 cases the court imposed imprisonment. Also, in one case an agreement on not to leave the country and due conduct was imposed on a defendant, and in one case a preventive measure was not imposed on a defendant. **In most cases (12 cases) a victim was a woman, former wife or partner of a defendant.**

It is worth noting that in 2 of the 10 cases in which bail was imposed on a defendant and a victim was a women(20%), the preventive measure was unreasonably lenient. Also, bail failed to adequately and appropriately ensure a defendant's behavior and reduction of the existing risks.

The example given below illustrates the aforementioned:

A person was accused of the violence against a spouse in unregistered marriage. Namely, according to the prosecutor's explanation, the defendant physically assaulted his spouse and committed physical violence against her in front of their child, namely he beat his spouse during 15-20 minutes causing pain and less severe bodily injury. The court found out that such violence was not committed for the first time. A restraining order had also been issued, but after the expiration of the order the defendant continued the criminal activity. In addition it was identified that the defendant had difficulties in controlling himself under the influence of alcohol, and he was prone to aggressive acts. The prosecution demanded imposition of imprisonment and supported its motion quite well. Despite the aforementioned, a judge imposed bail in the amount of GEL 3000 on the defendant, which in that case would not have a restraining effect. There was a reasonable ground that the defendant would continue violence because this was not for the first time and the fact of issuance of a restraining order proves that such violence was systematic.

The imposition on the defendant of an agreement on not to leave the country and due conduct in the case of domestic violence was similarly unreasonable and unjustified.

The example given below illustrates the aforementioned:

A person was accused of violence committed in an inebriated state against the spouse and daughter-in-law. According to the prosecutor's explanation, **the cases of violence against the spouse had occurred before, but the victim had not notified law enforcement bodies in this regards in order to avoid family disruption**. If was also found out that when drunk the defendant was unable to control his behavior. Based on the aforementioned, the prosecutor demanded imposition of bail in the amount of GEL 1 000, although the court agreed with the defense and imposed on the defendant an agreement on not to leave the country and due conduct. Also, the judge stated that this measure would have appropriate results, but the judge did not pay attention to the nature of the alleged crime and the fact that the defendant and the victim would continue living and working together.

Also, in one case an inadequate attitude and failure of the court to appropriately evaluate the existing risks was identified. Although this case is not related to domestic crime and domestic violence, the case is on the violence committed against a partner woman, which does not belong to the above classification.

The example given below illustrates the aforementioned:

This example demonstrates on the one hand inefficient application of bail, as a preventive measure, and on the other hand negligence of the prosecution with regard to commencement of investigation.

A person was accused of the threat committed against his girlfriend. Namely, according to the prosecutor's explanation, the defendant coercively cut off the victim's hair, distorted her appearance and then put the scissors at her neck and threatened her with death. As the court found out, the defendant had threatened the victim for several times before and there were also cases when he physically assaulted her. Besides, the prosecution emphasized the specific nature of the crime and severe emotional condition of the victim, who feared that the defendant might take revenge on her. For this reason the victim asked the prosecutor's office to conclude a plea agreement in order to avoid the revenge of the defendant. Based on the above, **the prosecution demanded imposition of imprisonment** and supported

its motion with the above stated arguments. In addition, the prosecutor pointed out former conviction of the defendant as his personal characteristic and emphasized the risk of pressure on the witnesses who were the acquaintances of the defendant.

The defense did not agree with the prosecutor's motion and basically pointed out the gravity of the crime and personal characteristics of the victim. The lawyer stated that criminal prosecution was not necessary and only a restraining order must have been issued. However, lawyer's opinion lacks legal grounds because legislation does not provide for the issuance of a restraining order in such cases of violence (this is not the case of domestic violence). Also, the defendant was concerned that his wife would learn about that and his family would be disrupted. Finally **the judge rejected the prosecutor's motion and imposed on the defendant a bail guaranteed with remand in the amount of GEL 4000**, which means that after payment of the bail amount the defendant will be released until rendering the final decision on the case. After imposition of the bail, the judge told the defendant: "*I hope you will justify my confidence*."

At one of such sessions the prosecutor filed a motion on submission of additional evidence related to the protocols of interrogation of the defendant and two witnesses. The prosecution stated that the defendant had threatened the victim to withdraw the claim (i.e. to apply to the prosecutor's office with the request to terminate the case) and to change the testimony given before, otherwise she would be a victim of physical assault. The prosecutor wanted to submit additional information with regard to that fact. Also, the prosecution explained that the evidence submitted by the prosecution proved the threat committed by the defendant. The judge rejected the motion and stated that if a person's act implied the elements of a crime, a further investigation should have been launched with regard to that fact. However, the conclusion of the prosecutor's office is vague, which stated that there were not any grounds for launching investigation regarding that fact.

The above case proves that sometimes imposition of a bail or other less severe measure is not an effective mechanism that will restrain a defendant's behavior. For that purpose the risks and threats, arising from a defendant, must be thoroughly and adequately evaluated at the very beginning.

1.3. Imposed punishment in the cases of domestic violence and domestic crime

Out of 41 cases on domestic violence and domestic crime[14] a judgement of conviction was pronounced in 21 (51%) cases and a judgement of partial conviction and partial acquittal was pronounced in one (2%) case[15]. As for the remaining 19 cases the proceedings are still pending or a judgement was rendered in such a way that GYLA's monitor was not able to attend the session, due to which the form of the judgement is unknown. Out of 41 cases, a defendant was male in 37 (90%) cases, female - in 3 (7%) cases and both male and female in one (2%) case[16].

Although in most cases a judgement of conviction is pronounced, the adequacy of the punishment is also a problematic issue.

Out of 22 judgements, community service was imposed on the defendants in 8 (36%) cases, imprisonment was imposed on the defendants in 8 (36%) cases, although conditional sentence was imposed on them with the probation period[17], and in 6 (27%) cases out of 22 an actual sentence, namely imprisonment at a penitentiary facility, was imposed on the defendants[18]. It should be noted that in the last 6 cases, in which imprisonment was imposed on the defendants, the following circumstances were present:

- In one case a defendant committed domestic violence for the third time. For the first time fine was imposed on him, and for the second time – community service. Only in the third case the defendant was sentenced to 2 years of imprisonment.
- One case was related to intentional murder of a spouse, in which a defendant was sentenced to 10 years of imprisonment[19].

[14] During this reporting period, we attended 66 sessions of the hearing on merits of 41 cases on domestic violence and domestic crime; the number of plea bargain trials are not included.

[15] The court acquitted a defendant in the part of domestic violence and convicted due to the violation of a restraining order;

[16] Defendants were a son-in-law and a mother-in-law;

[17] In some cases fine or community service has been imposed as an additional punishment;

[18] Also, in one case fine and in another case community service was imposed as an additional punishment;

[19] The defendant was convicted for commission of the crime determined by Article 108 of the Criminal Code of Georgia, which is punishable with 7 to 15 years of imprisonment.

- In one case a judge imposed 6 months of imprisonment only due to the violation of the restraining order, while acquitted the defendant in the case of commission of a domestic crime, which was included in the category of judgements of partial acquittal.
- One case was related to multiple domestic violence. Besides, a defendant had been convicted for illegal storage of firearms. In that case a judge imposed 6 months of imprisonment while the Article determines one to three years of imprisonment[20].
- In one case where the victims were two persons, the defendant's spouse and daughter-in-law, the court imposed 6 months of imprisonment.
- In one case a defendant, who had committed similar crime several times in the past, committed domestic violence in front of a minor child. The court sentenced the defendant to one year of imprisonment.

Although GYLA has not examined the contextual part of the imposition of sentence and the rendered decision, the fact that in most cases judges impose lenient and less severe punishments gives rise to some question marks regarding inadequate approach to the cases of domestic violence and domestic crime and improper evaluation of the suffering experienced by a victim. As the above cases demonstrate, actual sentence is mainly imposed if violence is systematic and a person has been convicted for several times.

Explanation of the judge on one of the cases of domestic violence, in which a conditional sentence and a fine of GEL 1 000 was imposed

"I thought much, I was going to impose imprisonment, an actual sentence, although the only factor why I refrained myself was that as you [defendant] stated, you no longer live with your spouse and the risk of repeating the crime is reduced."

Such explanation of the judge is unclear and vague, because the fact that a violator and defendant no longer live together does not reduce the risks of repeating the crime. Often, commission of a crime is not a barrier for a violator despite living separately.

[20] Article 126^1(2)(e) of the Criminal Code of Georgia.

Explanation of the judge on one of the cases of domestic violence, in which a conditional sentence and a fine of GEL 1 000 was imposed as well

> *"The materials of the case included a protecting order and this was not a single fact, so I think that this punishment will have a restraining effect."*
>
> In this case the position of a judge is unclear; what are the grounds based on which a conditional sentence and a fine of GEL 1 000 would have a restraining effect, while the defendant had already committed violence before, and under the imposed punishment free movement across the territory of the country would not be restricted for the defendant.

In addition to application of concessionary terms by the court, there was one case during this reporting period in which in the case of domestic violence, where a victim was a women, the prosecutor's office exercised its discretional right and withdrew a motion at the stage of hearing of the case on merits for the purpose of conclusion of diversion, an alternative mechanism of criminal prosecution, with the defendant[21]. According to the Criminal Policy Guidelines, there are circumstances that refer to the practicability of criminal prosecution, namely if a committed crime is common and systematic in a certain region, also if a crime has been committed on the grounds of discrimination or against a vulnerable person[22]. Accordingly, conclusion of diversion by the prosecutor's office on the case of domestic violence makes an impression of inappropriate and improper application of the mechanism.

1.4. Position of the victims regarding the defendants' punishment

Trial monitoring showed that in most cases victims of domestic violence and domestic crime have extremely lenient attitude towards the violence committed against them and they have to endure violence in order to avoid judgement by the society, due to the economic depen-

[21] This information was provided by the employees of Tbilisi City Court;

[22] Order No 181 of 8 October 2010 of the Minister of Justice of Georgia on approval of general part of guidelines of the criminal law, Chapter 3, Discretional right of a prosecutor to carry out criminal prosecution;

dency on the criminal, fear of revenge from the criminal or other factors. For this reason, victims of violence change their testimonies and no longer pursue a claim against the defendants. This creates certain barriers for the prosecution, but this does not mean that more lenient and concessionary conditions must be applied against the defendants. The criteria of reconciliation with the victim cannot be considered in the domestic crime[23].

The phrases and opinions of a victim with regard to the punishment of a violator are given below in order to illustrate the aforementioned:

During the examination a victim stated: *"[defendant] always tried to find a cause to provoke conflict... [defendant] has never assaulted me physically... there was a case when he froze his hand in the air, which was intended to hit me... he took a chair and hit it to the refrigerator. I was frightened... he knows it and uses this fear to demonstrate his power... maybe I was afraid of death... I would not deny that I frequently called the patrol police...he assaulted me verbally... this was a psychological stress for me... at present I have no claim...I want him to be given another chance and to be released...* ***after his arrest I have not left home, I am more stressed when he is arrested... I am ashamed of people. This is psychological stress for me."***

Position of a victim with regard to the violence committed by a father against his child

Defendant's spouse- *„a victim is a mischievous child, this happened only for the purpose of upbringing the child. Do not arrest my husband, otherwise our family will be economically destroyed".*

Victim - *„I love my father and I forgive him. Do not be strict against him. I made him angry."*

Neighbor - *„they have an exemplary family. We have not heard anything bad from them... he raised hand against his child in order to bring him up well."*

[23] Dekanosidze, T., Judgements on Femicide Cases, 2014, GYLA research, Tbilisi, 2016, 49.

It should be also noted that in certain cases victims are afraid that a violator may take revenge, so they ask law enforcement bodies to impose lenient sanctions against the defendants.

The example given below illustrates the aforementioned:

A female victim of domestic violence stated at the hearing of the case on merits: "*I do not want him to be imprisoned. Just tell me that he would not touch me... issue an order restraining him to touch me.*" The judge explained to her that an order could not be issued and this procedure was carried out in an administrative manner. Also, he explained that she had the right not to give testimony against a close relative. After that the victim refused to give testimony.

In this case there is a doubt that refusal to give testimony was caused by the fear of revenge and repeated violence by a violator.

1.5. Classification of a crime and a discrimination motive in the cases of violence against women

In the cases of violence against women, it is important that classification of a crime actually corresponds to the gravity of the committed action. In conditions of incorrect classification of a crime, it is impossible to have a gender sensitive law system, in which crimes committed against women are appropriately recognized, classified and punished by the prosecution and judicial authorities[24].

According to the legislation the courts are not allowed to change the classification of a crime to more serious one. This fact imposes even greater responsibility on the investigative and prosecutorial bodies. The court is allowed to change the classification of a crime only to similar or lighter classification.[25]

At the same time it is important that in cases of violence against women or domestic violence against women, investigation is launched withthe viewpoint whether a crime was committed on the grounds of gender

[24] Dekanosidze T., Judgements on Femicide Cases, 2014, GYLA research, Tbilisi, 2016, 35-36.

[25] Article 273 of the Criminal Procedure Code of Georgia.

or not[26]. During the investigation, in case of existence of a possible discriminatory motive, the employees of the Ministry of Internal Affairs of Georgia shall be obliged to reference Article 53(3[1]) of the Criminal Code of Georgia - commission of crime on discriminatory grounds[27]. The employees of the Prosecutor's Office have the same obligation.

Findings

- In all cases monitored, except one, these crimes were not classified as crimes committed on discrimination grounds (no reference was made to Article 53(31) of the Criminal Code of Georgia). Accordingly, prosecutorial and judicial bodies do not recognize that violent crimes committed against women are the consequence of gender discrimination. Also, there were cases identified, where, along with discrimination grounds, the correctness of classification (classification of crimes acording to their gravity) is questioned[28].

The example given below illustrates the aforementioned:

In one of the cases, which was related to the violence committed against a spouse, GYLA monitored the first appearance session as well as a pre-trial hearing and a hearing on merits.

A person was accused of the crimes committed against the spouse (unlawful deprivation of liberty, threat, coercion). Namely, at the first appearance a prosecutor stated that a conflict occurred between a victim and a defendant, due to which the victim called the patrol

[26] Report of the Special Rapporteur of the UN, UN Doc. A/HRC/23/49 (14 May 2013), §73; also, IACtHR, Case of Gonzalez et al. ("Cotton Field") v. Mexico, decision of 16 November 2009, §455; see: Dekanosidze T., Judgements on Femicide Cases, 2014, GYLA research, Tbilisi, 2016, 18-19. Also, see: Council of Europe Convention (Istanbul Convention) on Preventing and Combating Violence against Women and Domestic Violence, 11.05.2011, Istanbul, Article 3(a); see: Dekanosidze T., Judgements on Femicide Cases, 2014, GYLA research, Tbilisi, 2016, 35.

[27] Instruction No 47 of the Minister of Internal Affairs of Georgia on prevention of discrimination and implementation of effective response measures against the offences committed on discrimination grounds by the units of the Ministry of Internal Affairs of Georgia.

[28] The classification of actions in the cases of domestic violence and domestic crimes will be evaluated through general analysis of the trials attended and on the basis of statements made by the parties to proceedings.

police. After that fact the victim changed the door lock, although in vain. The defendant went to the victim's house and demanded to open the door, otherwise he threatened with death. In relation to that fact the patrol police was called in, after which a restraining order was issued against the defendant, which prohibited the defendant to approach the victim. Despite the above, **the defendant went to the victim's house, tied her hands at the back with an extension cord and put her on the bed. Then he released gas in the room. Although the victim asked him to let her go, the defendant kept telling that she deserved death. Besides, the defendant broke down the door lock to prevent the victim from opening it, took away her mobile phone and went to another room. The victim was not able to move for about ten minutes, but later she managed to free her hands, took advantage of her husband's negligence, opened the damaged door lock and called her neighbors for help.** The defendant continued to threaten her with death with a knife. The victim managed to call the patrol police, although the defendant forced her to call again and cancel the previous call. The victim obeyed. Patrol police came anyway but the defendant told them that the call had been canceled. The victim asked patrol police for help and said that her husband forced her to cancel the call. The defendant was arrested. **The prosecution explained that he would kill the victim if other circumstances had not prevented him to.**

At the pre-trial hearing, which discussed the issue of leaving in force the imprisonment imposed on the defendant, the judge stated: "*he [defendant] tied victim's hands with an extension cord and then tried to suffocate her.*"

At the hearing of the case on merits the prosecution repeated the above information. Despite the above, the defendant is charged under three Articles: unlawful deprivation of liberty by dangerous violence for life and health and/or threatening with the commission of such violence, threat and coercion.

It is worth noting that in the given case there was possibly an attempt of murder. The behavour of the defendant leads us to think so, who left the victim on the bed with her hands tied at the back, released gas in the room, took away the victim's mobile phone and broke down the door lock to prevent her from escaping. All these acts indicate to the intended murder and action committed with this motive.

In one case the judge also paid attention to the classification of the action. In that case a person was accused of the repeated threat with death against the spouse. At the hearing on merits, when a judge pronounced a judgement of conviction he stated that **the defendant's action must have been classified under a stricter article**, although the judge did not make additional explanation what was implied under the concept of a stricter classification.

Also, on one of the first appearance sessions, which was related to the threat against the spouse, in the conviction part, the prosecutor did not apply Article 11^1, which determines the circumstance indicating domestic crime and only Article 151 of the Criminal Code of Georgia was applied in the case. Article 11^1 was applied during the pre-trial session, although it is unclear why such rule was absent at the first appearance session when the domestic nature of the violence has already been identified.

As for the discrimination grounds, only one case was identified during this reporting period, in which the prosecution applied the provision of Article 53(3^1) of the Criminal Code of Georgia in the context of aggravation of the punishment for the defendant. However, the prosecutor did not make an additional explanation on how the defendant's discriminatory action was manifested[29].

GYLA hopes that in all possible cases the prosecutors will apply Article 53(3^1) of the Criminal Code of Georgia in the future as well, which will have practical and effective nature and will be aimed at emphasizing the discrimination motive of the defendant and aggravating the punishment.

However, despite the aforementioned, there were certain cases in which, due to the actual circumstances, there were doubts that violence had been committed on grounds of discrimination; although the judgements have been delivered on those cases in such a way and some of them are still pending, that the prosecution has neither mentioned that issue nor the necessity of the above rule. The prosecutor did not point out a discriminatory motive in any of the cases on domestic violence, domestic crime and violence against women.It is worth noting that if from the perspective of an objective monitor a crime has been possibly

[29] In this case the court imposed nine years of imprisonment, which was assumed as conditional for the defendant and the probation period of 1 year and 6 months was determined.

committed on grounds of discrimination, the prosecution must be interested in such cases and carry out more comprehensive and detailed investigation.

The example given below illustrates the aforementioned:

At one of the first appearance sessions, during which the case of domestic crime was reviewed, the defendant stated the following against the victim: *"I cannot stand the chattering of that person [the victim] when she opposes me. So much chattering is not necessary. When one is drunk you should keep away; you cannot tell things that are not necessary."*

Also, at one of the hearings on merits on the case of domestic crime the lawyer stated that: "*his wife called the defendant and asked him to stop drinking and to go home, but it was not admissible for the defendant from the women (i.e. he was annoyed).*"

In one of the cases of violence, the victim stated the following at the court:

"We had conflict quite often, but I have never applied to the police. Main reason was that he was jealous. We had been broken up for one week, but he kept coming to my workplace. I kept hiding from him. One day I found him at the door of my house. I was even afraid to talk. I called for the patrol police, which issued a restraining order. After that he did not appear for two weeks. Once he followed me in the underground, asked me to forgive him. I refused…" As the victim said, **theviolator was jealous of her manager**. "*He fought with me, he kept telling that he would kill me unless I behaved myself. I told him that I would call the police, but he told me that he would suffocate me before the police comes… he was jealous, he hit me in the face during one of the fights. I felt pain and started screaming… he put his hand on my mouth and told me to stop screaming. He was holding a knife.* ***He told me that he would slaughter me like a dog before the police comes, and no one would find me, that he was not afraid of jail and he would go out of the jail like he might be put into it."***

In those cases there is a doubt that defendants showed discrimination against victims, controlled their behavior and called them for strict obedience to the gender roles. Presumably, the motive of commission of the crime was disobedience of the victim and failure to fulfil the demand. However, although such doubts existed, the prosecution did not show interest in examining those facts in more details.

2. Conduct of the participants of criminal proceedings and their attitude towards vulnerable groups

This chapter covers the cases that demonstrate the attitude of the trial participants towards vulnerable groups (female defendants and victims, foreign defendants, etc.). In certain cases the monitoring identified unethical and improper conduct towards the above persons, and in other cases stereotypical and stigma-based attitude towards specific groups.

Monitoring results

During the reporting period there were certain cases of unethical conduct of judges, prosecutors and lawyers against certain groups of persons, the demonstration of gender stereotypes or other stigma-based attitude emphasizing a different characteristic of a person and creating a degrading environment for him/her. The right to a fair trial includes respect for the dignity of humans and their protection from stigmatization. Accordingly, such attitude from the side of the parties to proceedings already creates barriers/obstacles in accessing justice, irrespective of what effect such attitude had on the results of the proceedings.[30] Access to justice is not a result-oriented concept only. It includes the examination of individual issues related to proceedings.

30 According to some recommendations of 23 July 2015 made by the UN Committee on the Elimination of All Forms of Discrimination Against Women: *"stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants"* (CEDAW/C/GC/33).

The examples given below illustrated the aforementioned:

Judge's sexist and prejudicial attitude towards women

At one of the first appearance sessions, reviewing the case of threat against a woman, the judge became interested in the cause of previous divorce of a defendant and asked the following question: *"What was the cause of the divorce?* ***Was your wife traditionally asking too much and you could not afford it or what?"***

The judge proved a prejudicial attitude towards women.

Prosecutor's cynical attitude towards the reproductive role of a female defendant

Prosecutor:*„How many children do you have?"*
Defendant: *„I have six little children."*
Prosecutor*: „Are not you going to give birth to another one? You should not stop at six."*

Unethical attitude of a lawyer towards a foreign defendant

At one of the first appearance sessions the issue of imposition of a preventive measure on a foreign defendant was reviewed. The defendant had a Russian language interpreter. At the session the defendant wanted to tell something to a judge, but the lawyer kept the defendant silent: "*Bequiet, are not you a human?!...You interrupt us, so be quiet.*" The interpreter and the defendant kept silent. Later on the prosecutor stated that according to the defendant his/her father had immovable property and he/she would be able to pay the bail with that property. This dissatisfied the lawyer and addressed the defendant: "*I told you to keep quiet, you were talking too much, so that's the consequence.*"

Finally, the judge asked the defendant whether he/she agreed with the lawyer, to which the defendant nodded. The lawyer rebuked and said: "*do not nod, say something.*"

Lawyer' attitude towards a female victim of domestic violence

Lawyer: "*This woman [victim] was a flight attendant. She has four children, nobody knows from whom*". The judge reprimanded the lawyer for this prejudicial attitudeand said that the lawyer did not have the right to evaluate the morality of the victim. The judge's reaction should be assessed positively. However, the lawyer answered: *"I am ethical in relation to what she actually deserves."*

Lawyer' attitude towards a female defendant under his/her defense

The session was held in a courtroom, where a glass room was placed for a defendant. Before the beginning of the trial the lawyer referred to the defendant under his/her defense offensively and disrespectfully. Namely, the lawyer said: "*I hope [defendant] would not jump out of that room. [the defendant] is such a person even this [glass room] cannot hold him/her."*

There was also a case, in which a lawyer publicly talked about the health status of the defendant and stated that the defendant had AIDS and Hepatitis C, which was not relevant to the circumstances of the case to be reviewed. It should be assessed positively that the judge reprimanded the lawyer and warned him not to disclose publicly information about health conditions.

3. Access to justice for defendants, who do not have command of the language of the proceedings

3.1. Brief overview of the legislation

Under the Constitution of Georgia[31], Criminal Procedure Code of Georgia[32] and international conventions[33] to which Georgia if the party, if a person does not know the language of legal proceedings, he/she shall

[31] Article 85(2) of the Constitution of Georgia;

[32] Articles 11 and 38(8) of the Criminal Procedure Code of Georgia;

[33] Article 6(3) of the European Human Rights Convention;

have the right to use interpreter's services at the expense of the state.

Foreign defendants to some extent belong to the vulnerable group, because unlike the defendants who know Georgian language, they cannot properly perceive the situation where the processes are going on against them. Therefore, to compensate this, foreign defendants must have someone who will minimize the barriers/obstacles in the area of access to justice.

The right to use an interpreter's services implies ensuring complete quality of translation provided to a person, understanding the content of the proceedings and involving in it practically and effectively, with no theoretical and unreal, illusionary exercise of the right[34]. At the same time, the translation must be so detailed in order to enable comprehensive understanding of the proceedings carried out against a defendant and his/her adequate participation in the proceedings. In order for an interpreter's assistance to be practical and efficient, the body carrying out the proceedings is obliged not to be limited only by appointment of an interpreter, but to control the degree of the interpretation performed during the hearings[35].

Justice in the country is administered by the judicial authority, so it is responsible to ensure that the proceedings are carried out in the language understandable for everybody. This approach is also developed by the European Court of Human Rights, which established that the court is responsible for ensuring the professionalism of an interpreter[36].

3.2. Monitoring results

In most of the hearings attended during the monitoring in which defendants needed an interpreter, that right was effectively and appropriately exercised. Often a judge asked a defendant whether the issues stated at the hearing were understandable for him/her. Besides, sometimes a judge talked slowly and gave time to an interpreter to properly

[34] Mole, N., Harby K., Guide for the Right to Fair Trial, Human Rights Guidebook series No 3, Belgium, 2006, 69;

[35] Kamasinski v. Austria, №9783/82б 19 December 19, 1989, §74; Hermi v. Italy, № 18114/02, 18 October, 2006, §70; Protopapa v. Turkey, № 16084/90, 24 February, 2009,§80;

[36] Cuscanî v. United Kingdom, №32771/96, 24 September, 2002, §38-39.

translate the speech to a defendant. Also, a judge postponed several sessions due to the failure of an interpreter to appear. However, there were also exceptions in which a judge failed to exercise proper control.

Out of 43 cases when the defendant needed an interpreter's assistance, in 2 (5%) cases the interpreter translated for the defendant from time to time or did not translate at all the issues discussed at the hearing and an interpreter's participation had only a unilateral character. Thus, the right of a defendant to be provided with an interpreter's service was violated.

The example given below illustrates the aforementioned:

At the first appearance session, which was carried out against a foreign defendant, there was a case of unprofessionalism and inefficiency of an English language interpreter that had negative impact on the full participation of the defendant in the proceedings. The defendant often stated that the translation was not understandable. Also, the interpreter was often stopping and was not translating the proceedings. The interpreter did not translate the lawyer's speech as well. The judge asked the interpreter whether the lawyer's speech was translated or not, to which the interpreter agreed. Based on the above, the lawyer demanded recusal of the interpreter from the case, to which the prosecution did not agree. Also, the defendant refused recusal of the interpreter, which was presumably caused by the fact that the words translated to the defendant were not comprehensive, which confused the defendant.

If the judge had been more attentive, he/she would have noticed unprofessionalism of the interpreter and inefficiency of the translation.

Despite the above negative cases, there were positive responses as well, when the court noticed unprofessionalism and the gaps made during the translation.

The example given below illustrates the aforementioned:

At the first appearance session, during which a decision on a plea agreement was made, the defendant was a citizen of Belgium and did not know the language of legal proceedings. An English language interpreter was invited, who failed to fulfil its functions properly and had problems in synchronous interpretation. The judge was very

dissatisfied because of that and told the interpreter with a harsh tone: "*this is the humiliation of a judge. You are at the court and not in the theater.*" Such behavior of the judge confused and frightened the interpreter even more, due to which the interpreter was not able to continue interpretation. It was additionally found out that the interpreter participated in the investigation as well, so the judge made a decision on the recusal of the interpreter and on the invitation of other interpreter, who would re-translate the documentation of the proceedings for the defendant

Although the judge made a right decision and changed the interpreter, the behavior of the judge was unethical that damaged the image of the court.

Notably, according to the Bangalore Principles of Judicial Conduct a judge must maintain order and etiquette at all sessions carried out at the court. A judge must be patient and polite towards the parties, jury, witnesses, lawyers and other persons with which the judge has official relations. Also, a judge must call for the similar conduct by the representatives of the parties, court staff and other persons who are subject to the administration and control of the judge[37].

II. FIRST APPEARANCE OF A DEFENDANT AT COURT AND RESOLUTION OF THE ISSUE OF APPLICATION OF A PREVENTIVE MEASURE

1. Brief overview of the legislation

Under Article 198 of the Criminal Procedure Code of Georgia, during the first appearance of a defendant at the hearing, alongside other procedures the court considers the issue of what measure should be used to ensure that the defendant will further appear before the court, that his/her further criminal activities are prevented, and that the investigation process is not hindered until the final decision is made on the case. Apreventive measure must be substantiated, which means that

[37] Bangalore Code of Judicial Conduct, 2001, Judicial Group on Strengthening Judicial Integrity;

the application of a certain preventive measure must comply with the objectives of the legislation.

Application of a preventive measurehas a preventive and securing nature and it does not aim to prove the guilt of a person, but rather it is a mechanism for the prevention of hindrance toproper administration of justice[38].

The court may apply one of the preventive measures determined by the Criminal Procedure Code of Georgia, such as: imprisonment, bail, personal guarantee, agreement on not to leave the country and due conduct, and supervision by the command of the conduct of a military service member, and the transfer of a minor defendant under supervision.

Under Article 198(3) of the Criminal Procedure Code of Georgia,when filing a motion for applying a preventive measure, the prosecutor shall be obliged to provide reasons for the appropriateness of the requested preventive measure, and inappropriateness of another, less severe preventive measure. Accordingly, the burden of proof of the preventive measure shall rest on the prosecution. The defense is not obliged to submit evidence against motions of the prosecutor. In addition, under Article 198(5) of the Criminal Procedure Code of Georgia,when deciding to apply a preventive measureand its specific type, the court shall take into consideration the personality, occupation, age, health status, marital and material status of the defendant, violation of any of previously applied preventive measures and other circumstances.

A court decision applyinga preventive measuremust be substantiated, because making a substantiated decision at each stage of proceedings is part of a right to a fair trial, which is guaranteed by the Criminal Procedure Code of Georgia[39] and is supported by a range of decisions made by the European Court of Human Rights[40].

2. General overview

In comparison to the previous monitoring periods (from October 2011), general situation has improved, although there are still significant gaps in certain individual components of first appearance ses-

[38] Protocol N 6466 II-40 of 26/06/2015 of the Constitutional Court of Georgia.

[39] The Criminal Procedure Code of Georgia, Article 194(2);

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

sions. In addition, certain negative practice of the previous periods has not been changed and even worsened. Cases of unsubstantiated imposition of bail have increased from 12% to 28%. However, the percentage of unsubstantiated decisions imposing imprisonment has been reduced from 2 % to 10%. Notably, the approach of common courts to the standards and criteria of preventive measures is mixed.

Mainly, courts still use preventive measuresof two types. **94% of the appliedpreventivemeasures are bail and imprisonment. The percentage of application of alternative preventive measures is still very low.** Namely, personal guarantee and agreement on not to leave the country and due conduct was applied to only 6% of the defendants[41].

The situation has relatively improved during this reporting period in terms of substantiation of imposition of imprisonment, as a preventive measure, bythe prosecution, as well as the court approaches. However, it should be noted that in certain cases the motions of prosecutors were abstract and formulaic. Although the prosecution specified the goals and grounds for the application of a preventive measure, those arguments were often put forward at random and were not related to certain factual circumstances. It should be noted that sometimes the court substantiated the application of a preventive measureby abstract risks, which is not a standard of a reasonable belief where the application of a certain preventive measure may be proven.

Unlike imprisonment, the situation has worsened in terms of imposition ofbail. In certain cases, prosecutors required very big amounts of bail without having substantiated the appropriateness of that preventive measure or the amount of money. A significant gap exists in terms of determination of the amount of bail by a prosecutor, because almost in all cases prosecutors lacked information on the financial status of defendants.[42] Often judges asked prosecutors whether the latter had examined the financial status of a defendant, regarding which the prosecution did not have appropriate information.

[41] During this reporting period GYLA monitored 250 first appearance sessions (194 at Tbilisi City Court and 56 at Kutaisi City Court), in which 268 defendants participated.

[42] The prosecutor's office uses different approaches towards the study of the financial status of the defendants. The prosecutor's office sometimes provides the court with the information on financial status of the defendant, however, in most of the cases it does not provide the court with the same information.

The example given below illustrates the aforementioned:

Judge: „*Have you examined the financial status of a defendant based on which you require bail?*"

Prosecutor: "*As [the defendant] committed the crime during the period of a conditional sentence, we think that the only measure restraining him/her will be the amount of the bail. Less [amount of bail] will not ensure his/her [the defendant's] proper conduct.*"

To a certain extent, non-substantiation of motions for the imposition of bail by the prosecution resulted in the increase of the percentage of unsubstantiated decisions on the imposition of bail by up to 28%. In the previous reporting periods the amount of unsubstantiated imposition of bail was 12%.

It should also be noted that when a prosecutor required the application of a preventive measure other than bail and imprisonment, in certain cases he/she did not pay attention to the goals of the preventive measure, which made an impression that the status of a defendant automatically leads to the necessity of application of a certain preventive measure,which does not require appropriate substantiation.

Motions filed by the prosecution and decisions made by court

Asin the previous reporting period, there were cases in whicha prosecutor required the application of a preventive measureother than bail and imprisonment. Namely, a prosecutor required the application of a preventive measurein the form of an agreement on not to leave the country and due conduct to 4 (2%) defendants and filed a motion with court forthe imposition of a personal guaranteeon 3 (1%) defendants out of total 268 defendants. In addition to alternative preventive measures, the prosecutor did not require the application of any specific measure to 7 (3%) defendants and filed a motion with court only for appointing a pre-trial session. However, it should be noted that the reason for refusal by a prosecutor to require the application of a preventive measurewas the fact that in 4 cases the defendants were serving their sentence in connection with other criminal cases, and in one case imprisonment was imposed on a defendant as a preventive measure. This was the reason why the prosecutor refused to apply a certain preventive measure. Unlike the abovementioned, there was only one case in which a prosecutor did not require the application of any preventive

measure to an elderly female defendant, and in one case a prosecutor withdrew the motion.

Except for the cases of refusal to apply a certain preventive measure by a prosecutor, during the reporting period there was a very bad precedent of abuse of official authority by a prosecutor.

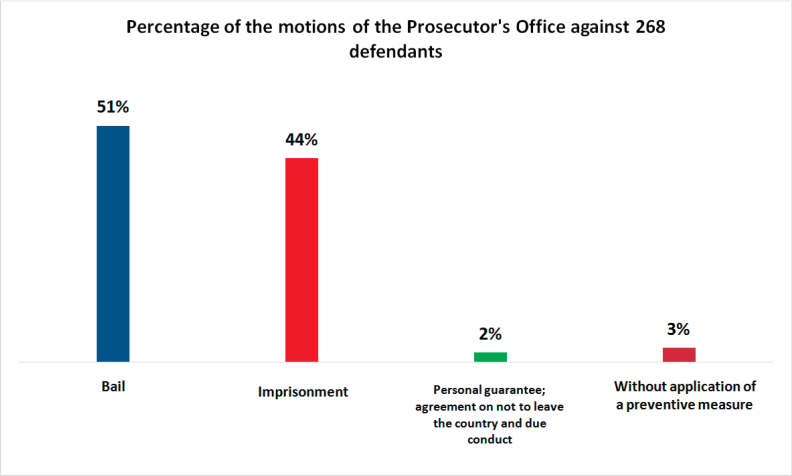
In the case described below, a prosecutor required the application of the most severe preventive measure, although imprisonment had already been imposed on the defendantas a preventive measure in connection with another criminal case.

Case of defendantN.R.

The person was accused of fraud. At the first appearance session a prosecutor required the imposition of imprisonment and pointed out the risks of pressure on witnesses, continuation of criminal activities and hindrance to the investigation. After filing a motion, the judge asked the prosecutor: "*Yes, I understand your substantiation. You have a very good motion, but please explain one matter. How can an imprisoned person commit the actions listed by youabove?*" The prosecutor stated that the imposition of imprisonment would secure the purposes of a preventive measure if the judge annulled imprisonment in the second case. Therefore, the prosecutor required the application of a measure securing a claim in advance by pointing out future risks. The judge did not eventually grant the prosecutor's motion and did not apply a preventive measure on the defendant.

The chart given below shows statistical data of the requirements of the Prosecutor's Office against 268 defendants.

ChartN№1



As for the issue of not applying a preventive measureby the court, 10 cases (4%) were identified during the monitoring, in which the court did not applypreventive measurestodefendantsdespite the prosecutor's requirement (in one case a prosecutor required the imposition of imprisonment, in one case a prosecutor required the imposition of a personal guarantee and in eight cases a prosecutor required the imposition of bail). **All the above cases were at Tbilisi City Court.**

Position of the defenseon the motions of the Prosecutor's Office

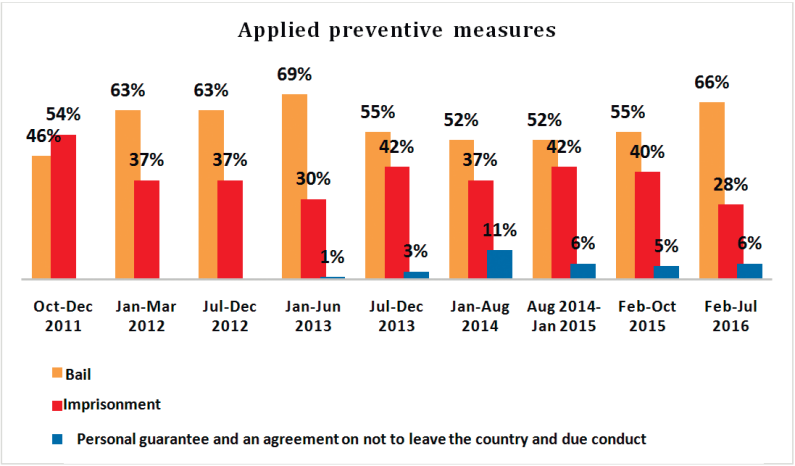
There are certain gaps with regard to the defense as well. Unfortunately, there were still the cases in which the defense only formally opposed the prosecution's motion and did not specify any convincing arguments in its favor. The defense opposed the requirements of the Prosecutor's Office only when the prosecution required the imposition of imprisonment. However, if the Prosecutor'sOffice required imposition of bail, the defense mainly agreed with the motion and only asked the court to reduce the bail amount. **In certain cases the existing circumstances allowed the defense to require reasonably from the court the application of a less severepreventive measure than that**

Bail

required by the Prosecutor's Office, although the defense failed to do so. This made an impression that the defense was not effective and did not make proper efforts to protect the best interests of a defendant.

The chart given below describes the situation during the whole period of monitoring in terms of application of preventive measures (from October 2011 to October 2015 inclusive).

ChartN°2



Non-uniform approach of the Prosecutor's Office and courts

Notably, in certain casesprosecutors demanded theapplication of different preventive measures to persons accused of the commission of the same crime. Also, the judges had different approaches in terms of application of preventive measures. Of course, the prosecution and the court have the right to demand and toapply different preventive measures to the persons accused of the commission of the same crimes if there are different circumstances leading to different approaches. However, in these cases different circumstances were not identified.

Relevant examples illustrating different approaches of the Prosecutor's Office are given below:

A person was accused of the commission of a crime provided for by Article 260(2) of the Criminal Code of Georgia. A prosecutor demanded the application of a preventive measure in the form bail in the amount of GEL 5 000 and substantiated the demand by specifying that the fact of consumption of drugs was also established against the defendant;however, the defendant had not previous conviction and the existence of other risks from the defendant was not proven either

❖

Unlike in the above mentioned case, a prosecutor filed a motion for the imposition of imprisonment in the case of a similar crime and supported the demand only with the fact of consumption of drugs. In this case the existence of other risks from the defendant was neither mentioned by the prosecutor nor identified during the court hearing.

A person was accused of the commission of a crime provided for by Article 273 of the Criminal Code of Georgia. A prosecutor demanded the imposition of bail in the amount of GEL 2 000 and did not substantiate the demand with any convincing arguments or facts.

❖

Unlike in the above mentioned case, a prosecutor demanded in the case of a similar crime the application of a preventive measure in the form of an agreement on not to leave the country and due conduct.The facts in this case, which are noteworthy in terms of application of a preventive measure, were identical to the example given above.

A relevan example illustrating non-uniform approaches of judges is given below:

In one of the cases a person was accused of the commission of a crime provided for by Article 276(5) of the Criminal Code of Georgia, a prosecutor demanded imposition of bail in the amount of GEL 10 000. The prosecution emphasized a severe punishment and the risk of absconding. The **judge has partially granted the prosecutor's motion, and imposed bail in the amount of GEL 8 000 on the defendantwithout examining the defendant's material status.**

❖

Unlike in the above mentioned case, the court demonstrated a different approach to a similar crime. Namely, a prosecutor demand-

ed the imposition of bail in the amount of GEL 8000, but did not support the motion with any specific and relevant arguments. In this case, **thejudge did not apply any preventive measure to the defendant**.

Notably, the above examples concern the cases identified at **Tbilisi City Court**. **Kutaisi City Court** has in all cases[43] imposed bail on persons accused under Article 276 of the Criminal Code of Georgia without any relevant and specific arguments.

3. Specific preventive measures

3.1. Bail

Bail is a preventive measure, the purpose of which is to ensure the defendant's return and preventfurther criminal activities or interference with proper administration of justice. In the case of imposition of bail, a defendant pays a certain amount of money in order not to be imprisoned beforea final decision is rendered on the case and to ensure defendant's proper conduct. The minimum amount of bail is GEL 1000; a defendant or a person, who pays a bail or equivalent immovable property in favor of the defendant, shall be repaidthe amount of the bail in full (taking into account the rate at the time the bail was posted), or the lien will be lifted from the property within one month after the execution of a court judgement. The above regulation shall be applied if a defendant has fulfilled his/her obligation precisely and honestly, and a preventive measure, applied to him/her, has not been replaced by a more severepreventive measure[44].

It is important that in the case of imposition of bail, as one of the types of a preventive measure, a prosecutor must substantiate not only the necessity of imposition of bail but also the amount of the demanded bail. When making a decision the court must take account of various factors, including the following: personality, financial status and other significant characteristics of a defendant. The court must pay atten-

[43] Out of 56 hearings attended at Kutaisi City Court with regard to the applicationof a preventive measure, four hearings concerned the crimes provided for by Article 276 of the Criminal Code of Georgia.

[44] Article 200 of the Criminal Procedure Code of Georgia;

tion to the above circumstances even if the Prosecutor's Office does not submit relevant information. In addition, the defense is not obligated to present the information, as it is the obligation of the prosecution to substantiate the relevance and proportionality of the preventive measure.

Besides, it is important that the imposition of bail on a defendant be proportional and substantiated. This means that bail must be substantiated and proportional to the financial status of a defendant and the alleged crime. To examine the issue of a preventive measure, all relevant circumstances must be analyzed in order for a judge to be convinced that a defendant can afford to pay imposed bail. If imposed bail cannot be paid, the bail may be replaced by a more severepreventive measure, such as imprisonment. Therefore, an unsubstantiated and excessively large amount of bail may be actually equal to the imprisonment of a person. Imposition of an unsubstantiated and excessively large amount of bail bears especially high risks in case of application of a preventive measure with a guarantee of remand[45]. It is also important that bail must have a restraining effect, namely the loss of the property must be a significant financial loss for a defendant, as a result of which he/she will try to fulfil the bail conditions[46].

In addition to the national legislation, the European Court of Human Rights has determined in several of its decisions that in the process of determining the bail amount a person's property and his/her relations with the person, who pays the bail, must be assessed[47]. Also, the states shall discuss this issue with the same diligence as the issue of necessity of imposition of imprisonment as a preventive measure[48].

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

[45] This issue will be described in detail below.

[46] A comment to the Criminal Procedure Code of Georgia, authors' collective body, editor: Giorgi Giorgadze, Tbilisi, 2015, pp. 577-578;

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

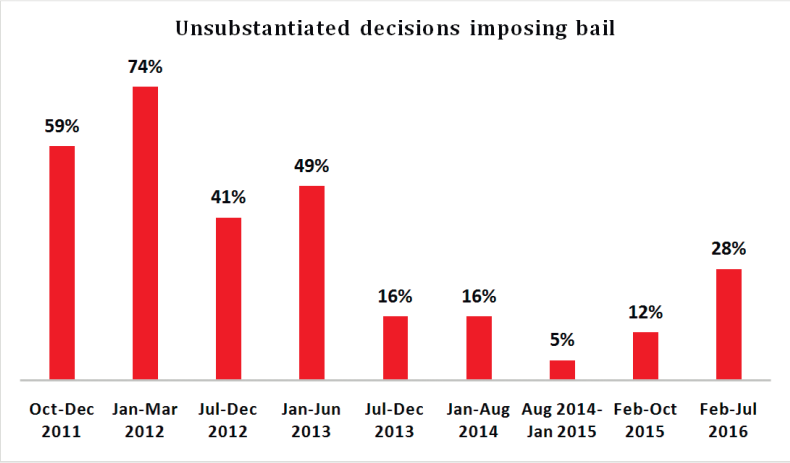
[48] Iwanczuk V. Poland, no. 25196/94, §66-70 (15 November, 2001).

3.1.1. Cases of imposition of bail

Notably, during this reporting period the percentage of unsubstantiated decisions imposing bail has increased. In particular, 47 (28%) decisions out of 166 (66%)decision imposing bail were unsubstantiated.

The chart given below shows the findings during the whole monitoring period (from October 2011 to July 2015 inclusive).

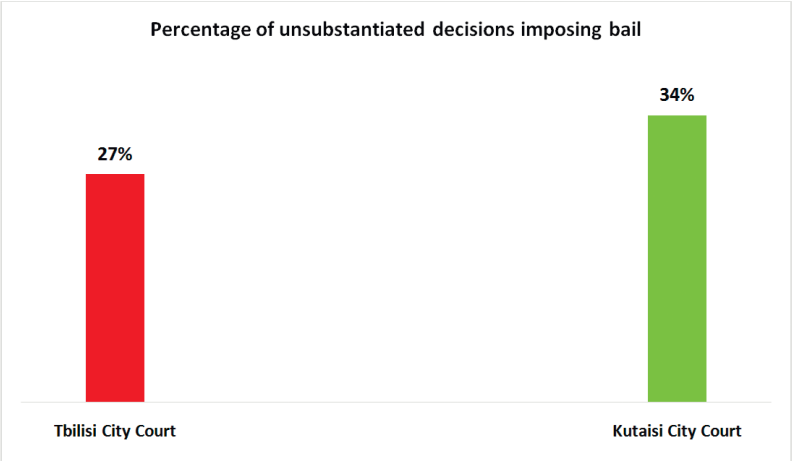
Chart №3



Notably,the percentage of unsubstantiated decisions is higher at Kutaisi City Court than at Tbilisi City Court.

The chart given below shows the percentage of unsubstantiated decisions imposing bail at Tbilisi and Kutaisi City Courts.

Chart №4



Sometimes, prosecutors did not substantiate properly the necessity of imposition of bail and made less efforts to prove the appropriateness of application of that preventive measure than in case of imposition of imprisonment. Substantiation of the bail amount is an especially problematic issue, because in most cases the prosecution did not have information on the financial status of a defendant. Although in such cases the court tried to determine the financial status of a defendant itself, this does not mean that a decision made [by the court] as a result of each such examination was substantiated. Also, there were cases in which bail was imposed on a defendant without examination of his/her material status and the court was not interested in that issue.

GYLA considers that bail is unsubstantiated if:

- judges make decisions on granting the prosecution's motion for theimposition of bail without having received proper substantiation from the prosecution, which must be based on the guilt, defendant's personality, defendant's financial status and other important circumstances for the case. Failure to examine these circumstances by the judges is more harmful if a defendant does not have a lawyer;
- despite the demand of the prosecution, in case of imposition of bail instead of imprisonment, a judge has not examined a defendant's financial status;

- although the defense agrees with the prosecutor on the imposition of bail, irrespective of the consent of the defenseto imposition of the bail, GYLA considers that the bail imposed by the court is unfair because the consent or desire of the defenseto pay bail neither aggravates nor neutralizes the risks, for the purpose of which a preventive measure is applied.

The example given below illustrates the aforementioned:

Case of defendant B. Kh.

A person was accused of the commission of a crime provided for by Article 260(2) of the Criminal Code of Georgia. At the first appearance session a prosecutor demanded the application of a preventive measure in the form of bail in the amount of GEL 4 000. For substantiation of the demand the prosecutor pointed out the specifics of the crime and the public threat. The prosecutor also specified the risk of continuation of criminal activities without presenting any supporting arguments or evidence. The defense opposed the prosecutor's demand and offered the court to impose personal guarantee. The defense presented two guarantors (defendant's uncles) at the hearing and explained that the defendant was a student, his/her father died when he/she was 3 years old and his/her mother was an unemployed housewife. Due to the aforementioned he/she [the defendant] would not be able to pay the bail amount. It should be also noted that the judge asked the prosecutor whether he/she had any information on the incomes and material status of the defendant, to which the prosecution answered that property was not registered in the defendant's name at the Public Registry, neither was he/she included in the list of a socially marginalized group. Apart from the above, the court has not discussed the defendant's material status. Despite the non-substantiation of the prosecutor's motion and the offer of the defense regarding the imposition of a personal guarantee, the court imposed bail in the amount of GEL 2 000 on the defendant with a guarantee of remand. In this case, as the financial status of B. Kh. was not properly examined, there is a high risk that the defendant will remain in custody due to failure to pay the bail.

Motions of the Prosecutor's Office for imposition of bail and decisions made by the court

During this reporting period the Prosecutor'sOffice demanded the imposition of bail on 51% of the defendants (on 136 defendants out of total 268). Unlike in the previous reporting period, the percentage of demands for the imposition of bail increased, one of the reasons for which may be the decrease of the percentage of the demand for imposition of imprisonment by the Prosecutor's Office[49]. It is worth noting that the court granted 120 (88%) petitions out of the demands for bail against 136 defendants, and decreased the amount of bail in 92 (77%) cases. **The fact that in most cases the court decreases the amount of bail demanded by the Prosecutor's Office indicates that mostly the Prosecutor's Office demands payment of an inadequately high amount of bail by a defendant, which may place more burden on a person than it is necessary for a reasonable level of security.**

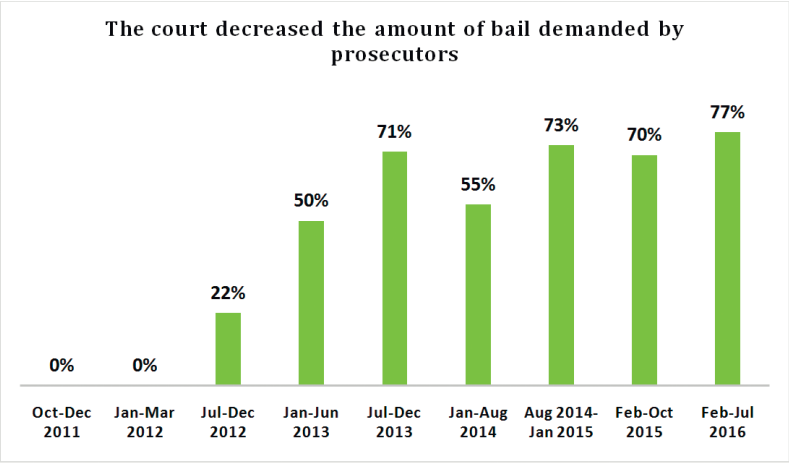
The total amount of bail demanded by the Prosecutor's Office against the defendants was GEL 683.500. In the cases, in which the court granted the prosecution's motion for the imposition of bail, the total amount of bail was decreased by GEL 370.000, which ultimately amounted to GEL 313.500.

As for the remaining 16 (12%) cases, the court rejected the prosecution's demand to impose bail, in 8 (50%) cases out of which the court did not applya preventive measureto a defendant; in 7 (44%) cases the court imposed an agreement on not to leave the country and due conduct, and in 1 (6%) case the court imposed a personal guarantee. The fact that alternative measures and no preventive measures were imposed on the defendants by the court should be positively evaluated.

The chart given below shows the statistical data of imposition of less amounts of bail than demanded by the Prosecutor's Office during the whole monitoring period (from October 2011 to July 2015 inclusive).

[49] During this reporting period, the Prosecutor's Office demanded the imposition of imprisonment on 118 **(44%)**defendants out of total 268 defendants. In the previous reporting period the percentage of demanded bails was **54%**.

Chart №5

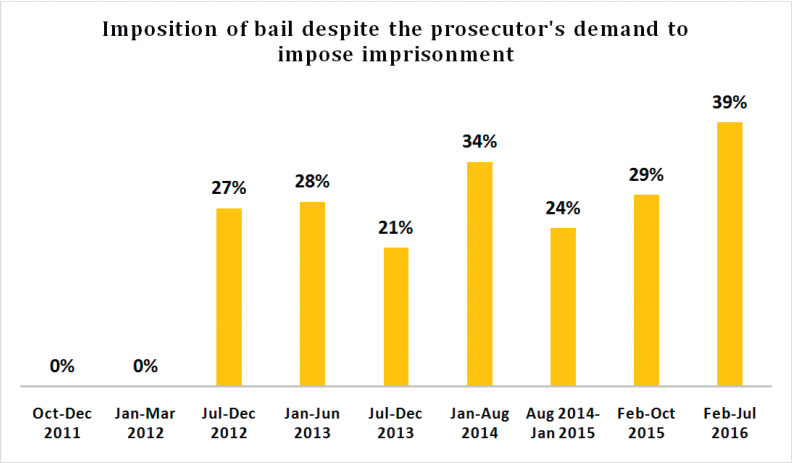


The data of granting by the court the bails demanded by the Prosecutor's Office are as follows: during this reporting period bail was imposed on 66% of the defendants. During the previous reporting period the percentage of imposition of bail was 55%. Also, in 39%, despite the fact that the prosecution demanded imposition of imprisonment, the court imposed bail on defendants but not all the cases of imposition of bail were properly substantiated.

Also, during this reporting period a preventive measure in the form of bail was applied in 39% of the cases in which the prosecution demanded the imposition of imprisonment (on 46 defendants out of 118). Notably, this percentage has been increased in comparison to the previous reporting period, when the percentage of imposition of bail was 29% despite the prosecution's demand to impose imprisonment.

The chart given below shows the statistical data of imposition of bail, despite the demand of the Prosecutor's Office to impose imprisonment, during the whole monitoring period (from October 2011 to July 2015 inclusive).

Chart №6



3.1.2. Imposition of bail with a guarantee of remand (remand on bail)

Under Article 200(6) of the Criminal Procedure Code of Georgia, the court shall, upon the motion of the prosecutor or on its own initiative, to ensure the application of bail, impose remand detention on an accused who was subjected to arrest, until he/she deposits, in full or in part (but not less than 50%), the bail amount to the deposit account of the National Bureau of Enforcement.

Findings

According to the findings of the court monitoring, in all cases a judge has imposed bail on a defendant with a guarantee of remand; when a defendant was presented to court as an arrested person, the prosecutor demanded the imposition of imprisonment but the judge rejected the prosecution's motion.

It is especially irrelevant and contradictory when the prosecution's motion for the imposition of imprisonment was considered by the judge to beunsubstantiated and an unnecessary preventive measure, and bail is imposed on the defendants because the latter served the purposes of the preventive measure, although the measure with a

guarantee of remand is applied, which may become the reason for the imprisonment of the defendant if the defendant fails to pay the bail.

Also, by imposing bail with a guarantee of remand on a defendant the court discusses only the appropriateness of imposition of bail as a main preventive measure. However, the court imposes imprisonment on the basis of mere reference to the above rule and does not substantiate the necessity of application of a measure with a guarantee[50].

It should be also taken into consideration that in case of application of a remand on bail, the defendants are in more unfavorable, unequal condition than in case of application of an ordinary bail.

Under the legislation, if a defendant fails to pay the bail amount, a prosecutor must file a motion to court and substantiate the appropriateness of application of a more severepreventive measure, or imprisonment, on the defendant. In this case the prosecutor and the court shall be obliged to examine whether failure to pay the bail is caused by deliberate and intentional non-payment or by an objective circumstance indicating the inability to pay the bail[51]. On the other hand, whenbail has been imposed with a guarantee of remand, in case of failure to pay the bail amount, the remand of the defendant is automatically imposedand the issue of review and discussion of this preventive measure is no longer on the agenda. Accordingly, the person remains in custody without any substantiation. Therefore, violation of two preventive measures of the same type has various legal consequences, due to which defendants are in unequal condition. The latter case indicates that in such cases imposition of bail has only formal character, which is caused by gaps in the legislation.

The example given below illustrates the aforementioned:

At the pre-trial session the prosecution filed a motion regarding the replacement of the bail, applied to defendant N. K. a more severe preventive measure in the form of imprisonment, on the ground that the defendant failed to pay the bail in the established timeframes, due to which the conditions of application of bail were violated. Judge reviewed the issue, rejected the prosecution's motion and stated that, in this case, there was only the fact of failure to pay

[50] Lack of application of the remand on bail is also clearly visible in the court judgments, which will be discussed below.

[51] Decision of the Tbilisi Court of Appeals, 08/01/2015, №1c/19.

the bail and no other risks were related to the defendant. Therefore, the judge stated that the material status must not be the basis for the replacement of a preventive measure. In addition, there was no evidence that the defendant had any property and he/she intentionally avoided payment of the bail.

Notably, if bail guaranteed with remand was imposed on a defendant, in case of failure to pay the bail amount, the duration of imprisonment would be automatically prolonged and the judge would not discuss the reasons of failure to pay the bail amount and the appropriateness of replacement of the preventive measure.

Therefore it is important that on the one hand the court discusses the necessity of application of bail with a guarantee of remand, and on the other hand, in case of failure to pay the bail amount if the 'bail on remand' is imposed, to discuss the reasons for failure to pay the bail amount and the appropriateness of remaining the person in custody. One of the methods for remedying those deficiencies is to make legislative changes.

3.2. Imprisonment

Imprisonment is a deprivation of liberty. Accordingly,application of this preventive measure, until a defendant is found guilty, must be considered in relation to anindividual's right to liberty, which is one of the most important rights in a democraticsociety.

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

According to the above normative acts, the grounds for imprisoning a defendant before final determination of guilt are as follows: a) a risk of absconding by a defendant; b) a risk of hindrance to administration of justice; c) prevention of commission of a new crime. Imprisonment may be applied only when other measures are ineffective. The existence of the above risks must be proved by understandable, convincing and relevant circumstances. The burden of proof of the above rests on

the prosecution. **A prosecutor must present facts and information to the highest extent possible that will persuade an objective observer that there may be sufficient grounds for application of a preventive measure.**

Furthermore, preference should be always given to the lightest form of restriction of rights and freedoms, which means that although there may be a certain ground for the application of a procedural coercive measure in the case, each individual circumstance of a specific case must be taken into consideration. As specified by the European Court of Human Rights, imprisonment of a defendant may be justified only if there are true signs of public interest, which, despite the presumption of innocence, overweigh the requirements of freedom of a person[52]. Also, preliminary detention must be in all cases reasonable and necessary[53].

The recommendation of the Committee of Ministers of the Council of Europe emphasizes the appropriateness of imposition of imprisonment and considers it in the context of the presumption of innocence. According to the recommendation, imprisonment must be applied as an exceptional measure. Also, imprisonment must not be obligatory and must not be used for the purpose of punishment[54].

In order to put in practice the recommendation of the Council of Europe it is necessary to observe proportionality imposed on the body filing a motion as well as on the court.

3.2.1. Cases of imposition of imprisonment

During this reporting period the situation has relatively improved in terms of substantiation of imprisonment by the Prosecutor's Office as well as by the court. Compared tothe previous reporting period, the percentage of unsubstantiated decisions has slightly decreased to 10%. Namely, out of 71 decisions imposing imprisonment, the decisions made against 7 defendants were

[52] *Labita v. Italy*, no. 26772/95, §152 (6 April, 2000);

[53] Pacuria v. Georgia, no. 30779/04, §62-65 (6 November, 2007);

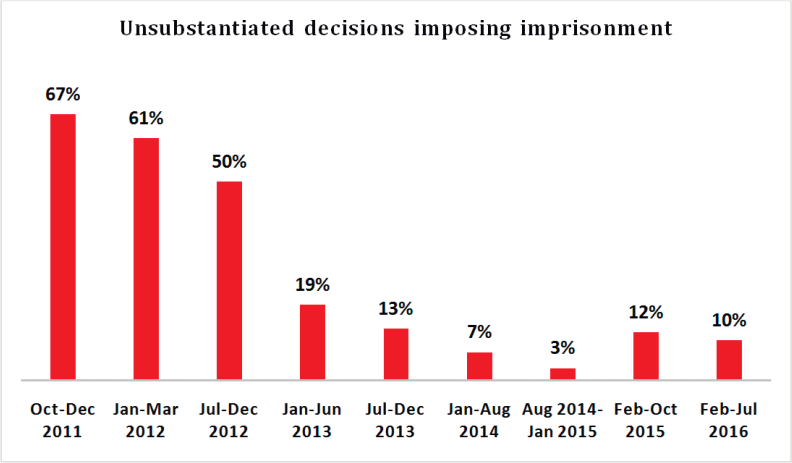
[54] Recommendation No. R (80)11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial.

unsubstantiated and implied the application of excessively severe measures.

It should be noted that the prosecution made more efforts to substantiate motions for the imposition of imprisonment. There were certain cases in which prosecutors' arguments were well supported with the precedents from the European Court of Human Rights. However, despite the above, in certain cases the prosecution's demand to impose imprisonment was explicitly unsubstantiated and included only abstract indication of circumstances. In such cases judges rejected motions, although there were cases in which, despite insufficient substantiation and improper evaluation of circumstances by the prosecution, the court imposed imprisonment.

The chart given below shows the findings of the whole monitoring period.

Chart №7



It should also be noted that during this reporting period the Prosecutor's Office demanded the imposition of imprisonment on less than half of the defendants, namely on 118 defendants out of the total 268 defendants. However, there are still problems in terms of imposition of imprisonment and 10% of the decisions made by the court are clearly unsubstantiated.

The example below illustrates the aforementioned:

The imposition of imprisonment on Salome Charkviani in the "Centre Point" case was unsubstantiated.

Salome Charkviani was accused of the commission of a crime provided for by Article 182(2)(a) and (3)(b)[55] of the Criminal Code of Georgia. The prosecution demanded the application of a preventive measurein the form of imprisonment, pointing out the risks of pressure on witnesses and absconding. However the prosecution did not support its motion with any convincing arguments. It also specified that the defendant had crossed the state border 23 times and as Guram Rcheulishvili is hiding[56], Salome Charkviani might also flee from justice. In response the defense stated that since 2006 she has not been related to the development company. During the interrogation she was notified that she might be arrested, but she did not attempt to flee or hinder the investigation and she [the defendant] was arrested at her apartment. In view of the above, the defense demanded the imposition of a personal guarantee and offered the imposition of bail in the amount of GEL 20 000 as an alternative way.

Despite the above, the court granted the prosecutor's motion and imposed imprisonment on the defendant, which was unsubstantiated.

Although the defendant had frequently crossed the state border, it is not always necessary to impose imprisonment in order to prevent the risk of absconding, because this goal may be achieved by seizing the defendant's passport of a citizen of Georgia or a travel document[57]. Moreover, in this case, there were no cases of illegal crossing of the state border by the defendant, which certified that the seizure of travel documents would neutralize the risk of absconding. We think that other less severe preventive measure would effectively ensure defendant's appropriate behavior.

[55] Appropriation or embezzlement with a prior agreement by a group.

[56] Chairperson of the Supervisory Board of the "Centre Point",

[57] A comment to the Criminal Procedure Code of Georgia, authors' collective body, editor: Giorgi Giorgadze, Tbilisi, 2015, p. 595.

The Prosecutor's Office demanded the imposition of imprisonment in 118 (44%) cases out of 268 defendants presented at first appearance hearings; the court granted the prosecution's motion in 71 (60%) cases; in 46 cases out of the remaining 47 (40%) cases the court applied bail, and in only one case the court did not impose a preventive measureon a defendant because imprisonment had been imposed on that defendant for another crime. During this reporting period there were not the cases in which a prosecutor demanded the imposition of imprisonment and the court imposed an alternative preventive measure other than bail.

The chart given below shows the findings during the whole monitoring period in this area (from October 2011 to July 2016 inclusive).

Chart №8

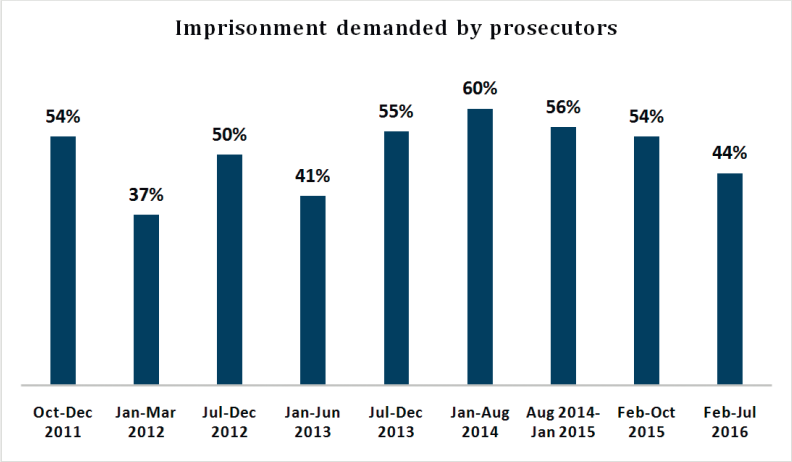
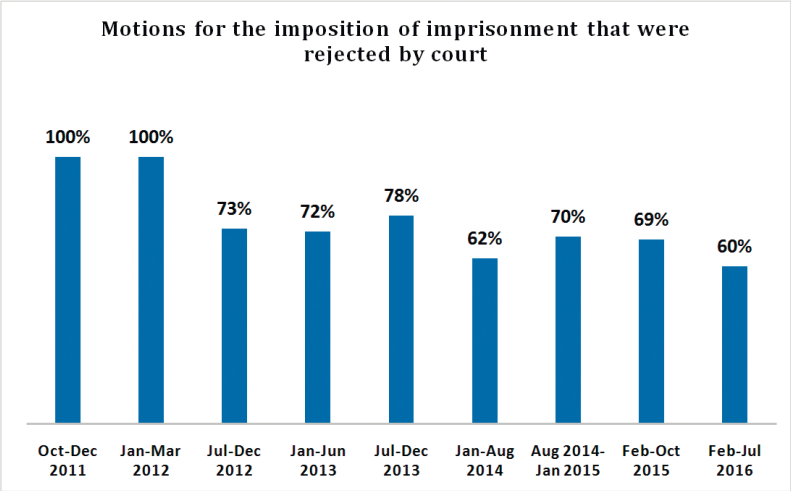


Chart №9



It should be noted that in comparison to the previous reporting period, the percentage of granting by the court of the prosecution's motions for the imposition of imprisonment has decreased and while in the previous reporting period the court granted the prosecution's demands in 69% of cases, during this reporting period this percentage decreased to 60%.

3.2.2. Periodical review of imprisonment on theinitiative of judges

On 8 July 2015 changes were made to the criminal procedure legislation with regard to the procedure of periodical review of imprisonment. According to the changes, if imprisonment has been imposed on a person as a preventive measure, the court is obliged to discuss at the very first pre-trial session the necessity of continuation of imprisonment upon its initiative, regardless of whether the party has filed a motion for changing or annulling the appliedpreventive measure[58]. Also, if a judge leaves imprisonment in force at the pre-trial session, after that [the court] shall, on its own initiative, review, at least once in two months, the necessity to leave imprisonment in force.[59]

[58] Article 219(4)(b) of the Criminal Procedure Code of Georgia;

[59] Article 219(4)(b) and Article 230[1] of the Criminal Procedure Code of Georgia;

The European Court of Human Rights stated that courts shall, at certain intervals, review the cases of persons who were subjected to imprisonment, and ensure their release in case of existence of relevant grounds[60]. Also, national courts should take into consideration the circumstances whether the situation, on the basis of which the court initially made a decision on imprisonment, has changed or not.

Monitoring results

Unlike in the previous reporting period, in this reporting period courts started to put in practice the above norms, and certain cases were identified in which the judge annulled imprisonment and replaced it by another preventive measure[61]. All the above circumstances took place at pre-trial sessions[62], although within the scope of hearings on merits all the cases of reviewed imprisonment remained in force.

Therefore, in most cases, a judge left the reviewed cases of imprisonment in force. **Although we have not examined the correctness of the court's act, the current statistical data give rise to a doubt that judges formally consider the issue of periodical review of imprisonment.** Also, it is worth noting that there was a non-uniform approach of judges towards the imprisonment review procedure, namely, in certain cases, before making a decision the judge listened to the substantiation of the parties regarding leaving imprisonment in force, while in other casesthe judge did not ask the parties' opinions and made a decision independently, which is also very formal.

Notably, at pre-trial sessions there were several cases when the judge violated formal requirements of the law. Namely, in order to carry out

[60] *I.A. v. France*, no. 1/1998/904/1116, §111 (23 september, 1998);

[61] At pre-trial sessions, imprisonment imposed on 4 defendants as a preventive measure has been changed. Namely, in one case imprisonment has been annulled because punishment has been imposed on the defendant in connection with another criminal case, in one case an agreement on not to leave the country and due conduct has been imposed on a defendant and in two cases imprisonment has been replaced by bail;

[62] **The case of beating a lawyer Giorgi Mdinaradze is notable**. Although a pre-trial session on that case was not held during the reporting period (from February 2016 to July 2016 inclusive), but as we monitored high profile cases, we monitored the trial of that case as well. It should be noted that at the pre-trial session imprisonment imposed on the defendant as a preventive measure has been replaced with bail in the amount of GEL 10 000.

an imprisonment review procedure,the judge did not rely on the provision of the lawobliging a judge to review imprisonment within the scope of pre-trial sessions, but rather relied on the provision regulatinga subsequent procedure[63].

GYLA hopes that in the future judges will take more care of this issue and examine in more detail the existing situation and the grounds for leaving imprisonment in force, because extension of the term of imprisonment requires stronger and more relevant arguments for its justification.

4. Review by courts of the lawfulness of arrests

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

In order to obtain a prior warrant for arresting a person, a prosecutor shall file a motion with court, which shall deliver a relevant ruling without oral hearing. The ruling may not be appealed[64]. If there is an urgent necessity of arresting a person as provided for by law, a person shall be arrested without a judge's prior warrant and at the first appearance session the court shall review the lawfulness of the arrest as well as the substantiation of the arrest carried outdue to urgent necessity[65].

The legislation of Georgia does not provide for any special mechanism for appealing the lawfulness of arrest. As a result, one of the purposes of first appearance sessions is to review the lawfulness of the arrest by the courts. This obligation shall be imposed on a judge irrespective of whether the party disputes that issue or not. It is important that the arrest, carried out on the basis of a prior warrant of a judge as well as on the grounds of urgent necessity, be reviewed at first appearance sessions. This legal mechanism serves for the minimization of the risks of making arbitrary decisions by the law

[63] Under Article 219(4)(b) of the Criminal Code of Georgia, a judge is obliged to review imprisonment at the pre-trial session, although in certain cases the court applied Article 230^1, which establishes the obligation to review imprisonment once in two months;

[64] Article 171(1) of the Criminal Procedure Code of Georgia;

[65] Article 171(2)(3) of the Criminal Procedure Code of Georgia.

enforcement bodies[66]. **It is especially risky if a person is arrested on the basis of a prior warrant of a judge because the defense is not allowed to put on the agenda the lawfulness of the ruling of the judge and the arrest, orto state its opinion regarding the above issues. If we assume that a judge has incorrectly issued the ruling on arrest, which will not be reviewed at the first appearance session, more restrictive measures may be applied against the person due to such arrest[67].** If, in the interests of national security, it is reasonable not to disclose certain information to the defense regarding the arrest of a person in urgent necessity, the court must ensure that the restriction of that right of the defensewill be balanced in such a way as to have an efficient mechanism for the review of the lawfulness of arrests[68]. The review of the issue of arrest must meet the requirements of equality and adversarial principles. The European Court of Human Rights has stated, in several of its decisions, that the court is obliged not only to check the compliance of the arrest with the procedural norms of the national legislation, but also to examine the grounds for doubt, which became the basis for arresting a person, and check the lawfulness of the purpose of the arrest[69].

Monitoring results

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

The fact that the lawfulness of detention is not examined by courts is conditioned by legislative gaps to a certain extent.

[66] Imprisonment as a guarantee for the imposition of bail, B. Niparishvili, Justice and Law journal, 2016, No 2, 53;

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

[68] A. and Others v. UK, February 19, 2009, §202-224;

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

The legislation does not provide for clear and unambiguous indication that the cases of the lawfulness of arrests based on the judge's prior warrant or due to urgent necessity are subject to further judicial review. Accordingly, the mentioned norms should be elaborated and clarified.

The court's approach encourages the risk of improperactivities from the part of law enforcement officers. Especially taking into the consideration the fact that the legislation of Georgia does not provide for any other mechanisms for assessing the lawfulness of arrest until the first appearance of a defendant before a court within 48 hours after arrest.[70]

The court's assessment of the lawfulness of the arrest is also important with reference to the proper execution of reimbursement for the damage incurred as a result of an unlawful and unjustified arrest of a person.[71] However, the mentioned right has only formal character without exercising relevant judicial control over the necessity and legality of arrest.

125 out of 268 defendants (47%) who appeared at the first appearance session had the status of arrested defendants during this reporting period. Hence, in the majority of cases 112 (90%), neither did the court review the lawfulness of the arrest nor the parties raised this issue, we had no information on the procedure applied in the process of arrest: whether the arrest was conducted based on the judge's prior warrant or on the grounds of urgent necessity.

However, after statements of the parties we have determined the basis for arrestin the remaining13 of 125 (10%) cases. In 3 cases, court rulings were issued on the arrest of persons, however their lawfulness was not reviewed during the first appearance sessions. In 10 cases, the grounds for arrest were based on urgent necessity. Subsequently, a judge considered arrest lawful in 3 of 10 cases, and he did not review this issue in 6 cases.In addition, this reporting period revealed only one case, when a judge found inadvisable and unlawful the arrest due to urgent necessity and ordered immediate release of a defendant from the courtroom.

[70] Bokhashvili B., Mshvenieradze, G., Kandashvili, I., Procedural Rights of Suspected in Georgia, Tbilisi, 2016, 19.

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

Case of defendant G. O.

This is a positive example of reviewing the lawfulness of detention due to urgent necessity and of the effective judicial oversight.

The defendant was charged with theft. At the first appearance session the judge asked the prosecution to explain the reasons behind the detention due to urgent necessity of the defendant. Due to the fact that the judge did not get grounded and relevant response from the prosecutor, he found that the arrest was illegal, rejected the prosecutor's motion for imprisonment, and ordered the defendant's release from courtroom on bail, as there were grounds for ordering the bail.

GYLA encourages such precedents and remains hopeful that the judges will maintain the trend of using this opportunity more frequently and review the legality and advisability of detention.

5. Level of non-substantiation of the application of preventive measures according to court rulings

In addition to monitoring court hearings and for the purpose of examination of the standards of substantiation of court rulings, we requested court rulings on the first appearances of defendants and the application of preventive measures from Tbilisi City Court.

The examination of rulings revealed that the court uses two types of preventive measures: bail and imprisonment. However, measures other than imprisonment were revealed in respect to 5 defendants.[72] In addition, in one case, where the prosecution requested bail, the court did not order any preventive measure.

Notably, the situation has improved with reference to the substantiation of imposing imprisonmentas a preventive measure, however major gaps and problems are still to be addressed in terms of imposing bail.

It is also worth considering that in some cases, the relevant attention is not paid to the arguments of the defense in the process of issuing

[72] The court released 2 defendants under an agreement on not to leave the country and due conduct and 3 defendants - under personal guarantee;

court rulings. The court supports developing the discussion raised by the Prosecutor's Office and only indicates its position with respect to the defense by agreeing or disagreeing with the prosecutor's motion. It should be noted that in all cases, when a judge ordered bail guaranteed with remand, the period of defendant's detention was determined till the date the bail was fully paid, while legislation provides for the release from custody if the half payment of bail is received.[73] In addition bail guaranteed with remand is imposed without obtaining relevant justifications and arguments due to the fact that legislation may be misleading in certain cases.

In addition, sometimes court rulings illustrate tendency that the court addresses more attentively and reviews more carefully the inadequacy of imprisonment rather than the necessity and adequacy of ordering bail in the cases when the court refuses to grant the motion for imprisonment and imposed bail on defendants instead.

Court decisions also revealed the cases when the court did not take into consideration the specific character of individual cases.

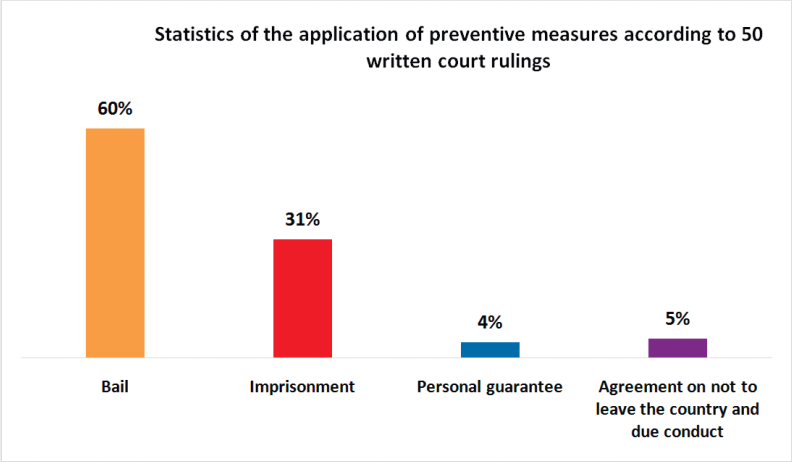
The example below clearly illustrates the case of applying a preventive measure to a defendant, who was charged with domestic violence without adequate consideration of the threats

The person was charged with threatening his partner's life, health and infliction of bodily harm. According to the judgement, the defendant constantly threatened the victim with a firearm registered in his name. Moreover, he threatened that he would kill not only her but also her mother if she reported this fact to the police. It is worth noting that the defendant continually subjected his spouse to verbal and physical abuse, which turned into threats later. In addition, a restraining order was served on him. The prosecutor demanded bail in the amount of GEL 4 000, however the court did not grant the prosecutor's motion and released him under personal guarantee and ordered two persons to monitor his behavior. Notably, neither the preventive measure requested by the prosecutor and nor the preventive measure ordered by the court did adequately assess existing threats in the mentioned case.

[73] Criminal Procedure Code of Georgia, Article 200(6).

The chart below illustrates the findings of examining judgements in terms of applying a preventive measure

Chart №10



The examination of 50 rulings has revealed the following major problems:[74]

1. Part of court rulings is still formulaic and unsubstantiated;
2. Courts do not review the impossibility of the imposition of less severe measures;
3. In the absolute majority of rulings, the prosecutor is not required to provide the burden of proof to determine the amount of bail.

Unsubstantiated and formulaic decisions

The problem of unsubstantiated court decisions remains unsolved,like in the previous monitoring period. 14 out of 50 (28%) examined rul-

[74] We have requested court rulings on first appearance sessions and application of preventive measures, which **were issuedon 10 and 21 March, 15 and 29 April, and 5, 20, and 25 May 2016** by Tbilisi City Court. As a result, we received 50 rulings from the court. The GYLA statement No. ჱ-04/334-16 of 19 July 2016 and the letter of Tbilisi City Court No. 1-01232/14771 of July 2016;

ings were clearly unsubstantiated.[75]**Decisions determining bail and its amount are mostly unsubstantiated.**

The court indicated the purposes of a preventive measurein an immaterial and declarative manner and did not identify/access the factual circumstances surrounding the case. The court rulings were based on biased statements and packed with legislative terms and norms. The court did not provide any convincing and realistic arguments explaining reasons leading to threatening public order unless the specific measures would have been served on defendants. The formulaiclanguage of decisions mainly was caused by the scarcity of facts.

The typical character of rulings is illustrated by the fact that the identical phrases and sentences are used in a number of decisions. For example, the decisions made by different judges state the following: *The court admits that the used preventive measure represents more the mandatory procedural provision of restrictive character rather than the proof that [the defendant] committed the crime."*

The unsubstantiated character of court decisions are partially conditioned by the fact that in some cases the prosecutor had no relevant arguments for applying a certain preventive measure. In individual cases, despite the fact that the assumptions of the prosecutor were not supported by the burden of proof, the judge satisfied their motions.

The European Court of Human Rights indicates clearly in a number of decisions that the arguments must not be immaterial and they must be reviewed while considering all circumstances. The decision on the application of a preventive measure must contain relevant and sufficient arguments and must be related to the characteristic of the given case.

Scarcity of reviewing the application of less severepreventive measures

The common problem of judgements is also the fact that the courts do not review the advisability of applying a less severepreventive measure, despite the fact that the mentioned is mandatory under law.[76]

[75] 14 decisions were served on 18 defendants, where the court ordered bail in 17 cases and imprisonment in 1 case.

[76] Criminal Procedure Code of Georgia, Article 198(1) and 198(4).

Relating this issue, the courts have the only statement declaring that "a less severepreventive measure does not ensure the fulfilment of the purposes referred to in Article 198 of the Criminal Code of Georgia."

The mentioned confirms the formal approach of courts towards the above-mentioned issue. It is important that, in addition to applying legislative norms and general explanations, courts develop discussions in rulings in this direction and indicate specific circumstances which exclude the application of less severe measures towards defendants.

Prosecutors do not substantiate the amount of proposed bails

Failure to substantiate the proposed bail and its amount leads to another vital problem associated with the decisions.The fact that the amount of bail requested by the prosecution is fully determined by the severity of the action and the person of a defendant and not by his/her financial status raises serious concerns. The examined rulings clearly demonstrate the fact that the prosecutor always filed motions for imposing bail without possessing the information on the financial status of defendants.

The example below illustrates the fact of requesting unreasonably excessive bail by the prosecutor.

A person was charged with the commission of a crime provided for by Article 214(1), which relates to the breach of the procedure for moving goods across the customs border of Georgia.The prosecutor requested bail in the amount of GEL 15 000 and substantiated it only by the amount of charges and the ability of the defendant to travel abroad. He also mentioned that the defendant could afford to pay the bail, but he did not provide any specific argument or evidence to certify this fact. In this case, the court fully agreed with the position of the defense on the financial status of the defendant and reduced the bail requested by the prosecutor to GEL 1 000.

We consider positive the fact that even though the prosecutor did not substantiate the amount of bail, the court tried to hear reasoned argument from the defendant himself relating the sum of bail and to determine his material and financial status. Judges indicated in several rulings that the prosecution was unable to substantiate the sum of bail

or provide evidence certifying the financial status of defendants and did not study their material conditions.

However, despite the positive role played by the court regarding the mentioned fact, there were cases when the court was unable to evaluate adequately the actual financial status of defendants and ordered them to pay excessive bails.

It is worth noting that non-substantiated sum of bail involves a serious threat and high risk in terms of the imposition of bail guaranteed with remand, hence in such cases, unless the material conditions of defendants are assessed adequately, the defendant may face imprisonment if he fails to pay bail.

The case below clearly illustrates the problems relating to ordering bail guaranteed with remand without considering the financial status of a defendant

A defendant was charged with the commission of a crime provided for by Article 260(3) of the Criminal Code of Georgia. The prosecutor demanded bail in the amount of GEL 10 000 and secure it by imprisonment, however he/she did not provide any evidence or argument supporting this amount. The court revealed that the defendant was a student, who did not have a criminal record. He was from internally displaced family from Abkhazia. He did not have ownership rights to any property. In addition, defendant's father was a missing person and his/her mother was the only bread earner in the family, whose daily wage equaled to approximately GEL 5. However, the court did not consider the mentioned circumstances and ordered bail in the amount of GEL 3 000 and secured it by imprisonment.

III. ANALYSIS OF PRE-TRIAL SESSIONS

1. Brief overview of the legislation

At pre-trial sessions, the court examines the admissibility of evidence to be reviewed at main hearings. This stage is of vital importance, as verdicts delivered at main hearings will be based on the evidence deemed admissible by the court at pre-trial sessions. In addition, at this stage the decision is made on the termination of criminal prosecution or the continuation of the proceedings with the examination of the case on merits.[77] It should be noted that not only insufficient evidence but also substantial violation of the procedural law creates grounds for the termination of prosecution.

The court's decision on pre-trial motions must be impartial and without prejudice to parties. The right of a defendant to impartial proceedings has been recognized by Article 84 of the Constitution of Georgia, Article 6 of the European Convention of Human Rights, and is guaranteed by the Criminal Procedure Code of Georgia.

Although pre-trial sessions are generally concerned with the admissibility of evidence, parties may also submit other motions.

2. Monitoring results

At pre-trial sessions the court remained impartial and without prejudice to parties and satisfied equally the motions on the admissibility of evidence submitted by both the prosecution and the defense. In addition, the defense seemed to be less active with respect to the participation in the review of admissibility of evidence submitted by the prosecution and more active with respect to the participation in the review of admissibility of evidence submitted by the defense. Moreover, unlike in the previous reporting period, no cases were revealed when the judge terminated criminal prosecution at a pre-trial session and did not transfer the case for main hearing. However, several cases when the judge terminated prosecution in relation to several individual charges were revealed.

[77] The court shall terminate criminal prosecution, if it establishes with high probability that evidence submitted by the prosecution is insufficient for proving the guilt.

Decisions on the admissibility of evidence

We attended 146 pre-trail sessions in this reporting period, which were held according to the same routine observed during the previous reporting periods. As a rule, courts agreed with the motions of Prosecutor's Office on the admissibility of evidence, however the same consent was provided to the defense and their motions on the admissibility of court evidence were fully or partially granted. **This reporting period has not revealed the case of refusal to fully grant the motions of the prosecution or the defense.**

Six out of 145 pre-trialsessions were postponed before the motion was filed by the parties, 1 session was closed.

In 138 (99%) out of 139 remaining cases, the prosecutor filed a motion on the admissibility of evidence, and in 1(1%) case the prosecution did not file a motion on the admissibility of evidence, hence the procedure of admissibility of evidence had been held during the previous session. The court fully granted motions of the prosecution to submit evidence in 134 (97%) cases, and partially granted motions of the prosecution to submit evidence in 3 (2%) cases. In 1 (1%) case the judge did not render the decision at the session and the session was postponed till the time the judge would have rendered the respective decision.

The position of the defenseon the motions of the Prosecutor's Office:

- In 1 (1%) case the defense fully opposed;
- In 10 (7%) cases the defense partially supported;
- In remaining 127 (92%) cases the defense did not oppose the prosecutor's motion and fully agreed with the recognition of the admissibility of evidence.

Compared to the previous reporting period, the defense is less active, namely the percentage of cases of opposing by the defense the motions of the prosecution decreased from 14% to 8%.

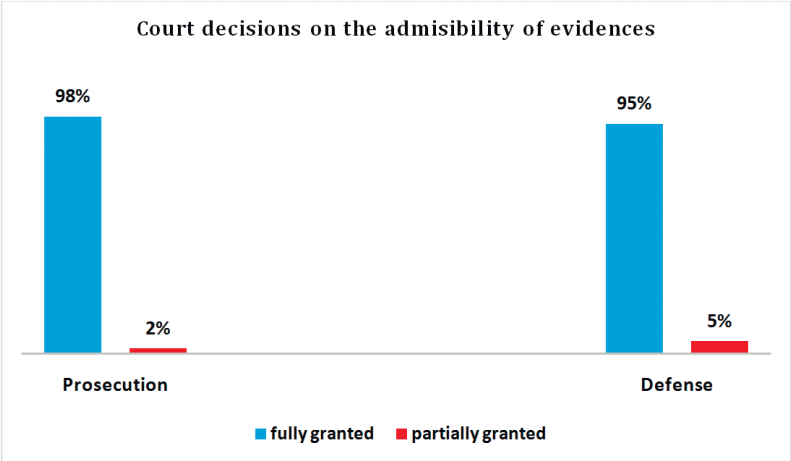
As for the motions of the defense, in this reporting period the defense submitted motions on the admissibility of evidence only at 42 (31%) pre-trial sessions, where such possibility was provided.[78] The court

[78]Hence, out of 146 sessions 6 were postponed, 1 was closed, 1 did not conduct the procedure of examining the admissibility of evidence, and 1 only reviewed the defense

granted the defense all motions: 40 (95%) motions were granted fully and 2 (5%) were granted partially. It is worth noting that the level of activity of the defense increased from 24% to 31% in comparison to the previous reporting period in terms of the requesting the admissibility of evidence.

The chart below illustrates the court decisions relating to the admissibility of evidence submitted by the prosecution and the defense in this reporting period.

Chart № 11



Review of advisability of continuing criminal prosecution and transferring the case for main hearing

In this reporting period, no cases were observed when the judge terminated criminal prosecution at the pre-trial hearing and did not forward the case for main hearing. However 3 cases were revealed when the judge terminated prosecution with respect to individual charges.

stated motion for the submission of evidences and afterwards the session was postponed, the defense had possibility to use the procedure of examining the admissibility of evidence in 137 pre-trail sessions.

The example below clearly illustrates the mentioned fact:

> The person was charged with the commission of crime provided for by Articles 260(6)(a) *(Illegal manufacturing, production, purchase, storage, transportation, transfer or sale of drugs, their analogues or precursors in particularly large quantities)* and 262(4)(a) *(illegal appropriation or extortion of drugs, their analogues, precursors or new psychoactive substances, their analogues or potent substances in particularly large quantities)* of the Criminal Code of Georgia. The judge terminated criminal prosecution launched under Article 262(4)(a) of the Criminal Code of Georgia, because in accordance with the case materials there was not a set of evidence that would have assured with high probability the court in the guilt of S. P. However, despite the mentioned, the judge transferred the case for main hearing with respect to the charges brought under Article 260(6)(a) of the Criminal Code of Georgia.

In addition, it is worth noting that the judge returned the case to the prosecutor with the purpose of applying diversion of a defendant. In accordance with the Juvenile Justice Code, the court may, on its own initiative or on the basis of a reasoned motion of a party, return the case to the prosecutor, who will offer diversion to the accused minor and shall decide on applying diversion in the event of the minor's consent.[79] This regulation applies to persons aged 18-21, if there is a substantiated assumption that he has committed a minor or a less serious crime.[80]

The given case represents the decision rendered in the best interests of a person and deserves positive evaluation.

[79] Law of Georgia Juvenile Justice Code, Article 39(2);

[80] Law of Georgia Juvenile Justice Code, Article 2(1).

IV. EXAMINATION BY COURTS OF THE LAWFULNESS OF SEIZURES AND SEARCHES CARRIED OUT ON THE GROUND OF URGENT NECESSITY

1. Brief overview of the legislation

The search and seizure procedure represents the massive interference in the right to privacy of a person, on the basis of which items, documents, substances or other means containing information relevant to the case are searched, seized and applied to the case. Due to the mentioned and in accordance with law, search and seizure is mainly conducted on the basis of a prior court warrant. However, if the situation of urgent necessity arises, when the delay of conducting search and seizure may result in devastating consequences, the mentioned investigative action may be performed without a court warrant, based on the order of the prosecutor or an investigator. [81]

Simultaneously, the legislation provides for a different procedure, when the consent of an owner, co-possessor or one party of communication is present. It such cases investigative actions may be carried out without a court warrant.[82]

It is important to admit that the prosecuting bodies use the main procedure and apply to the court for obtaining a court warrant before conducting the search and seizure procedure. The mentioned investigative actions must be carried out only due to urgent necessity without a court warrant in the cases when the delay may result in negative consequences of search and seizure.[83] In addition, the prosecutor must provide the burden of proof supporting the reasons for urgent necessity. In order to prove the urgent necessity it is not enough to bring only hypothetical substantiation, criminal record of the defendant or assumptions not directly related to the case.

Instead of applying abstract indications to the case, the court, as well as the defense, is also obliged under the legislation to examine the presence of the state of urgent necessity and the right of prosecuting bodies to launch investigative actions without obtaining prior court warrants, instead of applying abstract indications. The obligation of substantiating applies not only to court decisions, but also to court rul-

[81] Criminal Procedure Code of Georgia, Article 112(1) and (...);

[82] Criminal Procedure Code of Georgia, Article 112(1);

[83] Schwabe J., Decisions of the Federal Constitutional Court, Tbilisi 2011, 238;

ings on search and seizure.[84]

For the purpose of studying search and seizure practices carried out on the grounds of urgent necessity, GYLA conducted the analysis of the cases of legalization of conducted searches and seizures, which were identified at pre-trial sessions and were conducted without prior court warrants. In addition, for the purpose of assessing the level of substantiation of rulings, we requested the decisions of Tbilisi City Court, which referred to the lawfulness of mentioned investigative actions on the grounds of urgent necessity.

2. Monitoring results

Unlike in the previous reporting period, the number of searches and seizures on the grounds of urgent necessity as well as the percentage of legalization of such cases has increased significantly.

It is worth noting that the procedure, according to which searches and seizures were carried out, were not always identified at pre-trial sessions. However, the sessions revealed 43 cases of conducting the mentioned investigative actions;[85] these investigative actions were carried out under prior court warrants only in 2 (5%) cases,and in 41 (95%) cases – on the ground of urgent necessity, which were later legalized by the court[86] The percentage of searches and seizures carried out on the grounds of urgent necessity and legalized by the court was equal to 81% in the previous reporting period.

The chart below illustrates the situation revealed in Tbilisi and Kutaisi

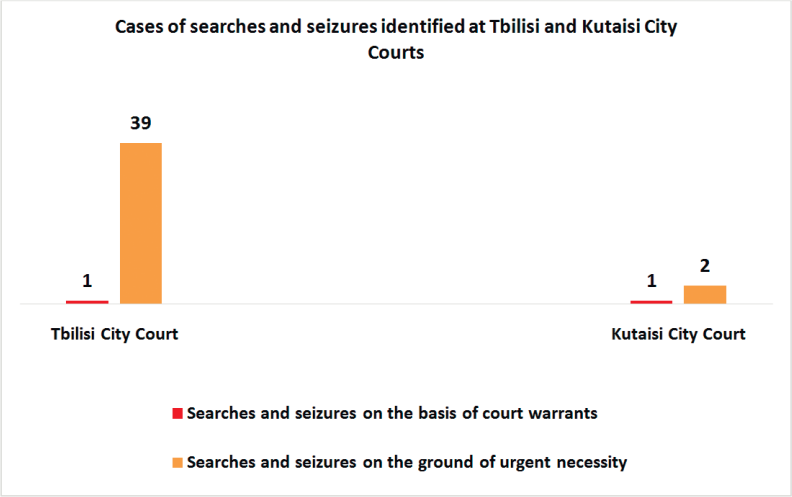
[84] Trachsel Sh., Human Rights in Criminal Justice, Tbilisi, 2009, 126.

[85] Several cases of searches and seizures were revealed in connection with some criminal cases;

[86] The data of **Tbilisi City Court** illustrates that in the majority of cases searches and seizures are carried out on the grounds of urgent necessity. Namely, considering the data between February 2016 and July 2016, searches and seizures were carried out on the basis of prior warrants in 364 (21 %) cases, and on the grounds of urgent necessity - in 370 (79%) cases, 70% out of which was legalized by the court. *The GYLA statement No. გ-04/342 of 10 August 2016 and the letter of Tbilisi City Court No. 16041 of 15 August 2016.* In addition, according to the data of Kutaisi City Court within the period between February 2016 and July 2016 searches and seizures were carried out on the basis of prior warrants in 35 (32 %) cases, and on the grounds of urgent necessity - in 74 (68%) cases, 99% out of which was legalized by the court. *The GYLA statement No. გ-04/376-16 of 15 September 2016 and the letter of Kutaisi City Court No. 19551 of 23 September 2016.*

City Courts relating to the searches and seizures during this reporting period.

Chart №12



Hence, search and seizure is an investigative action limiting the right to privacy, and the enforcement bodies must take appropriate measures before conducting this action. It is true that we had no possibility to get familiar with the content of the prosecutor's motions or study individual cases,[87] but the fact that the enforcement bodies applied to the court for obtaining the warrantsin advance only in 2 cases (5%) raises questions towards the disrespectful treatment of a right to privacy and misuse of procedural powers.

In addition, it was impossible to determine if the legalization of search and seizure conducted on the ground of urgent necessity was substantiated by the courts, since such facts are not generally reviewed through oral hearings.[88] However, the fact that 95% of investigative ac-

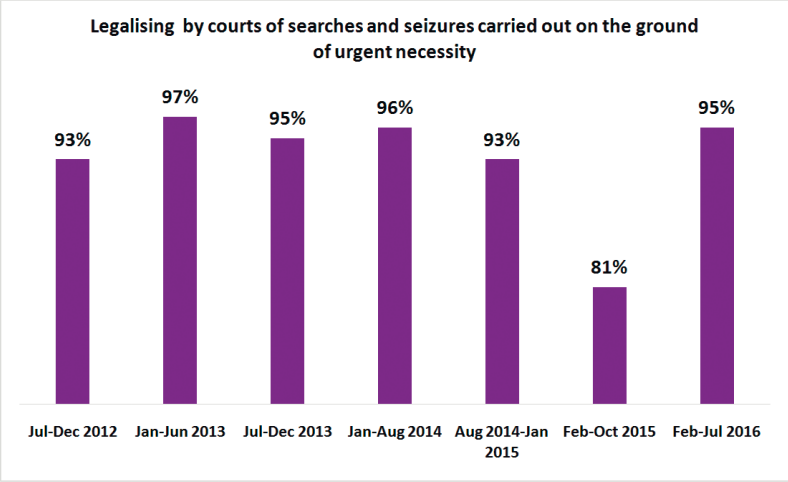
[87] We have requested prosecutor's motions for the legalization of searches and seizures on the ground of urgent necessity from the Chief Prosecutor's Office of Georgia, 12 August 2016, №ᲘᲜ-04/344-14, a letter. Our request was rejected by the letter No.13/54230 of 18 August 2016 of the Chief Prosecutor's Office and information was not provided;

[88] Apart from sessions, we have examined the level of substantiation of court decisions by having requested the court decisions and analyzed them, which we will discuss below.

tions were legalized after their completion, raises doubts that the law enforcement bodies and courts fail to perform their duties, according to which they are not allowed to conduct or legalizeinvestigative actions which are not properly substantiated and are conducted on the ground urgent necessity.

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

Chart №13



3. Analysis of court rulings

The detailed examination of the searches and seizures on the grounds of urgent necessity and their review practices revealed that generally the court rulings on the review of lawfulness of searches and seizures are not properly substantiated, they have typical character and in individual cases they do not comply with the official requirement of the law.

GYLA has revealed the clear violation of the right to a substantiated (reasoned) decision during the examination of 46 rulings on the review of the lawfulness of searches and seizures:

The examination of 46 rulings has revealed the following major problems:[89]

1. formulaic language of decisions;
2. scarcity of facts and the lack of discussions on specific circumstances;
3. non-compliance of court decisions with the legislative norms;
4. inconsistent approach of common courts to searches and seizures in the case of the consent of owner/possessor or one party of communication.

For providing the description of an overall picture, it must be mentioned that the judge refused to grant the prosecutor's motion in 18 (39%) cases out of 46 rulings. However, in all these cases the reason of refusal was the fact that the respective investigative action was conducted with the consent of the owner/possessor or one party of communication and, according to the explanation given by the court, such cases require neither prior warrants of the court nor further judicial control. In the rest of cases, 28 rulings (61%), the court satisfied the prosecutor's motion.

None of the examined rulings contained refusals to grant the prosecutor's motion on the basis that the search and seizure conducted due to urgent necessity was illegal and the state of urgent necessity did not present.

The formulaic language of decisions and the lack of discussions on specific circumstances

The main problem relating to the approved court rulings is the scarcity of specific circumstances and facts and references to legislative norms without providing any substantiation or showing any relevance to the case. The basis and pre-conditions for carrying out searches and sei-

[89] We have requested court rulings on the review of the lawfulness of searches and seizures conducted on the ground of urgent necessity, which were issued on 10 and 21 March, 15 and 29 April, and 5, 20, and 25 May 2016 from Tbilisi City Court.As a result, we obtained 50 rulings; however, 2 out of them was related to the issuance of a prior warrant for conducting searches and seizures, and 2 out of them - the examination of lawfulness of different investigative actions, which was not the subject of our request and interest. The GYLA statement No. ჱ-04/334-16 of 19 July 2016 and the letter of Tbilisi City Court No. 1-01232/14771 of July 2016.

zures on the grounds of urgent necessity, which are provided in the rulings, only have a formal or abstract character, and the factual circumstances that could have resulted in substantiated assumption for performing the investigative action without a prior court warrant are not discussed.

The court rulings indicate that *"...the delay of search may have caused destruction of the factual data essential to the investigation, and accordingly, the urgent necessity referred to in Article 112(5) of the Criminal Code of Georgia and expressed by the fact that delay would have made it impossible to obtain the above data, presented."* However, the court did not mention any specific threat or focus on the factual situation relating to the urgent necessity.

Considering the fact that the majority of searches and seizures are conducted on the ground of urgent necessity, the examination and evaluation of the issue of the efficiency of further court control is essential.

It is also worth noting that each case is different and requires individual approach; however, in different rulings issued by the same judge we can identify differences only in dates and personal data, which reduces the quality of substantiating the rulings. Moreover, identical phrases are used in the rulings issued by different judges. The formulaic languageof the decision is confirmed by the fact that in one of the rulings the judge recorded incorrectly the applied legislative norm and wrote "arrest warrant" instead of "search warrant".

At the same time, it is important to mention that, unlike seizures, searches limit the right to personal property, ownership and privacy more than seizures. Therefore, a judge may not apply the same criteria and standards to both motions submitted on search and on seizure. Despite this fact, the rulings examined by GYLA, the court applies the same standards while assessing the motions on search and the motions on seizure.

Non-compliance of court decisions with the legislative norms

The court rulings have met the official requirements and standards required by the legislation in the majority of cases, except for the section relating to the substantiation of rulings. Nevertheless, several gaps have been identified.

- In 3 rulings, the judges did not indicate the rule and procedure for appealing the decisions, which is provided for in the Articles

112(8) and 207 of the Criminal Code of Georgia.

- In addition, in all rulings the judge indicated that the prosecutor's motion was not granted in the cases wherea consent of an owner, possessor and one party of communication presented.

It is worth noting that in accordance with Article 112(6) of the Criminal Procedure Code of Georgia, after reviewing the lawfulness of investigative actions which limit private property, ownership or personal privacy, the court shall deliver one of the following rulings:

- Finding lawful the conducted investigative action;
- Finding unlawful the conducted investigative action and finding the information received as inadmissible evidence.

Therefore, the legislation does not provide the court with any other option of making a decision on lawfulness of an investigative action, accordingly the court is obliged to choose between one of them.

In the examined rulings related to the cases where the consent of an owner, possessor or one party of communication presents, the court refused to grant prosecutor's motion, which did not comply with the above mentioned legislative norms.

We can read in the court rulings: *"...the prosecutor's motion shall not be granted".* Such decisions do not represent any of the type of decisions provided for in Article 112(60) of the Criminal Procedure Code of Georgia, since the judge has no right to render a decision other than two above mentioned options in the process of reviewing the motions. The mentioned norms do not provide the court with the opportunity to formulate its decision otherwise during this process.[90]

It is true that the above mentioned gaps do not represent a substantial breach thatmay result in massive limitation of the person's right. However, each of them diminishes the high standards of court decisions and negatively affects the quality of justice.

Inconsistent approach of common courts to searches and seizures in the case of the consent of an owner/possessor or one party of the communication

In accordance with Article 112(1) of the Criminal Procedure Code of

[90] Decision of Tbilisi Court of Appeals, 14/07/2016, No.1ბ/1193.

Georgia, an investigative action that restricts private property, ownership or the inviolability of private life, shall be carried out under a court ruling upon the motion of a party. However, the respective investigative action may be carried out without a court ruling if there is the consent of a co-owner, a co-possessor or one party of communication. Legislation does not specify if further judicial review is required for investigative actions which were performed with the consent of an owner, a possessor or one party of communication to searches and seizures.

The chaotic and obscure character of the legislation leads to the inconsistency of court practice in common courts.

Out of all examined rulings, in 18 (39%) cases the judge refused to grant the motion of the prosecution on the grounds thatthere was the consent of an owner, a possessor or one party of communication to theconduct of a respective investigative action. When reviewing the cases, the judge did not find searches or seizures lawful or unlawful, but considered that this issue was not subject to judicial review due to the above-mentioned circumstances.

The ruling specifies that *"that the examination of the lawfulness of investigative action conducted with the consent of one of the communication parties does not fall under the scope of the Criminal Procedure Code of Georgia."*

It is worth noting that common courts do not have a uniform approach to this issue and the practice used by the Supreme Court and the Court of Appeals differ from the practice used by courts of the first instance.

In accordance with the decision of the Supreme Court of Georgia, the lawfulness of evidence obtained through searches and seizures of flats or other private premises on the groundof urgent necessity must be examined by the court upon the prosecutor's motion even in the cases when the consent of an owner or a legitimate possessor presented.[91] The same approach is shared by the Court of Appeals of Georgia, which explains that the court control must be exercised despite the consent of an owner, a possessor or one party of communication.[92]

[91] Decision of the Supreme Court of Georgia, 19/05/2016, No.ბ-609ად.-16;

[92] Decision of Tbilisi Court of Appeals, 22/07/2016, No.1გ/1239-16; The Decision of Tbilisi Court of Appeals, 14/07/2016, No.1გ/1193; The Decision of Tbilisi Court of Appeals, 14/07/2016, No.1გ/1197.

As it can be clearly observed, different explanations are applied to this issue in rulings rendered by Tbilisi City Court before the above mentioned has been made as well as after the judgement has been rendered, despite the approaches demonstrated by the Supreme Court and the Court of Appeals.

V. APPROACHES RELATING TO THE REVIEW AND APPROVAL OF PLEA AGREEMENTS

1. Brief overview of the legislation

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

On 24 July, the plea agreement on punishment was abolished in accordance with the amendments applied to the criminal procedure legislation, which means that without the admission of guilt reaching the plea agreement has become impossible.

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

For the purpose of ensuring the fairness of the punishment, a judge must review the existing circumstances, the individual characteristics of a defendant, the motives for committing the crime and agreed charges. The law does not specify the method for ensuring the fairness of the punishment, however according to the general principles of imposition of punishment, there is a possibility to support the mentioned criteria. For instance, while imposing a penalty, a judge has the possibility to clarify: the financial status of a defendant; his ability to pay the penalty; if the amount of the penalty is adequate to the inflicted damage; circumstances surrounding the commitment of a crime; and the severity of expected punishment. Apart from the mentioned, a judge has the right to make changes to plea agreements upon the consent of both parties. Namely, if in accordance with the legislation a judge considers that there is insufficient evidence to render a ruling without a main hearing or establishes that a plea agreement has been signed in

violation of the requirements of the Criminal Procedure Code of Georgia, the judge shouldoffer to the parties to alter the terms of the plea bargain, which should be agreed with a superior prosecutor. If a judge is not satisfied with the amended conditions of the plea agreement, he should refuse to approve it and return the case to the prosecutor.

2. Findings

Unlike previous reporting period, the situation is deteriorated in terms of exercising by the court of proper control over the conclusion of plea agreements. There was an increase in the number of cases when judges fail to fully explain to defendants their rights and pay less attention to the evaluation of the lawlessness and fairness of punishment.

The following interesting trends have also been identified:

- In a majority of cases, judges did not inquire about the level of fairness and lawfulness of the charges imposed under plea agreements;
- Judges approved plea agreements in all cases;
- In individual cases, judges did not fully explain the rights under Article 212 of the Criminal Procedure Code of Georgia.

- In individual cases, the court limited itself to non-substantial review of certain details of plea agreements and did not try to further examine the proposed conditions.For example, assessment of the adequacy of the sentence imposed.

- It is worth noting that in comparison to the previous reporting period, the practice of failing to explain the rights under Article 212 of the Criminal Procedure Code of Georgia has increased. Namely, in 20(18%) cases, a judge did not inform a defendant that if the court does not approve a plea agreement, any information contained in such agreement and submitted by him/her during the review of a plea agreement may not be used against him/her. In the previous reporting period this number was 8%. In addition, in 18 (16%) cases, a judge did not inform a defendant that filing a complaint about being subjected to torture, inhuman or degrading treatment filed by the defendant would not interfere with the approval of a plea bargain concluded in compliance with the law.

The number failing to explain the mentioned right equaled to 6% in the previous reporting period.

In addition, one case when a judge did not explain any of the rights under Article 212 of the Criminal Procedure Code of Georgia and approved the plea agreement in 7 minutes was revealed.

The fact that the judge does not give the full and comprehensive information on defendants'legitimate rights, despite the fact that it is a direct duty of the judge, makes the impression that the judges have indifferent approach toward the issue of plea agreement approval. The formal character of plea agreements is also verified by the fact that in individual cases the relevant factual circumstances are not discussed and the judge orders the prosecution only to read out the operative part of the motion, where only the conditions for the imposition of punishment are indicated.

It is worth noting that in individual cases, the parties have preliminary expectations that the judge will approve the proposed plea agreement by all means. Such predisposition diminishes the reputation of the court, makes the session useless and partially may be understood as disrespect towards judges. Hence, parties sometimes tend to precede the judge's decision and predetermine it, when the judge may refuse to approve the plea agreement.

The example below clearly illustrates the mentioned fact:

This reporting period has revealed one case, when a defendant paid the penalty prematurely, before the approval of a plea agreement by a judge. The defendant: *"I was given time, but I have already paid the sum (penalty) today".* The judge: *"Nobody forced you to rush with payment, moreover you were given the time. Nobody can predict if [the plea agreement] will be reached."*

3. Court's approaches toward the fairness and lawfulness of punishment

In accordance with Article 212(5) of the Criminal Code of Georgia, a judge makes a decision on the plea agreement on the basis of law and is not obliged to approve the agreement agreed to between a defendant and a prosecutor. This right of a judge serves as an important tool for controlling the fairness and lawfulness of plea agreements and may be

used by the judge not to approve the agreement in the case of abusing the plea bargain.

Despite the fact that the legislation does not give a judge the right to automatically alleviate or change the punishment, it does not justify to impose excessively light or severe punishment on the basis that the prosecution submitted the motion under such conditions. One of the significant components of fair trial is the imposition of punishment, accordingly a judge must closely observe the process of determining the punishment and prevent the imposition of an inadequate sanction.[93]

Despite the fact that the legislation provides judges with this significant right, in the majorityof cases they did not inquire whether the punishment determined by the parties was fair and lawful in this reporting period. Moreover, judges approved all 111 plea agreements submitted by the prosecutor.

However, contrary to the above-mentioned fact, several cases, when a judge pointed out the technical fault to the prosecutor and requested from the prosecution the correction of mistakes made during the calculation of the punishment, have also been revealed. Individual cases, when a judge inquired about the financial status of a defendant to determine his/her ability to pay the proposed penalty, have also been revealed.

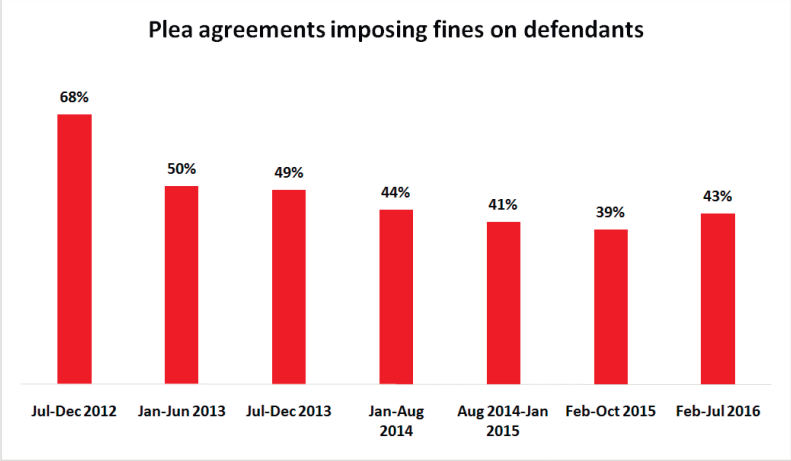
4. Charges applied under plea agreements

In comparison to the previous reporting period, the percentage of defendants who were imposed penalties under plea agreements has increased. It is worth noting that the trend has been downward with regard to the imposed penalties in each reporting period since the initial stage of the monitoring (October 2011); however, this trend has changed and the imposition of monetary penalties has increased by 4%.

The chart below illustrates the frequency of the application of penalties in the GYLA monitoring period (from July 2012 to July 2016).

[93] Guiding principles of form, justification and text style of judgements in criminal cases, Tbilisi 2015, 63.

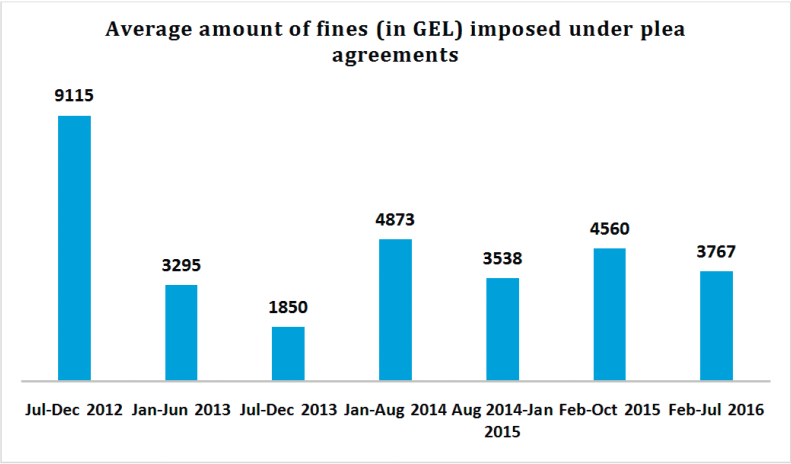
Chart №14



As for the total number of fines imposed under plea agreements, their rate has increased in comparison to the previous reporting period. Namely, 56 plea agreements were formed imposing penalty on defendants, which resulted in a total of GEL 211 000. However, the average amountof penalties has decreased irrespective of this fact. The average amount of imposed penalties came to GEL 4560 in the previous reporting period. During this reporting period it equaled to GEL 3767.

The chart below illustrates an average amount of penalties under plea agreements from July 2012 to October 2015.

Chart №15

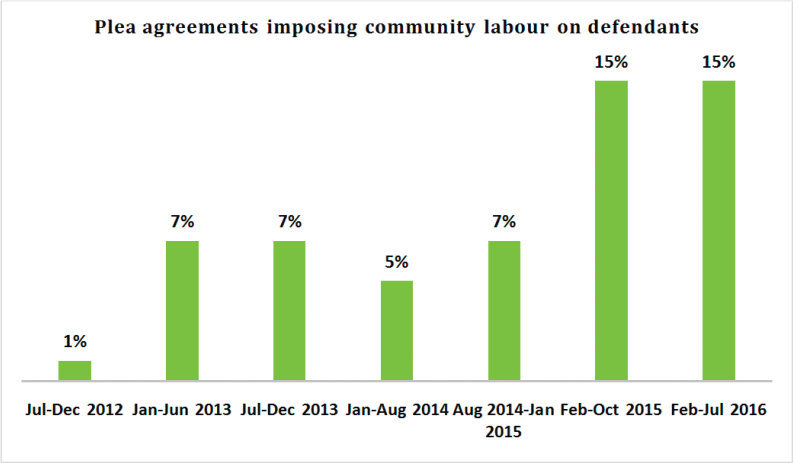


The amount of penalties rangedbetween GEL 1 000 and GEL 20000 in this reporting period.

In this reporting period, the percentage of applying community labor levelled at 15% as in the previous period.

The chart below illustrates the frequency of the application of community labor under plea agreements during the GYLA monitoring period (from July 2012 to July 2016).

Chart №16



5. Proportion of charges imposed under plea agreements for illegal use of drugs

It is worth noting that plea agreements were reached in 45(34%) of cases initiated against defendants who committed drug-related crimes.

In addition, it is worth considering that this reporting period revealed cases when a varied and inconsistent approach was used by the Prosecutor's Office with respect to the crimes under Article 273 of the Criminal Code of Georgia[94]. It is certain that the Prosecutor's Office is authorized to propose different sanctions to defendants for committing the similar crime, but where the facts are identical (defendants have no prior conviction and they are charged with the repeated consumption of narcotic drugs within 1 year after the administrative penalty was imposed on them) and when in some cases the prosecutor uses more severe approach than in other cases, the Prosecutor's Office becomes questionable.

[94] Illegal manufacturing, purchase, storage or illegal consumption without medical prescription of drugs, their analogues or precursors in small quantity for personal consumption by the person who was served administrative penalty or was previously convicted for this crime

The problem becomes acute when monitoring reveals that the courts does not show necessary and adequate effort to access the fairness and legality of punishment.

The example below clearly illustrates the mentioned fact:

A defendant was charged with crime committed under Article 273 of the Criminal Code of Georgia. The proceedings revealed that the defendant had no prior conviction and he consumed narcotic drugs repeatedly one year after an administrative penalty was served on him. Consequently, criminal liability was imposed on him. At the first appearance session, a plea agreement was signed and the defendant was served to pay penalty equal to GEL 1 000 as well as was deprived the rights provided under the law of Georgia on Combating Drug-related Crime for 3 years.	A plea agreement was also signed at the first appearance session initiated relating another case, which referred to the crime committed under Article 273 of the Criminal Code of Georgia. Proceedings revealed that the defendant had no prior conviction and consumed narcotic drugs again after being served the administrative penalty. However, compared to the previous case, the defendant was served a penalty equal to GEL 2 000 and deprived the rights provided under the law of Georgia on Combating Drug-related Crime for 3 years.

VI. JURY TRIALS

1. Brief overview of the legislation

Under the Criminal Procedure Code of Georgia, if a defendant is charged with the commission of a crime subject to a jury trial, the judge shall be obliged to explain to the defendant the provisions of the jury trial and the related rights of the defendant. Also, the judge shall find out whether the defendant agrees to have the case tried by a jury[95]. If a defendant wants to have the case tried by a jury, a judge shall carry out the procedures determined by law.

During this reporting period, GYLA's monitors monitored one high-profile case, which was tried by a jury[96].

[95] Article 219(3) of the Criminal Procedure Code of Georgia;

[96] The case of Magda Papidze, who was sentenced to life imprisonment due to intentional murder of her husband and child;

2. Monitoring results

Notably, the whole case was carried out with significant procedural and right violations. Namely, in certain circumstances the publicity of sessions was not ensured, inviolability of private life of a defendant was violated, sometimes a judge was not able to ensure order at the courtroom, and the court didnot organize placement of examined witnesses and the witnesses to be examined separately, the obligation of which is imposed on the court by law.

In the above case GYLA's monitors attended the session of selection of 6 jury members and 16 hearings on merits.

It should be noted that at **all six sessions of jury selection** the information was published beforehand and the public was allowed to attend them. This is the continuation of a positive trend, which has started in the previous reporting periods[97]. GYLA positively evaluates the fact of solution of this problem by court and hopes that the society would no longer have artificial barriers to attend sessions like the previous reporting periods.

As for the hearings on merits, in most cases the principle of publicity has been observed, although with some exceptions. Namely, at the first part of the first hearing on merits, during which main and reserve jury members were selected and the senior juror was elected, not all the persons who wanted to attend, including a GYLA's monitor, were able to attend the hearing due to the lack of seats in the courtroom. It worth noting that tens of employees of the prosecutor's office entered the courtroom in priority to others, despite the fact that many other persons who wanted to attend the hearing were waiting at the entrance of the courtroom. This was one of the reasons that prevented all interested persons to attend the hearing.

Similar exception took place at the last hearing on the case, at which the members of a special forces unit made a human chain, were very aggressive and allowed citizens to enter the courtroom only after the entrance of all of their representatives. In this case as well all interested persons were not able to attend the hearing.

Although there was a great interest in the case, in both cases the court has not taken any measures to ensure publicity of the hearing[98].

[97] The court solved this problem in the seventh reporting period;

[98] For example the session might have been broadcasted live by means of the screens installed at the court building.

Notably, certain procedural violations took place at the sessions (at individual sessions and as a result of analysis of all sessions), which, in certain cases, led to significant violation of rights.

Inviolability of personal life

During the review of the case, the hearing was closed partially several times in order to examine witnesses who would talk about the details of personal and sexual life of the defendant. Besides, one of the reasons for closing the hearing was that the issues, related to the above stated matters, would have to be disclosed.

Although the hearing was closed, the prosecution as well as the defense and a witness, in one case, disclosed in their interviews with the media some details that were discussed at the closed hearing[99].

Also, defendant Magda Papidze filed a motion for partial closing of the hearing during one of the court hearings, because during the examination of a witness a prosecutor asked several questions related to the details of private life of the defendant. However, in this case the judge failed to properly evaluate the legitimate reason for closing the hearing and rejected the defendant's motion.

The judge's explanation on closing the hearing: "*we cannot close the complete hearing because there are one or two delicate questions. Please, file a motivated motion.*"

The above cases prove that the purpose of closing the hearing as provided for by law, namely to protect private life of a participant of the proceedings, was not ensured.

Notably, the dissemination of the information and non-uniform and unsubstantiated approach of the court on the issue of closing the hearing, violated the inviolability of private life of the defendant.

Ensuring order at a courtroom

During the proceedings there were several cases of violation of order and of humiliating shouting by the attendants against the defendant.

[99] The dissemination of information is confirmed by the internet sources: the interview of the prosecution - http://bit.ly/2cPdzlc; the interview of the defense - http://presa.ge/new/?m=crimes&AID=45755; the interview of the witness - http://topnews.mediamall.ge/?id=170138.

However, in certain cases, the judge did not responded adequately. Although Magda Papidze asked the judge several times to observe order at the courtroom because the examination of a witness was hindered, the judge failed to take sufficient measures for ensuring order. It should be noted that in certain cases inconsistent act of the judge for ensuring order was often promoting the attendants not to observe order. Excessive lenience or strictness of the judge damaged the possibility to carry out the proceedings effectively.

It should also be noted that, in certain cases, a judge did not respond adequately when the attendeesdictated answers to the witnesses.

Issue of separation of examined witnesses and witnesses to be examined

In this case, the issue of separation of already examined witnesses and witnesses to be examined was not resolved, which according to the law, must be ensured by the court[100].

All the persons to be examined as witness were waiting in the lobby of the first courtroom and were able to interact with one another. There were cases when after examination witnesses left the courtroom and then returned again. This raises concernthat they interacted with the witnesses to be examined, who were waiting in the lobby. Unfortunately, the court did nothing to prevent this.

Interaction of the prosecution with the jury

Several cases were identified where prosecutors came close to the jury and spoke to them without a microphone. Also, there were cases when a prosecutor presented evidence and made relevant explanation, but others were unaware of what did the prosecutor indicate to. Besides, there was one case when a juror asked a question to a prosecutor, but was answered by the defense so that is was not publicly stated. The judge told the prosecution to speak into the microphone, but despite that remark there were still the cases where that remark was not taken into account.

It is worth noting that such attitude of the prosecution violated the ad-

[100] Under Article 118(2) of the Criminal Procedure Code of Georgia: "*a witness shall be examined separately from witnesses who have not yet been examined. At the same time, the court shall take measures to ensure that witnesses summoned for the same case, do not interact with each other until the end of their examination*".

versarial and quality principles and also made an impression of pressure on the jurors.

Verdict of the jury

During the first three hours after the hearing of the case on merits, the jury unanimously pronounced a guilty verdict, although due to the refusal of the defense they did not take part in the session determining the punishment. The punishment was determined personally by the court, which sentenced defendant Magda Papidze to life imprisonment.

Alleged ill-treatment against Magda Papidze

Magda Papidze stated at the first appearance session[101] that she was subject to improper and humiliating treatment by police.

Investigation was launched regarding this fact by the Investigation Division of Tbilisi Prosecutor's Office on the fact of violent abuse of power by police officers.

According to the letter of Tbilisi Prosecutor's Office the totality of evidence, obtained on this case, did not prove the fact of abuse of power by police officers against Magda Papidze and/or any signs of other crime determined by the criminal legislation, due to which the investigation was terminated on 2 June 2016[102].

Although there was great public interest regarding the fact of alleged ill-treatment against Magda Papidze, the Prosecutor's Office neither publicized that information nor informed the public.

The prosecution did not disclose information related to the investigation of ill-treatment allegations towards Magda Papidze. However, the prosecution disclosed detailed information related to the investigation of charges against Magda Papidze. The disclosure of detailed information violated defendant's right to privacy and presumption of innocence.[103]

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[101] First appearance session of Magda Papidze and the issue of application of a preventive measure to her was not included in our common trends and statistics, because this process was not carried out during the reporting period (from February 2016 to June 2016 inclusive);

[102] GYLA's statement No ჯ-04/364-16; letter No 13/01-57636 of 5 September 2016 of Tbilisi;

[103] https://gyla.ge/ge/post/saias-ganckhadeba-magda-papidzis-saqmestan-dakavshirebit.

VII. PUBLIC TRIAL AND JUDICIAL APPROACHES REGARDING CLOSING OF A SESSION

1. Brief overview of the legislation

The right to public trial is an important right of a defendant and the public and is guaranteed at national as well as international level. It ensures more transparency of justice facilitating the increase of public trust, more accountability and a wide discussion around the judicial system[104].

Court proceedings satisfy publicity requirements when public is able to easily obtain information on the date and place of a trial[105].

The right to public trial implies not only the possibility of attendance of the public, but also ensuring by the court that in case of attendance the content of the trial be clear and understandable for each person.

It should be also noted that the right to public trial is not absolute and may be limited based on various legitimate interests. However, at the same time, if a session is partially or completely closed, the court is obliged to specify the reason for closure of the session and substantiate the necessity of the rendered decision[106].

Within the scope of the right to public trial it will be evaluated whether the information on holding sessions is publicly disseminated, the speech of judges is clear and understandable for the persons sitting in the courtrooms and whether it is possible for everyone to attend the sessions.

2. Monitoring results

During this reporting period the situation has been improved in the area of public trial and, in most cases, practical and adequate exercise of that right is ensured, with the exception of the first appearance sessions in which case there is still a systematic problem and information on the sessions is not published.

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[104] Trial Monitoring Report of the OSCE, Warsaw, 9 December, 2014, 54, § 64;

[105] Comment to the Criminal Procedure Code of Georgia, Authors' collective body, editor: Giorgi Giorgadze, Tbilisi, 2015, 92;

[106] Article 182(6) of the Criminal Procedure Code of Georgia;

Out of 614 sessions[107], which does not include the first appearance sessions and the sessions of selection of the jury and hearing of the cases on merits by the jury, in 80 (13%) cases the information on the date and place of the session wasnot published in advance. Likewise, this indicator was 13% during the previous reporting period. It should also be noted that although in the remaining534 cases the information on holding the sessions was preliminarily published, in 4 (1%) cases the courtroom was not specified.

Also, out of 864 sessions, which include first appearance sessions, in only 7 (1%) cases the judge's speech was not clear and understandable, and in 5 (1%) cases the right of the interested persons to attend the sessions was limited. During the previous reporting period the interested persons were not able to attend sessions in 4% of the cases.

Ensuring public announcement of sessions

As a result of the monitoring it was found out that, as a rule, the information on court sessions is publicly announced with the exception of first appearance sessions, in which case the information on holding the sessions has never been known.

It is worth noting that the court bailiffs announced the date and place of a session, including first appearance sessions, at the lobby of Kutaisi City Court. However, it is not an appropriate measure for ensuring publicity of the session.

The problem of failure to publish information on the first appearance sessions was specified in all reports of GYLA since October 2011, when the monitoring started. Despite GYLA highlighting the issue, the situation has not been changed. The representatives of the judicial system state that it was caused by technical limitations related to the first appearance sessions within not later than 24 hours after the appearance of a defendant at the court. Also, they expressed their readiness to solve that technical problem. Despite the promise, no measures have been taken in this terms.

During the previous monitoring periods the subject of monitoring was Batumi City Court, where the information on the date and place of first appearance sessions was published in advance on the screen especial-

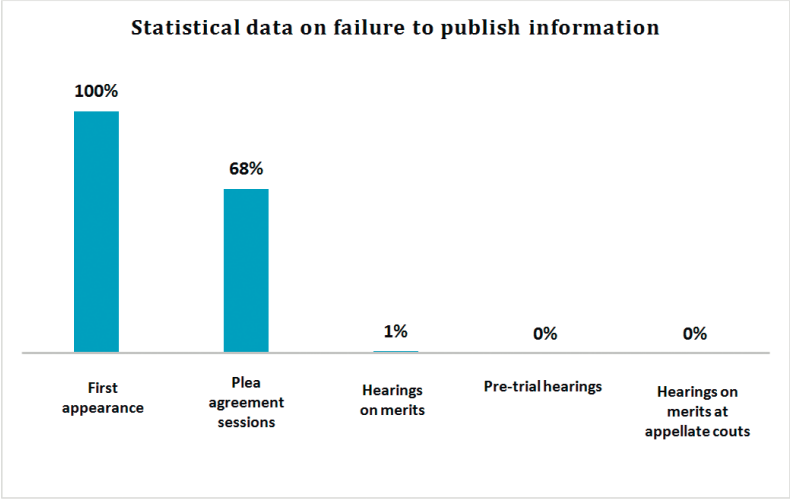
[107] 615 hearings include pre-trial hearings, hearings regarding plea agreements, hearings on merits and the sessions held at the appellate courts.

ly designated for that purpose. A positive example of Batumi City Court shows that preliminary publication of information of the first appearance sessions is technically possible if appropriate efforts are taken.

As for other sessions: there was not a single case in which information has not been published in advance on a pre-trial hearing. The problem of publication of information in advance on the plea agreement cases was identified in 75 (68%)[108] cases, there were 5 (1%) cases of hearings on merits, in which the information on holding the sessions was not publicized.

The chart given below shows the situation at various stages of legal proceedings regarding the problem of failure to publish information on the sessions.

Chart № 17



[108] Out of 75 plea agreement cases, 69 were held on the first appearance sessions. This was the reason why information has not been published in advance, because information on the first appearance sessions is never announced beforehand.

Understanding a judge's speech by the persons sitting in the courtrooms

During the reporting period there were only a fewcases of low and unintelligible speech of the judge. This is violation of the right to public trial because, although it was possible for the public to attend those sessions, they were not able to comprehensively listen to the judge's speech.

Out of 865 sessions, which do not include the sessions of selection of the jury and hearings of the cases on merits by the jury, in 7 (1%) cases a judge's speech was unintelligible and the persons attending the hearings had problems in understanding the information provided during the hearings.

The example given below illustrates the aforementioned:

> At one of the first appearance sessions a judge was reading the speech from a piece of paper. However, as the judge was not reading clearly, he/she often stopped and started reading from the beginning. In all, the judge's speech was not clear and understandable for the persons attending the session.

There were also certain cases, in which a judge's speech was understandable, but due to various technical gaps or other reasons the attending persons could not hear the speeches of the participants of the proceedings. Sometimes, they made claims in this regards, although at one of the pre-trial hearings when an attending person showed dissatisfaction that he/she could not hear the speech, the judge said: "*Most importantly I heard it. Should we shout? They cannot speak louder. They do not have deep voice and what can we do about that?"*

Access of the public to the trials

During this reporting period there were cases in which all the interested parties were not able to attend sessions. Out of 864 sessions, which included the sessions of selection of the jury and the hearings on merits by the jury, in 5 (1%) cases everyone was not able to attend the sessions, which is also the violation of the right to public trial. In all cases the reason for that was the small space in the courtroom.

Although law cannot guarantee the attendance of all persons to sessions, it is important that courts appropriately and efficiently use their

existing resources. For that purpose courts must take into consideration public interest towards the case and, where possible, hold sessions in larger courtrooms to ensure attendance to the sessions for everyone. If necessary, court sessions may be broadcasted live via the screens installed at various places at the court building[109].

The example given below illustrates the aforementioned:

> All interested persons were not able to attend one of the hearings on merits because the hearing was held at a relatively smaller courtroom, while it was possible to hold the hearing in another larger courtroom.

Deciding the issue of closing a session

The monitoring showed that courts have non-uniform approach towards making a decision on closing a session. Sometimes, courts are guided by the procedure established by law and publicly announce the decision on closing the session, which is a positive and proper approach. However, in certain cases, a session is held in a closed manner from the very beginning and the reasons for closing the session are unknown for everybody, which is a clear violation of the legislation[110]. The monitoring showed that courts have non-uniform approach towards making a decision on closing a session. Sometimes, courts are guided by the procedure established by law and publicly announce the decision on closing the session, which is a positive and proper approach.

Sometimes, a trial was held without clear explanation of the reasons for not allowing the public to attend closed sessions. Such practice contradicts the obligation of the court to publicly announce the grounds for closing a session, which is considered to be an arbitrary and non-transparent process.

The fact of automatically holding sessions in a closed manner defeats the purpose of the grounds for closing sessions and weakens the degree of substantiation of the court decision on closing the session with regard to the rendered judgement.

[109] Trial Monitoring Report of the OSCE, Warsaw, 9 December, 2014, 59, §78.

[110] Under Article 182(6) of the Criminal Procedure Code of Georgia, the judge is obliged to publicly announce the reasons for closing a session.

The example given below illustrates the aforementioned, which demonstrates the violation of the legislation in making a decision on closing a session.

At one of the first appearance sessions, related to the case of a minor defendant, the session secretary made the trial monitor to leave the courtroom because the session had to be carried out in a closed manner. Accordingly, the trial has started without opening it and the judge has not publicly announced the reasons and grounds for closing the session.

This is violation because according to the legislation, in any case, a judge is obliged to publicly announce the grounds for closing a session.

RECOMMENDATIONS

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

For common courts

1. When reviewing cases on domestic violence, domestic crimes and violence against women, judges should take into consideration the specific character of such crimes and adequately assess the threats/risks coming from defendants and apply preventive measures and punishment of relevant severity.
2. Courts should provide foreign defendants with an interpreter's services and, at the same time, should properly control the quality of oral interpretation made during the proceedings. Courts should assure themselves in the professionalism of interpreters.
3. Judges should not behave unethically and should not demonstrate a stereotypical and stigma-based attitude to other participants of proceedings, especially to vulnerable groups.
4. Courts should exercise their discretionary powers with respect to the application of preventive measures. Judges should more often apply less severe measures (alternative measures, those other than imprisonment and bail) where applicable and in cases where

the prosecution fails to substantiate the necessity of applying a preventive measure they should refrain from applying such measures at all. Courts should also demand that the prosecution submit more substantiated motions for the application of a preventive measure, and impose the burden of proof on the prosecution.

5. Imprisonment as a preventive measure should be applied only as a last resort when all other less severe measures do not ensure the purposes of the preventive measure.

6. Judges should better substantiate decisions on the application of preventive measures and indicate in their rulings factual circumstances that necessitated the application of a concrete preventive measure.

7. Courts should develop consistent approaches when deciding the issue of applying preventive measures to defendants who committed same crimes and are in identical circumstances. A different practice may create the signs of selective justice.

8. Courts should grant motions for carrying out searches and seizures on the ground of urgent necessity only after having thoroughly examined the motions, should substantiate their decisions and ensure that the delivered rulings comply with the requirements of the legislation. Common courts should also develop a uniform practice with respect to the search and seizure procedures and the mechanisms for the exercise of judicial control over their lawfulness in cases when there is the consent of an owner/possessor or one party of communication to search or seizure.

9. Judges should undertake a more active role at plea agreement sessions. In all cases, judges should comprehensively explain to defendants their rights provided for by the legislation and examine the fairness and legitimacy of sentence agreed by the parties in order to eliminate any suspicions about the proportionality of the sentence and the crime.

10. Judges should act in a manner established by the legislation and should publicly announce the reasons and grounds for closing sessions.

For the Prosecutor's Office

1. The prosecutor's office shall properly qualify crimes of domestic violence, domestic crimes and violence against women in order to ensure proper sentencing. Also, the prosecution shall properly investigate and identify a gender related motive of a crime and if the crime is committed on gender or other discriminatory motives, apply special article 53.3[1] of the Criminal Code along with other, relevant article of the Criminal Code.
2. The Prosecutor's Office should properly assess the circumstances in connection with cases on dometic violence, domestic crime and violence against women, and should demand the application ofa preventive measure corresponding to the gravity of the crime, which will be a guarantee of the safety of the victim.
3. Prosecutors should demonstrate highly ethical conduct towards the participants of proceedings, especially towards vulnerable groups. Their activities should not be prejudicial, stigmatic and reinforcing the stigma.
4. Prosecutors should better substantiate the necessity and appropriateness of application of a concrete preventive measure. Simultaneously, prosecutors should explain why the application of other less severe measure does not ensure the relevant purposes.
5. Prosecutors should substantiate the amount of requested bail and examine the material and financial status of defendants.
6. Prosecutors should develop consistent approaches when requesting preventive measures against defendants who committed same crimes and are in identical circumstances.
7. The investigation and prosecution authorities should carry out searches and seizures without a prior court warrant only in extreme cases.

For the Parliament of Georgia

1. The Parliament of Georgia should define by the legislation the obligation of courts to substantiate the necessity and appropriateness of securing bail with remand.

2. The legislation should define that in the case of bail guaranteed with remand, the so-called "remand on bail", the person will not automatically remain in custody, but the replacement of bail with a more severepreventive measure and the reasons why the conditions of bail were breached will be subject to discussions, as it is in the case of "common bail".
3. The legislation should regulate mechanisms and procedures for the review of the lawfulness of arrests. The legislation should determine the obligation of judges to examine at the first appearance sessions the lawfulness of arrests both on the basis of a prior warrant and on the ground of urgent necessity.

For the High Council of Justice

1. The High Council of Justice of Georgia should develop a common standard and system for courts to ensure advance publication of complete and correct information on scheduled trials. This especially applies to the first appearance sessions, where advance publication of information is still a systemic problem.

For the Georgian Bar Association

1. Lawyers should defend their clients in a qualified, active and credible manner at all stages of court proceedings. For this purpose, the Georgian Bar Association should ensure their permanent retraining and advanced professional training in different areas of criminal proceedings (for example, with respect to standards of application of preventive measures, rights and needs of vulnerable groups, etc.).
2. Lawyers should demonstrate highly ethical conduct towards the participants of proceedings, especially towards vulnerable groups. Their activities should not be stereotypical and stigmatic.