Georgian Young Lawyers' Association

MONITORING CRIMINAL TRIALS IN BATUMI, KUTAISI AND TBILISI CITY AND APPELLATE COURTS

Monitoring Report №7
Period Covered: August, 2014 - January, 2015
June, 2015
Tbilisi, Georgia

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

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Promoting Rule of Law in Georgia (PROLoG)

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

Author: **TINATIN AVALIANI**

Editor: **KHATUNA KVIRALASHVILI**

Tech. Editor: **IRAKLI SVANIDZE**

Responsible of publication: **TAMAR GVARAMADZE**

The following GYLA monitors took part in the preparation of the monitoring and research results: **SOPHO KVINIKADZE**
TAMAR BOCHORISHVILI
REVAZ ACHARADZE
MARIAM MELADZE
PAATA DIASAMIDZE

Was edited and published
in the Georgian Young Lawyers' Association
15, J. Kakhidze st. Tbilisi 0102, Georgia
(+99532) 293 61 01, 295 23 53

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THE MAIN TRENDS

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- Compared to the preceding monitoring period (January - August 2014):
  - The percentage of the defendants for whom the prosecution requested imprisonment as a preventive measure decreased from 60% to 55%.
  - The percentage of the defendants who were ordered imprisonment as a preventive measure increased from 37% to 42%.
  - The percentage of the defendants who were ordered bail as preventive measure remains 52% same as it was in the preceding reporting period.
  - The percentage of the defendants who were ordered other alternative preventive measures or were left without any preventive measure decreased from 11% to 9%.
- This reporting period (August 2014-January 2015) revealed six cases when a judge considered detention protocol unlawful and released a defendant from the courtroom. For the first time since the start of the monitoring (October 2011), three similar cases were observed in January-August, 2014.
- The reporting period (August 2014-January 2015) revealed six cases when a court did not order defendants any preventive measure despite a prosecution's motion for detention. In addition, the GYLA observed similar case for the first time in 2013, when a judge did not order the defendants any preventive measure.
- There were 7 cases when a prosecution did not motion for the use of preventive measure for defendants who already were sentenced to prison for other crime. As opposed to the preceding reporting period this reporting period did not reveal a case where a prosecutor did not request the use of preventive measure for defendants who were not sentenced to prison for different crime. Total of 13 (3%) defendant's cases were transferred for pre-trial review without ordering any type of preventive measure against any of the defen-

dants. Since number of defendants who were left without any preventive measure decreased twice compared to the preceding reporting period the GYLA remains hopeful that the prosecutors and courts will maintain the trend of the preceding reporting period and will request and use a preventive measure only in the cases of necessity. In addition, the GYLA remains hopeful that in cases of such necessity pre-trial detention will be requested and used only in exceptional cases, as the most severe measure of last resort.

- The courts basically used two types of preventive measures: pre-trial detention and bail. Although, it should be noted that compared to the previous reporting periods judges ordered alternative preventive measures more frequently including: 2 cases of personal guarantee and 23 agreements about proper conduct and not to leave the territory.
- For the last three reporting periods (since January 2013), a court continued to adequately substantiate its rulings on use of preventive measures. In particular, 96% of court rulings on pre-trial detention and 95% of rulings on bail were substantiated, while in the preceding reporting period 93% of decisions of pre-trial detention and 82% of bail decisions were substantiated.

Additional trend has been observed since the previous two reporting periods. Namely, judges appeared to give more consideration when imposing preventive measures, instead of automatically granting preventative measure requested by the prosecution:

- In 34% of cases where the prosecution requested detention, the court ordered bail;
- In 3% of cases where the prosecution requested detention, the court left defendants without any preventive measure;
- In one case, where the prosecution requested imprisonment, the court ordered personal guarantee;
- In 73% of cases where the prosecution requested bail, the court reduced requested amount of bail;
- In 9% of cases where the prosecution requested bail defendants were released under agreement of proper conduct and not to leave the territory;

- In 4% of cases where the prosecution requested bail, the defendants were released without any preventive measure.

    - As for publicizing information about the sessions of first appearances in advance, since the start of the monitoring (October 2011) the GYLA observed b change, when Batumi City Court publicized information through the special monitor about first appearance sessions in advance in 27% of cases. In the other cases, bailiffs verbally announced information concerning first appearance sessions in the court corridors. Regretfully, similar to the previous monitoring periods Tbilisi and Kutaisi City Courts failed to ensure advance announcement of information about first appearance sessions. However, in Kutaisi City Court the bailiffs verbally announced information concerning the first appearance sessions in the court corridors.

Pre-Trial Sessions

- Unlike the past two monitoring periods there was not a single case when the judge terminated criminal prosecution at pre-trial stage and did not forward the case for merits hearing.
- As in the previous reporting periods, courts routinely sustained prosecution's motions to submit evidence. As for defense, it seemed more passive than in past two reporting periods. In this reporting period out of 213 cases none of which was a high profile case, the defense filed motions for submission of evidence in 43 cases only (20%). During the preceding reporting period the same rate was at 23%, while in its previous reporting period it was 36%. The defense mainly agreed with prosecution's motions.

Plea Agreement Sessions

- Compared to previous reporting periods, judges seemed more active at plea agreement hearings and did not automatically approve prosecution's motions on plea agreements. Since the start of the monitoring (October, 2011) this was

the second case when the judge asked additional questions at plea agreement session and expressed interest in fairness and lawfulness of the plea agreement provisions. . Since fairness and lawfulness of 2 plea agreements seemed less convincing for the judge he did not approve them. In another case, the defense refused the approval of a plea agreement, since the agreement protocol did not fully reflect conditions parties have agreed on. Consequently, the judge refused to approve the plea agreement. The GYLA assesses the development positively and remains hopeful that in the future judges will be more active in identifying lawfulness and fairness of plea agreements and will approve them after proper examination.

- For the past four monitoring periods, number of plea-agreements imposing fines gradually decreased. The indicator equaled 41% in this reporting period, while in previous reporting periods it was 69%, 50%, 49% and 44%. The average amount of fine established by plea- agreements has decreased slightly to 3538 GEL.
- The plea agreements establishing community service as a criminal sanction increased again from 5% to 7%. It should be noted that after the Parliamentary Elections of October 2012, the indicator increased from 1% to 7%, though afterwards, the condition remained mainly unchanged.

Other Key Findings

- Situation remains unchanged in terms of effectiveness of defense. Defense was typically passive compared to the prosecution, save for first appearances where it seemed more active.
- In all 204 cases finished (170 plea agreements and 56 merits hearings) defendants were found guilty. Such indicator has not been observed since 2012. In previous two reporting periods three and one acquittals were observed.
- As in the preceding monitoring period judges did a much better job for informing defendants about their right in terms of plea agreements. Furthermore, the quality of explaining oth-

er rights to defendants has also improved. Though, it should be noted that the situation is the worst in terms of explaining rights of a defendant at pre-trial stage, where judges thoroughly interpreted rights only in 19% of cases.

- Situation did not change much in terms of legalization of search and seizures. Out of 43 motions of search and seizure, the courts issued advance permit on its conduct only in three cases. In other 40 cases the court legalized searches already conducted. This engenders a doubt as to compliance of law enforcement authorities and the court with their obligation – if there is no urgent necessity for a search or seizure it shall not be conducted or then legalized.
- Since January 2014, courts solved the problems with publicity of jury trials and in the reporting period individuals were given chance to attend these hearings.
- The timeliness of court proceedings remain a problem. Save for the first appearances, 9% of other sessions started with 40-120 minutes delay. Overall, 23% of cases started with more than 5 minutes delay. This is a better result compared to the preceding reporting period when 38% and 28% of sessions started with delay.

INTRODUCTION

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

GYLA presented to the public and stakeholders its first and second trial monitoring reports (covering October 2011 to March 2012) in June 2012. Presentation of GYLA's third report (covering July to December 2012) was held in April 2013. The fourth monitoring report (covering January to July 2013) was held in October 2013. The fifth report (covering the period from July 2013 to December) was submitted in April, 2014. The six reports (covering from January 2014 to August 15 period) was submitted in December 2014. Along with the sixth report, GYLA also submitted three years' summary findings, revealing problems identified in courts during these periods, changes, trends and existing challenges..

This is GYLA's seventh trial monitoring report, covering the period from August 15, 2014 to January, 2015. The report also includes results of monitoring jury trials. Similar to previous reporting periods, the purpose of monitoring criminal proceedings was to increase their transparency, reflect the actual process in courtrooms, and provide relevant information to the public. This report also presents relevant recommendations to solve newly discovered problems. The recommendations aim at promoting improvement of the criminal justice system.

Between August 15, 2014 to January, 2015 the GYLA monitored 1101 court hearings including:

- 339 - first appearance sessions;
- 234 - pre-trial sessions ;
- 170 - plea agreement sessions;
- 351- hearings on merits;
- 4 - appellate hearings;
- 3 - sessions of jury selection

Out of those 1101 hearings 553 took place in Tbilisi City Court (TCC), 285 took place in Kutaisi City Court (KCC), 259 were held in Batumi City Court (BCC) and 4 in Kutaisi Appellate Court. The GYLA did not review jury trials and appellate sessions separately, since no different trend has been observed at the trials.

In the preceding monitoring report the GYLA noted the positive trend of ordering alternative preventive measures others than bail and pre-trial detention by judges and their activeness in plea agreement sessions. This reporting period showed slight development in terms of applying alternative preventive measures and in more cases defendants were ordered alternative preventive measures. Number of unsubstantiated decisions decreased even more at the stage of preventive measures. As for plea agreement sessions , situation remains the same. Judges asked questions and in some cases they refrained from approving plea agreements since they were not convinced of lawfulness of the agreement.

Methodology

All of the information in this report was obtained by monitors through their direct monitoring of hearings. GYLA's monitors did not communicate with the parties, and did not review case materials or decisions. GYLA's experienced lawyers and analysts performed the analysis of the information obtained.

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

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

subjective information; however, GYLA's conclusions are based on the analysis of all of the information gathered by the monitors.

In view of the complexity of criminal proceedings, GYLA's monitors typically attended individual court hearings rather than monitoring one trial from start to end. However, there were certain exceptions. "High profile cases" – selected by GYLA's monitors and analysts according to criteria elaborated beforehand – were monitored from beginning to end, to the extent possible. These cases involved gross violations of rights, high public interest, or other distinguishing characteristics. GYLA monitored such cases in the Appellate Court as well.

Structure Of The Report

The report consists of five main parts.

The first part presents key observations related to two stages of criminal proceedings: the first appearance sessions and pre-trial hearings and plea agreement sessions.

The report then provides an evaluation of the basic rights that defendants have in criminal proceedings. These rights include: the right to public hearing, equality of arms and adversarial proceeding, right to defense, prohibition against ill-treatment and the right to reasoned judgment.

The third part of the report describes conduct of parties in a court. It illustrates irregularities which expressly contradict procedural law or norms of ethics, while the fourth part reviews technical gaps of the court process.

The fourth part covers technical gaps associated with the court proceedings.

The conclusion of the report highlights the key issues identified during the reporting period. In addition, it submits recommendations drafted on the basis of identified problems.

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

A. OBSERVATIONS REGARDING SPECIFIC STAGES OF CRIMINAL PROCEEDINGS

I. First Appearance Sessions

According to the Article 198 of the Criminal Procedure Code of Georgia (CPC), during a defendant's first appearance the Court considers the issue of what measure should be used to insure that the defendant returns to court for later hearings and does not either commit a crime while awaiting resolution of the case or interfere with the prosecution of the case. This preventive measure must be substantiated, meaning that the preventative measure imposed must correspond to the goals of legislation.

Many different types of preventative measures are available to the court. These include: imprisonment, bail, personal guarantee, agreement on not to leave the territory and due conduct, and supervision of the conduct of a military serviceman by commanders–in-chief.

CPC Article 198(3) provides:

> When filing a motion to apply a preventive measure, a prosecutor must justify the reason behind his/her choice of preventive measure and the inappropriateness of a less restrictive preventive measure. Accordingly, the prosecution bears the burden of prove in terms of preventive measure. A defense is not obliged to submit an evidence against the preventive measure.

Further, CPC Article 198(5) provides:

> When deciding on the application of a preventive measure and its specific type, the court shall take into consideration the defendant's character, scope of activities, age, health condition, family and financial status, whether the defendant has violated a preventive measure previously applied, and other circumstances.

A decision of the court on preventative measures must be substantiated, since at any stage of proceedings substantiation of decisions constitutes a part of the right to a fair trial, guaranteed by the Crimi-

nal Procedure Code[1] and reinforced by a number of judgments by the European Court of Human Rights (ECHR).[2]

1.1. General Trends

During this reporting period, the GYLA monitored 339 first appearance hearings (232 in TCC, 48 in KCC and 59 in BCC) involving 401 defendants.[3] Compared to previous monitoring periods, a general picture has improved considerably, though the positive changes that began in the courts two years ago have not developed substantially in the last period. Moreover, other previous troubling practices remained unchanged.

Positive trend that started in the courts two years ago in terms of substantiation of preventive measures continues in this reporting period. After the October 2012 parliamentary elections, courts changed their obedient attitude to prosecution sometimes rejecting the prosecution's motion for preventive measures. In the next monitoring periods this trend in favor of the defense has persisted. Courts were relatively active in examining motions for preventive measures, and were not merely bound by the prosecution's demand. In the current reporting period the approach has improved even more and judges revealed more efforts with a view to determine grounds of prosecution's motions and defense's position. On its turn prosecution had better attempt to reason its motions. Accordingly, the number of substantiated preventive measures has increased significantly.

Though in the current reporting period prosecution requested imprisonment in more than half of the cases, the motions for imprisonment became more substantiated. When requesting bail as preventive measure prosecution's motions still lacked support, since they seldom submitted information about the defendant's financial status. However, in such cases, court played its positive role and attempted to acquire information from the defendants. It should be noted that in the preceding reporting period the best situation was in TCC and the worst in BCC, while in this monitoring period regional judges became

[1]According to Article 194.2 of the Criminal Procedure Code: a court's decision shall be well-grounded.

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

[3] More than one defendant participated in some of the first appearance sessions.

more active and did their best to collect all necessary information in the course of examining motions on preventive measures. GYLA welcomes the fact and remains hopeful that regional courts will continue positive practice.

Situation has not improved in performing defense at first appearance sessions. However, when requesting imprisonment and bail defense less frequently agreed with the prosecution's position and attempted to better substantiate its position. Nevertheless, there were still some cases when the defense objected the prosecution's charges formally and did not bring any valid argumentation for its support.

Similar to the preceding reporting period the GYLA observed diverse practice in terms of ordering preventive measures. A court no longer used only two preventive measures: the imprisonment and bail and released defendants without any preventive measure more often. On their turn, prosecutors also requested alternative preventive measures and sometimes asked for pre-trial hearings without any preventive measure. Despite the abovementioned the rate of using alternative preventive measures is still low and 90% of the preventive measures used are imprisonment and bail.

A court ordered imprisonment to 39% of defendants (156 from 401) and bail to 51% (206 from 401) of defendants. The monitoring revealed 6 cases when the court left the defendant without preventive measure despite the prosecutor's demand to use a preventive measure (in 3 cases prosecution demanded imprisonment and in 3 cases bail). Moreover, similar to previous reporting period there were cases when the prosecution did not motion for any preventive measure. In all, from 401 cases in 7 cases the prosecution did not request preventive measure (all 7 defendants were already convicted for other offence and were in custody) Totally 13 defendants were left without preventive measure in the reporting period.

The court applied agreement on not to leave the territory and proper conduct to 23 (6%) defendants and six of them hadn't lawyers. It should be noted that prosecution requested this alternative preventive measure only in one case, while in other 20 cases out of 22 it requested bail and in remaining 2 cases it requested imprisonment.

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

Out of 401 defendants only for 75 defendants (19%) the defense requested preventive measure other than the bail (46 were requests to leave defendant without any preventive measure, 10- personal guarantee, 11- agreement on not to leave the state and proper conduct. In 8 other cases the defense requested to apply any preventive measure less strict than bail). From 75 motions 14 (19 %) were satisfied by the court.. Notwithstanding the small number of foregoing motions, it should be noted that the indicator has improved compared to the preceding reporting period where defense requested alternative preventive measure other than bail only in 4% of cases, while court granted none of them. GYLA remains hopeful that the use of less strict alternative measures will continue more actively and it would be well-reasoned requests, rather than formal motions. On its turn courts will use all possible conditions for ordering alternative preventive measures other than bail and imprisonment.

1.2. Specific Preventive Measures

1.2.1. Bail

Bail is a preventive measure by which helps ensure the defendant's return and prevents committing the future crimes or interference with the prosecution by requiring the defendant to deposits funds in order to be released until the judgment is delivered. The defendant or the person who posted bail in favor of the defendant shall be repaid the amount of the bail in full (with consideration of the rate at the time when the nail was posted), or the lien which was imposed shall be lifted from the pledged property, within one month after the execution of the court judgment, provided that the defendant has fulfilled his/her obligation precisely and honestly, and a preventive measure applied against him/her has not been replaced by stricter preventive measure. [4]

As a type of a preventive measure, bail is subjected to all of the obligations under the Criminal Procedure Code for the application of a preventive measure. As a result, the prosecutor must justify the reason behind his/her choice of preventive measure and the court must take into consideration a variety of circumstances , including the defendant's character, financial status and other significant characteristics, even when the prosecutor does not provide the information relating

[4] Criminal Procedure Code of Georgia, Article 200.

to such circumstances. The defense is not obligated to present information about these circumstances, as it is the prosecution that must justify the relevance and proportionality of the preventive measure sought.[5]

Hence, the appropriateness of the bail depends on its substantiation.

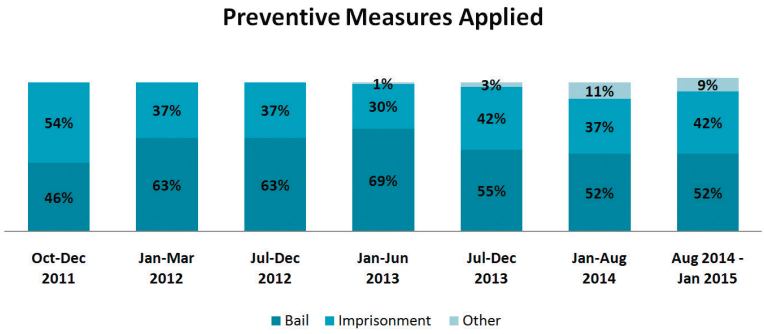
Findings

The practices observed in the reporting period are considerably different from what we found during initial periods of the monitoring. In particular, judges no longer grant prosecution's motions for preventive measures automatically, rather, they order preventive measures based on more profound discussions.

Similar to previous monitoring periods, bail was granted to 52% of defendants. The indicator is less than it was in all previous reporting periods.[6] In certain cases, even though prosecution demanded imprisonment, court ordered bail.

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

Chart N1



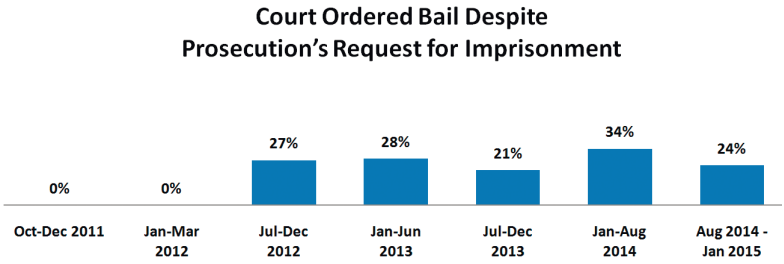
[5] According to Article 200.2 of Criminal Procedure Code of Georgia: the amount of bail is determined according to gravity of crime committed and financial position of a defendant.

[6] In the course of the monitoring the lowest indicator of using bail was revealed in the last quarter of 2011, during the first stage of the monitoring.

During the reporting period, bail was applied as a preventive measure in 24% of cases in which the prosecution demanded imprisonment (the bail was granted to 63 individuals out of 223). It should be noted that the preceding monitoring period revealed the highest indicator (34%) of applying bail by a court, despite the prosecution's demand for imprisonment.

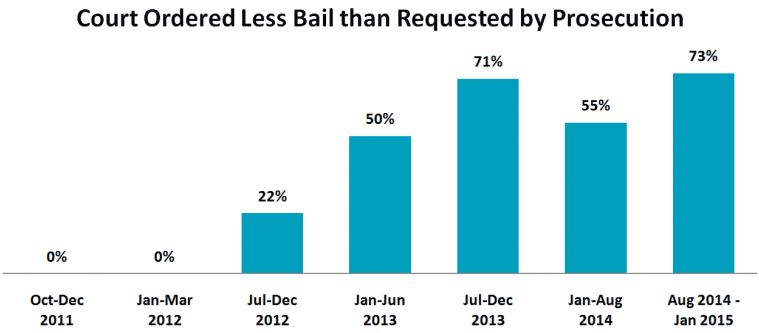
The Chart below illustrates the situation over the course of the monitoring project in terms of applying bail even when prosecution requested imprisonment (from October 2011 through January, 2015).

Chart N2



In the preceding reporting period prosecution demanded bail in 42% of cases (169 defendants out of 401). Out of requested 169 bails court granted 143. In 73% of cases in which the prosecution demanded bail (105 of 143 cases), the amount of bail ordered was less than the amount demanded which is the highest indicator of such cases throughout the whole monitoring project. In 27% (38 cases) the amount of bail ordered was equal to the amount demanded. In 26 additional cases, the court rejected prosecution's demands for bail, including it did not order any preventive measure against defendants in 3 cases and ordered an agreement of proper conduct and not to leave the territory in 21 cases and personal guarantee in two cases. The Chart below illustrates the situation over the course of the monitoring project (from October 2011 through January, 2015) in terms of ordering less amount of bail than demanded by the prosecution.

Chart N3



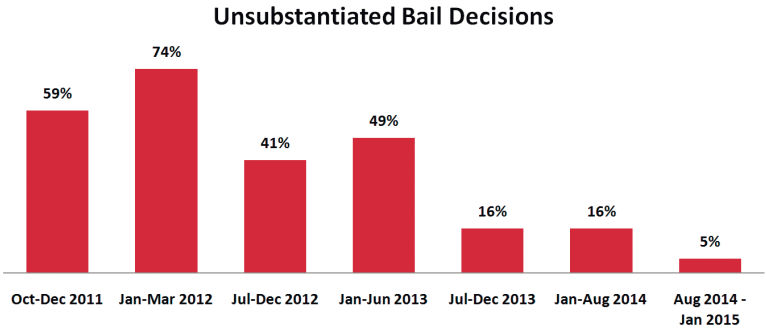
100,000 GEL was the maximum amount ordered in bail during the reporting period, while 1,000 GEL remained to be the minimum amount.

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

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

Out of 206 decisions setting the bail, GYLA believes that 10 (or 5%) were unsubstantiated, which is a significant improvement from the initial stages of the monitoring since 2012. The Chart below illustrates results throughout the monitoring project (from October 2011 through January, 2015).

Chart N4



GYLA believes that bail is unsubstantiated when:

- Judges decide to grant the prosecution's motion for bail without the prosecution providing adequate substantiation based on charges leveled, personal characteristics of the defendant, his/her financial status and other facts relevant to the case. Failure of judges to examine these circumstances is even more damaging in cases where a defendant does not have a lawyer;
- A judge releases a defendant on bail against prosecution's motion for imprisonment but without examining financial status of the defendant.

Below are examples of unsubstantiated bail:

- A person was charged with inflicting intentional damage to health of his former wife; in particular, during conflict the defendant hit the victim with a flower vase. The defendant was detained on the grounds of argent necessity before his first appearance hearing. The prosecution motioned for imprisonment as a preventive measure and provided valid substantiations. During the trial it was found that there were several other calls to police due to the conflict between the defendant and the victim. The reason that caused the crime was not eliminated. Further, the defendant called their child from prison and threatened to kill his mother if she continued to stay in his apartment. In response, the defense stated that the defendant was a businessman with no prior record;

he cooperated with investigation and was ready to cover the victim's treatment costs. The defense also argued that the defendant simply flung the vase and it accidentally hit the victim in her head. Therefore, the defense requested that the bail be set at 5000 GEL. During the trial, the judge found that in addition to his business the defendant also received 700$ per month from Moscow. He also had savings in the amount of 18 000$. In this light, even though there was a meaningful threat that the defendant would continue to perpetrate the criminal action, which constitutes grounds for ordering imprisonment, the judge released the defendant on bail of 5000 GEL. Additionally, in light of the financial status of the defendant, 5000 GEL was insufficient as a preventive measure. This case is particularly important considering frequent acts of domestic violence against women in 2014, which was often met with indifference or inadequate actions by the state, and resulted in death of women. The court's decision jeopardized life and health of yet another woman, who was a victim of domestic abuse.

- A defendant was charged with illegal use of drugs, without doctor's prescription –which amounts to misdemeanor and is punishable with community service or one-year imprisonment. Prosecution demanded one-year imprisonment on grounds that the defendant had prior conviction. Defense noted that the prior conviction had been nullified and therefore, the prosecution's motion for imprisonment was absolutely unfounded. Defense requested an agreement of proper conduct and a not to leave the territory. Despite the fact that the judge had an actual opportunity to resort to an alternative measure, he released the defendant on bail in the amount of 2 000 GEL, without examining his financial status.
- A defendant was charged with acquisition and storage of psychoactive substance, which amounts to a misdemeanor. Prosecution demanded imprisonment without any substantiation. Defense noted that the defendant was a sportsman, had no prior conviction and was not addicted to drugs. He had a mother sick with cancer and regretted what he did. Defense requested bail in the amount of 2 000 GEL. The judge, though, set the bail at 5 000 GEL without examining the defendant's financial status.

- A defendant was charged with illegal consumption of drugs, without doctor's prescription, which constitutes a misdemeanor. The prosecution motioned for bail, demanding that the bail be set at 3 000 GEL, and that the defendant be left in custody until the bail was posted. The prosecution did not have a single valid argument to corroborate their demand; instead, it was citing formal grounds for use of the preventive measure, as prescribed by law. Therefore, the defense demanded that the defendant not be ordered to any preventive measure. Further, the defendant was a socially vulnerable person; the only breadwinner in his family was a mother sick with oncological disease. He had three sisters, one of which was a minor. Nevertheless, the judge set bail at 3000 GEL, which the defendant's family could not afford to pay and it was highly likely that the defendant would remain in custody.

However, there were six other positive cases, in which judges deemed protocols of arrest illegal, released defendants from the courtroom on bail while prosecution was demanding that defendants remain in custody. Notably, this was the second time we observed such cases since the beginning of the monitoring in 2011.

GYLA welcomes such precedents and remains hopeful that judges will resort to bail more frequently in the future and leave defendants in custody in extreme cases only.

Positive examples of using bail:

- In the first case, three defendants were charged with serious crimes, and prosecution demanded that they be held in custody without bail. However, it became clear during the trial that procedural norms of arrest had been violated against the defendants. In particular, actual time of the arrest was different from the time of the arrest as recorded in the protocol, violating 72-hour time limit of the arrest. The defense demanded that defendants not be ordered preventive measure. The judge fulfilled his duty and released defendants from illegal custody. However, because there were grounds for the use of preventive measure, they were released from the courtroom on bail.
- In the second case, a socially vulnerable person was charged with theft. He confessed to the crime and cooperated with

investigation. The crime qualified as misdemeanor. The prosecution demanded that the bail be set at 5 000 GEL and the defendant be held in custody until the bail was posted, on grounds that according to operative information the defendant intended to flee. The defense requested that the bail be set at 2000 GEL. The judge declared that operative information "planted" in the case was "waste paper" and ruled that the arrest was illegal. Bail was set at 2000 GEL and the defendant was released from the courtroom.

- The third case, where the defendant was charged with violation of transportation rules, also involved violation of procedural norms. In particular, certain discrepancies were found between the protocol of inspection of video surveillance material from the scene and the actual video surveillance recording. The lawyer stated that because the footage was poor quality, it did not show anything clearly while the protocol provided detailed account of the accident. According to the lawyer, after pointing out the poor quality of the footage to the prosecutor the latter stated that the quality of the footage may have deteriorated but they knew what happened and prepared the protocol accordingly. Therefore, the protocol of examination of the surveillance footage was based solely on victim's testimony and not the actual footage itself. The judge therefore ruled that the protocol of arrest was illegal, rejected motion of the prosecution for imprisonment and released the defendant on bail.

Positive Example of Using Bail

A defendant was charged with theft. He has been arrested in urgent necessity, and the prosecution was requesting imprisonment as a preventive measure. The judge asked the prosecution about the reason why they did not apply for court's warrant for arrest. The prosecution responded that they knew court would have rejected their request. The judge therefore found that the arrest was illegal and ordered his immediate release from courtroom on bail.

1.2.2. Imprisonment

Imprisonment is the deprivation of liberty. Therefore, application of this measure – particularly before the final determination of guilt has been made – must be considered in relation to an individual's right to liberty, one of the most important rights in a democratic society.

The right to liberty is guaranteed by the Constitution of Georgia,[7] the European Convention on Human Rights,[8] and the Criminal Procedure Code of Georgia.[9]

Under these provisions, the only grounds for imprisoning a defendant before a final determination of guilt are: a) a risk that the individual would flee and a need to prevent the obstruction in obtaining an evidence; b) a risk of obstruction of justice and c) to avoid the commission of a new crime. Even then, the imprisonment may only be used when other measures are insufficient. Reassessment of proportionality of imprisonment sentenced on periodic basis is another key element of the right to liberty both under the ECHR[10] as well as national procedure legislation.[11] The point is that court under the human rights convention and ECHR case law is obliged to review time to time the imprisonment under the party's request, and that denial to consider such request is also the matter of the right to liberty.

Findings

This reporting period revealed progress in terms of applying imprisonment as preventive measure. Though compared to the preceding reporting period prosecution's requests for imprisonment as preventive measure were more frequent, they became more substantiated. Moreover, when prosecution's requests for imprisonment as a preventive measure were not substantiated, courts granted those requests less frequently.[12]

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[7] Constitution of Georgia, Article 18 Para.1.

[8] European Convention on Human Rights, Article 5.1.

[9] Criminal Procedure Code of Georgia, Article 205.1.

[10] *Jėčius v. Lithuania; The Right to Liberty and Security of the Person, A Guide to the Implementation of Article 5 of the European Convention on Human Rights, Monica Macovei, Human Rights Handbooks, No.5, Council of Europe, p.60-61;*

[11] Criminal Procedure Code of Georgia, Article 206.

[12] It was first observed by GYLA in the preceding monitoring period since the time it

Of 401 defendants observed at first appearances, the prosecution requested imprisonment in 223 cases (56%). The court granted prosecution's motion in 156 cases (70%). The charts below illustrate the situation over the entire monitoring project (From October 2011, until January 2015).

Chart N5

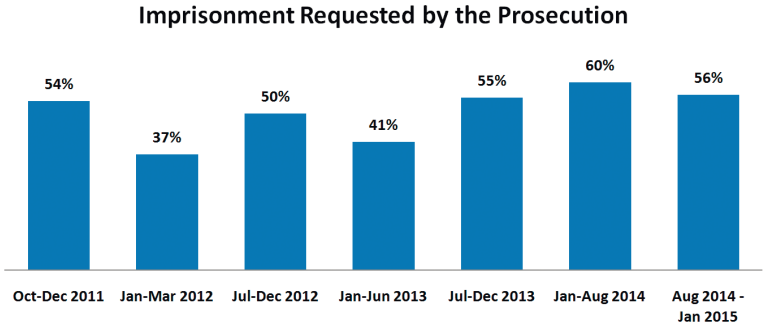
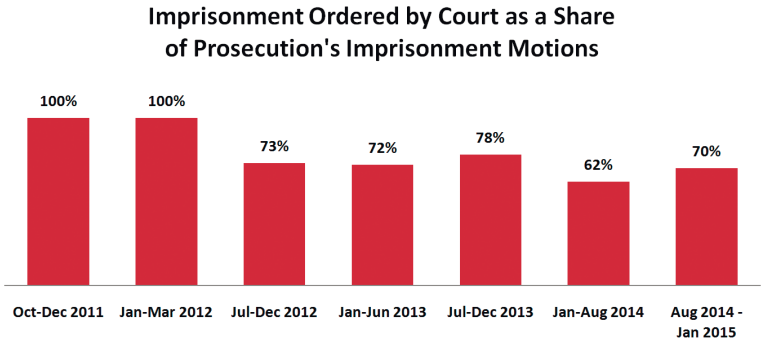


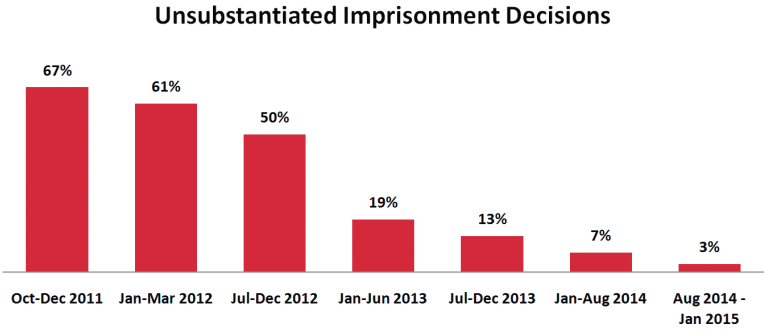
Chart N 6



began the monitoring in October 2011. Until October 2012 GYLA did not observe the fact when the court did not grant prosecution's motion to order imprisonment as a preventative measure.

Out of the 121 imprisonment decisions during this monitoring period, GYLA considered only five (3%) unsubstantiated, with the prosecution not having enough evidence to show the necessity of imprisonment and citing only the gravity of offence as a justification. The chart below illustrate the situation over the entire monitoring project:

Chart N7



Example of Unsubstantiated Imprisonment

The defendant was charged with theft, which falls under the category of misdemeanor crime. Based on the defendant's prior record, the prosecution demanded that he be sentenced to imprisonment. During the trial it was found that the defendant's prior conviction had been annulled, which the prosecution knew nothing of. At the trial the defense also noted that the defendant had a newborn and an 8-year old girl, and he was the only breadwinner for his children, his wife and his mother-in-law. They all lived in a rented apartment. The defense requested that the defendant be released on bail of 1500-2000 GEL. The judge ordered the defendant to imprisonment without any adequate arguments, even though bail that could have been set at a higher amount would have served as an adequate preventive measure.

1.2.3. Personal Guarantee

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

Of the first appearance hearings observed this monitoring period, the defense proposed a personal guarantee as the preventive measure for 10 out of 401 defendants. Of these 10 cases the judge granted only two motions.

Court did not use personal guarantee in other cases. It should be noted that in the preceding reporting period, in one case prosecutor was the initiator of the personal guarantee, which was the unique case for the whole monitoring period (October 2011- August 2014). Similar case was not observed in this reporting period.

1.2.4. Agreement on Not Leaving the Country and Proper Conduct

An agreement to not to leave the country and proper conduct may be used as a preventive measure if the defendant is charged with a crime that envisages imprisonment for less than a year.[13] During this monitoring period GYLA observed 85 defendants who were eligible for such a preventive measure, but the court considered it appropriate only in 23 cases. The indicator is the same as it was in the preceding monitoring period, though it is much higher than in other reporting periods. The GYLA remains hopeful that courts will continue to apply the measure more intensively in all appropriate cases.

In other 62 cases, 6 defendants were released from the courtroom without any preventive measure. As for the rest 56 defendants, regretfully the judge did not attempt to find out possibility of applying other alternative preventive measures and ordered bail and imprisonment.

[13] Criminal Procedure Code of Georgia, Article 202.

Positive Examples of Using Alternative Measures

In four similar cases, defendants were charged with narcotics crime (Article 273 of the Criminal Code of Georgia). The prosecution demanded bail in all four cases, while the defense demanded that bail be set at lower amount and time limit for posting the bail be increased. Judge fulfilled his duty and ordered defendants to lighter proportionate measure – agreement of proper conduct and house arrest.

1.3. Publishing Information about Hearings in Advance

The monitoring of first appearances also revealed a procedural problem related to a defendant's right to a public hearing. The right of a defendant to a public hearing is guaranteed by the Constitution of Georgia[14], the European Convention on Human Rights,[15] and the Criminal Procedure Code of Georgia.[16]

To make this right effective, it is not sufficient for the public to merely have the right to attend at a criminal proceeding; the public must also have the right to be informed in advance about the proceeding so that it has the opportunity to attend. Therefore, the right to a public trial obligates the court to publish in advance the date and place of the first appearance hearing, the full name and surname of a defendant, and the charges against him/her.

Findings

In 339 first appearance sessions monitored by GYLA it was the first case (Since October 2011) when in 20 cases information was published in advance in the court hall. It should be noted that all cases were observed in BCC. As for the TCC and KCC situation remains unchanged. Though before some session bailiffs announced information about time and place of hearing in KCC and BCC, it is insufficient measure for ensuring publicity of the hearing.

[14] Constitution of Georgia, Article 85.

[15] European Convention on Human Rights, Article 6.1.

[16] Criminal Procedure Code of Georgia Article, 10.1.

Failure to publish information about first appearance hearings in advance has been observed since GYLA began monitoring in October 2011 and was reflected in all monitoring reports. Representatives of the judiciary previously claimed that this was caused by technical reason related to the fact that first appearances are held within 24 hours from the arrest, and expressed readiness to settle the technical problems. The practice of BCC illustrates that advance publication of information about first appearances is technically possible. GYLA welcomes the changes launched in BCC and remains hopeful that TCC and KCC will also share the positive practice and will eliminate the gap of violating the right to public hearing during first appearances.

II. Pre-Trial Hearings

At a pre-trial hearing the court considers the admissibility of evidences that will be considered at the main hearing. This stage is of extreme importance, as the verdict at the main hearing will be based on the evidences deemed admissible by the court at the pre-trial hearing. In addition, the issue of termination of the prosecution or proceeding with the examination of the case on merits is decided.[17]

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

Although pre-trial hearing concerns admissibility of evidences, parties can also submit other motions.

Findings

As opposed to the preceding reporting period the GYLA did not observe the fact when the court terminated the case at the pre-trial hearing stage. As the current observations have demonstrated, the defense seemed more passive than prosecution.

Compared to the preceding reporting period, objection of defense on

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

prosecution's motions decreased from 23% to 6%. The GYLA thinks this is a significant decrease in defense's activities and the defense should be paying more attention to this issue as it affects defendants' interests. Otherwise, results of the current monitoring period are nearly identical to previous periods. Courts mainly granted prosecution motions to submit evidence. As for defense, it agreed prosecution's motions.

Following interesting trends have been revealed at the pre-trial hearings monitored:

- 14 out of 234 pre-trial hearings observed were postponed and one was closed. In the remaining 216 hearings, where the prosecution submitted motions to submit evidence 2 trials were postponed before the judge made the decision. From the rest 214 in 210 cases, the court completely granted all prosecution's motions on admissibility of evidences and in 4 cases partially.
- The defense objected to 14 of 216 prosecution's motions. From these 14 objections, the court did not grant 12, in two cases the hearings were postponed until making the decision by the judge.
- The defense submitted motions to submit evidence in only 43 of 213 (20%) cases[18]. In 31 of 43 cases prosecution agreed to the motions and the Court upheld them. The court fully granted 8 of 12 defense motions that the prosecution was opposed to. The court partially upheld 1 motion and 3 were not granted.

III. Plea Agreement Hearings

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

Under Article 213 of the Criminal Procedure Code, when a plea agreement is reached the judge must verify whether the charges brought

[18] Of 234 sessions 17 were postponed before the defense stated motion on submission of evidences; 3 sessions were postponed before the monitoring started and it was not possible to determine if defense had stated similar motion; while one session was closed.

against the defendant are lawful and whether the agreed-to punishment set out in the prosecutor's motion for acceptance of the plea agreement is fair.

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

It gives a judge although limited but a certain leverage to influence fairness of punishment.

Findings:

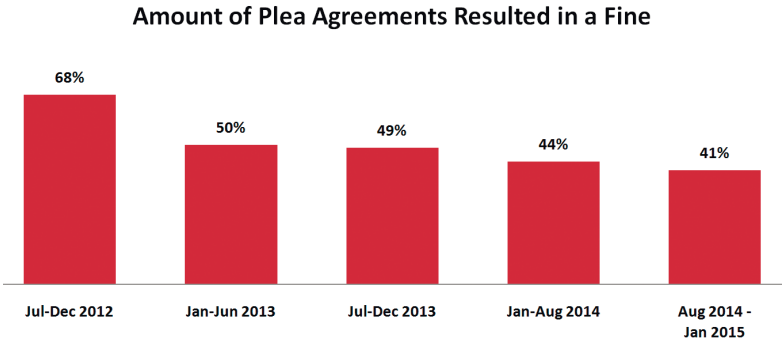
Unlike previous reporting periods, save for the last reporting period, we found that court's involvement in reviewing plea agreements was more active. While in previous reporting periods, in the process of reviewing plea agreements judges limited themselves to their procedural obligations only and asked defendants for the formalities' sake whether they agreed to a plea bargain or not. In the present reporting period judge refused to approve two plea agreements, believing that their provisions were unfair and illegal. Further, during one trial judge asked questions in an attempt to examine whether the punishment was fair. In another case judge attempted to alter conditions of plea agreement and announced a break, though agreement was not reached with a prosecutor and conditions remained unchanged. In one case judge suggested that prosecutor decrease the term for con-

fiscation of driving license, since in view of circumstances of the cases the agreed penalty was disproportional. In other two plea agreements a judge introduced technical corrections and corrected legal flaws.

From 204 sessions, where court delivered final decisions, in 170 (83%) cases plea agreements were approved.

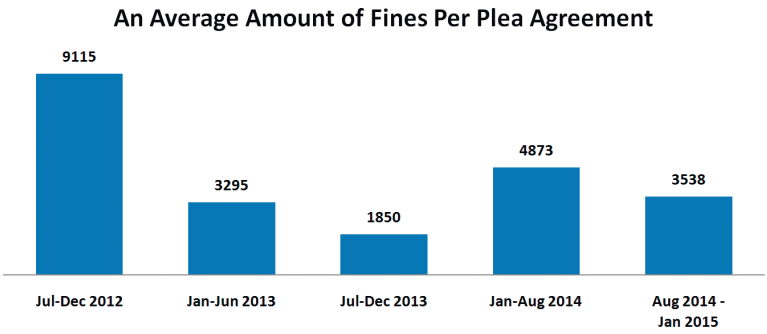
Compared to the preceding reporting period the percentage of plea agreements in which a fine was imposed declined even more. This is continuation of the trend that has been observed by GYLA since the start of the monitoring on the issue. The Chart illustrates situation for the reporting periods when GYLA observed frequency of applying fines (July 2012- January 2015).

Chart N8



As for the average fines imposed by plea agreements, though the previous reporting periods illustrated declining tendency, the average amount of fines imposed increased again in the preceding reporting period. During the current monitoring period, 78 plea agreements resulted in a total of GEL 276,000 in fines (an average of GEL 3.538 per plea agreement). The Chart below illustrates situation for the monitoring periods where GYLA observed variance of the indicator (July 2012- January 2014).

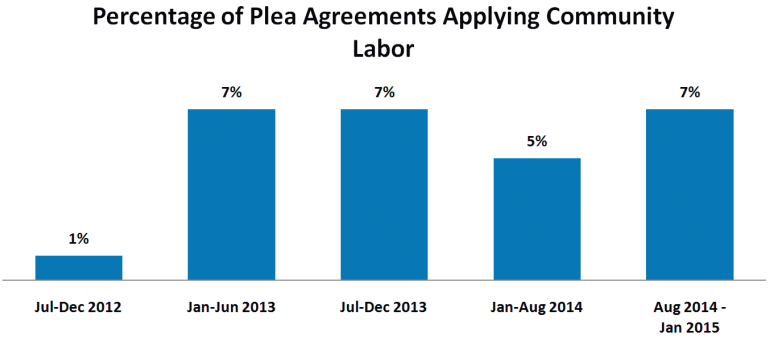
Chart N9



Similar to preceding monitoring period the range of fines during the current monitoring period was between GEL 1000 and GEL 30000.

In the reporting period percentage of applying community labor increased from 5% to 7%. Though it should be noted that in the third monitoring period (July-December 2012) it was only 1% and reached 7% only in the fourth monitoring period (January –June, 2013), though afterwards situation remained the same. The Chart below illustrates situation in the previous monitoring periods where GYLA observed frequency of applying community labor in plea agreements (July 2012-January 2015).

Chart N10



Case in which Judge had the Prosecution Reduce the Term of Deprivation of Person's Right to Drive a Motor Vehicle

A defendant was charged with illegal consumption of drugs. A plea agreement was negotiated envisaging 6 months of deprivation of freedom, served as a suspended sentence, and one year served on probation. Further, the defendant would be deprived of his right to drive a motor vehicle for 3 years. The defendant stated at the trial that he was working as a cab driver, and deprivation of his right to drive would mean loss of the only source of income for his family. The judge suggested that the prosecution modify conditions of the plea agreement. The prosecution requested a recess. Following the recess, the prosecution stated that they were willing to reduce the term of deprivation of the right to drive a motor vehicle from 3 to 1 year. The defendant agreed to the new terms and the judge approved the plea agreement.

The reporting period revealed three cases of advance payment of plea agreement fines. Such facts cast shade over the authority of judiciary and reveal disrespect to a judge, since parties, with their conduct precede judge's decision and determine his judgment in advance, while a judge may abstain from approving plea agreement and the fine envisaged therein.

B. OBSERVATIONS REGARDING SPECIFIC RIGHTS OF DEFENDANTS

I. Equality Of Arms And The Adversarial Process

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

The meaning of these principles is that the parties to a proceeding have an equal right to present evidence in the case and to enjoy equal rights during the process present their case under equal conditions.[19] To safeguard this right the judge must ensure equality of arms during the trial, meaning that s/he must provide both parties with an equal opportunity to examine evidence without interference. Further, the judge should not exceed the scope of the charges, but should be bound by the positions presented by the parties.

The principle of equality of arms is of particular importance in criminal proceedings, where the prosecution has the resources and power of the state behind it and the defense is at a disadvantage.

Findings

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

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

Nevertheless, GYLA found certain flaws. In two of the cases the judge interfered with powers of the prosecutor by assisting him in the process of questioning the witness, namely, he was hinting to the prosecutor to object to the line of questioning. Further, the judge intruded into the process of questioning witness and grossly violated the principle of equality of parties and adversarial proceeding:

- At a main hearing, during a repeat cross-examination, fol-

[19] Constitution of Georgia, Article 42.6.

lowing the defense lawyer's questions, defendant asked additional questions to a witness in violation of procedural regulations. The prosecution's response was not adequate. Judge told a few times to the prosecutor: "Mr. Prosecutor, let me remind you that this is repeat cross examination. Do you have any motions to present?" The judge was hinting to the prosecutor to object to the line of questioning.

- In another case, where the defendant was a lawyer himself and was defending himself, judge violated principles of equality of arms and adversarial proceedings on a few occasions:
  - ✓ Judge interrupted the defendant three times when he was asking questions to a witness, stating that questions were wrong. The judge noted that even though he did not have the right to object to questions of the defendant, because prosecutor did not react he was urging the defendant to rephrase his questions.
  - ✓ Whenever the prosecutor objected to questions and failed to substantiate his objections, the judge provided argumentation himself as to why the objection had to be sustained.
  - ✓ During direct examination, the judge helped a witness to answer a question. The defendant asked the witness about who had given him assignment and how (in written, verbally, by sending a text, etc.). The judge provided part of the answer before the witness could say anything. He told witness that the assignment did not need to be provided in written; it was not mandated by law. He also told the witness to simply answer the question about who gave him the assignment.
  - ✓ Before investigator started examination, the judge told him that it was likely that he (the investigator) did not remember circumstances of the case, because the incident took place in March. Afterwards, the judge offered a case file to the witness, to help him answer the questions based on materials in the case. The witness agreed. Such method makes the whole point of questioning absolutely meaningless because any individual could have

responded to questions based on the case file, and provided exactly the same information.

In two cases the judge did not explain his rights to a defendant, which could have prevented the latter from meaningful realization of his rights:

- The judge finished the process of examining a plea bargain in 4 minutes, without explaining any of his rights to the defendant. He merely told him that regrettably, he had to spend one year in prison. However, considering that maximum punishment for the crime concerned was 14 years of deprivation of freedom, terms of the plea bargain were favorable to the defendant. The judge announced that the plea bargain had been approved and left the courtroom.
- In another case, during the first day of a main hearing judge asked the defendant whether he wanted to hear his rights. The defendant responded that he knew his rights and did not need any explanation. Therefore, the judge did not explain to him a single one of his rights. Notably, judge is not bound by defendant's statement and in order to protect rights of a defendant to a maximum extent, s/he must provide defendant with comprehensive explanation of his rights, and not only upon request of a defendant.

During one of the high-profile cases against former Mayor of Tbilisi Giorgi Ugulava, judge did not allow prosecutor to fully express his protest. When the prosecutor was objecting to questions asked by the defense, the judge did not let him explain his objection fully, on grounds that the defendant changed his question to make it more specific, explaining that making a question more specific means rephrasing a question, which is not true. Without hearing prosecutor's objection fully, it was impossible to rephrase the question in a way that would address the cause of the prosecutor's concern. The prosecutor was extremely dissatisfied about this.

On the other hand, there were some positive cases when judges promoted meaningful equality of arms and observance of the principle of adversary proceedings:

- During a main hearing it was found that lawyer did not include defendant's statement in the list of evidence, mean-

ing that only prosecution could decide whether to put the defendant on stand or not. Meanwhile, the prosecutor had included the defendant in the list of persons to be questioned. Later the prosecutor removed the defendant's statement from the list of his evidences and decided against putting him on stand. This way, the defendant's right to testify in his own case was curtailed, meaning that he was put at a disadvantage vis-à-vis the prosecution. Judge took adequate measures; without narrowly limiting himself to norms of the Criminal Procedure Code, he acted in abidance of the principles of equality of arms and adversarial nature of proceedings and resolved the issue in best interests of the defendant. The judge explained that because the individual is not a mere witness but a defendant, he has the right to be examined at his own trial, and allowed the defense to question the defendant as a witness. In GYLA's own experience beyond the court monitoring project, court practice is rather inconsistent in such cases and often law is interpreted in a way that puts the defendant at a disadvantage. Notably, all similar cases point to lack of professionalism of lawyers and violation of right to defense.

- During their first appearance before a court, defendants who had waived their right to a lawyer were provided with answers to all of their legal questions by a judge. The judge provided comprehensive and detailed explanations, introduced them to all types of restraining measures and when to request them.

- During one of the pre-trial hearings, judge helped defendant familiarize himself with materials in the case. Right after the trial began, judge stated that he received a response to his letter addressed to prison N8 and requesting that defendant G.Gh. be allowed to read the information recorded on a CD in prison. According to the response, the defendant was provided with access to the CD and he continued to familiarize himself with the evidence. The judge asked the defendant whether he had really been able to read the evidence. The defendant responded that he had.

GYLA found that court's practice for maintaining order in courtroom was rather inconsistent. In a number of cases, court was inadequately

loyal, that had a negative impact on effectiveness of the proceedings; in other cases a judge took necessary measures for maintaining order in courtroom. Like for instance:

- At a main hearing during examination of a witness, judge was having a hard time keeping order; the parties were interrupting each other's motions for objection and started a quarrel. At the same time, witness continued to answer questions while judge failed to discharge his powers to maintain order. During one of these disputes, defendant lost his temper and started cursing at the prosecutor and the witness. The judge expelled him from courtroom; however, before the expulsion the defendant was also verbally insulted by the prosecutor (he was cursed at). The judge issued a strict warning for the prosecutor and said that even though he was a prosecutor, if he cursed again, he would also be expelled from courtroom. GYLA believes that the prosecutor should have been subjected to the same sanction for court contempt and should have been expelled like the defendant. Further, had the judge taken adequate measures in time, the situation would not have escalated to the extent that it did and it would have been possible to proceed with the trial under the proper conditions.
- During one of the high-profile cases against Giorgi Ugulava, there was a noise in the courtroom. Judge declared that noise interfered with the proceedings. Prosecutor asked the judge to take adequate measures in response but the judge stated that it was impossible to identify the particular individual who was making the noise. The judge could have closed the trial to ensure normal proceeding of the trial.
- During another trial involving Giorgi Ugulava, there was a noise in the courtroom from the very start of the hearing. The judge strictly demanded order and warned attendees that if noise continued, adequate measures of liability would be imposed. The judged succeeded in observing order in the courtroom. Further, the judge interrupted the defendant Giorgi Ugulava while he was making a political statement and said that courtroom was not a political tribune and that he would not allow such statements in the courtroom.

- During one of the first appearance sessions defendant continued to address judge with lack of respect. The judge warned about liability for court contempt. The defendant made a joke while the judge was explaining his right to recuse a judge, and therefore was fined with 200 GEL. The defendant started yelling that he could not afford paying all the fines. He kept yelling that he did not understand legal terms and he had the right to ask clarifying questions. The judge increased fine to 500 GEL. After bailiffs did not succeed in calming the defendant down, the judge expelled him from courtroom for court contempt and postponed the trial until the appearance of a public defense counsel.

Other findings:

- Out of 351 main hearings attended by monitors of GYLA 3 were closed and 128 were postponed. In remaining 220 cases witnesses were questioned in 132 (60%), with a judge asking questions in 9 cases. In these 9 cases judges observed procedural requirements by asking questions to witnesses with the consent of the parties. Since the start of the monitoring project (October 2011) it is the first case when a judge observed procedural requirements of asking questions.
- Similar to preceding monitoring period, at two merit hearings, court failed to ensure separation of witnesses examined from the witnesses to be examined, that should be ensured by the court.[20] Witnesses were outside the courtroom, sharing with each other statements they gave in the court. Nobody did anything to prevent this.

II. Right To Defense

The defendant's right to a defense is of crucial importance in criminal proceedings, and is guaranteed under Article 42 of the Constitution of Georgia and the ECHR. In addition, Article 45 of the Criminal Procedure Code requires that the defendant have a lawyer when realization of the right to defense and defendant's rights may be at risk, such

[20] According to Article 118.2 of the Criminal Procedure Code of Georgia: a witness should be questioned in isolation from other witnesses. Further, court should take measures for preventing witnesses summoned for questioning in the same case from communicating with one another before the questioning is over.

as when the defendant does not have command of the language of the proceedings, is in the process of plea bargaining, or when defendant has certain physical or mental disabilities that hinder him/her from defending him/herself.

For a full realization of the right to defense, the defense should be given adequate time and opportunity to prepare its position. Further, the defense attorney should use all legal means at hand to defend his/her client.

Findings

The monitoring results suggest that the right to defense was generally protected and that an attorney was provided in cases of mandatory defense.

Moreover, in all those cases where the defense asked to postpone the hearing to become more familiar with the case materials and prepare the defense, the judge granted the motion. It should be noted that prosecution did not object the motions.

Nevertheless, GYLA's monitors observed some violations of the right to defense, when a court did not apply proper measures to ensure right to defense, or law enforcement bodies restricted right to defense or the lawyer was too passive and fell short to apply all available resources for protection of defendant's interests:

Below are some examples of violation of the right to defense by courts and law enforcement bodies:

- At the one pre-trial hearing, after examination of admissibility of motions the judge ended hearing without asking parties if they had any other motions. As a result, the defense was not able to submit motion to change the preventive measure. The lawyer expressed his dissatisfaction, though the judge stated that hearing had already been closed and advised the lawyer to file a written motion to the court. In this case, judge's direct obligation was to follow procedures of hearing and find out if there were other motions. The lawyer however could have reminded the judge about a procedure before closing the session. In view of this we face incompetence or carelessness from both sides: a lawyer and a judge, which ultimately resulted in violation of the right to defense.

- At a main hearing, a public lawyer declared that he had no chance to meet a defendant prior to the hearing, since prison administration did not let him there. He added that he filed a written application to the administration asking the reasons that inhibited him in exercise of his duties. No answer was provided so far.

Example of Positive Actions Taken by a Judge

Because defendant failed to appear at a main hearing, the prosecution requested imprisonment, without looking into the reason why the defendant was missing. Neither did the defendant's lawyer provide any helpful information. The judge acted in best interests of the defendant and ordered both parties to find out the reason why the defendant was missing, and to submit all adequate documents at the subsequent trial. The judge asked the prosecutor whether he had tried to find the defendant at his home address. He responded that he didn't. The judge noted that because the defendant had prior convictions, law enforcement authorities had all the information about him. The judge urged the prosecutor to obtain the information, contact his relatives and find out where he was, whether he was alive or not. The judge stated that after finding out about the reason why the defendant had failed to appear, the court would take further legal actions.

Examples of unqualified and passive defense were observed in the following cases:

- At a main hearing the lawyer stated that he disagreed with a defendant, however since he had to defend him, he did that just before a court. The lawyer and a defendant had different positions on a number of issues. When a defendant objected concrete issue, the lawyer nodded his head in support of a judge. As a result, the lawyer and the defendant had a conflict and the lawyer had to ask self-recusal since they could not agree on the same position which substantially violated defendant's right to defense.
- At another main hearing, the prosecutor was questioning defendant as a witness at direct examination when posing

leading questions is prohibited. The prosecutor questioned a defendant in violation of the rules of direct examination, namely at the end of every question he added the phrase "isn't this true?" Regretfully, the defense did not object any of the questions which illustrate his insufficient qualification and carelessness.

- During one of the first appearances, defense lawyer was unqualified to the extent that he had difficulty to know elementary issues such as minimal amount of bail envisaged by law and requested a court to set bail less than 1000 GEL. In view of this defendants right to defense was violated.
- At one of the trial sessions observed a defendant was not informed about his opportunity to curtail the period of deprivation of right. He seemed deeply surprised when he heard about it from a judge. Afterwards, the defendant requested restriction of the three years term envisaging confiscation of his driving license, though the prosecutor objected and plea agreement was approved under previous conditions. GYLA also found one positive example when a judge attempted to promote exercise of the right to defense and announced 20 minutes break so that parties had opportunity to agree on altered conditions.

At two other trials lawyers appeared unprepared:

- During a pre-trial hearing we found that a lawyer was not familiar with the case file and was trying to find during the trial which evidence to object to. The lawyer initially announced that he was objecting to all the evidences. After the judge asked him whether he was objecting to power of attorney, the lawyer realized that there were many other pieces of evidence which the defense was not objecting to;
- During a main hearing, lawyer was unaware of whether defendant was pleading guilty or not. In his introductory remarks he stated that the defendant did not plead guilty while later it became clear that the defendant was pleading guilty.

Lawyers in two more cases were acting in an indifferent and irresponsible manner:

- In the first case, lawyer provided legal consultation for the defendant several minutes before the trial began, explaining how to act and how to respond to judge's questions;
- In the second case where plea bargain was to be concluded, lawyer did not appear at the trial. He gave the defendant a letter stating that he had a trial in Batumi and was requesting postponement of the trial. Because the motion for plea bargain had been filed 13 days ago in court and the 14-day limit for reviewing the agreement was about to expire, the trial was postponed for a few hours to give some time to the lawyer to get to Kutaisi. The lawyer did not appear at the trial again; instead, he told the defendant to request postponement of the trial for the next day. The judge explained that they contacted Batumi City Court and found out that the lawyer had another trial scheduled for the following day in Batumi, and the time limit for the trial was also expiring. Therefore, the judge refused to postpone the case and appointed a public lawyer. The trial was postponed until his appearance in the court.

III. Prohibition Of Ill-Treatment

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

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

As a result, GYLA would like to highlight a legal gap related to the ill-treatment of defendants. Under the Criminal Procedure Code, a judge is authorized only to explain to a defendant his/her rights against ill-treatment and to hear alleged facts of ill-treatment. The law does not establish a procedure through which a judge can take meaningful action when ill-treatment is alleged; instead, a judge is only empowered to declare whether ill-treatment took place.

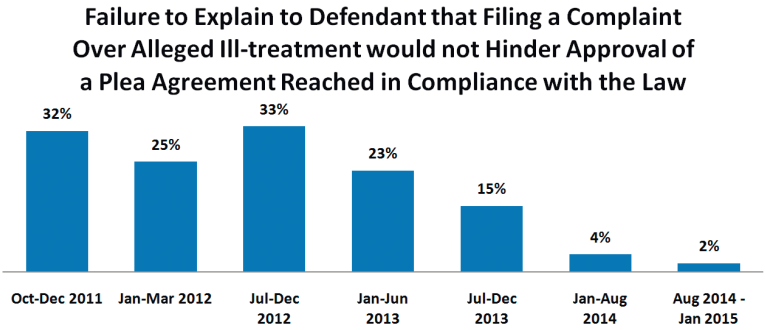
Findings

The reporting period revealed the fact of alleged ill-treatment. Namely, at the first appearance session, the lawyer reported that investigator had asked the defendant to sign the statement written by him for making plea agreement with a prosecutor. According to the lawyer, the prosecutor was also informed about the fact. According to the lawyer, the defendant did not confess to guilt and he had been subject to psychological pressure for two hours. The judge advised a lawyer to apply to relevant agencies about abuse of power by a prosecutor/ investigator. Foregoing case illustrates formal role of a judge in revealing ill-treatment facts and shows necessity of increasing judge's role and authorities in that direction.

As for the other observations, compared to the preceding monitoring period, the judge explained to defendants the right to file a complaint over alleged ill-treatment in a higher percentage of cases:

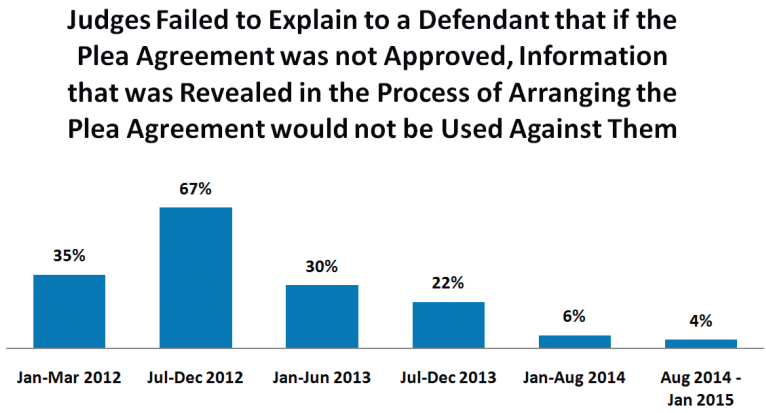
- Of the first appearances observed, judges failed to explain to defendants their right to file a complaint over alleged ill-treatment and did not inquire whether the defendant alleged ill-treatment in 24 of 339 hearings (7%). During the previous reporting period, judges failed to do so only in 16 of 283 hearings (5%). It should be noted that it was 28% in the beginning of the monitoring (October –December, 2011).
- For the last three monitoring periods the situation improved considerably in terms of explaining plea agreement rights. In 170 observed cases, the court failed to inquire whether a plea bargain has been reached through coercion, pressure, deception or any illegal promise only in one case. During the preceding reporting period, judges explained the right in 100% of cases (135 sessions).
- GYLA found out that during this monitoring period in only 2% of plea agreements (3 of 170) judges failed to explain to defendants that filing a complaint over alleged ill-treatment would not hinder approval of a plea agreement reached in compliance with the law. The below Chart illustrates results of the whole period of monitoring (October, 2011 January 15, 2014).

Chart N11



- In 4% of cases where a plea agreement was reached (7 of 170), judges failed to explain to a defendant that if the plea agreement was not approved, information that was revealed in the process of arranging the plea agreement would not be used against them. This is much improved result since the last monitoring period, when the judge failed to inform the defendant in 8 out of 135 cases (6%). This is continuation of the trend that started during the third reporting period (July-December, 2012). The below Chart illustrates results of the whole period of monitoring.

Chart N12



IV. Right To A Reasoned Judgment

The right to a fair trial is an internationally recognized right of a defendant encompassing within itself a right to a reasoned judgment. [21].

To assess the reasoning of decisions and determine if there was a trend, GYLA monitored a number of searches and seizures that were conducted without prior approval by a judge and were later justified on the grounds of an urgent necessity. GYLA thinks this is an area that needs separate research which is beyond the scope of the court monitoring project. However the statistical data provided in this report illustrates situation in Georgian courts in terms of substantiation of court decisions.

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

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

Findings

Situation has not changed in cases of decisions about search and seizures where GYLA again observed apparent violations of the right to a reasoned judgment.

As in the preceding reporting period, in nearly all of the cases observed by GYLA search and seizures were justified by urgent necessity and legalized later by the court. Namely, out of 43 cases of search and seizure only three were performed with a court's prior warrant, while the remaining 40 cases were legalized later by the court.

GYLA was unable to determine whether the after-the-fact legaliza-

[21] According to Article 194.2 of the Criminal Procedure Code of Georgia: a court's decision shall be well-grounded.

tions of searches and seizures were substantiated, due to the fact that they are not discussed in open court. However, the fact that 93% of searches were only justified after having been performed raises doubts as to the compliance of law enforcement authorities and the court with their obligations not to conduct or legalize searches that are not appropriately justified on the basis of urgent necessity.

V. Right To A Public Hearing

As noted above, right to a public hearing is an important right of a defendant and the public itself, guaranteed at both the national and international levels.

The right requires the court to ensure that proceedings are conducted in a way that attendees have no trouble hearing and understanding the process. This also means equal access to everyone to attend the proceedings. The court must also announce the ruling of the court to the public, indicating the measure of punishment applied the applicable legislation on which the judgment was based, and the right of a defendant to appeal the decision.[22]

It should be noted that amendments were introduced to the Organic Law of Georgia on Common Courts in May, 2012 which ensure more publicity of trials. As a result of introduced changes, the public broadcaster and other TV companies were given opportunity to carry out video and audio recording of the court hearings. [23]

Findings

The monitoring revealed that the right to a public hearing was usually observed. Similar to the previous reporting periods, the major exceptions were revealed at the first appearance hearing stage in TCC, where information about the hearings was never provided in advance. The monitoring revealed a positive trend of publishing information about the scheduled first appearances in Batumi City Court.

Moreover in 93 of 762 (12%) hearings that do not include first appearances, no advance information was published about scheduled

[22] Criminal Procedure Code of Georgia, Article 277.1.

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

date and time of the hearings. In preceding reporting period, in 10% of the hearings except first appearance hearings no advance information was published. It should be noted, that in this regard the best situation is again in Batumi City Court and the worst in Tbilisi City Court.

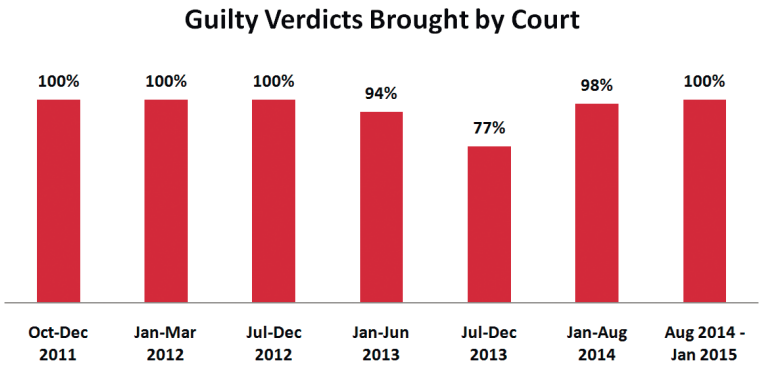
GYLA also revealed the following facts:

- Since the start of the monitoring project (October 2011), none of preliminary published information from 669 cases was either incomplete or incorrect. All notices provided comprehensive information about the place and time of the session and about a defendant and the charge.
- In all three open hearings of jury selection observed by the GYLA, the information was published in advance and individuals had opportunity to attend them without restriction. Notably, save for the preceding reporting period, in the previous monitoring periods the interested individuals had no opportunity to attend jury selection sessions, since bailiffs were guarding the entrance of the room, though the session was not closed by the judge. GYLA assesses positively resolution of the problem by the court and remains hopeful that similar barriers will not be observed in the future.
- In 5 of 1101 cases (0.4%) defendant's relatives or other interested persons were unable to attend hearings due to the small size of the courtroom. Among them were three high-profile cases (the case of Ugulava and trials in Bachana Akhalaia's case [24]).
- 56 of the 348 main hearings observed[25] ended with the public announcement of a final judgment. Of those judgments none was an acquittal. From 56 convictions two were high-profile cases and 54 ordinary cases. The chart below illustrates situation throughout the whole monitoring project (October 2011 – January, 2015).

[24] Bachana (Bacho) Akhalaia – the former Minister of Defense and the former head of the penitentiary system

[25] Three hearings were closed.

Chart N13



- Similar to preceding monitoring period a judge did not approve three plea agreements (2%). Out of167 plea agreements approved, the judge failed to announce judgements publicly only in four (2%) cases. In both abovementioned cases the judge only announced that the plea agreement had been approved and left the courtroom.

C. CONDUCT OF PARTIES DURING THE TRIAL

GYLA observed actions of the parties, including the court being both unethical and against the established procedures in a number of hearings. Even though each case involves violation of individual rights to a certain extent, it is mostly indicative of the lack of professionalism and competence of parties. The present section does not include facts involving legal interpretation of norms or legal (however unreasonable) use of discretionary powers by the parties to the proceedings.

Courts

During one main hearing GYLA found court's actions to be unqualified and/or negligent. In particular, prosecutor's objections to questions asked to a witness were met with silence from the judge. He did not state whether he sustained or overruled objection. Prosecutor had to remind him to respond.

Further, during two main hearings court acted in an informal and unrestrained manner towards officers of the prisoner transportation service, lawyers and defendants:

- In the first case, as he entered the courtroom judge started arguing and yelling at officers of the prisoner transportation service: "do you need someone to kick you to come in? This is how everything works in the goddamn Georgia!" He started arguing at the trial secretary as well, for not telling bailiffs to bring the defendant in. Throughout the trial the judge interrupted defendant's motions a number of times, without any specific reason. He would just mutter something or address the secretary aloud.
- During another main hearing, the judge had apparently gotten tired of the defendant's manner of questioning as he was citing specific norms of the Criminal Procedures Code, and told him: "are you testing the witness? What kind of questions are you asking?" The defendant responded that he was not testing the witness; if he were, he would have asked him what individual Articles of the Code were about instead of reading those Articles. During the same trial the judge told the lawyer: "why can't you remember the damn protocol?"

> During the same main hearing, a technical error was found in recording of the trial. In particular, the trial was not recorded on audio device, and microphones were switched on only after the prosecutor asked to switch on his microphone.

During another main hearing which was continuation of a postponed trial, judge was trying to find out which defendant had prior conviction and which was on probation, which he should have done earlier during an opening trial.

Prosecutors

During one of the plea agreement hearings prosecutor provided the court with a document that contained an error about qualification of crime. The judge expressed his disappointment. The prosecutor tried to explain by saying that it was a mere technical error. Namely, according to prosecutor's motion, the defendant was charged with theft that caused considerable damage. This crime is prescribed by Article 177.2."a" of Criminal Code of Georgia, but prosecutor mentioned Article 177.2."b". Judge asked: *"Should it be "a" or "b" in the motion?"* Prosecutor answered: *"Yes, It should be "a" in the motion, it is a technical error."*

During one of the main hearings observed judge found out that defendant had not been fully informed about charges brought against him. The judge expressed his disapproval and noted that this had become a frequent practice. The judge wanted to know why investigators are not trained adequately not to make such mistakes.

Lawyers

During one of the pre-trial hearings observed, lawyers were disrupting order, showing disrespect towards the prosecutor, ironically addressing him as "our 'qualified' prosecutor". One of the lawyers stated: "why is this prosecutor better than me? Am I too skinny or too short?" The judge rightfully imposed a fine on the lawyer in the amount of 100 GEL. After the lawyer again violated order in the courtroom and made statements without permission of the judge, the fine was increased up to 300 GEL.

D. TIMELINES OF THE COURT PROCEEDINGS

GYLA's monitoring revealed problems with timeliness of the hearings, which may be the result of courts 'overload and/or improper court administration. In the reporting period 66 of 762 hearings that did not involve first appearances (9%) started with 40-120 minutes delay. Totally, out of 762 hearings up to 177 (23%) hearings started with more than 5 minutes delay. Although it still remains a problem, compared to the preceding reporting period, where 28% of hearings started with more than 5 minutes delay, the situation has slightly improved.

Out of 177 hearings mentioned above:

- In 90 cases (51%) the judge was late;
- In 17 cases (10%) the other session continued in the same courtroom;
- In 17 cases (10%) the defendant was late;
- In 18 cases (10 %) the lawyer was late;
- In 12 cases (6.5%) the prosecutor was late;
- In 1 case (0.5%), only one party was present;
- In the left 22 cases (12%) other reasons were observed.

SUMMARY OF OBSERVATIONS

- In the reporting period the courts continued to improve in certain aspects. The number of unsubstantiated decisions for imposition of preventive measures decreased. This is particularly true for decisions about imprisonment.
- Certain changes were found in the pattern of using preventive measures – judges started using measures other than bail and imprisonment more often than before. In particular, 6% of defendants were ordered to alternative preventive measure while 3% were released from courtroom without any preventive measure.
- Small portion of prosecution's motions for preventive measures remains unsubstantiated. One positive improvement was court's more frequent attempts to examine defendant's financial condition. The court stopped the practice of automatically granting prosecution's motions for imprisonment. Consequently, its decisions became more substantiated.
- Unlike the previous two monitoring periods cases when a judge terminated criminal prosecution was not observed during pre-trial hearing.
- Similar to the preceding monitoring period, problems with respect to attending hearings for the selection of jury members was not observed, and everyone was allowed to these meetings.
- For the first time throughout the monitoring (since October 2011), Batumi City Court succeeded in publishing information about some of the scheduled first appearance hearings in advance; however, nothing has changed in Tbilisi and Kutaisi courts in this regard.
- Similar to the preceding monitoring period, pre-trial hearings were mostly routine proceedings. Courts mostly agreed to prosecution's motions on submission of evidence. Defense usually refrained from submitting its own evidence as well as from objecting to admissibility of evidence submitted by the prosecution. Compared to the previous reporting periods, defense seemed even more passive.

- As to the searches and seizures, GYLA still questions the fulfillment of obligations of the law enforcement authorities as well as of the courts which prohibit them from conducting or legalizing searches and seizures when an urgent necessity is not properly substantiated.
- Since the start of the monitoring (from October 11 through January 2015) for the second time the GYLA found two cases when a judge deemed punishment envisaged by a plea agreement unfair and refused to approve it. We did not find any other significant developments in the process of plea-bargaining. However, unlike the preceding reporting period the courts seemed to have taken a more active role and demonstrated attempts to examine fairness of punishment envisaged by plea agreement in most of the cases. Percentage share of plea agreements imposing a fine was further reduced. Also, average amount of fine was slightly decreased compared to the previous reporting periods.
- As to concrete rights of a defendant, the GYLA did not find any noticeable changes; however, judges were considerably better at informing defendants about their rights against ill treatment, and at examining whether plea agreement was the result of an ill treatment. The judges' explanation of defendant's rights was of the lowest quality at the pre-trial hearings.
- Starting trials on time remained a problem. Often judges were late to the trial; however, unlike previous reporting periods, we found certain improvements in the area.

RECOMMENDATIONS

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

1. Judges should discharge their discretionary powers more often with respect to imposition of preventive measures. They should increase application of less severe measures (alternative measures vis-à-vis imprisonment and bail) where applicable and in cases where the prosecution fails to substantiate necessity of using a preventive measure they should refrain from using such measures at all. Courts must also demand that the prosecution submit adequately substantiated motions for the use of preventive measure, and impose the burden of proof on the prosecution, especially in cases involving bail.
2. Defendants without an attorney must be provided with a comprehensive explanation of all relevant preventive measures and their use. Further, judges must play more active role in finding out whether the use of any other form of punishment, lighter than the bail or imprisonment, is possible.
3. Judges must undertake a more active role in the process of plea bargaining and approve only those agreements that are fair and legitimate, in order to eliminate any suspicion about proportionality of punishment and crime.
4. During examination of witnesses, judges must abide by legal rules and should not interact with witness examination in a manner which violates the principles of equality of arms and adversarial process.
5. Law must be amended to broaden authority of judges to combat alleged ill-treatment of defendants.
6. Performance of defense should be considerably improved. Lawyers must defend their clients in a qualified, active and credible manner at all stages of court proceedings.
7. Judges must apply all proportionate measures to ensure that order is observed in courtroom and parties are able to present their positions fully during the trial.
8. Judges must explain defendant's rights in a comprehensive and comprehensible manner.

9. Judges and law enforcement authorities must act more responsibly when it comes to the practice of search and seizure. Law enforcement authorities must use the measure without court's prior warrant only as a last resort, while judges must approve search and seizure conducted without such prior warrant only based on a thorough examination of its lawfulness.
10. Court must ensure that complete and correct information about the scheduled trials is published in advance.