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Criminal Trial Advocacy for Georgian Lawyers

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The Georgian language translation of this book 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 the authors and do not necessarily reflect the views of USAID, the United States Government or East West Management Institute, Inc.

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ISBN 978-9941-10-851-8

Meridiani publishers
Tbilisi 2014

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I. Introduction

In the years following Georgia's 2003 "Rose Revolution," reformers in Georgia's new government set out to radically change the country's criminal justice system. Among the most significant steps they took was to replace the existing, Soviet-era, criminal procedure code with a code that closely resembling those being employed in the United States. One of the intended effects of this change was to make the Georgian criminal justice process more open and more adversarial in nature.

This book was written in part to help the Georgian lawyer understand why some of the key new procedural code sections were created and how they were designed to fit into the developing regime of international criminal law and practice.[1] The *main* goal of the book however, is to help Georgian legal practitioners acquire the skills necessary to effectively operate in a more adversarial courtroom environment. The book provides explanations and examples of how a trial advocate should prepare for trial, examine witnesses during trial, and make persuasive arguments to judges and juries. It is also designed with the development of Georgian legal education in mind. It can be used as the basic text for a course on trial advocacy taught by any Georgian law school. It can be used for the same purpose by institutions providing professional level courses for prosecutors and defense attorneys.

[1] *See* Acknowledgments for a fuller explanation of this book's origins.

II. Georgia Makes the Change: Trial Advocacy under the New Code of Criminal Procedure

By Giorgi Chkheidze

Introduction

In October 2009, the Georgian Parliament adopted a new Criminal Procedural Code (CPC). The passage of the code was the result of more than five years of intense study, discussion and drafting work. It represented Georgia's effort to switch from a Soviet-style inquisitorial system to an adversarial system.

Work on the project began in 2004, just after the peaceful "Rose Revolution" brought great political change to Georgia. Shortly after taking power, the leaders of the new government announced their intention to create a system of criminal justice with the hallmarks of the Anglo-American system. This new criminal justice system would be a revolution in itself. It would be a system in which the judge would be a referee not an inquisitor and the defense would stand on more equal footing with the prosecution – even being allowed to do its own investigation of the facts. It would be a system where the most critical fact finding would be done at the trial stage by the parties examining live witnesses, and more serious criminal cases would be decided by a jury.

This chapter does not aim to provide a comprehensive review of the new Criminal Procedure Code nor a comparative analysis of international legal norms. It hopes merely to provide an introduction to sections of the new code which are bound to have the greatest impact on the practice of trial advocacy in Georgia.

Background

Before the passage of the new CPC, the Georgian criminal justice system was based on a code adopted in 1998.[2] This old code was heavily influenced by the inquisitorial traditions of the Soviet period. It included the comprehensive and complex *inquiry*, *investigation* and *prosecution* stages. Its articles worked to limit and heavily regulate court proceedings. Because the code was constantly amended from 1998 to 2003, often to conform to the demands of corrupt law enforcement agencies, it ultimately became a compilation of vague and contradictory provisions which directly or indirectly violated basic fair trial guarantees provided by the Georgian Constitution and international treaties. Although civil society actors attempted to challenge the inequities and shortcomings of the code through Constitutional Court litigation[3] and by lobbying Parliament, the consensus among legal professionals during this period was that a comprehensive reform of the whole criminal justice system, including its legal framework, would be needed.

A comprehensive reform is what the new Georgian government set out to achieve. As soon as they took power in 2004, the new Minister of Justice established a special working group to prepare a draft criminal procedure code that would cast aside the inquisitorial model of the past in favor of an adversarial model. The decision to adopt an adversarial model seems to have stemmed from the positive opinions many of the reformers held of the U.S. and other common law-based justice systems.[4] They felt that these systems, systems which stress the oral nature of legal proceedings and allow for the use of jury trials, provide better due process and overall greater

[2] Georgian Code of Criminal Procedure (CPC), adopted 20 February 1998.

[3] An important precedent was set by the Constitutional Court of Georgia in its decision *Pirus Beriashvili, Revaz Jimsherishvili and Georgian Public Defender (Ombudsman) vs. Parliament of Georgia (*23 January 2003). In this remarkable judgment, the Court declared a number of CPC articles unconstitutional and fully supported the recognition and enforcement of some core rights of the criminally accused, including the right to a lawyer from the moment of arrest.

[4] It is worth noting that many of the new CPC drafters did their academic study in the US and other common law countries.

protection for the rights of the accused.

Although the existing Georgian Constitution spoke of legal proceedings being adversarial in nature,[5] under the old CPC these constitutional provisions were interpreted only to require adversarial type proceedings at the final, trial stage of the justice process.[6] The drafters of the new CPC wanted the adversarial principle enunciated in the Constitution to be applied to the *entire* criminal justice process and made their intention explicit in the code. New CPC Article 9 states, "From the moment of the initiation of criminal prosecution, criminal proceedings shall be carried out based on the equality of parties and the principle of adversarial proceedings."

Prosecutorial discretion

The code drafters understood that they could not change the fundamental nature of their procedural system by simply stating a principle and hoping everything else fell into place underneath it. They would need to make significant changes to the foundational elements of the Georgian criminal justice system. A central pillar of that foundation was the office of the prosecutor.

Prior to the passage of the new CPC, Georgia's criminal justice system functioned under the principle of "mandatory prosecution," which meant that prosecutors had a *duty* to initiate prosecution on every complaint supported by evidence brought to them by the police or by citizens. The drafters of the new CPC believed that maintaining the principle of mandatory prosecution would not allow an adversarial system to function properly. They felt it was inconsistent with the presumption of innocence and could work to reduce

[5] *See* Georgian Const. art. 85.

[6] The only CPC article that specifically mentioned adversarial proceedings was Article 49, an article that dealt with the trial hearing. Georgian courts read this to mean that the constitutional guarantee to an adversarial hearing *only* applied to trial hearings and not to other parts of the process.

the burden upon the prosecution to prove each case beyond a reasonable doubt. Believing this, they made a radical break from the past and gave the prosecution the *discretion* to bring charges in criminal cases. This meant that Georgia's prosecutors would have near absolute power to choose whether or not to bring criminal charges against an individual.

It is important to note however, that in practice, an individual prosecutor's discretion to charge a suspect with a crime is now guided by a detailed set of internal rules. In 2010, the Minister of Justice approved new Criminal Justice Policy Guidelines[7] which provided a comprehensive explanation of the role a prosecutor should play in the new justice process. The Guidelines establish a two-part test for case filing. According to the Guidelines, a prosecutor can only pursue a prosecution if (1) the evidence is sufficient to meet the legal standards of proof; and (2) the prosecution is in the public interest – public interest being defined by a set of criteria provided in the Guidelines.

The discretion to prosecute should not be confused with the obligation to investigate. Under Georgia's new legal framework, criminal investigations are carried out by authorized investigative agencies (in most cases the Criminal Police Department of the Ministry of Internal Affairs). The investigative agencies then bring the cases to the prosecutor's office to be considered for criminal filing. Simply stated, the obligation to investigate belongs to the police and the discretion to prosecute to the prosecutor's office.

Georgian lawyers still debate whether discretionary prosecution is the best model for Georgia. Some lawyers believe that since crime will increase as the country develops it will be impossible for all crimes to be fully investigated and discretionary prosecution is the best way to focus limited resources on the largest problems. Others maintain that discretionary prosecution

[7] The General Part of the Criminal Justice Policy Guidelines was adopted and published on October 8, 2010.

puts too much power in the hands of the prosecution and that the discretion will be used to let guilty people go free.

The new status of the victim

In addition to adding to the power of the prosecution, the new CPC changes the legal status of the victim. Under the previous code, a person claiming to be the victim in a criminal case was considered one of the parties to the criminal proceedings. A victim had the right to participate in the proceedings on equal footing with the prosecution and defense, to act in effect as a "private prosecutor." The victim acting as private prosecutor had the right to make motions, examine witnesses, and demand certain punishments even if they were different from those demanded by the prosecution. He had the right to appeal a judgment, even in cases where the prosecution did not file an appeal.

The drafters of the new code saw serious problems with this manner of proceeding. They felt that the role of private prosecutor did not fit into a system that granted broad discretionary power to the state prosecutor. They felt that it could create unnecessary conflicts between the state and victim regarding how a case should be handled in court. It also made it difficult to establish and maintain the presumption of innocence for the defendant; the act of granting a "victim" status as a full party to the case worked to create a presumption that the named victim was truly the victim, and the named defendant was truly the perpetrator. With these concerns in mind, the drafters created a whole chapter in the new code which redefined the role of a victim in the criminal case process. Article 56 of the code places a victim in the same general category as witness. Articles 57 and 58 make it clear that his interests are to be protected by the prosecutor, not by his own attorney. The drafters also limited the victim's ability to seek restitution as part of the

criminal prosecution. Under the new code, a victim must file and pursue a civil case against the defendant, separate and apart from the criminal case if he wishes to explore all of his remedies for restitution and the recovery of damages.

To be sure, the new code weakens the position of the victim in the criminal proceeding and can operate to make him feel more vulnerable and "victimized." The code drafters were concerned about this and their initial drafts included the possibility for the victim to conduct private prosecution of a case when the state refuses to initiate public prosecution.[8] The Georgian Parliament adopted some elements of private prosecution in its first hearing of the code; however at the final stage of drafting, the government dropped all references to private prosecution from the code.

It would be wrong to suggest that the new code completely ignores victim rights. Article 57 provides a long list of victim rights which include, the right to be informed of charges brought against a defendant; the right to testify about damage done; the right to obtain copies of relevant documents; and the right to request special measures to protect a victim and his family from the defendant. Article 58 also requires the prosecution to give a victim advance notice of all important proceedings and to inform him of any plea agreement to be signed by the defendant and prosecution.

The new role of the judge

An essential component of the adversarial process is the existence of a neutral and impartial judge. Georgia's new CPC takes great pains to estab-

[8] *See generally* letter from the Georgian Young Lawyers Association to the Georgian Parliament entitled, "New Georgian Code of the Criminal Procedure – Belated Reform and Betrayed Victim," (September 2007) *available at* http://www.gyla.ge/index.php?option=com_content&view=article&id=166%3Agyla-chairman-applies-to-the-members-of-the-parliament&catid=45%3Anews-eng&Itemid=1&lang=en (last accessed on 3 September, 2011).

lish this impartial role for its criminal law judges. Under CPC Article 25, a judge is obliged, prior to rendering the judgment or any other final court decision, to refrain from expressing his or her opinion regarding the guilt or innocence of a defendant.[9] Article 25 also obliges the judge to listen to the opinion of an opposing party while considering a motion that is raised.[10] Most importantly, the new CPC explicitly prohibits a judge from playing a leading role in the fact finding. Article 25(3) states,

> The court shall be prohibited from independently collecting and examining evidence confirming the guilt or innocence of a person. The collection and presentation of evidence shall be the exclusive right of the parties. In exceptional cases, the judge shall be authorized to ask a clarifying question, if this is necessary for ensuring a fair trial.

While the general prohibition is clear, it should be noted that the last sentence in the article allows a judge some limited ability to participate in the examination of witnesses, and to prevent clearly unjust outcomes.

At the same time the new CPC works to reduce the role of the judges in fact finding, it requires the judge to *enforce* the expanded role of the parties. Article 25 of the CPC places an obligation on the judge to ensure the equality of arms and adversarial nature of the proceedings at both the trial and the investigate stages of the proceedings. It obliges the court to provide the parties equal opportunities to protect their rights and legitimate interests without granting preference to any of them.[11]

This shift from head fact finder to neutral referee has momentous implications on trial practice in Georgia. No longer can an attorney, be she prosecutor or defense, sit back and expect a judge to do all the work bringing forward and examining the evidence. The burden to do this is now on the

[9] CPC art. 25.3.

[10] CPC art. 25.4.

[11] CPC art. 25.1.

lawyers. This brings great responsibility but also great opportunity – responsibility for the success or failure of a case but opportunity to use all of a lawyer's energy and talent to represent his side of a lawsuit.

Equality of arms in the courtroom

The principle of equality of arms requires each party be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent. The new CPC firmly establishes this principal in Georgian law. Article 25(1) obliges the court "to provide the parties with equal opportunities to protect their rights and legitimate interests, without granting preference to any of them." Article 25(4) states that "if both parties participate in a court session while considering a motion or a complaint filed by one of the parties, the court shall also hear the opinion of the other party."

When the equality principle is applied to the *court trial*, one measure of equality is the degree to which both the parties, prosecution and defense, are given the right to examine each other's witnesses. CPC Article 114.2 makes clear that the examination shall be carried out with participation of the parties. Article 244 explicitly provides for both parties to call witnesses and to cross-examine the other party's witnesses.[12] (For further illumination, see Chapter V below.)

Of course the court trial is not the only stage of the criminal process. What occurs during pretrial proceedings can be just as important to the outcome of the case as the trial itself. Prior to the passage of the new code, much of the fact finding in a case was done at the pre-trial hearing stage and did not allow equal participation by the defense. In fact, the previous code allowed

[12] CPC art. 245.

an investigator or prosecutor to command a witness to provide testimony at a pre-trial interrogation without the presence of the defense lawyer. The results of the interrogation could be admitted at the trial stage, leaving little or no possibility for the defense to cross-examine. The new CPC changes this situation somewhat. It allows a witness to give a *voluntary* interview to the prosecution *or* defense at the pre-trial stage[13] but does not compel the witness to do so. Also, under the new code, *both* parties are allowed to summon witnesses for interrogation in front of a judge at the pre-trial hearing.[14] This all works to strengthen the oral nature of the criminal court process.

There are some circumstances however, where the code allows witnesses to be questioned at the pretrial stage and their testimony can later be used in court without examination of a live witness. These circumstances include situations where a party shows the existence of a "real threat" to a witness' life or health that may prevent his appearance at trial, and situations where a witness plans to leave Georgia for an extended period of time. In addition, a party can conduct a pretrial examination of the witness if the judge is convinced that, "despite reasonable efforts, it is impossible to obtain necessary evidence to proceed with the investigation from other sources."[15] It needs to be pointed out in the case of this last circumstance that if judges are too liberal in their interpretation of what evidence is "impossible to obtain" by "reasonable efforts" they could do damage to the application of the oral nature of the court trial and the equality of arms principle.

It should also be kept in mind that the code sections having to do with the treatment of witness pre-trial testimony do not come into force until December 1, 2013.[16] Until then, previous code sections apply, providing the possibility for investigators and prosecutors to summon and receive testi-

[13] *See* CPC art. 113, which provides rules related to the interview and clearly states that the interview is voluntary.

[14] CPC art.114; to be enforced from 1 December 2013.

[15] CPC art. 114.1.

[16] CPC art. 332.

mony from witnesses the defense side has no chance to examine.

Equality of arms outside the courtroom

What the law allows the parties to do outside court in pursuit of the evidence can be just as important as what they are allowed to do in court. Many Georgian lawyers believe that one of the weaknesses of the previous code was its failure to provide the defense the ability to do its own investigation of the facts, separate and apart from that done by the authorities. In a significant step forward toward the realization of the equality of arms principle, the new CPC allows the defense to use all legal means to collect information and submit it to the court as evidence. The defense does not need to apply to the police or prosecutor's office to request investigative activities or to acquire documents or other tangible evidence.

The defense does not have unlimited ability to pursue its investigation activities however. The CPC does not allow a defendant to appeal to the subpoena power of the court to request a search be done or that evidence be handed over.[17] Although early drafts of the CPC included an article that gave the defense the ability to request a court to command police to conduct a search or collect requested evidence, this article was dropped from later drafts and is considered by some to be a major setback in the effort to achieve true equality of arms.

Equally as important as allowing both sides to develop their own evidence, is the requirement that the parties disclose the evidence they intend to use in their case to the other party. Under the old code, the defense had some rights to access the prosecution case materials but these rights were limited. The new code broadens these rights. According to Article 83 of the

[17] CPC art.111.

new code, the prosecution must provide information it plans to use in court against the defendant upon request of the defense.[18] The prosecution is also under an obligation to hand over *exculpatory* evidence to the defense.[19]

The CPC regulates disclosure of information not only at the trial stage but also at the initial stages of the prosecution – prior to the first appearance of a defendant in court. Article 84.8 obliges the prosecution to give a defendant access to the information the prosecution plans to present to the court in the pretrial stage.[20] This provision can be seen as an effort to comply with the state's obligation to inform a defendant of the charges brought against him as guaranteed by the national constitution and international treaty instruments. However, for unclear reasons, the article applies not only to the prosecution but also to the defense, obliging a defendant to provide information to the prosecution at this very early stage.[21]

Standards of Proof

The concept sitting at the core of the adversarial system is the *presumption of innocence*. A defendant enters the court system under the protection of this presumption. The prosecution on the other hand, bears the burden of presenting proof of guilt at a level sufficient to overcome the presumption.

Different stages of the criminal trial process typically require different standards of proof. In the Anglo-American system the standard of proof applied to the final trial stage is the highest standard – proof beyond a reasonable doubt. The prosecution bears a lighter burden at the earlier stages of the

[18] The obligation runs both ways; the prosecution is entitled to request and receive information the defense intends to use in its case. CPC art. 83(1).

[19] Ibid.

[20] CPC art. 84.8.

[21] This change was made 7 December 2010.

trial process. If the prosecutor does not meet its burden, the court has the obligation to either dismiss the charges (pretrial) or find the defendant not guilty (after trial.)

The new Georgian CPC adopts, more or less, the standards of proof commonly applied in the U.S. system. Unlike the previous code, the new CPC makes an effort to clearly define these standards. The CPC articulates three basic standards of proof– *reasonable suspicion*, *high probability* and *beyond a reasonable doubt.*

The *reasonable suspicion* standard is applied to decisions taken by the prosecution to bring criminal charges against a person. In principle, this is the same standard used under the previous system to arrest and to bring charges against a citizen.

The *high probability* standard is a new standard. It is applied to evidence presented at the pre-trial hearing to determine if the case should move on to the trial stage. According to the CPC, the evidence meets this high probability standard if the body of evidence presented at the pre-trial hearing creates a "high probability" that a trial judge, hearing the same evidence, will convict the defendant."[22] In cases where a judge rules that the prosecution has not met its burden at the pre-trial stage, the prosecution has the right to pursue an interlocutory appeal with the Court of Appeals.[23] It is worth noting that prior to 2005 a judge had the right to "return*"* the case to the prosecution and give it, in effect, a "second chance" to meet its burden. Under the new CPC, no such possibility exists except in cases where the judge disapproves a plea agreement reached by the parties. In such cases, the court can disallow the agreement and send the case back to the prosecution.[24]

[22] CPC art.3(12).

[23] According to CPC art. 219, "If the evidence presented by the prosecution does not provide a reason to believe with high probability that the person committed the crime, the judge of the pre-trial hearing shall terminate the criminal prosecution by a ruling. The ruling may be appealed only once, in the investigative panel of the Court of Appeals within 5 days from when it was issued."

[24] See art. 213.

The *beyond* a *reasonable doubt* standard is applied at the trial stage. According to CPC Article 3.13, proof beyond a reasonable doubt in a Georgian court means the level of proof necessary to "convince a reasonable person of the guilt of a person."

While the CPC provides definitions, everyone involved in the criminal case process should clearly understand that the determination of what level of proof reaches the level of beyond a reasonable doubt, or reasonable suspicion, or high probability, is highly subjective. These determinations cannot be made scientifically. The definitions exist in the minds of judges and jury members hearing the case and may change from minute to minute and case to case. This can be frustrating for all involved but the creation of such subjective standards reflects the need for a society to reach judgments in criminal cases while at the same time recognizes the fact that human beings possess a limited ability to divine the absolute truth of an event. To the trial lawyer the existence of these subjective standards provide the opportunity to practice the real "art" of advocacy. They allow room for interpretation of evidence and argumentation. They provide the chance to *convince* by appealing to the logic and sense of fairness of the listener.

Trial by jury

Without a doubt, the sections of the new Criminal Procedure Code that have received the most attention from both domestic and international observers are the sections introducing the jury trial. CPC Chapter 22 provides a detailed description of how jury trials are to be implemented in Georgia. The chapter covers a wide variety of issues including: the selection of jurors; the roles of the parties; jury instructions; the order of presentation of evidence; and the rights of jury members. Being cautious, the code drafters provided for a phased implementation of jury trials. For the first year of its operation

the code allows for jury trials only in aggravated murder cases committed in Tbilisi.[25] The use of jury trials will gradually expand over time to include other crimes and other regions of the country.[26]

During the drafting process, the drafters debated whether to recognize the "right to be tried by jury" as belonging solely to the defendant or allowed for the prosecution to also have a say in the matter. Eventually the drafters decided that both parties should possess the right, and they established a *presumption in favor of jury trial* if the charges in the case allow for the possibility of a jury trial. In practice, this means that if either party wishes the case to be tried by jury it must be tried by jury.[27] Of immense importance to the defense, the code incorporates the protection against a defendant being tried repeatedly for the same crime by denying the prosecution the ability to appeal a jury's verdict of acquittal (known in common law systems as the prohibition against "double jeopardy"). This prohibition will also work to support the integrity of the jury decision and encourage responsible judgments on the part of individual jury members.

One of the oversights of the drafters might have been their failure to require jurors to provide some written justification for their verdict. While the U.S. and other common law systems that use juries do not require specific justification for jury verdicts, the lack of verdict justification may make it difficult for Georgia to comply with its obligations as a Council of Europe member and signatory to the European Convention on Human Rights (ECHR). In the case of *Taxquet v. Belgium,*[28] the European Court of Human Rights (ECtHR) held that a verdict issued by a Belgium jury was not sufficiently explained and so ran counter to ECHR Article 6, the right to a fair trial. The ECtHR found that the justification of a criminal judgment was necessary because it both protected the accused and also formed a bulwark against ar-

[25] CPC art. 330(1)

[26] *See* CPC art.330, sections 1-4.

[27] CPC art. 219.

[28] *See Taxquet v. Belgium*, App. No. 926/05, (Eur. Ct. H.R., November 16, 2010).

bitrary decision making. Since ECtHR case precedents have a high degree of importance for the Georgian legal system and potentially similar judgments can be delivered against Georgia, Georgian courts may need to give a detailed set of jury instruction to the jury and require a fairly detailed set of responses if their jury verdicts are to stand up to ECtHR scrutiny.[29]

Conclusion

It should be clear now that the new CPC represents a revolution in Georgia's legal development. It provides a whole new set of protections and due process guarantees for criminal defendants. It demands more from prosecutors and defense lawyers in their roles as advocates. It offers Georgian citizens the chance to participate in their new democratic system of governance in the most direct and meaningful way - as voting members of a jury.

Of course the reform of Georgia's criminal justice system is not over. The CPC still contains many shortcomings and contradictory elements. In fact, it might be best to think of the CPC at this stage of its development as a "work in progress" that will undergo many changes and adjustments over time. Make no mistake however, the path chosen by those who drafted the code is the path of the adversarial process. It is a path that requires Georgian lawyers to master the art of trial advocacy.

[29] Although Article 231 provides general guidance for how a judge should instruct a jury, this guidance may not be specific enough in terms of explaining how a jury should explain and justify its verdict.

III. The Adversarial Proceeding

Because Georgia's shift to the use of an adversarial process in criminal cases was abrupt and not the result of gradual development over time, there is understandable confusion and uncertainty about what the "adversarial process" means and how an adversarial trial differs from an inquisitorial one. It may be helpful therefore, to introduce the basic elements and origins of the adversarial process before moving on to describe some of the lawyering skills needed to successfully operate in the adversarial trial environment.

A. Elements of the Adversarial Proceeding

In recent times, there have been two main approaches to criminal procedure used by legal systems around the world: the inquisitorial approach, used in civil law systems and the adversarial approach used in common law systems. The inquisitorial approach originated on the continent of Europe and still prevails there. The adversarial approach originated in Great Britain and prevails there as well as in many of Britain's former colonies.[30]

Traditional inquisitorial models are based on the belief that a theoretically neutral magistrate should be responsible for both developing the evidence and making the ultimate determination of guilt or innocence.

Adversarial systems are based on the belief that pitting two adversaries against each other, with each interested in presenting their version of the truth, is the best way for a decision maker to determine the probable truth.

A system is usually said to be adversarial if it includes the following elements:

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[30] See generally Craig M. Bradley, Criminal Procedure: A Worldwide Study, (1999 Carolina Academic Press) at xv.

1. The decision maker is neutral and passive (This may be either judge or jury.)

2. The parties, not the court, are responsible for presenting the proof.

3. The proof is presented in a formal setting where a set of rules governs the trial and the behavior of the litigants. (Proof must normally be presented in the form of oral testimony by witnesses who can be examined in open court by both parties.)

Within these elements there is often room for flexibility and adaptation. In most adversarial systems for example, judges are allowed to do more than just sit silently and observe the parties. They have some ability to ask witnesses questions and make meaningful inquiry in an effort to help determine the truth. Adversarial systems also allow for certain types of evidence to be presented to the decision maker in a form other than first person oral testimony. In the Anglo-American common law tradition such consideration is often given to categories of evidence which fall within exceptions to the "hearsay rule," the general rule that excludes second hand information.

The Preference for Live Witnesses

In order for an adversarial trial process to function effectively, the courts must show a strong preference for live witness testimony.

There are three main reasons to require live witnesses to testify in court and subject themselves to the examination of the parties. These are:

1. It provides an accused greater ability to challenge the prosecution case and present his defense. (This is also necessary to protect his fair trial right to call and examine witnesses.)

2. It enhances the truth seeking function of the court since in many cases it increases the level of reliability of the information considered by the court in making its decision.

3. It allows for greater public observation of information considered by the court in making its decision. This provides an important measure of public oversight for the organs of justice - the courts, prosecution and police, which over time, should lead to greater public trust in these institutions.

In adversarial systems, a common justification for excluding information that does not come from first person, live-witness testimony is that the information is not reliable. It is important to note that in these systems live witness testimony is not considered more reliable and credible on its face but is considered more reliable because it can be *tested* for credibility and reliability through the process of examination and cross-examination.

Requiring live witness testimony also gives the fact finder the opportunity to view the age, education, understanding, and behavior of the witness (witness demeanor) which may impact the fact finder's opinion of the witness' credibility. It allows a face-to-face meeting between the accuser(s) and the accused that may reveal errors in identification, prejudice against the accused, and even purposely false accusations. The in-court examination of a witness by the parties is also bound to provide the court much more information upon which to base its decision than would a mere reading of a police report. Often, police officers do not have a full understanding of the relevant issues or know all of the relevant facts at the time they question witnesses and write their reports. Because of this, police officers may omit important facts in their reports or take too narrow an approach in their investigation. These inadequacies of police reporting can often be remedied by allowing a full examination of the witnesses in court by the parties.

B. Historical Development

The adversarial process has its origins in the historical development of England. In England during the medieval time period (400-1400 AD), the forms of accepted dispute resolution included trial by battle and trial by ordeal. In trial by battle, the accused was required to fight the accuser. The underlying belief was that God would give victory to the party who was right. Trial by ordeal was similar in that it relied upon a "heavenly judgment." In trial by ordeal, the litigant would subject himself to torture which might include carrying a hot metal bar, placing his arm in boiling water, or being totally immersed in water. If he survived the ordeal then he was awarded the judgment. While these methods of dispute resolution required little in the way of evidence, they did include procedural elements which would appear in later phases of England's legal development: they required the active participation of the parties with only limited participation by the judge.

As England emerged from the medieval age of ignorance and superstition, it developed more sophisticated, reason-based methods to resolve conflicts - court systems and court trials. During the early phases of legal development, court procedures were not adversarial but inquisitorial in nature. Judges interrogated the witnesses. They allowed very little if any participation by the accused. Lawyers were infrequently used. Judges often introduced their political opinions into the proceedings.

The British adversarial process really began to take shape in the 17th and 18th centuries. No one set out to create an adversarial system from an inquisitorial one. It developed slowly, over time. It was a result, at least in the beginning, of judges and lawyers making changes in their day-to-day courtroom behaviors that gradually began to reshape how court trials were conducted. Judges began to allow the accused and their lawyers more freedom to present evidence and make arguments. The lawyers began to seize the opportunities given them to play a more active role in litigation and expand their

importance in the system. As the lawyers became more active, the courts developed more complex rules to control the lawyers and to establish a structure for the trial proceeding.

There have been numerous explanations given for why these changes took place: the development of more democratic ideals and principles, the rise of individualism, the growth of the market economy, and the response to the abuses of the inquisitorial system. There is no definitive explanation. It was probably a mixture of all these reasons.

As Great Britain expanded its empire to the far reaches of the globe, it brought its legal system with it. Systems based on adversarial principles operate in much the same form in many former British colonies such as Canada, Australia, New Zealand, and the United States.

Currently, the United States possesses the legal system perhaps most widely identified with adversarial trial proceedings. This is probably due in large part to American film and television using the court trial as a dramatic mechanism. It should be kept in mind however, that much of the dialogue and behavior engaged in during the courtroom scenes in these films and programs would never be allowed in a real U.S. courtroom. Most "courtroom dramas" are not realistic depictions of U.S. court trials.

While the main explanation for the use of the adversarial model in the U.S. is certainly the historical link between the U.S. and Great Britain, the legal foundation for many elements of the adversarial process employed in the U.S. exists within the 6th Amendment to the U.S. Constitution. The 6th Amendment establishes a number of "Constitutional rights," some of which are the same rights protected by international fair trial standards. (See Annex A) These rights are: the right to be tried without undue delay ("speedy trial"), the right to a public trial, the right for a defendant to be informed about the nature and charges against him, the right to confront witnesses,

the right to have witnesses summoned to testify in a defendant's favor, and the right to be represented by an attorney. While neither the right to be presumed innocent nor the requirement that the government prove the accused guilty beyond a reasonable doubt are mentioned in the Constitution, American courts have found that both these rights exist within the common law, are implied by the Constitution, and must be afforded an accused. These Constitutional rights which work to support the U.S. adversarial process have, over the years, made their way into international human rights-related covenants (see Annex A), and into the constitutions and procedural codes of many other countries, including Georgia.

C. Claimed Strengths and Weaknesses of the Adversarial Process

Of course no legal system provides the perfect balance between protecting public safety and resources and defending the rights of the individual. The adversarial process has its strengths and weaknesses like any other system. These are some of the claims that have been made in this regard:

1. Claimed Strengths:

    a. It encourages judicial impartiality and neutrality.

    b. It is a superior mechanism to determine the truth because:

        - The decision maker has the benefit of hearing different perspectives and arguments.

        - Examined live testimony is generally more reliable and complete than unexamined, secondhand information.

        - Parties with the greatest motivation to uncover facts in their favor are given the power to do so.

c. It is an open and participatory form of dispute resolution which works to protect individual rights and to give the process legitimacy in the eyes of the public.

d. The adversarial court trial provides a fixed date when the matter may be resolved.

2. Claimed Weaknesses:

a. It is too expensive.

b. It is too unequal. Between prosecution and defense, the prosecution usually possesses much greater resources. Between defendants, the wealthier defendant often can hire better legal assistance.

c. Procedural rules sometimes prevent important evidence from being heard.

D. Convergence

While separating the inquisitorial and adversarial models into two completely different approaches makes comparative discussion easier, the truth is that the separation between the two approaches is not always so complete. Procedures which might be labeled "inquisitorial" can be found within the frameworks of many adversarial systems and elements of the adversarial process can be found within inquisitorial systems. In short, there is no "pure" adversarial or inquisitorial system functioning today.

In recent years there has been an increasing convergence between systems. Most of this convergence is due to traditionally inquisitorial systems becoming more adversarial – like is the case with Georgia. To give just a few other examples: In Europe, a series of decisions from the European

Court of Human Rights have interpreted the provisions of the European Convention of Human Rights to require the courts of member European nations to establish a preference for live witness testimony and to give a defendant an adequate opportunity to challenge and question the witnesses against him in court. (See Annex A, Chapter I, International Fair Trial Standards, The Right to Call and Examine Witnesses.)

This trend to adopt more adversarial trial proceedings is probably due to a number of factors. These factors likely include: increased emphasis placed upon the protection of the individual rights within societies around the world; the development of international fair trial norms which include adversarial procedural elements; and the strong political and cultural influence exercised by countries with adversarial based legal systems upon legal reform efforts in the developing world.

IV. Trial Advocacy Skills: Opening Statement and Developing a Theory of the Case

Georgian Procedure

Article 241 of the new Georgian Code of Criminal Procedure (CPC) makes it very clear that the parties to a criminal case have the right to give an opening statement at the beginning of a trial. Article 241 states:

> 1. The presiding judge shall give the prosecution the right to give the opening statement. After that, the defense counsel and the defendant are given the right to deliver an opening statement.
>
> 2. The presiding judge shall give the parties reasonable time for opening statements.

It is important to note that while Article 241 provides the parties a right to give an opening statement they are not obliged to do so. A party is free to waive opening. The distinction between right and obligation is especially important in regard to the defendant. Since the defendant is presumed innocent, and the burden of proof is on the prosecution, the defendant should not be required to say anything to the court or jury in his defense; this includes making an opening statement. (Of course, the same goes for the lawyer who is speaking on his behalf.)

Article 241 does not say how long an opening statement should be. It states only that the judge will allow the parties "reasonable time." Presumably, a judge's estimation of what amount of time is "reasonable" in a given case will conform to concepts of fairness and the principle of equality of arms between the parties. However, the wise advocate should keep in mind the limited purposes of the opening statement and the relatively short attention span of listeners when preparing his opening. More will be said on this point below.

What is an opening statement?

In many adversarial systems, the opening statement is the first opportunity the parties have to address the judge (or jury) about the facts of the case. The main function of the opening statement is to assist the decision maker in understanding the evidence that will be presented in trial.

The information in an adversarial hearing is given to the decision maker in bits and pieces as witnesses testify. The opening statement is designed to give the decision maker a picture of what the puzzle will look like after all of the pieces are put together. Of course, in most cases, the prosecution and defense will be presenting different pictures to the court. A theory of the case is what holds a party's picture together.

Theory of the case

A theory of the case is a party's version of "what really happened." It is a concept which explains the legal aspects of the case and the factual background of the case and ties them together. It is at the center of a party's case.

A theory of the case should meet the following requirements:

- Should be simple and easy to understand
- Should be logical
- Should meet the legal requirements of a party's claim
- Should be consistent with an ordinary person's view of how real life works

Defense theories of the case are usually wrapped around a legal defense but the legal defense is normally not sufficient to complete the theory since it does not usually go far enough to explain the facts surrounding the event. Examples of frequently used legal defenses in criminal cases are as follows:

Legal defense 1: The accused did not engage in the action making up the offense.

Legal defense 2: The accused was justified in taking the action since he was acting in self-defense.

Legal defense 3: The accused engaged in the action but did not possess criminal intent.

Examples of theories of the case constructed upon these legal defenses are as follows:

Theory 1: This is a case of mistaken identity and poor police investigation. My client was not the person who committed the crime. The police were so eager to arrest someone they blamed my client without doing sufficient investigation to find the real perpetrator.

Theory 2: This is a case of a frightened woman protecting herself against a violent and abusive drunk. My client's husband physically abused her for years and when he attacked her this time, she was forced to defend herself with the only weapon in reach, a kitchen knife.

Theory 3: This is not a crime but a tragic accident. My client and his friend were foolishly playing with the handgun when it accidentally went off.

Of course prosecution theories of the case should be built upon facts that prove up the elements of the crime. In most cases the theory should also

include an explanation of *why* the defendant committed the crime. Judges and juries, like everyone else, want to know the *reason* for the behavior and are more persuaded by a case that provides the reason.

Examples of theories the prosecution might use:

Theory 1: The defendant needed money to buy drugs. When he saw the victim walk away from the ATM machine alone, he grabbed the chance to fill his own pockets with someone else's cash.

Theory 2: The defendant suspected her husband was seeing other women. This suspicion made her so angry that she attacked him with a kitchen knife.

Theory 3: The defendant knew the gun was loaded and was thrilled with the idea that by pulling the trigger of the weapon he might take the life of another human being. He lost his gamble and his friend lost his life.

Crafting the Opening Statement

Every opening statement should include an explanation of the party's theory of the case.

Presenting the statement in story form is often most effective. A good advocate will find a way to focus the story on the *people* involved. Judges and juries like all other citizens, are most interested in people and what makes them do what they do. There will be other opportunities in the trial to focus on the legal issues.

Opening statements should use time efficiently. People have limited attention spans. Research has shown that most people can maintain a high level of concentration for only 15-20 minutes. Memory also fades quickly.

Research shows that within a few hours most people have forgotten the great majority of what they have heard. All of this means that most opening statements should be between 10 and 30 minutes in length.

An advocate should consider using visual aids and exhibits in his opening statement if the court will allow it. Exhibits that present images that are strong and clear can create an impression that words alone cannot. In some cases, a chart or diagram may be extremely helpful to explain complicated fact patterns or relationships. An advocate however, must be careful not to use exhibits in a way that distracts the listener's attention from the advocate.

An advocate should not overstate the evidence. Nothing can be more damaging to an advocate's case than creating an expectation during opening statement that he cannot fulfill.

An advocate should not "argue" during the opening statement. "Argument" here means asking the court (or jury) to draw conclusions or inferences from the evidence, commenting on the credibility of anticipated witnesses, or asking the court (or jury) to consider matters beyond the evidence itself. Argument should be reserved for closing statement. An advocate's personal opinion should never be made part of opening or closing statements. His or her personal opinion is not relevant. It is the information presented as evidence during the trial, and of course, the conclusions that can be drawn from that information that the court (or jury) should be concerned with.

Sample Opening Statements

State vs. Givi Tsereteli - Prosecution Opening Statement:

Ladies and Gentlemen, this case is about a man imposing the ultimate form

of control over a woman. It is a case about a man killing the woman he felt he possessed, rather than let her be free. It is a case of premeditated murder.

This is what the facts will show happened in the case:

In November of 2004, Nana Jvania was twenty-nine years old. She was single and had never been married. She had been working as a cashier at the Populi food store on Pekini Street in Tbilisi for nearly three years. She worked the morning shift, 6 a.m. to 3 p.m., five days a week. She was well liked by her colleagues and had made friends with many of the people that came into the store every day.

One of the people that came into the store regularly was the defendant, GiviTsereteli. As you can see, he was some years older than Nana. He had retired from the military and was living off his pension. He had a lot of free time on his hands. He came into the store a lot and talked with Nana a lot. Over the course of several months, Nana and the defendant established a friendship that turned into a dating relationship. This relationship went on for nearly two years. They went out to dinner together, to the movies together; they spent time in each other's homes.

In the fall of 2003 however, Nana decided that she no longer wanted to date the defendant. She felt the relationship had gone as far as it could, or should, go. She wanted to be free. She told the defendant this. The defendant however, did not want the relationship to end and made this clear to her. During the trial, you will hear a witness tell you that she overheard the defendant say to Nana, "You cannot leave me. You will be sorry if you do." You will also see a letter the defendant wrote to Nana demanding that she remain his girlfriend and threatening trouble if she broke their relationship off.

Despite the defendant's demands and veiled threats, Nana remained strong.

She followed through with her resolve to break up with the defendant. She gave him back personal items he had left at her home. She asked him to stop calling her at work. She thought she had broken free. The defendant however, had other ideas.

On November 20, 2004, Nana was working at the Populi food store. It was a Sunday morning; the weather was pleasant- cool and sunny. The neighborhood was quiet. At around 10 o'clock, Nana was standing behind the cash register talking to her colleague, Elene Feradze, who was stacking items on the shelves. All of the sudden, the defendant's red BMW screeched into the Populi parking lot. The defendant got out of the car and marched up to the Populi doors. He pushed his way inside the doors and shouted at Nana, "I want to see you, now!" Nana whispered to Elene, "Here we go again," and asked Elene to watch the register for a few minutes.

Elene Feradze will testify in this case and she will tell you that she watched Nana follow the defendant outside. She saw Nana get into the passenger side of the BMW and the defendant get into the driver's side.

Elene will tell you that she could see the defendant's car clearly from her position behind the cash register. It was parked about 20 meters from the store's front door. Elene Feradze could not see what was going on inside the car. She will tell you that customers began to come into the store but she would glance from time to time at the defendant's car wondering when Nana would return.

At one point, Elene looked out and saw Nana standing next to the passenger side door. She saw the defendant standing next to her, and to her horror, realized that the defendant was holding a knife. She watched the defendant raise the knife and plunge the blade into Nana's chest again and again. Nana fell to the ground. Then, Elene saw the defendant turn and walk away from Nana's body.

Elene immediately called the police and ran outside to help Nana - but it was too late. The defendant had stabbed the knife deep intoNana's heart and severed critical blood vessels. By the time the ambulance arrived, too much of Nana's blood had flowed from her heart into her chest cavity. She died on the way to the hospital.

The police arrived at about the same time as the ambulance. They arrested the defendant who was standing in the parking lot; he was still holding the bloody knife.

The knife. The evidence will show that the defendant brought the knife with him that day. You will hear at least one witness in this case testify that the knife belonged to the defendant and that he had seen it in the defendant's possession on numerous occasions prior to the day he used it to kill Nana.

These facts and others will show that the defendant had decided he was not going to allow Nana to leave their relationship alive. He came to the Populi food store with the intent of killing Nana and he brought a long, sharp, butcher knife with him to do the job. The evidence will show that he lured Nana into the car. When she got out of the car, he came around the car and attacked her. He stabbed her repeatedly and forcefully in a place on her body that he knew would bring about her death- her heart. Then he left her bleeding on the sidewalk, to die.

Based on these facts and the law, I will be asking you at the end of the case to find the defendant guilty of deliberate, premeditated murder.

State vs. Givi Tsereteli – Sample Defense Opening Statement

Your Honors, the facts in this case will show that Givi Tsereteli stabbed

Nana Jvania and that as a result of being stabbed, she died. The facts will show however, that this was not a case of murder as the prosecution claims, but of self-defense.

As you know, the prosecution has the burden of proving every element of the crime beyond a reasonable doubt. That burden in this case includes proving that Givi Tsereteli was not justified in defending himself. My client of course does not have to prove anything. He is presumed innocent. However, in this case, the defense will present evidence and this evidence will show that Givi Tsereteli's actions were justified because he was acting in self-defense.

What really happened that Sunday morning in the Populi food store?

As the prosecution mentioned, Elene Fruidze will testify and tell you what she saw from her position inside the store. Ms Fruidze will tell you that she saw Mr. Tsereteli stab Miss Jvania but she will admit that she only saw a tiny piece of what happened. She will tell you that she did not see what went on inside the car. She did not see how Mr. Tsereteli got over to the passenger's side of the car. She did not see what happened moments before Mr. Tsereteli stabbed Miss Jvania. There is a great deal Ms. Fruidze did not see and what she did not see makes all the difference in this case.

Your Honors, the defense will provide you with the evidence of what Ms. Fruidze did not see. The defense will provide you with a *full picture* of what happened that day.

As the prosecutor mentioned, the evidence will show that Givi Tsereteli and Miss Jvania were in a dating relationship. Mr. Tsereteli cared a great deal about Miss Jvania. In fact, he loved her. But this was not an equal relationship. It was not equal for the following reasons. First, Mr. Tsereteli was twenty-five years older than Miss Jvania. He had finished a long

and honorable career serving in this country's Navy. Miss Jvania on the other hand was almost 30 years old but had not established any sort of professional career. She worked as a clerk in a grocery store, her last in a series of temporary positions.

Second, although Miss Jvania was working, and although Mr. Tsereteli's pension was not large, it was Mr. Tsereteli who paid for nearly everything the couple did. This included gambling. You will hear testimony that the two of them made frequent trips together to a local casino and gambled on horse racing and slot machines. Almost always, Miss Jvania used Mr. Tsreteli's money to gamble, not her own.

Third, the relationship was unequal in the affection each individual expressed for the other. You will hear testimony that Mr. Tsereteli frequently told Miss Jvania that he cared for her. He expressed his feelings verbally and in letters. You heard the prosecution in his opening statement mention some of those expressions of Mr. Tsereteli's affection. A person would have to grossly distort the meaning of Mr. Tsereteli's correspondence with Miss Jvania however to find veiled threats in any of these communications. He cared for her; he thought the relationship was good for both of them; he wanted it to continue; he told her so.

Now Miss Jvania remained in this relationship for almost two years and, to Mr. Tsereteli at least, seemed content - until the money ran out. You see, about one week before the incident at the Populi food store, Miss Jvania went to a casino with Mr. Tsereteli. She took $1,000 of Mr. Tsereteli's money and bet it on a horse race. She lost. In one rash gamble, she lost $1,000 of Mr. Tsereteli's money. And, even worse, it was the last of Mr. Tsereteli's money.

The fact was, that after dating Miss Jvania for nearly two years and paying for almost everything, including Ms Jvania's gambling, Mr. Tsereteli's

savings had dwindled. The $1,000 Miss Jvania gambled away that day was all that Mr. Tsereteli had left of his savings. Now it was gone. In despair, Mr. Tsereteli told Miss Jvania that he had no more money. Two days later, Miss Jvania told him their relationship was over.

Of course Mr. Tsereteli felt terrible about the breakup. He cared for Miss Jvania and missed her. It had also begun to dawn on him that she had been using him- she stayed with him only as long as he had money to spend on her. And on top of this, perhaps worst of all, he felt scared because his money was gone and he didn't know how he was going to pay his bills. After anguishing about this for days, he decided that he would go ask Miss Jvania to give him some of the money back that she had gambled away. It was for this purpose that Mr. Tsereteli drove to the Populi food market that Sunday morning. He wanted to ask Miss Jvania to give him some of the money back so he could pay his bills and survive.

That morning, Mr. Tsereteli drove to the Populi food market in his own car, the red BMW. He had driven to the food market many times before in this car. The Populi employees had seen him park this car, right out in front, many times before. This day, he parked the car in plain view as he always did and walked into the store to talk to Miss Jvania. He talked to her in front of Elene Fruidze, Miss Jvania's colleague and a woman he had met many times before. His business with Miss Jvania was personal, so he asked her to go outside to speak in private. She followed him; they got into the car- all of this in full view of Ms. Fruidze.

Now, the prosecutor in his opening statement mentioned the knife. He was correct in saying that the knife that killed Miss Jvania belongs to Mr. Tsereteli. It was in the BMW when Mr. Tsereteli drove into the parking lot. But Mr. Tsereteli did not bring the knife to the Populi food store to attack Miss Jvania. You see, that knife had been in the car for weeks. Mr. Tsereteli was having trouble with his carburetor and had been using the knife to pry

off the carburetor cap so he could make adjustments to the points inside. At least one witness will testify in this case that he saw Mr. Tsereteli use the knife to do this mechanical work and watched Mr. Tsereteli store the knife under the front passenger seat when he was done.

What you also did not hear from the prosecution during the opening statement was that Miss Jvania was a very large woman. She was as tall as Mr. Tsereteli and weighed over one hundred kilos. She had a loud voice, and on occasion exhibited a very bad temper. That morning, Mr. Tsereteli received the full force of that voice and that temper.

Mr. Tsereteli will testify in this case. He does not have to testify. As you know, it is his right not to testify. But he wants the facts, all the facts, of what happened that day to be known. He will tell you what happened inside that car. He will tell you that when they both were sitting inside the car, he turned to Miss Jvania and asked her to repay some of the money she had gambled away. Miss Jvania responded by saying she had no intention of doing so. Mr. Tsereteli tried to approach the subject from different angles but Miss Jvania's response was always negative. And as she talked, she grew angrier and more abusive. At one point, she called him a "stupid, gullible, old fool." Mr. Tsereteli was shocked and returned her insult by calling her a "gold digging whore." When he said this, Miss Jvania, who had worked herself up into a frenzy, grabbed the knife which was sitting on the floorboards below her feet. She then reached over and jabbed at Mr. Tsereteli. He put his hands up to block the blade and the point of the knife cut into his right thumb. Mr. Tsereteli felt intense pain. He shoved his door open and got out of the car quickly. Miss Jvania did the same.

Mr. Tsereteli was stunned and hurt. The attack had been so sudden, so unexpected. Before he knew exactly what he was doing, he had walked around the car to confront Ms Jvania. He had a vague intention of taking the knife away and trying to calm her down. But as I said, Miss Jvania was

a big woman. She stood nearly eye-to-eye with Mr. Tsereteli and she was angry. As he got close, she said, "You bastard," then lunged at him with the knife. He caught her wrist and yanked the knife out of her hand. She kept coming, and in a defensive reflex, he stabbed down twice with the knife to keep her away. The knife was sharp and entered her chest.

He will tell you that at that point he went into a state of shock. He knew somewhere in his brain that he had mortally wounded her. The knife had gone too deep. He realized that without meaning to, he had certainly killed the woman that he loved. Despite what she had done to him, he still loved her. He did not run away. He just walked a few steps across the parking lot and stood, and stood, oblivious to everything around him. He was in a complete state of shock. He will tell you he remembers nothing after feeling the knife go into Miss Jvania. The police who arrived on the scene will support this by telling you that when they arrived Mr. Tsereteli was just staring into space. He did not run; he did not resist. He just stood there staring into the sky.

Your Honors, the facts will show that when Givi Tsereteli drove to the Populi food store that day he did not intend to hurt anyone. He only wanted Miss Jvania to return some of the money she had gambled away. The facts will show that Miss Jvania's assault upon Mr. Tsereteli was swift, violent and unexpected and that he acted instinctively, in self-defense. Mr. Tstereteli's actions were justified. Miss Jvania's death is tragic and it is a horrible waste but it is not a murder.

At the end of the case, based upon a full understanding of the facts, the defense will be asking you to return the proper verdict in this case- a verdict of not guilty.

(Note: In this case, even though the defense has presented a self-defense theory in the opening statement, it leaves itself the ability to argue an

alternative theory should the court not find that the defendant's actions were entirely justified. The defense could argue in closing statement that if the court finds that defendant did not act in self-defense, then the defendant is only guilty of some form of manslaughter (e.g. inflicting deadly damages as a result of the high psychological stress), not murder, since the facts showed, at the very least, that the defendant acted in the heat of passion or upon severe provocation.)

V. Trial Advocacy Skills: Questioning Witnesses in Court

Georgian Procedure

The amended Georgian CPC makes it clear that witnesses, in most cases, must testify in court in order for their testimony to be considered as evidence to be used by the trier of fact, either judge or jury. In most cases, this testimony must be given in open court. (CPC Art. 10, 14) Now in Georgia, both the prosecution and the defense have the right to examine witnesses appearing before the court. (CPC Art. 14)

In adversarial systems, the questioning a party does of his own witnesses is called direct examination. (CPC Art. 244.1) The questioning a party does of his opponent's witnesses is called cross-examination. (CPC Art. 245.1) The two types of questioning are different from one another both in the goals they set out to achieve and the techniques they employ to achieve the different goals.

Article 244 and 245 of the Georgian CPC establish the basic guidelines for direct and cross-examination. Article 244, Direct Examination, states:

> 1. The party who called the witness shall conduct direct examination.
>
> 2. Asking leading questions during the direct examination shall be prohibited. A party may object to leading questions and/or request that the question and its answer be held inadmissible evidence.
>
> 3. The judge shall impose reasonable time limit for the posing of question(s), as well as set a reasonable time to answer questions.

Article 245, Cross-examination, states:

1. The party who did not call the witness may conduct cross-examination.

2. Asking leading questions shall be permissible during cross-examination.

3. The judge shall impose reasonable time limit for the posing of questions, as well as set a reasonable time to answer questions.

In addition to cross-examination, the CPC also gives the parties the ability to ask questions that follow upon questions asked of a witness by an opposing party. (CPC Art. 246) The "re-direct" questioning comes after the cross-examination and is limited to issues brought up by the opposing party on cross-examination. The "re-cross examination" comes after the re-direct and is limited to issues brought up on re-direct. (CPC Art. 246.1) This raises the possibility for endless rounds of questioning, however, the CPC gives a judge the ability to impose reasonable time limits on the questioning done by the Parties. (CPC Art. 244.3, 245.3) Also, upon the motion of a party, the presiding judge may strike objectionable questions posed to a witness during an examination. (CPC Art. 246.2)

Direct Examination

Direct examination of witnesses provides a party with the opportunity to present the substance of his or her case through witness testimony.

Direct examination is used to:

- Introduce undisputed facts

- Present a party's version of disputed facts
- Lay the foundation for admission and consideration of exhibits
- Enhance the credibility of witnesses

Organize Logically

An advocate conducting a direct examination should organize the points he wishes to make through the witnesses in a logical fashion. Most people are better able to understand a series of events or other information if it is presented in chronological order. For example, a prosecutor when questioning the victim of a robbery with serious injuries might put his examination together in the following order:

a. Victim background (age, occupation, etc.)

b. Description of scene of robbery

c. What occurred immediately before the robbery

d. What happened during the robbery

e. What happened immediately after the robbery

f. Victim injuries and emergency medical treatment

g. Long term physical effects and medical treatment

There may be cases where chronological organization is not the best way

to present the information. Whatever the order of examination points, the organization should be logical so the judge or jury can easily follow and better remember what the witness said.

Introduce Witness and Develop Background

Every examination of a witness called on direct examination should begin with questions whose answers introduce the witness and reveal relevant background information. The examination should result in the witness providing answers to these questions:

"Who is he?"

"Why is he here?"

"Why should he be believed?"

Example:

Q. Mr. Chantladze, what is your full name?

A. My name is Giorgi Chantladze.

Q. How old are you?

A. I am 22 years old.

Q. What is your profession?

A. I am a tailor.

Q. On the morning of September 5, 2004, did you see a man attacked near the corner of Rustaveli and Chavchavadze streets?

A. Yes.

Through this short exchange of questions and answers, the examiner has identified the witness, indicated why the witness has been called, and provided some support for why he should be believed: he is an ordinary citizen who was an eyewitness to the event.

Background questions should be asked of all witnesses since credibility is always an issue. The amount of background information necessary (or allowed by the court) will depend on who the witness is and how important her testimony is to the case.

It is wise to keep in mind that the answers to the questions will form the record of the case. In the example above, while it may be obvious to the trial judge(s) that Mr. Chantladze is a young man, it will not be obvious to appellate court judges who may later attempt to understand the facts by reading the record of the case. If the age and physical characteristics of the witness are relevant to the case, the best way to ensure these facts make it into the record is to ask the pertinent questions. Providing such details also helps a judge "paint a mental picture" of the witness.

Set the Scene

The court should receive an oral description of the scene from the witness before it hears about the action. Properly setting the scene helps the court

understand the action that follows. Also, action testimony can be more effectively presented if presented in an uninterrupted fashion. An effective technique in setting the scene is to move from description of the general to a description of the specific.

Example:

Q. Mr. Chantladze, had you been at that intersection before?

A. I walk by it every day.

Q. Could you please describe the intersection?

A. Rustaveli is a large avenue which runs from the east to the west in the Old City district of Tbilisi. Chavchavadze Street runs from the south to the north and intersects Rustaveli.

Q. What type of neighborhood is it?

A. It is a business neighborhood but there are large apartment buildings on each side of the intersection. It is always very busy with cars and people.

Q. Was it busy on the morning of September 15?

A. Yes.

Q. What was the weather like that morning?

A. It was clear, not raining. A little cold. I remember my hands were cold because I had forgotten my gloves.

Q. Where were you when you saw this attack?

A. I was walking across the intersection, going from the southeast corner of Rustaveli and Chavchavadze to the northeast corner of the intersection.

Here the advocate has provided the court a general description of the location of the event. A more detailed description will not usually add much to the direct examination. It is usually best to let the cross-examiner bring those details out if she wishes.

Recreate the Action

Direct examination can be used to recreate the action of the event so that the judge(s) can experience the event through the eyes of the witness. There are three basic concerns in effectively recreating the action through direct examination: point of view, pace and proper language.

a. Point of view

The examiner's questions should be organized so that the listener "sees" the action through the witnesses' eyes:

b. Pace

Pace involves controlling the speed of the examination so the listener can "feel" what happened.

c. Proper language

The words and phrases used in questioning the witness should be simple and easy to understand for the witness. Use language that invokes a *feeling* in the listener.

Use Nonleading Questions

Use short, open-ended questions that assist the witness tell his version of events in a logical, organized fashion.

Examples:

Where did you go that day?

How did you feel?

What did the man look like?

What happened next?

Do not use leading questions. Leading questions are questions that contain or suggest the answer.

Examples:

You went to the market that day didn't you?

You were frightened weren't you?

He was a tall man wasn't he?

He attacked you, right?

Use Exhibits to Assist the Examination

The Georgian CPC allows a Party to "present" exhibits during trial with the consent of the presiding judge. (CPC Art. 248.1) While it is unclear how broadly Georgian judges will interpret this right of presentation in individual cases, an active advocate will use Art. 248.1 to argue for an expansive interpretation, one that allows him to show exhibits to witnesses, have witnesses describe and explain the exhibits and, if the proper foundation is laid, submit the exhibits as evidence for the court's (or the jury's) consideration.

Exhibits can be maps, diagrams, photographs, weapons, clothing or any other physical object which can be testified to by a witness and which can be used to prove or illustrate a fact relevant to the outcome of the case.

Exhibits can make a witnesses' testimony easier to understand. If a witness testifies, for example, about the location of people and objects at a crime scene, a listener can quite easily become confused or draw erroneous conclusions. If the witness is asked to place the people or objects on a map or diagram that can be seen by the listener, the testimony is much more likely to be followed and understood.

Exhibits can make a witnesses' testimony easier to remember. Studies have shown that most people remember much more about the information they *see* than the information they *hear*. They remember even more about information they *see* and *hear*.

Exhibits may express more about an event than words are capable of expressing. Pictures of injuries often fall into this category. They also may have a greater emotional impact on the listener than words alone. In the English-speaking world there is a saying that captures this idea, "A picture is worth a thousand words."

Exhibits can assist the fact finder acquire a more accurate understanding of the facts. When one person hears another person describe a place, a person, or an object, his or her mind constructs an image of that place or thing. The image he constructs may or may not resemble the actual place or thing. Other people who hear the description will construct their own, different images. Allowing witnesses to refer to maps, diagrams or photographs during their testimony can reduce this "distortion" between the actual place or object and the image created by a listener in his head.

Examples:

Example #1: In the example used in "Set the Scene" above, the witness described the corner of Rustaveli and Chavchavadze. As you read those questions and answers, your mind probably created an image of the intersection. Since the description did not give much detail, your mind filled in the rest. Much of what your mind filled in was probably not accurate. If the witness uses a diagram or photograph to help describe the scene however, your mind will not be forced to create so much detail and your understanding of what the scene looked like at the time of the event will probably be much closer to reality.

Example #2: The victim of a domestic assault testifies that her husband hit her with a belt and left a bruise on her back. Hearing this, one judge (or juror) on the panel has an image of a small bruise; another judge (or juror) has an image of a large bruise. If the prosecutor shows a picture taken of the victim's back after the attack, all of the judges (or jurors) will have one, more accurate, image of what the injuries really looked like. This could make a big difference in how they decide the case.

The best time to use exhibits is usually after the witness has completed tell-

ing the "action" part of his story. The witness can then be asked to describe and explain the exhibits and how they relate to the events that took place. An advocate who follows this approach will not interrupt and detract from the oral telling of the action part of the story. Once the action is related, the advocate can then ask the witness to describe the exhibits and ask questions that focus attention on the more important parts of the witness' testimony.

Prepare the Witness

Where possible, the examiner should prepare his witnesses for the examination. This means letting the witness know beforehand what questions he will be asked on direct and what questions he might be asked on cross-examination. It means, where possible, showing the witness ahead of time, the exhibits he will be shown during trial so that he can better explain the exhibits to the court. If a witness is not given any advance notice of what will be covered during questioning, the witness may be easily confused and may perform poorly under the stress of open court questioning.

Of course, a lawyer must take special care not to "coach" a witness, by telling him what to say or what answers he wants to hear. This risks misleading the court and raises serious ethical questions about the conduct of the lawyer.

Cross-Examination

Cross-examination is said to be at the heart of the adversarial process. The two broad purposes of cross-examination are: 1) to bring out information favorable to your case; and 2) to damage the case of the opponent - this is called a "destructive examination." A destructive examination is designed to discredit the witness or her testimony.

Of course, not every witness needs to be cross-examined. If an opposing witness has not damaged an advocate's case, there may be no reason for that advocate to ask the witness any questions. Sometimes the best cross-examination is simply to say, "No questions of this witness." A destructive cross-examination is not necessary in every case and may only hurt an advocate's case when the witness has testified to facts that are helpful to him.

Structure of Cross-Examination

A lawyer planning a cross-examination should create an organizational structure to her questioning. Ordinarily, the structure should limit the number of main points to three or four. This is because attempting to cover too much ground during cross-examination risks diluting the impact of the main points and also increases the chances the examiner will lose control of the witness and the examination. The main points should be points that support the cross-examiner's theory of the case.

Cross-examination should not be a repeat of the direct examination. This is a frequent mistake made by many lawyers. Asking the same or similar questions on cross-examination that were asked during direct examination usually works to assist the witness solidify the testimony he gave on direct.

One of the most important rules of trial advocacy is, "Never ask a question you do not know the answer to." This is especially true of cross-examina-

tion. The purpose of cross-examination is to elicit facts that are favorable to you or to diminish the impact of the direct examination. It is not a time to go fishing for information. An advocate should only ask questions she knows the answers to or questions that will provide answers that she knows she can handle without hurting her case.

An advocate should not argue with the witness. Because cross-examination often puts the questioner in a confrontational frame of mind and because in many cases the witness is in fact antagonistic, it is easy to slip into argument. This is not only unprofessional but is likely to be counterproductive. The more effective cross-examinations are those in which the examiner is in control - of the questions, and of her own emotions. The best way to avoid becoming argumentative with a witness is to organize and structure the examination carefully.

A cross-examiner should normally avoid asking the witness open-ended questions, questions that ask the witness to "explain." Questions that ask "what," "how," or "why" give the witness a chance to give testimony that is damaging to the examiner's case. When a witness is asked a question that allows her to "explain" rather than provide a simple answer, the cross-examiner loses control of the examination. Cross-examination is about control. Remember that the direct examiner can ask these types of questions of the witness on redirect if he feels it necessary.

Style of Cross-Examination

During direct examination, the examiner usually tries to maintain a secondary role to the witness. In cross-examination however, the examiner should attempt to play the main or dominant role. The attention of the fact finder should shift from the witness to the examiner. The cross-examiner can make this shift occur by using certain techniques:

a. Ask leading questions. These are questions that suggest the answer. Examples of leading questions are:

Q: Ms. Sokhadze, on June 28 you owned a bicycle, didn't you?

Q: You hit the man with your fist, isn't that right?

Q: You were drinking liquor that night, correct?

An advocate can also make the questions leading by using intonation and attitude.

Example:

Q: Mr. Jashi, you were assaulted at around 11:00 p.m.?

A: Yes.

Q: It was December 5, wintertime?

A: Yes.

Q: It was nighttime?

A: Yes.

Q: The sun was down?

A: Yes.

Q: The stores were closed?

A: Yes. Most of them I think.

Q: Not many cars driving around?

A: Not at that time of night.

Q: You said during your direct testimony that there was light from the streetlights?

A: Yes.

Q: And those lights were located at end of each block?

A: Yes.

Q: But there weren't any streetlights in the middle of the block?

A: No.

Q: And that is where the robbery happened, didn't it?

A: Yes.

In the short piece of cross-examination above, the examiner has not only controlled the responses of the witness by the form and tone of his questions, he has also built a factual basis for his argument that the lighting conditions were too poor for the victim to see and accurately identify his attacker. In such an examination, the examiner might consider having a photograph of the scene available to show to the witness at the right moment during the examination. If the witness claims that there were streetlights in the middle of the block and the photo shows that there were not, the witnesses' recollection will be proven faulty. This may cause the court to question other aspects of the witness' recollection which may in turn lead to the court finding his identification of the defendant unreliable.

b. Ask short, clearly understood question that move the witness bit by bit toward giving you the information you seek.

In the example above, the examiner did not ask, "You really didn't see the man who robbed you, did you?" If he had done that, the witness would probably have given an answer that the examiner did not want to hear. The questioning style he used helped him draw facts from the witness that he could later use to argue that the lighting on the scene was not good enough for the victim to make a reliable identification.

c. *Keep control over the witness.*

In Anglo-American trial proceedings, one method lawyers use to control witnesses is to object to the response of a witness that does not directly answer the question posed then ask the court to order the witness to give a more direct answer. While in Georgian courtrooms there may be no formal rules that govern this sort of exchange between witnesses and lawyers, there is nothing preventing the examiner from asking the judge to command the witness to be more responsive. In many cases, making such a request may be successful.

A less formal method of exerting control is simply to use the witness' fear of looking foolish or providing false information to the examiner's advantage. If the examiner carries himself with confidence and the questions are delivered with certainty, the witness will often adopt a more submissive, less antagonistic attitude. This will help the examiner control the witness and get to the information that is helpful to his case.

d. Use a style that is natural

There are many styles of examination and presentation that are effective. While American movies may give the impression that a "dramatic" style

is desirable, in reality, most judges and jurors are not impressed by overly dramatic presentations. Every advocate should develop a style that is natural for himself or herself, a style that he or she is comfortable with.

Bringing Out Favorable Information

When another party's witness possesses information that supports a party's case and is consistent with its theory of the case, the cross-examiner should bring out this information from the witness. This should be done at the beginning of the cross-examination. If the examiner is pleasant and polite in her questioning, this will cause the witness to relax and be more cooperative. If the examiner needs to ask questions that discredit or challenge the witness, she can do this later in the examination, after the witness has given the favorable information the examiner seeks.

It is very rare that a witness's entire direct examination is damaging to a party's case. Usually the witness gives some information that is helpful. It is often helpful to a cross-examiner to have the witness repeat those facts that are favorable to her case. Having the witness repeat favorable facts improves the chances that the judge(s) will remember those favorable facts when they are making their decision.

It may be that the other party's witness can corroborate, or support, parts of the cross-examiner's case. It may be that the witness possesses certain facts that support statements made by witnesses she has called. Statements made by the other party's witnesses that support the cross-examiner's case or the cross-examiner's witnesses often leave a very powerful impression with the judges. An advocate can argue during closing statement that certain facts must be true since even the opposing party's witnesses have admitted that they are true.

Discrediting Unfavorable Testimony

This type of cross-examination has one main purpose- to show or suggest that the testimony of the witness is less reliable or less likely to be true than it appeared at the end of the direct examination. The aim is not to discredit or "destroy" the witness himself. Rarely will an examiner have the opportunity to show that a witness purposefully lied during direct examination. Most witnesses however, will include their own perspectives, attitudes and beliefs in telling their stories. This can distort the reality of the event. Cross-examination can develop and reveal this distortion.

Two approaches that can be used to discredit a witness' testimony involve challenging a witness' *perception* and challenging a witness' *memory*.

Perception.

An obvious way to discredit a witness' testimony is to bring out facts that suggest that the witness did not have the best ability or opportunity to observe the event he testified about on direct examination. This usually means showing that the event occurred quickly and unexpectedly, that the witness was frightened or excited or that the distances were far or the lighting was poor. This type of examination can result in the court questioning the accuracy of the witness' observations.

Example:

Q: Ms Loria, the incident about which you testified on direct examination occurred on Vaja Pshavela street, is that right?

A: Yes.

Q: Vaja Pshavela is normally a very busy street?

A: Yes.

Q: A lot of traffic?

A: Yes.

Q: Even at night, is that correct?

A: Yes, it is always very busy.

Q: You testified that the man who took your purse confronted you under the footbridge near the corner of Vaja Pshavela and Asatiani.

A: Yes.

Q: There is no sidewalk under bridge is there?

A: No.

Q: So you have to walk a bit into the road to get under the bridge isn't that right?

A: Yes, on the side of the road.

Q: And at that point, traffic is coming right at you?

A: Yes.

Q: So you have to keep a close eye on traffic when you go under the bridge to make sure you don't get hit you, right?

A: Yes.

Q: You were keeping an eye on traffic when you walked under the bridge that night weren't you?

A: Yes.

Q: Because you didn't want to get hit?

A: No I did not.

Q: Now the incident occurred around 10:00 o'clock, correct?

A: Yes.

Q: It was dark out?

A: Yes but there was street lighting.

Q: But there was no lighting under the bridge?

A: No, I don't think so.

Q: So you must have been paying special attention to the traffic since you knew it would be more difficult for them to see you in the dim light?

A: Yes, I suppose so?

Q: This is when the man came up behind you?

A: Yes.

Q: Under the bridge?

A: Yes.

Q: In the lane of traffic?

A: On the side of it, yes.

Q: He jumped in front of you?

A: Yes.

Q: He surprised you didn't he?

A: Yes he did.

Q: He scared you didn't he?

A: Yes.

Q: He showed you a knife?

A: Yes

Q: Describe the knife?

A: It was shiny with a blade about six inches long.

Q: You kept your eyes on the knife?

A: I suppose I did?

Q: He grabbed your purse and ran?

A: Yes.

Q: Did he still have the knife in his hand when he ran?

A: Yes, I believe he did.

Q: This happened very fast didn't it?

A: Yes.

Q: It took just a few seconds, right?

A: Yes.

Q: And it all happened in the lane of traffic under the bridge?

A: Yes.

In this cross-examination, the examiner has cast doubt on the accuracy of the witnesses' observations in a number of ways. He brought out facts that indicate the lighting was poor, that the witness was at least partially distracted by the oncoming traffic, that she was surprised and frightened by the appearance of the man, that she was probably concentrating more on the knife than the man's face, and that she had only a very short time to make her observations. The examiner can use this testimony to later argue that since her observations were made under the worst possible conditions, the witnesses' identification of the defendant as her attacker is not reliable.

Memory

A witness' ability to remember the details of an event can have a great impact on the reliability of his testimony. If a large amount of time has passed since the event, he may have difficulty remembering the event accurately. He may have trouble separating the actual details of the event from details he heard from others or details his own mind created. Cross-examination

can often point out that a witness has forgotten, confused or has otherwise mixed up certain facts which are necessary to the accurate reconstruction of events.

Example:

A police officer arrested a defendant six months prior to the trial and took a statement from him. The cross-examination reveals that the officer did not write the statement down in his report and suggests that the officer has arrested so many people and taken so many other reports since then, that he cannot possibly remember with accuracy what the defendant said:

Q: You arrested my client more than six months ago?

A: Yes.

Q: How many arrests do you think you make a week?

A: Maybe 4 or 5.

Q: So, since you arrested my client six months ago you have made approximately..120 arrests?

A: Probably about that. Maybe a few less. It's difficult to say how many.

Q: It's impossible to remember all of the details of every one of those arrests isn't it?

A: Yes.

Q: That's why you write the details down in police reports?

A: Yes.

Q: And you try to write down in the report everything you think is important?

A: Yes.

Q: But your report in this case does not mention anything about a statement made by the defendant?

A: No.

Q: Your report says nothing about what the defendant actually said, does it?

A: No.

Impeachment

Impeachment is a cross-examination technique that discredits a witness or his testimony. Its purpose is simple- to show the court that the witness or his testimony cannot be believed.

There are several basic impeachment techniques. Two standard techniques are:

a. Showing the witness possessed bias, interest, or motive.

b. Revealing the witness made prior inconsistent statements.

Bias and *prejudice* are tendencies or inclinations that a person has that prevent him from being impartial. An individual can be biased in favor of, or prejudiced against, another person or position. Exposing this bias or prej-

udice usually involves revealing a family, business or personal relationship that makes the witness unable to be impartial or objective.

Example:

The defense is alibi. The defendant's mother testified on direct that her son was home when the crime was committed. The cross-examination reveals the mother's obvious bias toward her son.

Q: Mrs. Jvania, your son was living with you on October 6, the date this assault occurred, is that right?

A: Yes.

Q: He is still living with you?

A: Yes.

Q: It's fair to say that you talk to your son every day?

A: Yes.

Q: He tells you about his problems?

A: Yes.

Q: You've talked with your son about this case many times, haven't you?

A: Yes.

Q: The court did not force you to come to court today did it?

A: No.

Q: Your son and his lawyer asked you to come and testify today, is that right?

A: Yes.

You will note that this cross-examination was very gentle. The examiner asked enough questions to point out the mother's obvious bias without attacking her and making her look more sympathetic to the court.

Interest refers to the possible benefit that a witness might derive from the outcome of the case, or the possible detriment. Often interest is financial. Since human greed is a common human motivation, revealing that greed can have a damaging effect on a witness's testimony.

Motive is the psychological urge that causes a person to think or act a certain way. Common motives are greed, love, hate, and revenge. Effectively suggesting that a witness has a motive to testify in a certain way can result in the court viewing the witness' testimony with skepticism.

Example:

The defendant is charged with arson. The cross-examination is designed to show that he was experiencing financial difficulties and to suggest that he burned down his own restaurant to collect on an insurance claim.

Q: Mr. Rijamadze, six months ago you invested heavily in the Georgia stock market, correct?

A: Yes.

Q: To be specific, you bought over $100,000 in a Bank of Argo stock did you not?

A: I did.

Q: You borrowed money to buy that stock didn't you?

A: Yes.

Q: You used your restaurant as collateral for the loan?

A: Yes I did.

Q: Four months ago, Bank of Argo collapsed, it went bankrupt didn't it?

A: Yes.

Q: Your stock was worthless.

A: Unfortunately, yes.

Q: At the same time, your creditors began to demand payment on the loan?

A: Yes.

Q: You did not have the money to pay the creditors did you?

A: No.

Q: You did not have enough money in the bank to pay them did you?

A: No.

Q: In fact, you were broke.

A: Basically, yes.

Q: You did own your restaurant?

A: Yes.

Q: It was insured?

A: Yes.

Q: For $200,000, is that right?

A: Yes.

Q: When your restaurant burned down, you made a claim on your insurance right?

A: Yes.

Q: The claim was for $200,000.

A: Yes.

Q: And with that money you were able to pay back the loan *and* keep $100,000 for yourself, correct?

A: Basically, yes.

Prior Inconsistent Statements

Confronting a witness with inconsistent statements he made at some time prior to testifying in trial can be one of the most effective methods of impeaching a witness. These statements can be statements made to the police

or civilians or even statements made in court at previous hearings. The aim is to show that the witness has given two or more versions of the same event or fact, and therefore his testimony cannot be trusted.

There is a simple technique that can be used for impeaching a witness in this fashion. It is three-step technique. The first step involves making the witness acknowledge that he made a certain statement during direct examination. The second step involves building up the statement made during direct examination to show its importance. The third step is to confront the witness with the prior inconsistent statement in such a way that he must admit that he made it.

Example:

Q: Mr. Abuladze, you stated on direct that you were *less than* 10 meters away when you saw the cars collide?

A: Yes.

Q: There is no doubt in your mind about that?

A: None whatsoever.

Q: Now, the distance between you and the place where the cars collided is important isn't it?

A: I'm not sure what you mean.

Q: The farther away from the crash you were, the less able you would have been to observe the details, correct?

A: That's common sense.

Q: Mr. Abuladze, weren't you *more* than 20 meters away when you saw the crash?

A: No.

Q: Well, you spoke with a police officer a few minutes following the accident didn't you?

A: Yes.

Q: That was at a time when the details were still fresh in your mind?

A: Yes.

Q: You knew the police officer was investigating the accident didn't you?

A: Of course.

Q: And you were careful to give the officer the correct facts?

A: Of course.

Q: In fact, you told the police officer, minutes after the accident, that you were "more than *20 meters* away" when you saw the crash, didn't you?

A: I suppose I did, yes.

In the above example, the cross-examiner used the three-step technique to reveal that the witness had given two versions of a crucial fact. The fact that the witness has made contradictory statements is something the court is likely to use in determining whether the witness' testimony was reliable. It should be pointed out that where a witness denies he made a previous contradictory statement, unlike the example above, the examiner should

be prepared to confront the witness with the evidence of that statement, for example, showing the witness a police report or transcript of a prior hearing containing the prior inconsistent statement, or by presenting actual witnesses who will testify to the contradictory statement being made.

VI. Trial Advocacy Skills: Closing Arguments

Georgian Procedure

The Georgian CPC explicitly gives parties the right to make closing arguments at the conclusion of the evidence. It also establishes the order of presentation. Article 251, Closing Arguments of Parties, states in subsection 1, "Closing argument shall be first presented by the prosecution, and then by the defense."

Subsection 1 lays out the broad parameters of closing argument stating, "The parties shall not refer to evidence that was not examined by the court." At first glance, this language seems to underscore the public, oral, and adversarial nature of the fact finding process. However, since the CPC still allows the court to consider reports written by the prosecution during the investigation stage of the case as evidence - reports based on interviews with witnesses outside the presence of defense counsel or judge - the public and oral nature of the trial is not what it would be in more traditional adversarial systems. In a truly adversarial system, subject to a few limited exceptions, witness statements cannot be considered as evidence by the trier of fact unless the parties have had an opportunity to examine the witness in open court.

As was the case with opening statements, the CPC allows a judge to impose a "reasonable time limit" within which parties can make their closing arguments. (CPC Art. 251.3) As was true with opening statements, the CPC provides no guidance as to what a reasonable limit should be.

After the parties have delivered their closing arguments, the CPC allows each party to give their "dissenting opinion" or "remark." (CPC Art. 252) The CPC does not give guidance on the content or length of the remark only that it be made in a "reasonable time set by the presiding judge." A lawyer

trained in a traditional adversarial system might assume that the right to remark is allowed under the CPC to give a chance for a party to respond to, or rebut, what was said in the opponent's closing argument. However, the real purpose of the remark under Georgia's unique, mixed procedural system is not altogether clear. In practice, the Georgian trial courts usually restrict the remark to a simple statement of a party's position on the evidence. It is usually very short, to the point, and of questionable utility considering that it immediately follows the longer and more detailed closing arguments.

In addition to providing the prosecution and defense a right to make a remark, the CPC gives a defendant, separate and apart from his defense attorney, the opportunity to present a "final statement" to the Court. (CPC Art. 253) No such separate right exists for a defendant in other adversarial systems. Interestingly enough, unlike the closing arguments of the prosecution and defense, the CPC *does not* allow the judge to define the length of the final statement. In theory, the defendant's final statement could go on for as long as the defendant felt he needed to make his points. However, the CPC does give the judge the "possibility to interrupt the defendant if the latter touches upon circumstances that are not relevant for the case or which has not been examined during the hearings." (CPC Art. 253.2).

It is not clear what the legislature had in mind by providing a defendant the ability to make his or her own final statement in addition to his lawyer's closing argument. It may reflect a reluctance by the legislature to take away another opportunity for a defendant to have his voice heard. It may simply be a remnant of the former system which the lawmakers could not bring themselves to delete. No matter its intended purpose, the option's existence seems to provide both great advantages and great dangers for the defense. The greatest advantage may be that it allows a defendant the chance to make his own arguments, perhaps even give his own version of the facts, without cross-examination, and to be the last voice heard. The disadvantage to the defense side may be that some defendants are lured into incriminating

themselves or otherwise damaging their chances of a favorable outcome by speaking without the guidance of an attorney. The existence of the opportunity may also have a more serious, systematic impact on a fundamental right of the accused. If Article 253.2 creates an expectation that every defendant will give a final statement, failure by a defendant to make such a statement might be used by the court to imply his guilt. This could work to compel a defendant to speak on his own behalf, thus violating his right to remain silent provided by Article 38 of the CPC and by the Georgian Constitution. Given the possible advantages and disadvantages of making this "extra argument," an advocate is well advised to discuss the issue with his client in advance in order to determine the best approach to take in the individual case.

Crafting a Closing Argument

The closing argument provides the advocate the opportunity to finally argue her case to the fact finder. The closing argument is not a summation of the facts. It is an *argument* used to convince the fact finder that the advocate's case is the true and correct one.

An effective argument takes the theory of the case, the evidence, and the law and molds them together into a persuasive whole. A successful argument makes the judges do what the advocate wants them to do and feel good about it.

Like the opening statement, the closing argument should be efficient. Again, remember that most people can maintain a high level of concentration for only a short period of time. An effective closing argument should focus on the main themes and key pieces of evidence. It should not overwhelm the judge or jury with details. Most closing arguments should not be more than 20-40 minutes in length.

Since at the conclusion of a Georgian criminal court trial, the court normally rules on both the issue of guilt and the issue of punishment (except in case of jury trial, when after verdict a separate sentencing hearing is conducted by the judge), the closing argument in a Georgian courtroom should logically include arguments that address both issues. This poses a significant challenge for Georgian defense lawyers in some cases. It may be quite difficult to vigorously argue a client is innocent of the crime while at the same time arguing that his punishment should be mitigated. This section will focus upon the part of the argument that addresses the issue of guilt.

General Considerations

While there are an infinite number of ways to create and present a convincing closing argument there are some basic approaches and devices that should be considered in every case. These include:

1. Argue the theory of the case. The theory of the case that was presented during the opening statement should remain the center of the advocate's closing argument. It should be repeated.

2. Argue the facts. Argue the facts by carefully choosing the pieces of information that support your theory of the case. Refer to specific witnesses and testimony. A fact is only a fact when a specific witness vouches for it. Avoid giving your personal opinion. Your personal opinion is irrelevant.

3. Use exhibits and visual aids. Exhibits can do many things. They can enhance the emotional content and persuasive power of a presentation. They can organize complicated factual scenarios or legal concepts in ways mere

words cannot. They can provide a refreshing change of pace for the listener that will allow her to refocus her attention on what the advocate has to say.

4. Use analogies and stories that relate to real life. If they are short and they are pertinent they can make an advocate's point extremely clear.

Example:

Where the defense attorney wants to focus the judge's attention upon an untrustworthy prosecution witness, he argues, "If you find a maggot in your food, you throw it *all* away because chances are it is *all* rotten. The prosecution in this case wants you to ignore the maggot and eat the whole plate."

5. Argue strengths. The most successful arguments are those that focus on the strengths of the advocate's case. If an advocate spends too much time focusing on the weaknesses of the other party's case, he may convey the feeling to the listener that his own case is weak.

6. Do not hide weaknesses. While an argument should be positive and stress the strengths of an advocate's case, it should not entirely avoid discussing the weaknesses of the case if they exist. There are two advantages to addressing a case's weaknesses during argument: First, if an advocate mentions the weaknesses before the opposing party does, he diminishes the impact the opposing advocate would make if he raised them first. This is often referred to in English speaking courtrooms as, "stealing the opponent's thunder." Second, judges and jurors are likely to respect the honesty and candor of an advocate who discusses the weaknesses of his case. Respect for the advocate often translates into respect for his argument.

Elements of an Effective Closing Argument

There are a variety of ways to construct an effective closing argument. Of course the structure will depend on the nature and facts of the case and the style of the advocate. Many effective closing arguments however generally follow the structure below:

1. Introduction

2. Issues

3. What really happened and the proof

4. Basis for guilt/innocence

5. Conclusion

Introduction

Judges and jurors want to hear a clear, concise explanation of what an advocate wants and why he wants it. They want to hear it in a way that captures their attention. The advocate should deliver an introduction that does these things using the theory of the case to bind it together.

Example (defense):

Tamar Asatiani is on trial here for defending herself against a very large, very drunk man who was trying to kill her. Our law, sensibly, allows a person the right to self-defense. This right to self-defense extends to wives in the same way it extends to husbands, or to friends, or to mere acquaintanc-

es. Tamar acted in self-defense and therefore she must be found *not* guilty.

Issues

Somewhere, either before or after discussing the facts of the case, the advocate should clearly state issues or questions posed in the case in a way that makes the answers obvious.

Example (prosecution):

To find Tamar Asatiani guilty of attempted murder you must answer two simple questions: First, did she intend to kill her husband when she plunged that 10-inch kitchen knife directly into his chest with such force that it snapped the blade? Second, would a person who was truly acting in self-defense behave in the manner she did after the killing - not calling the police or ambulance for five hours?

Example (defense):

There is only one issue in this case: Was Tamar Asatiani justified in defending herself against a drunken man, twice her size, who burst into the house screaming that he was going to kill her - a man who had beaten her senseless many times before?

What really happened - the proof

After hearing the evidence presented in pieces during the trial, the court will want to hear the party's version of how the pieces fit together to make a believable whole. This should not be a repetition of all of the evidence presented but a presentation of the critical facts supporting an advocate's case and what those facts *mean.*

A standard approach to this part of the argument is to tell the court the story from the point of view of the party then move immediately to a discussion of the sources of information that support the story.

Example (defendant):

For Tamar Asatiani, the evening of July 20, 2011 began in a familiar way. Her husband, the defendant, pushed himself away from the dinner table and announced that he was going out and would not be back until late. She knew that he would be back alright- he would be back drunk, angry and eager to take out the frustrations of his life on her. She knew that she would be beaten. She just didn't know how badly, or if this time, she would survive. She waited in fear for hours, until she heard the sound of his loud steps in the hallway outside.

During this trial you heard Tamar talk about the life of fear she led. She told you about the many times the defendant had beaten her up in his drunken rages. You also heard from her neighbors, Mrs. Pruidze and Mrs. Kenchadze. They told you about those many times they heard the defendant come home late at night; they told you about hearing the sound of blows being struck and hearing Tamar begging her husband to stop hitting her. From this evidence, you know that Tamar was justified in her belief that this time, the defendant would kill her.

The artistry of good closing statement is to weave the facts that support your case into a cohesive, logical, and compelling argument.

Basis for guilt/innocence

It is essential in all closing arguments that an advocate spend some time

focusing on the areas of the law that are of main importance to the outcome of the case. For the prosecution this often means reminding the court of the legal elements of the offense and discussing how the evidence in the case has proven up each element. For the defense, this usually means singling out certain legal elements necessary to prove the crime and arguing that the prosecution has failed to meet its burden of proof on those elements, or raising an affirmative legal defense and arguing the facts that establish that defense.

Example (prosecution for *giving* a bribe)

Article 339 of the Criminal Code says that a person is guilty of bribery when he 1) gives money or other benefits to a civil servant; and 2) he gives these benefits with the intent that the civil servant use his official authority to take an action, or refrain from taking an action, to benefit the giver.

The evidence has shown that the defendant gave property to a state official by providing an Inspector for the Tax Department, with many, many, free meals from his restaurant in the period between May and December 2011. The only reasonable inference that can be drawn from the defendant's actions is that the defendant intended to cause the Inspector to refrain from collecting the required tax from his business operation. This being the case, both elements of the crime have been proven.

Example (defendant)

There is no question that my client hosted Mr. Razmadze at his restaurant a few times and that he gave him a few bottles of liquor as gifts. But this is no crime. The law requires that the prosecution prove that my client's intent was to secure illegitimate benefits. Where is this proof of intent? The prosecution has presented no evidence at all of any agreement existing between my client and Mr. Razmadze to keep the restaurant open in exchange for a

few free meals. It has proven no illegal purpose. In fact, the evidence has indicated that my client's purpose was friendship. He knew Mr. Razmadze; he liked him; he acted as a generous host. This is no crime.

Conclusion

The end of the argument should smoothly conclude the advocate's case. It should remind the court of the advocate's theory of the case. It should make clear what the advocate is requesting. If possible, it should end on a confident, decisive and dramatic note.

Example (defense of robbery):

The evidence has shown this: The police got the wrong man. Mr. Burduli was not at the robbery scene. He had nothing to do with the robbery whatsoever. By being wrongfully charged, he has in fact, become a second victim of the crime. We ask that you end this second injustice and find Mr. Burduli not guilty. Let him go back to his job, his family, his life.

Example (prosecution for *accepting* bribe):

Extortion and bribe taking come in many different forms. When the defendant accepted all of those free meals from the restaurant owners she was supposed to be regulating, she was accepting bribes. While the defendant may not have stuck a gun in the ribs of those restaurant owners or beaten any of them up, she was in effect, reaching into their pockets and robbing them of the fruits of their labor. Worse yet, her actions threatened to damage the trust the public has in their government. We simply ask the court to find her guilty of the crime she committed- bribe taking.

Sample Closing Arguments

State vs. David Jashi - Prosecution Closing:

Your Honor, Ladies and Gentelmen, during the opening statement I told you that this was a simple case of residential burglary. The evidence presented in the case has proven this to be true. The evidence has shown that the defendant broke into the Chelidze's home in an attempt to steal their property. Fortunately, he was caught in the act.

I am going to speak in some detail about the evidence that was presented in this case but before I do this I would like to speak briefly about the law. As the prosecutor in the case, I bear the burden of proving each element of the offense to you beyond a reasonable doubt. It is absolutely essential therefore, that I make sure you understand how that offense, the crime of residential burglary, Article 178.2(b) of the Criminal Code, is defined by the law.

The crime of residential burglary is very simple; it has only three elements. In order for someone to be guilty of committing the crime of residential burglary he must have 1) entered the residence of another; 2) taken possession of another's property; and 3) intended to permanently appropriate that property. The prosecution has proven all three of these elements beyond a reasonable doubt.

This is the evidence that you heard during the trial that proves these elements:

Both Mr. and Mrs. Chelidze testified in this case, and they told you that on October 4, 2011 they lived at Gamarjveba Street with their three-year-old daughter, Tamar. It was a modest, one-bedroom apartment with a kitchen and living room. The Chelidze's had lived in that apartment since they had been married. It was their home.

On October 3, the family went to sleep around at 10 o'clock, their normal bedtime. Mr. and Mrs. Chelidze slept in a double bed in the middle of the room. Tamar slept in a child's bed in the corner of the room. At approximately one o'clock in the morning Mrs. Chelidze was awakened by the sound of a crash. She at first thought that the sound was her husband getting something to eat in the kitchen. But when she reached out and felt her husband beside her and looked over and saw her daughter sleeping in her corner bed, she realized that something was very wrong. She began to understand that someone, a stranger, was in her home.

Mrs. Chelidze sat up in bed, now completely awake. She told you during direct examination that she at first didn't know what to do. Should she call the police? But the phone was in the living room. Should she wake her husband and ask him to confront the intruder? But what if the intruder had a weapon? Should she hide her daughter under the bed? She was terrified.

Before she could make a decision, she heard another crash from the kitchen. This time, Mr. Chelidze woke up. Mrs. Chelidze whispered to her husband that there was someone in the house. Mr. Chelidze got out of bed, grabbed the only object he could use as a weapon- an umbrella, and headed out of the bedroom to confront the intruder. He found the defendant standing in the kitchen, his mouth full of khinkali that he had taken from the pantry. There were two broken bowls on the floor.

Mr. Chelidze yelled at the defendant and demanded to know what he was doing in his home? The defendant mumbled back an insult. Mr. Chelidze told him to get out. The defendant stuffed another khinkali into his mouth and headed toward the door. Mr. Chelidze pushed him out and called the police.

Fortunately for everyone except the defendant, a police car was passing nearby the Chelidze's apartment building just as the radio call regarding the

intruder went out. The officers saw the defendant walking away from the Chelidze's apartment building and detained him. When they searched his pockets, they found them stuffed full of the khinkali he had stolen from the Chelidze's kitchen.

When the Chelidze's and the police inspected the Chelidze apartment a short time later, they determined that the defendant had gotten into the apartment by breaking a window latch and climbing into the kitchen window.

Let us now take these facts and apply the law of burglary to them. As you recall, the first element of burglary is entry into a residence. The Chelidze's apartment was a "residence" and the defendant entered it by breaking and climbing through the kitchen window. This element has been met.

The second element of burglary is that the defendant appropriate another's property. He certainly did that here. He stuffed the Chelidze's khinkali his mouth. He stuffed more into his pockets and he walked away.

The third element of burglary is taking the property with the intent to appropriate, or permanently deprive. Now of course it is impossible to open up a person's head and look inside to see what he is thinking, so the element of intent must be proven by circumstantial evidence.

What is the circumstantial evidence which proves the defendant's intent to steal in this case? First, the evidence shows that he broke into the Chelidze home at 1:00 in the morning. Second, when he got into the home he helped himself to the Chelidze's food- stuffing khinkali into his mouth and khinkali into his pockets. Third, when confronted by Mr. Chelidze, he insulted him then fled the scene of the crime. The only reasonable conclusion that can be drawn from these facts is that the defendant entered the apartment to take things that did not belong to him; in other words, to steal.

Now, the defendant, in an effort to avoid responsibility for the crime, told you a preposterous story about being so drunk he thought the apartment was his own. He lost his key he said, and had to break the window to get in. I suppose such a thing is possible. We have all heard stories about individuals being so drunk they wander into other people's homes thinking them to be their own. But we know that is not the case here.

Why do we know this? To begin with, when the defendant was confronted by Mr. Chelidze, he didn't tell Mr. Chelidze this. He didn't say, "I'm sorry I've got the wrong house." He didn't say, "I'm confused. Is this my house?" No, he didn't do either of these things. What he did was call Mr. Chelidzea a "jerk" and run away. His behavior is consistent with the behavior of a thief, not of a person who has made a foolish mistake.

Second, the defendant stuffed khinkali into his pockets. Let me ask, is a man who believes himself to be returning for the night to his own home, standing in his own kitchen, going to stuff whole handfuls of his own khinkali into his pockets? Of course not. If he wants to eat khinkali, he'll eat them one at a time, sitting down at table, standing up, wherever, but he isn't going to stuff handfuls into his pockets. No, the defendant grabbed those khinkali "to go." He was in the process of stealing what he could before he made his escape.

Third, there is no evidence that the defendant even tried to get in by the front door. The Chelidze's didn't hear anyone yelling to get in; they didn't hear any pounding at the front door. The evidence indicates that the defendant crept up to the kitchen window, saw it was dark inside, and broke in, period. All of this is the behavior of a thief.

The defendant tried to explain this problem in his story by claiming that he didn't try to get in the front door because he was afraid of being confronted by his wife. Let me ask you this:What is likely to make your wife more

angry, waking her up to open the front door or breaking the kitchen window, climbing in, and then smashing the kitchen crockery? Here again, the defendant's story makes no sense.

Ladies and Gentelmen, the law says that when you, the jurors, are faced with two explanations for an event, one explanation being reasonable and the other being unreasonable, you must reject the unreasonable and accept the reasonable. This is what we ask you do here. The only reasonable interpretation of the reliable evidence presented during trial is that the defendant broke into the Chelidze's home with the intent to steal, and stole.

Your honors, based on the law and the evidence, we ask you to find the defendant guilty of residential burglary.

State vs. David Jashi - Defense Closing Statement

Ladies and Gentelmen, the evidence in this case has shown that on October 4, 2011, my client, David Jashi, entered the Chelidze's home thinking it was his own home. He was drunk, extremely drunk, and he didn't know the difference between the Chelidze's apartment and his own. It was a stupid mistake not a crime. It is just as simple as that.

Of course this reflects poorly on Mr. Jashi. He is not proud of it. He knows how weak and pathetic that makes him look in your eyes. Both he and his wife testified plainly and openly about his drinking problem. You found out that this was not the first time that David had gotten so drunk he did not know where he was. His wife told you it had happened at least twice before. The evidence has shown that Mr. Jashi has a drinking problem, a big one. It

has not shown that he is a thief.

The Prosecutor in his closing argument spent some time talking about the issue of intent. This of course was quite proper since intent is the main issue in the case. The Prosecutor also spent time giving his opinions about what is reasonable and unreasonable. Here again, he was quite correct in raising the concept, I would however disagree with his interpretation of the facts and the conclusions he has asked you to reach.

When Mr. Jashi testified he told you this. After work, he went to a bar with some colleagues to talk and drink. He started out drinking beer, then vodka, and then later switched to beer again. He became intoxicated. He remembers that people came and went from the table. After a time, he remembers only a jumble of noise and a swirl of faces. He vaguely recalls leaving the bar to go home. He next has a fuzzy recollection of standing in a kitchen that he thought was his own. He is not sure how he got there. All of a sudden a man appears waving a purple umbrella in his face. The next thing that he clearly remembers is sitting in the back of a police car needing to go to the bathroom.

The Prosecutor has loudly proclaimed the defense explanation of events as "unreasonable." It is unreasonable he says for a man to break into the window of what he believes to be his own home when he could have come in the front door. It is unreasonable the prosecutor says for a man to stuff khinkali into his pockets for later consumption rather than eat them there on the spot. Perhaps this might be true if applied to the behavior of a sober man. But Mr. Jashi was drunk. Drunken men do not always act reasonably. They frequently act unreasonably. This is because the alcohol impairs their reason. It impairs their decision-making ability. We all know this- either from observing others, or from our own personal experience.

Your Honors, I will say this is as simply as I can, it is reasonable to expect

a drunken man to act unreasonably.

Mr. Jashi didn't bang on the front door and try to wake up his wife because in his drunken state it seemed a better idea to go in through the kitchen window. He stuffed the khinkali in his pocket because it seemed a better idea than eating them there on the spot. It seemed reasonable to a man who was drunk.

If Mr. Jashi's testimony alone was not enough to convince you that did not enter the apartment to steal, you should consider the evidence that supports his version of events. There is plenty of it.

First, both of the police officers that detained Mr. Jashi testified that he smelled like alcohol and appeared to be under the influence of alcohol.

Second, you heard testimony from David's wife that she and David lived only two blocks away from the Chelidze's in an apartment house that looked very much like the Chelidze apartment house. Moreover, the outside of their kitchen window looked very similar to the window area outside the Chelidze's apartment. In fact, Mrs. Jashi brought a picture of their window and you had an opportunity to compare it to a picture of the Chelidze's' window. You saw they looked very similar. From these facts you should draw the conclusion that it was not so unreasonable *for a man in Mr. Jashi's condition* to have mistaken the Chelidze's' apartment for his own.

Third, Mr. Chelidze discovered Mr. Jashi in the kitchen doing… what? Eating! If Mr. David's intent was to steal the Chelidze's valuables why did he waste time stuffing khinkali into his mouth and into his pockets? A thief would have gone right for the Chelidze's valuables –the money, the jewelry, the electronics. Instead, it was just khinkali.

Fourth, and this a point where the Prosecutor failed to mention all the facts

during his closing statement, when Mr. Chelidze confronted Mr. Jashi, Mr. Jashi said, "Who are you, you jerk?" He asked who Mr. Chelidze was …because he didn't know who Mr. Chelidze was. He was wondering what Mr. Chelidze was doing in *his* kitchen. This is exactly the statement you would expect the drunk and confused Mr. Jashi to make. I'm sure he regrets calling Mr. Chelidzea jerk, but after all, from Mr. Jashi's intoxicated point of view at the time, a stranger in pajamas had appeared in his kitchen without explanation and was waving an umbrella in his face.

Fifth, and finally, Mr. Jashi did not run away from the scene like a thief would. He *walked* out of the apartment. The police found him a few minutes later, *walking*, not running down the street nearby. This is the behavior of an intoxicated man, not the behavior of a thief.

Our law says, that if you, the judges, are presented with two reasonable interpretations of the same set of facts, you must adopt the interpretation that is favorable to the defense. This approach is absolutely required by our law which gives an accused the presumption of innocence. Mr. Jashi's version of events is not only just as reasonable as the prosecution's version, it happens to be the truth.

Ladies and Gentelmen, Mr. David Jashi has a drinking problem. That is clear. It is a problem that has caused David and his family a great deal of embarrassment and pain. He recognizes that his behavior on that night frightened the Chelidze family and caused them great distress. This he deeply regrets. But he did not intend to harm the Chelidze family. He did not intend to steal from them. He did not commit the crime of residential burglary.

There is no question that David needs to get a grip on his drinking problem. He needs to defeat this demon that has brought such trouble into his life. He told you during his testimony that this arrest has opened his eyes to the

need to break his alcohol habit. He is trying to do this. I ask you Ladies and Gentelmen, not to make this process any more difficult for David by convicting him of a crime he did not commit. I ask you to find him *not* guilty of the crime of residential burglary.

VII. Exercises

TRIAL EXERCISE A

A. An Allegation of Rape

Criminal Prosecution of NIKA BARATELI

FACTUAL BACKGROUND

Nika Barateli is a basketball player for the Dinamo, a professional basketball team. On June 1, 2012, he and several of his team members went to the Zero O'Clock Bar to drink and have fun. They drank beer and watched girls dance.

Nika Barateli and his friends were immediately recognized as famous ball players when they arrived and received a substantial amount of attention from the people in the bar. An hour before the bar closed, one of the waitresses, Natia Urushadze, came over and sat with Nika Barateli and his friends. She told Nika Barateli that she had just gotten off work. She had several drinks with Nika Barateli and talked with him until the bar closed. When it was announced that the bar was closing, Natia Urushadze mentioned that she needed a ride home and Nika Barateli offered to drive her home. Since Nika Barateli had ridden in his friend's car, he asked his friend, David Sturia, if he could borrow the car to take Natia Urushadze home. David Sturia agreed and loaned Nika Barateli his car.

Nika Barateli and Natia Urushadze left the bar at 1:10 A.M. They drove to

Natia Urushadze's home. Nika Barateli asked if could come inside and use the bathroom and Natia Urushadze said it would be fine. When he came out of the bathroom, Natia Urushadze asked him if he would like something to drink. He agreed to do so. She got two beers from the refrigerator and they both sat down in the living room to drink the beer and talk. Eventually, they ended up in Natia Urushadze's bedroom where they engaged in sexual intercourse. Nika Barateli left Natia Urushadze's apartment and returned David Sturia's car. David Sturia lived next door to Nika Barateli so after parking the car in front of David Sturia's house, Nika Barateli walked to his own home.

The following day, late in the afternoon at approximately 4:00 p.m., Natia Urushadze called her friend Tamar Tereteli, and told her that Nika Barateli had raped her the night before. Tamar Tereteli immediately came to Natia Urushadze's home. Natia Urushadze was crying and told her again that Nika Barateli had raped her and showed Tamar Tereteli the bruises on her arms where she said Nika Barateli had held her down. When Tamar Tereteli asked why it had taken so long to call her, Natia Urushadze said that she was worried about what her husband might think when he returned from his business trip next week. After discussing the facts with Natia Urushadze, Tamar Tereteli convinced Natia Urushadze to call and report the incident to the police.

Officer Shalva Beridze arrived and took the report as well as photos of the bruises on Natia Urushadze's arms. Natia Urushadze told Officer Shalva Beridze that she had met Nika Barateli at the bar and that he had offered her a ride home. She said that she had been drinking that night but could not remember how much she had to drink. Natia Urushadze said that Nika Barateli had asked if he could come into the house to use the bathroom and that she had agreed. After Natia Urushadze entered the apartment, she offered him a beer and they both sat down on the sofa in the living room while they drank their beers and discussed basketball and dancing. Natia Urushadze

said that after sitting on the sofa and talking, Nika Barateli tried to kiss her. She pushed him away and he got mad. He grabbed her and when in an effort to get away, she ripped the pocket of his shirt. She remembered that he was wearing a blue cotton shirt with the pocket on the left side. He picked her up by the arms and carried and pushed her into the bedroom. He took off her clothes and had intercourse with her. She tried to struggle at first and told him to stop but he was too strong and she stopped struggling because she was afraid of being hurt. In the struggle, a lamp fell and broke. She said that Nika Barateli left the apartment about 3:00 a.m.

Officer Shalva Beridze interviewed Tamar Tereteli. Tamar Tereteli told him that when she arrived at Natia Urushadze's house, Natia Urushadze was hysterical. Her hair was a mess and her eyes were red. She was crying and could hardly relate the events that had taken place. She said that Natia Urushadze did not say anything about how much she had to drink but did mention ripping Nika Barateli's shirt. She said that she had known Natia Urushadze and her husband for many years and that they had been happily married for six years. She told Officer Shalva Beridze that until today, she had never seen bruises on Natia Urushadze's body.

Nika Barateli was arrested the next day. Officer Shalva Beridze interviewed Nika Barateli. He told Shalva Beridze that he left the bar with Natia Urushadze that night at 1:10 a.m. He arrived at her home at 1:30 a.m. and she invited him in. He told Shalva Beridze that he never asked to go inside to use the bathroom but that once inside, he did use the bathroom. He told Shalva Beridze that after using the bathroom, he had a beer and talked to Natia Urushadze. He said that having intercourse was Natia Urushadze's idea and that he agreed. He claimed that the sex was consensual. He said that after having intercourse, they talked for awhile and eventually fell asleep. He left her apartment at around 6:00 a.m. He never noticed any bruises on her arms. He said that he was wearing a blue cotton shirt. He admits that the pocket on the shirt is now torn but he does not remember how it came to be

torn. He told Shalva Beridze that he never struggled with Natia Urushadze and that the lamp was accidentally knocked to the floor while they were making love.

Officer Shalva Beridze interviewed David Sturia who said that he has known Nika Barateli four years. They have played on the same basketball team for all thattime. He and Nika Barateli were good friends. He admitted loaning his car to Nika Barateli to take Natia Urushadze home. He remembers that he heard the bark of a dog and the sound of a fence door opening around 6:30 a.m. although he did not look at the clock. When he looked out the window he saw Nika Barateli returning to his own home. Later that morning, Nika Barateli gave him his keys back and said that he had a "great time" with Natia Urushadze. David Sturia did not notice if Nika Barateli's shirt was ripped.

Officer Shalva Beridze noted that David Sturia lived at Kekelidze Street and that this location was about 10 kilometers from Natia Urushadze's home and the driving time would be about 20 minutes between David Sturia's and Natia Urushadze's.

Statement of Case

Nika Barateli has been charged with a violation of Georgian Criminal Code article137, Rape. He has entered a plea of not guilty.

Witnesses

Prosecution: Natia Urushadze, Tamar Tereteli

Defense: Nika Barateli, David Sturia

Exhibits

Diagram of area

Photo of bruises

Blue shirt with ripped pocket

Photo of broken lamp

POLICE REPORT

Person arrested: Nika Barateli

Charge: Rape, Georgian Criminal Code Article 137

Date of Arrest: June 3, 2011

Date of Incident: June 2, 2011

Description of Incident: On June 2, 2004, at 5:10 p.m., I received a call from dispatch regarding the report of a rape. I proceeded to Gldani District where I spoke to Natia Urushadze and her friend, Tamar Tereteli. Natia Urushadze advised me that Nika Barateli, a basketball player with the Dinamo professional basketball team had taken her home early that morning. She said that Nika Barateli had asked to enter her residence to use the rest room and she let him in for that purpose. Inside she and Nika Barateli had a beer and sat on the sofa in the living room to discuss basketball and dancing. Nika Barateli tried to kiss her but she pushed him away. He got mad at her and grabbed her. She tried to get away and ripped his blue shirt in the process. He then picked her up and took her into the bedroom where

he took her clothes off and had intercourse with her. She tried to struggle and told him to stop but he was too strong so she eventually stopped struggling because she was afraid of getting hurt.

Natia Urushadze had bruises on her arms which she said were the result of the struggle. I photographed the bruises.

Natia Urushadze stated that she worked as a waitress and first met Nika Barateli on the evening of June 1 when she working at the Zero O'Clock Bar. When she finished her shift she sat down with Nika Barateli and had some drinks. He asked her if she needed a ride home and she accepted. They left the bar around 1:15 a.m. She said that she didn't report the incident immediately because she was worried about what her husband, Revaz Turtumia, would think. Revaz Turtumia was out of the city on a business trip.

Tamar Tereteli said that she was a friend of Natia Urushadze's and that she had received a telephone call from Natia Urushadze around 4 p.m. on June 2 asking her to come over. When she arrived, Natia Urushadze was very upset. Her hair was a mess and her eyes were red. Tamar Tereteli described her as being hysterical. Tamar Tereteli told her that she had been raped by a basketball player named Nika Barateli. Tamar Tereteli convinced Natia Urushadze that she should call the police and report what happened.

Arrest and subsequent investigation:

Nika Barateli was arrested on June 3, 2004 at his residence. After being advised of his rights he gave a written statement which is attached to this report.

David Sturia was also interviewed. His written statement is also attached.

A diagram showing the respective locations of the Natia Urushadze's

apartment and Nika Barateli's residence is also attached. It is 10 kilometers from Natia Urushadze's house to Nika Barateli's residence and the driving time is approximately twenty minutes.

Dated June 4, 2011

Police Officer Shalva Beridze

STATEMENT OF NIKA BARATELI

Person arrested: Nika Barateli

Charge: Rape, Georgian Criminal Code Article 137

Date of arrest: June 4, 2004

Date of incident: June 2, 2004

I, Nika Barateli, declare that I have been advised of my rights. I understand those rights and make the following statement voluntarily.

I live at Kekelidze Street. I work as a professional basketball player for the Dinamo.

On June 1, 2004, I went with several members of my team to the Zero O'Clock Bar to relax. It was the first time I had been there. I drank some beer with my friends and watched some girls dance.

I had a couple of drinks during the evening. Just before the bar closed, one of the waitresses came over and sat down at our table next to me. She introduced herself as Natia Urushadze. I bought her a drink and watched the

last dance. Later on she mentioned she needed a ride home and I told her I would see if I could borrow a friend's car. I borrowed a car from David Sturia and took her home.

When we arrived at her place I asked her if I could use the bathroom and she said O.K. We had a couple of beers at her place and she began to act like she wanted to be physical with me. I didn't resist and eventually we ended up in the bedroom where we had intercourse. She never asked me to stop nor did she resist in any way. I didn't force her to have sexual intercourse with me. I saw some bruises on her arms but she said that they were caused by her arms hitting something when she was dancing. There was not a struggle and nothing was broken inside her flat.

We eventually fell asleep. I woke up and left her house around 6:00 a.m. Then I arrived at my place, returned the car to my friend David Sturia and went to my house to take a nap.

I was wearing a blue cotton shirt that evening. The pocket was a little bit torn. I have no idea how and when it was torn but I'm sure that it is not from the struggling of Natia Urushadze. I gave my shirt to Officer Giorgi Tsurtumia. I have several shirts like this one.

My statement is true and correct.

Nika Barateli

STATEMENT OF DAVID STURIA

I, David Sturia, voluntarily declare that:

I live at Kekelidze Street. Nika Barateli is my neighbor. I am acquainted with him. I have known him for four years and we both play basketball for the same team. I consider him to be a close personal friend.

On June 1, I went with Nika Barateli and some other team members to a bar named Zero O'Clock to relax. Nika Barateli rode with me in my car. We had a few drinks and watched girls dance.

Many of the spectators recognized us and people were constantly coming over to our table to talk or buy us drinks. Just before the final dance one of the waitresses, Natia Urushadze, came over to our table. She sat down and started to talk to Nika Barateli. I didn't pay much attention.

Later, Nika Barateli asked if he could borrow my car to take her home. I loaned him my car and got a ride with one of the other guys.

The sound of a dog's bark and the fence door opening woke me up and I saw Nika Barateli coming. It was about 6:00 a.m. the next morning. Nika Barateli returned me the keys and went to his house. He was wearing a blue cotton shirt.

I declare under penalty of perjury that this statement is correct.

David Sturia

Pre-trial hearing

July 10, 2011

Testimony of Natia Urushadze

Direct Examination:

Q: Please state your name.

A: Natia Urushadze.

Q: Where do you reside?

A: The Gldani District.

Q: How are you employed?

A: I work as a waitress at the Zero O'Clock bar.

Q: How long have you been employed there?

A: About 5 or 6 years.

Q: Were you working at the Zero O'Clock Bar on June 1, 2011?

A: Yes. I was working that evening.

Q: Did you meet someone by the name of Nika Barateli that evening?

A: Yes.

Q: Do you see him here in court today?

A: Yes.

Q: Could you tell us where he is seated and what he is wearing today?

A: He is sitting at the table to my right wearing a red shirt.

Q: May the record indicate that the witness has identified the defendant Nika Barateli?

The Court: Yes.

Q: Did you know Mr. Nika Barateli before you met him that evening?

A: No.

Q: How did you meet him?

A: After I finished my work I was asked by a group of basketball players to sit at their table. I went over and was introduced to Nika Barateli and we started talking about basketball and dancing.

Q: Did you later obtain a ride home from Nika Barateli?

A: Yes.

Q: How did that occur?

A: During our conversation I told him my car was being repaired and he said he would borrow a friend's car and take me home.

Q: What time did you leave the bar?

A: It was just after 1:00 a.m.

Q: Did you go right to your house?

A: Yes.

Q: What happened when you arrived?

A: Nika Barateli asked if he could come in to use the bathroom and I said, "Sure."

Q: What happened next?

A: He came in and after he went to the bathroom I asked him if he wanted a beer. He said, "Yes." Then we sat on the sofa drinking beer and talking about basketball and dancing.

Q: What happened then?

A: After we had talked for a while, he tried to kiss me. I told him I was married and asked him to stop.

Q: Did he stop?

A: No. He got mad and grabbed me.

Q: What did you do?

A: I tried to get away and in the process I ripped his blue cotton shirt. Then he really got mad. He picked me up and carried me into the bedroom. I tried to struggle, but he was too strong.

Q: What happened when you got in to the bedroom?

A: He took my clothes off and raped me.

Q: Did he put his penis in your vagina?

A: Yes.

Q: Did you consent to this?

A: No.

Q: What happened after he raped you?

A: He got up, put his clothes on and left.

Q: Were you hurt in any way?

A: I had bruises on my arms where he held me down.

Q: I now show the court what has been marked for identification as prosecution's Exhibit 1. Do you recognize it?

A: Yes. It's a photo of the bruises on my arms.

Q: Is it a true and accurate representation of the way your arms looked that night?

A: Yes.

Q: We offer Exhibit 1 into evidence.

The Court: Is there any objection from the defense?

A: No.

The Court: It will be received.

Prosecutor: No further questions.

Cross Examination

Q: On the evening of June 1, did you have anything to drink at the bar?

A: Yes. I had two or three glasses of beer.

Q: When Mr. Nika Barateli offered you a ride home, did you accept?

A: Yes.

Q: You accepted a ride home even though you had just met him a couple of hours earlier, is that correct?

A: Yes.

Q: You knew at that point that he played basketball for the Dinamo?

A: Yes.

Q: When you serve drinks at the bar do you occasionally get bumped by the customers?

A: No, not really.

Q: Are you ever bruised on your arms?

A: Maybe, sometimes.

Q: Who was the first person you told about this incident?

A: Tamar Tereteli.

Q: Isn't it true that you didn't tell her about the incident until 4 p.m. the next day?

A: Yes.

Q: Did anything else happen when Mr. Nika Barateli was at your residence that you did not tell us about?

A: No.

Defense: No further questions.

Prosecutor: No questions.

(Pre-trial hearing)

July 10, 2011

Testimony of Tamar Tereteli

Tamar Tereteli testified as follows:

Direct Examination

Q: Please state your name?

A: Tamar Tereteli.

Q: How are you employed?

A: I work as a waitress at the Zero O'Clock Bar.

Q: How long have you worked there?

A: Seven years.

Q: Are you acquainted with Natia Urushadze?

A: Yes. I have known Natia Urushadze for about six years. We are good friends and work together.

Q: Directing your attention to the afternoon of June 2, did you have the opportunity to see Natia Urushadze?

A: Yes. She called about four in the afternoon asking me to come over to her place.

Q: Did you do that?

A: Yes.

Q: What did you see when you got there?

A: Natia Urushadze was very upset. She was crying and her eyes were red. She was shaking so she could hardly talk to me.

Q: What if anything did she tell you?

A: She said a basketball player named Nika Barateli had raped her.

Q: Did she tell you how it occurred?

A: Yes. She told me that he had given her a ride home and had come in to

use the bathroom. Once he was inside he attacked her. She said she tried to resist but he was too strong.

Q: Did she tell you how it had occurred?

A: Yes. She said it took place in the early morning hours around 2:30 a.m.

Q: I show you now a photograph that has been introduced into evidence as Exhibit 1. Do you recognize this photo?

A: Yes. It shows the bruises I saw on Natia Urushadze's arms.

Q: Have you ever received bruises on your arms or legs working as a waitress?

A: Sometimes, maybe.

Q: Could you tell me how it happens?

A: While serving drinks all night in a crowded bar you can get bumped and pushed. It's a pretty small place.

Q: Do you have an opinion on whether or not the bruises on her arms were caused by being bumped by customer?

A: Yes. They were not caused by bumping into customers.

Q: Did you ask Natia Urushadze why she had waited so long to call someone?

A: Yes. She said that she didn't want her husband to find out.

Q: Did she want to call the police?

A: Not initially but I convinced her that she should report it.

Prosecutor: No further questions.

Cross-Examination

Q: Do you consider yourself a close friend of Natia Urushadze's?

A: Yes.

Q: Are you acquainted with her husband, Revaz Turtumia?

A: Yes. I have known him ever since I've known Natia Urushadze.

Q: Have you ever seen him become angry because he thought Natia Urushadze was flirting with another man?

A: Well, one time we had a customer named Zaza who seemed be paying a lot of attention to Natia Urushadze. When her husband heard about it, he was furious and threatened to make Natia Urushadze quit her job. Shortly after that Wu stopped coming to the bar and the incident was forgotten. That's the only time.

Q: Was Natia Urushadze reluctant to call the police?

A: Yes.

Q: Did you convince her to call the police?

A: Yes. It took me almost an hour to convince her.

Q: Did she say how much she had to drink?

A: She said she had several glasses of beer and was feeling a little drunk.

Q: Did she mention anything about his shirt?

A: Yes. She said she ripped his shirt when she was struggling against Nika Barateli.

Defense: No further questions.

Prosecutor: No questions.

B. Love Triangle - Assault with a Deadly Weapon

Criminal Prosecution of Nino Sartania

FACTUAL BACKGROUND

"Buda" is a bar in Kutaisi. Nino Sartania and her boyfriend, Erekle Narmania, have been regular customers at the bar for the last two years and frequent the bar at least two to three times a week to drink beer and dance. On March 2, 2011Nino Sartania and Erekle Narmania got in an argument at the bar about who was responsible for paying the current rent and utilities at the apartment they share. After the argument, Erekle Narmania and Nino Sartania didn't speak to each other that night and Erekle Narmania spent the rest of the evening with Tamar Gamtsemlidze, a newcomer at the bar.

The next week Nino Sartania and Erekle Narmania split up and Erekle Narmania moved in with Tamar Gamtsemlidze. All three individuals continued to visit the bar. Nino Sartania was upset as a result of the break up.

On April 13, 2011, Tamar Gamtsemlidze, Erekle Narmania and Nino Sartania were at Buda drinking and dancing. Shortly after 11 o'clock, Tamar Gamtsemlidze excused herself to go the ladies' room. While in the ladies' room she realized that she didn't have her lipstick and went outside to the parking lot. In the parking lot she confronted Tamar Gamtsemlidze and the two began to shout and yell at each other. During the confrontation, Nino Sartania pulled out a knife and put a deep slashing cut in Tamar Gamtsemlidze's left arm.

When the argument in the parking lot started, Shalva Jokhadze, the bartender, was outside unloading beer kegs and he observed the confrontation and struggle. During the struggle Erekle Narmania ran out and also saw part of the incident. Shalva Jokhadze was on the southeast corner of the loading

dock when he observed the incident. This location was approximately 100' away from the struggle.

Shalva Jokhadze and Erekle Narmania separated the two women and someone called the police and an ambulance. Tamar Gamtsemlidze was taken to the hospital where her arm was cleaned and sutured with thirty stitches. Officers Zaza Nioradze and Nana Vadakharia arrived and placed Nino Sartania under arrest. Officer Vadakharia took statements from Shalva Jokhadze, Erekle Narmania and Nino Sartania at the scene and she also recovered the knife used by Nino Sartania. After completing their investigation at the scene, Officer Zaza Nioradze took Nino Sartania to jail while Officer Vadakharia proceeded to the hospital where she spoke with Tamar Gamtsemlidze and took photos of her injury.

Tamar Gamtsemlidze will testify that she went to the parking lot to obtain her lipstick from the car and just before she reached the car she heard her name being called. She turned to see Nino Sartania coming out of the bar. Nino Sartania came up and started yelling her of stealing Erekle Narmania. When she started to walk away, Nino Sartania spun her around and pulled out a knife. Nino Sartania started swinging the knife wildly and Tamar Gamtsemlidze began to scream. Nino Sartania came closer and slashed her left arm. She will also testify she didn't touch Nino Sartania in anyway before she was cut and didn't mace her.

Nino Sartania will testify that she followed Tamar Gamtsemlidze out of the bar because she wanted to talk to her about Erekle Narmania. When she tried to have a conversation with Tamar Gamtsemlidze, she started yelling and using profanity. Tamar Gamtsemlidze told her to "get lost" and when she refuse to leave, Tamar Gamtsemlidze grabbed a can of Mace from the car and maced her. She was temporarily blinded and before she could recover Tamar Gamtsemlidze placed her in a headlock. Nino Sartania will testify she was being chocked and couldn't breathe. She was on the verge

of passing out when she pulled out her knife and cut Tamar Gamtsemlidze's arm in self-defense. She stated she carries the knife strapped to her leg under her jeans.

Shalva Jokhadze will testify that after the breakup Nino Sartania told him she was very upset but he cannot recall the exact words she used. He will also testify that he was in the parking lot unloading beer kegs when he heard the argument and the foul language. The parking lot was well lighted and when he looked in the direction of the argument he saw that Tamar Gamtsemlidze had Nino Sartania in a headlock. He then saw Nino Sartania pull out a knife and slash Tamar Gamtsemlidze's arm. Tamar Gamtsemlidze immediately released Nino Sartania and Nino Sartania backed away. He ran over to break up the fight and provide assistance. When he arrived She's arm was bleeding profusely and he yelled for someone to call an ambulance. He will also testify he observed Erekle Narmania drink 7-8 beers that evening and in his opinion Erekle Narmania was under the influence of alcohol.

Erekle Narmania will testify that he was in the bar when he heard the yelling and he ran outside immediately. When he entered the parking lot he saw Nino Sartania swinging the knife wildly and saw her cut Tamar Gamtsemlidze's arm. He heard Nino Sartania yell, "You want some more bitch?" He saw Shalva Jokhadze arrive at that point to break up the fight. He also stated that during the time he had been living with Nino Sartania he had seen her in two other fights and on one occasion she had used her knife to cut the girl she was fighting with. Nino Sartania had advised him several times that she would "cut up anyone who tried to take her man."

STATEMENT OF THE CASE

Nino Sartania has been charged with a violation of Criminal Code article 117, assault with a deadly weapon. She has entered a plea of not guilty.

WITNESSES

Prosecution: Tamar Gamtsemlidze, Erekle Narmania

Defense: NINO SARTANIA, Shalva Jokhadze

EXIBITS

Diagram of parking lot

Knife

Phone of injury

A can of mace

ADDITIONAL ITEMS OBTAINED THROUGH DISCOVERY

Preliminary hearing transcript

Police report (Parties will stipulate to the admission of the police report)

POLICE REPORT

PERSON ARRESTED: NINO SARTANIA

CHARGE: C. C. 117

DATE OF ARREST: April 13, 2011

DATE OF INCIDENT: April 13, 2011

DESCRIPTION OF INCIDENT: On April 13, 2011 Officer Zaza Nioradze and I were on patrol in the Kutaisi. At 11:45 p.m. We received a call from dispatch advising us of a fight between two females at Buda. Upon arrival we found a woman later identified as Tamar Gamtsemlidze with a deep cut in her left arm. The arm had been wrapped and she was on the ground when we arrived. Within minutes after our arrival the paramedics arrived and transported her to the hospital.

Our initial investigation revealed two witnesses to the incident, Erekle Narmania and Shalva Jokhadze. Both of these individuals were interviewed.

Shalva Jokhadze stated he worked at Buda as a bartender and was in the parking lot unloading beer kegs when he heard an argument with a lot of foul language. He looked over and saw that Tamar Gamtsemlidze had Nino Sartania in a headlock. He then observed Nino Sartania pull out a knife and slash Tamar Gamtsemlidze's arm. Tamar Gamtsemlidze then released Nino Sartania and she backed away. He ran over to break up the fight and provide assistance. When he arrived Tamar Gamtsemlidze's arm was bleeding profusely. He took out a handkerchief and applied pressure to the wound. He also called for someone to phone for help.

Shalva Jokhadze said Nino Sartania was a regular customer at the bar and

was living with Erekle Narmania until about six weeks ago when they broke up. Shalva Jokhadze said that Erekle Narmania's new girlfriend was the victim, Tamar Gamtsemlidze.

Shalva Jokhadze said he recovered the knife from Nino Sartania after the incident because he was afraid of additional violence. The knife was turned over to us and subsequently impounded. Shalva Jokhadze agreed to provide a written statement.

Erekle Narmania was interviewed and stated he was in the bar when he heard the yelling and ran outside immediately. When he entered the parking lot he saw blood on Tamar Gamtsemlidze's arm and saw Nino Sartania yelling and advancing toward Tamar Gamtsemlidze while swinging a knife wildly. He heard Nino Sartania yell. "You want some more bitch?" Shalva Jokhadze arrived at that point and broke up the confrontation.

Erekle Narmania said he had been living with Nino Sartania for approximately two years before last March. He said they had an argument about living expenses and he had moved out. He said he was now living with Tamar Gamtsemlidze. He said that during the time he was living with Nino Sartania he had seen her in two other fights and on one occasion she had used her knife to cut the girl she was fighting with. He also stated she had advised him on several occasions that she would "cut up anyone who tried to take her man." Erekle Narmania was asked to sign a written statement, but refused saying he wanted to talk to his lawyer before he signed anything.

Nino Sartania was placed under arrest. After being advised of her constitutional rights she gave a statement which is attached.

After completing our investigation at the scene, Office Zaza Nioradze took Blaylock to jail while I proceeded to Kutaisi Community Hospital to interview Tamar Gamtsemlidze. At the hospital I spoke briefly to the doctor

who indicated he had cleaned the wound and sutured it with thirty stitched. I then took pictures of the wound.

Tamar Gamtsemlidze stated she had gone to the parking lot to obtain her lipstick from the car. Just before she reached the car she heard her name being called. She turned and saw Nino Sartania coming out of the bar. Nino Sartania called her a "bitch" and a "whore" and accused her of stealing Erekle Narmania. When Tamar Gamtsemlidze started to walk away, Nino Sartania spun her around and pulled out a knife. Nino Sartania started swinging the knife wildly and Tamar Gamtsemlidze began to scream. Nino Sartania came close and slashed her left arm. Tamar Gamtsemlidze said she may have yelled at Nino Sartania, but she never touched her.

Tamar Gamtsemlidze stated she had three or four beers to drink that night before the incident, but was not drunk. She said she weighs 125 lbs. and is 5'9'' tall.

Erekle Narmania's car had an expired registration and a computer check showed an outstanding warrant for driving under the influence. The car was impounded and a search of the glove compartment revealed a small bindle of cocaine in a woman's purse but no further identification was found in the purse. No additional charges were filed. A can of mace was found in a puddle of water next to the car. Fingerprints could not be lifted from the can.

Date: April 14. 2011 Giorgi Vadakharia

STATEMENT OF SHALVA JOKHADZE

I, Shalva Jokhadze, voluntarily declare that:

I live at 12, Rustaveli Street in Kutaisi. I am 32 years old and am employed as a bartender at Buda in Kutaisi. I have been employed in that position for the past six years.

I have known Erekle Narmania and Nino Sartania since they started coming to Buda four years ago. They are regulars and usually come in two or three times a week to drink beer and dance. Erekle Narmania is a fairly heavy drinker and usually has seven beers generally when she comes in.

Erekle Narmania and Nino Sartania were living together for a couple of years until last March when they broke up. Nino Sartania was very upset and told me she would get even with Erekle Narmania's new girlfriend, Tamar Gamtsemlidze. She said, "I'll get even with that bitch." On the night she made that statement she had five or six beers to drink and I figured it was just the beer talking and didn't think any more about it. Nino Sartania has never caused any trouble at Buda.

Tamar Gamtsemlidze is a newcomer to the bar. I don't know her very well. She seems very quiet, but attracts a lot of attention because of her looks and her dancing. She's a great dancer.

On April 13, I went out to the parking lot to unload a couple of kegs. I heard some arguing and a lot of foul language out in the parking lot. It was dark and it was difficult to see. I saw Tamar Gamtsemlidze grab Nino Sartania and get her in a headlock. Nino Sartania was trying to get free, but Tamar Gamtsemlidze really had a lock on her. I then saw Nino Sartania pull out a knife and slash Tamar Gamtsemlidze's arm. This all happened in a matter of seconds. I ran over to break the fight up. When I got there, Tamar

Gamtsemlidze had released Nino Sartania and was backing away. Nino Sartania seemed to be in a daze. I took the knife and yelled for someone to call an ambulance. Tamar Gamtsemlidze's arm was bleeding badly at that point. I was afraid she might bleed to death. I had her lie down and pulled out my handkerchief to apply pressure to the wound. Erekle Narmania ran up about that time and started yelling at Nino Sartania.

A few minutes later, the police arrived followed by an ambulance. I really don't know how much either Tamar Gamtsemlidze or Nino Sartania had to drink that night. Neither one seemed to be drunk.

I DECLARE UNDER PENALTY OF PERJURY THAT THIS STATEMENT IS TRUE AND CORRECT

Dated: April 13, 2011 Shalva Jokhadze

STATEMENT OF NINO SARTANIA

I, NINO SARTANIA, make the following statement voluntarily.

I reside at 65 Alaverdi Street, Kutaisi. I am currently employed as a checker at Populi's in Kutaisi.

I have known Erekle Narmania for approximately five years. I lived with him for three years prior to our break up last March. We broke up because of a dispute over payment of our living expenses. I was supporting both of us and thought it was time for him to get a job. He had been unemployed for over six months and was making no effort to find a job. When we broke up he moved in with Tamar Gamtsemlidze.

I don't know Tamar Gamtsemlidze, but had seen her at Buda on several occasions. Erekle Narmania and I have been going there for the last four years. We would go three to four times a week to dance and drink beer.

When Erekle Narmania and I split up I was sad, but I never threatened Tamar Gamtsemlidze. I may have made some unkind remarks about her, but I never threatened her. I never said, "I'll get even with that bitch".

On April 13, 2011, I saw Erekle Narmania and Tamar Gamtsemlidze at Buda. I saw Tamar Gamtsemlidze go into the ladies room and then leave the bar. Erekle Narmania had been drinking and I wanted to warn Tamar Gamtsemlidze about him when he gets drunk. I followed her outside. After I called her name, she started yelling at me. I cannot recall the words she utilized. We got into an argument. We started pushing and shoving each other. Tamar Gamtsemlidze grabbed a can of Mace from the car and maced me. I was blinded and Tamar Gamtsemlidze put me in a headlock. I struggled to get loose but I couldn't. I took my knife out with the idea of displaying it so she would let go. I accidentally cut her arm as we continued to wrestle. I was in shock when I saw the blood. I've never cut anyone before. Shalva Jokhadze came over and broke the fight up.

I carry a knife to protect myself. There is a pretty rough crowd at Buda. I've never cut anyone or threatened to cut anyone. I never told Erekle Narmania that I would "cut up anyone who tried to take my man."

I DECLARE UNDER PENALTY OF PERJURY THAT THIS STATEMENT IS TRUE AND CORRECT

Dated: April 13, 2011 NINO SARTANIA

Criminal Prosecution V. NINO SARTANIA

PRELIMINARY HEARING

AUGUST 1, 2011

TESTIMONY OF EREKLE NARMANIA

Erekle Narmania, being duly sworn, testifies as follows:

DIRECT EXAMINATION

Q: Please state your name for the record.

A: Erekle Narmania

Q: Where do you reside?

A: 39 Agmasheneli Street

Q: Are you employed?

A: Yes. I am the manager of "Fast car Repair" company in Kutaisi.

Q: Are you acquainted with the defendant Nino Sartania?

A: Yes. I have known her for five or six years.

Q: Are you acquainted with Tamar Gamtsemlidze?

A: Yes. She is my girl friend and we live together.

Q: On April 13, 2011, did you go to a bar in Kutaisi known as Buda?

A: Yes.

Q: Did anyone go with you?

A: Yes. Tamar Gamtsemlidze and I went together.

Q: Did anything unusual happen on that evening?

A: Yes. Nino Sartania attacked Tamar Gamtsemlidze.

Q: Where did that take place?

A: In the parking lot.

Q: What first brought this incident to your attention?

A: I was in the bar and had just come out of the men's room. I heard a lot of yelling and screaming outside and I ran outside to see what was going on.

Q: Did you recognize the voices of the people yelling?

A: Yes. One of them sounded like Tamar Gamtsemlidze.

Q: What did you see when you got outside?

A: I saw blood on Tamar Gamtsemlidze's arm.

Q: Did either Nino Sartania or Tamar Gamtsemlidze say anything?

A: I don't recall.

Q: What happened next?

A: Shalva Jokhadze, the bartender, ran up and separated the two females. He took the knife away from Nino Sartania and yelled for someone to call an ambulance.

Q: What did you do?

A: I ran to Tamar Gamtsemlidze and tried to comfort her. A few minutes later an ambulance arrived and took her to the hospital and I accompanied her in the ambulance.

Q: Have you ever seen Nino Sartania in fights before April 13?

A: Yes. I saw her involved in two other fights.

Q: When did these occur?

A: There were two to three years ago. I cannot recall the exact date.

Q: Where did they occur?

A: The first was right outside her residence and the second was in the parking lot at Buda.

Q: Did she use a knife in either fight?

A: Yes. In the second fight.

Q: Do you know her to carry a knife?

A: Yes. She carries it strapped to her leg under her Jean vest.

Q: Did you ever hear Nino Sartania threaten to cut anyone with her knife?

A: Yes. On several occasions when we were living together she said she would cut up anyone who tried to take her man.

Q: Was anyone present other than yourself when she made these statements?

A: No.

Prosecutor: No further questions.

CROSS EXAMINATION

Q: You indicated you have known Nino Sartania for five or six years. Is that correct?

A: Yes.

Q: Isn't it true that you were living with Nino Sartania for two years prior to March of 2011?

A: Yes.

Q: Did you and Nino Sartania break up in March?

A: Yes.

Q: Did you move out at that time?

A: Yes.

Q: Did you and Nino Sartania have an argument about sharing expenses before you broke up?

A: Yes.

Q: In fact in March you were unemployed and not contributing at all to the living expenses. Isn't that true?

A: Well, I had been laid off and was looking for a job.

Q: Were you angry with Nino Sartania for tossing you out?

A: Sort of.

Q: On April 13 did you have anything to drink?

A: Yes. I had a couple of beers.

Q: What about Tamar Gamtsemlidze? Did she have anything to drink?

A: She was drinking beer, but I don't know how much.

Q: After you moved out of Nino Sartania's place did you move in with Tamar Gamtsemlidze?

A: Yes.

Q: Did that occur immediately?

A: Yes.

Q: On April 13, before you ran into the parking lot, did you hear yelling and screaming?

A: Yes.

Q: Were these female voices?

A: Yes.

Q: Did you recognize the voices?

A: I recognized Tamar Gamtsemlidze's voice.

Q: Do you remember what she was yelling?

A: No.

Q: Do you remember what the other person was yelling?

A: No.

Q: Do you recall either person using foul language?

A: Yes. I think Nino Sartania was, but I don't remember what she was saying.

Q: When you went outside was Tamar Gamtsemlidze's arm already bleeding?

A: Yes.

Q: So you didn't see any of the events before she was cut. Is that correct?

A: Yes. That is correct.

Q: Was there a lot of yelling and shouting when you went into the parking

lot?

A: Yes.

Q: Was Shalva Jokhadze shouting?

A: Yes.

Q: Was Tamar Gamtsemlidze shouting?

A: Yes.

Q: Was Nino Sartania shouting?

A: Yes.

Q: Was it difficult to hear who was saying various things?

A: Sort of.

Q: At anytime when you were in the parking lot did you yell at Nino Sartania?

A: No.

Q: Have you discussed this incident with Tamar Gamtsemlidze?

A: Yes.

Q: How many times?

A: Three or four.

Q: Isn't true you dislike Nino Sartania?

A: Yes.

Defense: No further questions.

Prosecution: No further questions.

Criminal Prosecution of NINO SARTANIA

PRELIMINARY HEARING

AUGUST 1, 2011

TESTIMONY OF TAMAR GAMTSEMLIDZE

Tamar Gamtsemlidze, being duly sworn, testified as follows:

DIRECT EXAMINATION

Q: Please state your name for the record.

A: Tamar Gamtsemlidze

Q: Where do you currently live?

A: 39 Argmasheneli Street in Kutaisi.

Q: How are you employed at the current time?

A: I work as a dental technician.

Q: Directing your attention to the date of April 13, 2011, did you have occasion to go to a bar known as Buda?

A: Yes.

Q: Where is Buda located?

A: It is on Kutaisi East Road in Kutaisi.

Q: Were you accompanied by anyone?

A: Yes, I went with my boyfriend, Erekle Narmania.

Q: What time did you arrive?

A: About 9:30 or 10:00 p.m.

Q: Did anything unusual happen to you that evening?

A: yes, Nino Sartania attacked me.

Q: Where did this occur?

A: In the parking lot.

Q: What were you doing before you entered the parking lot?

A: I had gone to the ladies room around 11 and I realized I had left my lipstick in the car. I went outside to the car to get my lipstick and I heard someone call my name. I turned around and saw Nino Sartania calling my name.

Q: Do you see Nino Sartania here in the court today?

A: Yes.

Q: Please point her out and tell us what she is wearing.

A: She's to my right wearing a red dress.

Q: May the record indicate the witness has identified the defendant?

The Court: The record will so indicate.

Q: What was she yelling?

A: I don't recall.

Q: What did you do?

A: I turned around and told her to leave.

Q: What happened next?

A: She came up and said she wanted to talk about Erekle Narmania. I told her there was nothing to talk about and tried to walk away. She continued to yell and shout.

Q: Did you respond?

A: Yes. I pushed her away.

Q: Why did you do that?

A: She appeared to be drunk, so I figured the best thing to do was to leave

and go back into the car. I started toward the bar but she grabbed me and spun me around.

Q: Had you touched her in anyway before she spun you around?

A: Only a slight push.

Q: What happened next?

A: She pulled out a knife and started swinging it around.

Q: What did you do?

A: I screamed and tried to back away, but she cut my left arm. After that the bartender, Shalva Jokhadze, arrived and broke us apart.

Q: I show you now what has been marked as Exhibit 1, do you recognize it?

A: Yes, that is the knife I was cut with.

Q: Before she cut you did you threaten her in anyway?

A: No.

Q: Did you require medical attention for the gash?

A: Yes. I was taken to the hospital and thirty stitches were required to close the gash in my arm.

Q: I show you what has been marked for identification as Exhibit 2. Do you recognize this photo?

A: Yes. That is a photo of my arm after it was treated by the doctor.

Q: Is it a true and accurate representation of what your arm looked like at that time?

A: Yes.

Prosecutor: Your honor, we offer Exhibits 1 and 2 into evidence at this time.

Court: Any objection?

Defense: No.

Court: They will be received.

Prosecutor: No further questions.

Court: Cross-examination.

CROSS EXAMINATION

Q: How long have you known Erekle Narmania?

A: Since March of 2011.

Q: Is he living with you at the present time?

A: Yes.

Q: Did you know Nino Sartania before this incident?

A: I had seen her at Buda, but I really didn't know her.

Q: You knew she was the former girlfriend of Erekle Narmania, didn't you?

A: Yes.

Q: In fact you took Erekle Narmania away from Nino Sartania, didn't you?

A: No.

Q: Did you have anything to drink on April 13?

A: I had two beers.

Q: When you saw Nino Sartania in the parking lot, didn't you yell at her?

A: No.

Q: At any time in the parking lot did you ever yell or scream at Nino Sartania?

A: No.

Q: Did you ever push or shove Nino Sartania?

A: Only once.

Q: Did you ever grab her?

A: No.

Q: Did you ever have her in a headlock?

A: No.

Q: After Nino Sartania pulled out the knife did she say anything else?

A: Not that I recall.

Q: Have you and Erekle Narmania discussed this case before coming to court today?

A: Yes.

Q: On how many occasions?

A: Just once.

Q: Did you ever mace Nino Sartania?

A: No.

Defense: No further questions.

Prosecution: No further questions.

Acknowledgments

Criminal Trial Advocacy for the Georgian Lawyer book was adapted from a book written by Herbert D. Bowman in 2005 for use by Chinese lawyers and law students. It has been adapted to reflect the Georgian criminal trial reality and to include references to the Georgian Criminal Procedure Code. Chapter 3, Georgia Makes the Change: Trial Advocacy under Georgia's New Code of Criminal Procedure, was written by Giorgi Chkheidze and Herbert D. Bowman specifically for use in this book. All rights to this book and its component parts are reserved by its authors.

The following sources proved invaluable in the preparation of this book:

Chapter I *What is a Fair Trial? A Basic Guide to Legal Standards and Practice,* March 2000, Lawyers Committee for Human Rights

Chapter II Craig M. Bradley, *Criminal Procedure: A Worldwide Study,* 1999 Carolina Academic Press

Chapter IV Thomas Mauet*, Trial Techniques,* 6th Edition, 2002 Aspen Law and Business. The structure and content of the skills section of this book was influenced by Mauet, a standard text for law students and trial practitioners in the United States.

Chapter V Honorable Max Amos & Jeffrey A. Joseph, *Trial Materials for Trial Practice, Millennium Edition.* The mock trial problems provided in this book were based upon factual scenarios presented in *Trial Materials for Trial Practice.*

Annex A International Fair Trial Standards

Traditionally, the procedures used to adjudicate criminal offenses in legal systems around the world have been considered a purely national affair, not the subject of international attention or normative development. This has changed in recent years. International bodies such as the United Nations as well as a host of other governmental and nongovernmental institutions have argued that certain individual rights - human rights, are universal and that the procedures needed to protect these rights should be implemented universally; that is, they should be implemented by every international and domestic justice system. These arguments have led to the development of a set of generally accepted rights and guarantees or "fair trial standards" that many argue should be applied to every criminal case, be it international or domestic.

International courts such as the European Court of Human Rights, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court (ICC), have given strength to this argument of universality by adopting these fair trial standards as part of their legal and procedural structures and employing them to adjudicate some of the world's most notorious criminal cases.

Why are these international standards relevant to Georgian lawyers? For starters, Article 6 of the Georgian Constitution operates to establish a "monist" legal regime[31] under which any international treaties ratified by the Georgian government immediately become Georgian national law.[32] Georgia has ratified many of the international treaties that form the foundation

[31] In States with a monist legal system, international law does not need to be translated into national law and the act of ratifying an international treaty immediately incorporates that international law into national law.

[32] Constitution of Georgia, Article 6, section 2 states, "The legislation of Georgia shall correspond to universally recognized principles and rules of international law. An international treaty or agreement of Georgia unless it contradicts the Constitution
of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts."

of the international fair trial standards so these treaties and standards are in effect, Georgian law. Moreover, in recent years Georgian judges have been using international law to provide legal justification for their judgments and consequently, Georgian lawyers should be prepared to use international law to influence those judgments and better represent their clients. Additionally, more and more Georgian lawyers are finding themselves appearing in front of various types of international tribunals and a solid understanding of international law and international standards is essential to their success.

This chapter will describe the essential elements of the emerging international fair trial structure, focusing most of its attention on those fair trial rights most likely to be raised in the context of the criminal court trial and having most impact on trial advocacy, namely: the right of the parties to be treated equally in the trial process ("equality of arms"); the right to call and examine witnesses; and the right to have adequate time and facilities to prepare a defense. It should be pointed out that these particular fair trial rights also represent essential elements of the "adversarial trial process" which were discussed in the book.

The Universal Declaration and the ICCPR

It could be said that the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights (ICCPR) are the foundational documents upon which the international fair trial structure is built.

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted in 1948. Georgia joined the UN in 1992 and formally ratified the UDHR in1991. Many international legal scholars believe that the Declaration is a type of

international human rights "constitution" that through its wide international acceptance has become customary international law and therefore binding on all states. Some of the Articles listed in the Declaration directly address the rights of the criminally accused in trial. These Articles are as follows:

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any charge against him.

Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense…

The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was adopted by the United Nations General Assembly in December 1966 and entered into force in March 1976. Georgia ratified the ICCPR in 1994 and its optional protocol in1994, thus establishing direct enforceability of the treaty in Georgian legal proceedings.

The ICCPR recognizes the Universal Declaration's fair hearing, public trial, presumption of innocent, and in Article 14 section 3, lists certain "minimum guarantees" to which every accused is entitled. These guarantees include:

- The right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his choosing. (Art. 14 (3) (b))

- The rights to be tried without undue delay. (Art. 14 (3) (c))

- The right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. (Art. 14 (3)(e))

European Convention on Human Rights (ECHR)

The European Convention on Human Rights and Fundamental Freedoms (ECHR) adopted by the Council of Europe in 1950 became legally binding upon Georgia in 1999 after it joined the Council of Europe and ratified the instrument. Since then, the ECHR and the jurisprudence coming from the European Court of Human Rights (ECtHR) have had a direct and substantial influence upon the development of the Georgian legal system.

The ECHR addresses fair trial rights in two of its articles: Article 5, the right to freedom and physical security; and Article 6, the right to a fair trial. Article 5 and the jurisprudence of the European Court of Human Rights which has applied and interpreted the article, provide guarantees for pre-trial detention and bail.[33] Article 5 and its jurisprudence demand that the arrest and detention of a suspect must be lawful and in accordance with procedures prescribed by law. Article 5 requires that the authorities must possess a *reasonable suspicion* that a person committed an offence to make an arrest and they must inform the arrestee of the reasons for his arrest and the charges against him.[34] It also recognizes a suspect's conditional entitlement to release pending trial and the right to question the lawfulness of one's deten-

[33] See *Marttinen v. France*, No/ 19235/03

[34] See *Mattoccia v. Italy,* No.23969/94.

tion before a court and to demand release. The protections emanating from the rights mentioned in ECHR Article 6, right to a fair trial, have also been expanded through the jurisprudence of the ECtHR. This is especially true in regard to cases involving the principle of equality of arms,[35] the privilege against self-incrimination and right to silence,[36] and the right to an adequate defense.[37]

International Fair Trial Elements

Other than the Universal Declaration of Human Rights and the ICCPR, there is no single formal and internationally accepted document that provides a comprehensive listing of international fair trial standards. Such a list can be constructed however by doing an analysis of the Universal Declaration, the ICCPR, the ECHR, other international conventions that address fair trial rights, comments written by international human rights committees, international criminal tribunal statutes, and the published opinions of various international criminal tribunals now in operation around the world. Such a list is provided below. It does not mention all of the internationally accepted fair trial standards but attempts to limit itself to those standards most relevant to the practice of criminal court trial advocacy.

The Right to a Fair Hearing

Every person accused of a crime is entitled to a fair hearing. [*Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article XXVI of the American Declaration, Article 8 of the American Convention, Article 20(1) of the Yugoslavia Statute, Article*

[35] *Ocalan v. Turkey,* No. 46221/99.

[36] *Funke v. France,* No.10828/84;*Bykov v. Russia,* No.4378/02.

[37] *Antico v. Italy,* No.6694/74.

19(1) of the Rwanda Statute, Articles 64(2) and 67(1) of the ICC Statute.]

The right to a fair hearing requires that certain other rights be recognized and protected. These rights include: the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defense, and the right to call and examine witnesses.

These rights are only "minimum guarantees." Providing these guarantees does not, in all cases, ensure that a hearing has been fair. The right to a fair trial depends on the entire conduct of the trial. *[See: Human Rights Committee General Comment 13, para. 5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, Exceptions to the Exhaustion of Domestic Remedies, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L./V/III.23 doc.12, rev. 1991, at 44, para.24]*

The right to a fair hearing also includes the right to equality of the parties. *[Morael v. France, (207/1986), 28 July 1989, Report of the HRC, (A/44/40), 1989, at 210]*

The Equality of the Parties

Equality of the parties (sometimes called "equality of arms") means that the parties in a criminal case are treated equally by the court during trial and are placed in an equal position to present their case. *[See European Court judgments in the cases of Ofrer and Hopfinger, Nos. 524/59 and 617/59, Dec. 19.12.60, Yearbook 6, p. 680 and 696]*

Equality of the parties is especially important in criminal trials where the prosecution is supported by the resources and power of the state and the defense begins at a disadvantage. The principle of equality of parties helps

ensure that the defense has the ability to present its case on equal footing with the prosecution. The principle of equality of parties requires that the defense be given adequate time and facilities to prepare its defense, the right to legal counsel, and the right to call and examine witnesses. The principle is violated when the accused is not given access to information necessary for the preparation of the defense and where an accused is denied access to expert witnesses. *[Case of Foucher, European Court, 25 EH RR 234, at p.247, Borgers v. Belgium, No.12005/86; Martinie v. France, No. 58675/00]*

The Right to a Public Hearing

Court hearings and judgments must be public accept in limited types of narrowly defined cases. [*Article 11 of the Universal Declaration, Principle 36(1) of the Body of Principles, Article 8(5) of the American Convention and Article XXVI of the American Declaration. [Human Rights Committee General Comment 13, para.6] Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article 20(4) of the Yugoslavia Statute, Article 19(4) of the Rwanda Statute, Articles 64(7) and 67(1) of the ICC Statute.]*

The right to a public hearing means that the parties in the case and the general public have the right to be present. The public has a right to know how justice is administered, and what decisions are reached by the judicial system.

The public's access to hearings may be restricted in certain narrowly defined circumstances.

The grounds on which the press and the public may be excluded from all or part of hearings are the same in the ICCPR and the European Convention.

The grounds are: morals (for example, some hearings involving sexual offences); public order, which relates primarily to order within the courtroom; national security in a democratic society; when the interests of juveniles or the private lives of the parties so require; or to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interests of justice. [*Article 14(1) of the ICCPR, Article 6(1) of the European Convention. All of these exceptions are narrowly construed*.]

Presumption of Innocence

Everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted in proceedings which meet at least the minimum prescribed requirements of fairness. [*Article 11 of the Universal Declaration, Article 14(2) of the ICCPR, Principle 36(1) of the Body of Principles, Article 7(1)(b) of the African Charter, Paragraph 2(D) of the African Commission Resolution, Article XXVI of the American Declaration, Article 8(2) of the American Convention, Article 6(2) of the European Convention, Article 21(3) of the Yugoslavia Statute, Article 20(3) of the Rwanda Statute, Article 66 of the ICC Statute]*

The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial.

The requirement that the accused be presumed innocent unless and until proved guilty in the course of a trial means that the prosecution has to prove an accused person's guilt. If there is reasonable doubt, the accused must not be found guilty.

The presumption of innocence requires that the rules of evidence and the conduct of a trial must ensure that the prosecution bears the burden of proof

throughout a trial [Barbera, Messegue and Jabardo v. Spain, Nos. 10588/83, 10589/83, 10590/83].

The Right to Trial without Undue Delay

Criminal proceedings must be started and completed within a reasonable time. [*Article 14(3)(c) of the ICCPR, Article 7(1)(d) of the African Charter, Article 8(1) of the American Convention, Article 6(1) of the European Convention, Article 21(4)(c) of the Yugoslavia Statute, Article 20(4)(c) of the Rwanda Statute, Article 67(1)(c) of the ICC Statute. This right is enshrined in Article 14(3)(c) of the ICCPR, Article 21(4)(c) of the Yugoslavia Statute, Article 20(4)(c) of the Rwanda Statute and Article 67(1)(c) of the ICC Statute, which require that trials on criminal charges take place without undue delay, and Article 7(1)(d) of the African Charter, Article 8(1) of the American Convention, Article 6(1) of the European Convention, which require that* all *trials (criminal or other) are conducted within a reasonable time.]*

For anyone charged with a criminal offence and held in pre-trial detention, the obligation on the state to bring cases to trial in reasonable time is even more important. International standards require that a person charged with a criminal offence be released from detention pending trial if the time deemed reasonable in the circumstances is exceeded.

The Right to Call and Examine Witnesses

A fundamental element of the principle of the equality of the parties and the right of the accused to present a defense is the right of the accused to call and to question witnesses. [*Article 14(3) (e) of the ICCPR, Article 8(2)(f)*

of the American Convention, Article 6(3) (d) of the European Convention, paragraph 2(E) (3) of the African Commission Resolution, Article 21(4) (e) of the Yugoslavia Statute, Article 20(4) (e) of the Rwanda Statute, Article 67(1) (e) of the ICC Statute.]

The right to call and question witnesses ensures that the defense has an opportunity to question witnesses who will give evidence on behalf of the accused and to challenge evidence against the accused. The questioning of witnesses by both the prosecution and the defense provides the court with an opportunity to hear evidence and challenges to that evidence.

The wording of international standards, which use the phrase "to examine or have examined," takes into account different legal systems, including systems based on adversarial trial principles and systems where the judicial authorities play a greater role in examining witnesses. The language of the standard does not give the defense an unlimited right to obtain compulsory attendance of witnesses on the defendant's behalf, but only "under the same conditions" as witnesses against him/her.

(The Right of the Defense to Question Witnesses against the Accused)

All people accused of a criminal offence have the right to examine, or have examined, witnesses against them. *Article 14(3) (e) of the ICCPR, Article 6(3) (d) of the European Convention, Article 8(2) (f) of the American Convention and paragraph 2(E) (3) of the African Commission Resolution, Article 21(4) (e) of the Yugoslavia Statute, Article 20(4) (e) of the Rwanda Statute, Article 67(1) (e) of the ICC Statute.*

The right of the accused to adequate time and facilities to prepare a defense includes the right to prepare the examination of prosecution witnesses.

There is an implied obligation on the prosecution to give the defense adequate advance notification of the witnesses that the prosecution intends to call at trial.

The right to examine or have examined witnesses against the accused means that all of the evidence must normally be produced in the presence of the accused at a public hearing, so that the evidence itself and the reliability and credibility of the witness can be challenged. Although there are exceptions to this principle, the exceptions must not infringe upon the rights of the defense.

The use of testimony from an anonymous witness (i.e. where the defense is unaware of the witness's identity at trial) violates the accused's right to examine witnesses, because the accused is deprived of the necessary information to challenge the witness's reliability.

The use of anonymous witnesses may not necessarily be ruled out in all cases, but their use must be strictly limited. *[For decisions from the European Court of Human Rights on this issue see* Doorson v. The Netherlands*, 26 March 1996, 2 Ser.A 470, para.69;* Van Mechelen and others v. The Netherlands*, (55/1996/674/861-864), 23 April 1997, para.51;* Windisch Case*, 27 September 1990,186 Ser.A 11;* Kostovski v. the Netherlands*, 20 November 1989, 166 Ser. A 20.]*

(The Right of the Defense to Call and Examine Defense Witnesses)

Everyone accused of a criminal offence has the right to obtain the attendance of witnesses and to examine witnesses on their behalf "under the same conditions as witnesses against them." *[Article 14(3) (e) of the ICCPR, Article 6(3) (d) of the European Convention, Article 8(2)(f) of the American Con-*

vention, paragraph 2(E) (3) of the African Commission Resolution, Article 21(4) (e) of the Yugoslavia Statute, Article 20(4) (e) of the Rwanda Statute, Article 67(1) (e) of the ICC Statute.]

The right to call defense witnesses "under the same conditions" as prosecution witnesses gives criminal courts relatively broad discretion in deciding which witnesses to summon, although judges must not violate the principles of fairness and equality of arms.

The European Court has held that although Article 6(3) (d) of the European Convention does not require the attendance and examination of *every* witness an accused wishes to call, a court must exercise its discretion over which witnesses will be called in accordance with the principle of equality of the parties. It found a violation of the right to a fair trial where a judgment did not explain the reasons why the court had rejected the accused's request that four witnesses be examined. *[Vidal v. Belgium*, *(14/1991/266/337), 22 April 1992]*

In a murder trial where a witness for the defense was willing to testify but was unable to be present in court on the particular day because she did not have a means of transport, the Human Rights Committee found a violation of Articles 14(1) and 14(3) (e) of the ICCPR to the extent that the witness's failure to appear was attributable to the authorities, who could have delayed the proceedings or provided her with transportation. *[Grant v. Jamaica*, *(353/1988), 31 March 1994, UN Doc. CCPR/C/50/D/353/1988, at 10]*

(The Rights of Victims and Witnesses)

The rights of victims and other witnesses to be protected from reprisals and from unnecessary emotional pain have to be balanced against the right

of the accused to a fair trial. In balancing these rights, measures taken by courts include providing victims and witnesses with information and assistance throughout the proceedings, closing all or part of the proceedings to the public and allowing the presentation of evidence by electronic or other special means.

The European Court has stated that where the interests of the life, liberty or security of witnesses may be at stake, states must organize criminal proceedings so as to ensure that these interests are not unjustifiably endangered. [*Doorson v. The Netherlands*, *26 March 1996, 2 Ser.A 470, para.70] Nevertheless, the right to the fair administration of justice requires that measures restricting the rights of the defense must be carefully limited and strictly necessary. [Van Mechelen and others v. The Netherlands*, (55/1996/674/861-864), *23 April 1997, para. 54 and 58.]*

The Inter-American Commission has also recognized the need for measures to protect the personal safety of witnesses and experts, without affecting the guarantees of due process. *[Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, doc.39, 1993, at p.109]*

The Right to Adequate Time and Facilities to Prepare a Defense

Anyone accused of a criminal offence and their lawyer, if any, must have adequate time and facilities to prepare the defense. [*Article 14(3) (b) of the ICCPR, Article 8(2)(c) of the American Convention, Article 6(3) (b) of the European Convention, paragraph 2(E) (1) of the African Commission Resolution, Article 21(4) (b) of the Yugoslavia Statute, Article 20(4) (b) of the Rwanda Statute, Article 67(1) (d) of the ICC Statute.]*

The right to adequate time and facilities to prepare the defense is an impor-

tant aspect of the fundamental principle of "equality of arms": the defense and the prosecution must be treated in a manner that ensures that both parties have an equal opportunity to prepare and present their case during the course of the proceedings.

The right to adequate time and facilities to prepare the defense applies at all stages of the proceedings, including before the trial and during any appeals.

(Adequate time to Prepare Defense)

The time adequate to prepare a defense depends on the nature of the proceedings and the factual circumstances of each case. Factors include the complexity of a case, an accused's access to evidence and to his or her lawyer, and time limits prescribed within national law. [See *Human Rights Committee General Comment 13, para. 9*] The right to trial within a reasonable time may be balanced against the right to adequate time to prepare a defense.

If an accused believes that the time allowed to prepare the defense has been inadequate, the accused should request the national court to adjourn the proceedings on the grounds of insufficient time to prepare. *[Douglas, Gentles and Kerr v. Jamaica*, *(352/1989), 19 October 1993, Report of the HRC vol. II, (A/49/40), 1994; Sawyers and McLean v. Jamaica*, *(226/1987 and 256/1987), 11 April 1991, Report of the HRC, (A/46/40), 1991]*

(Access to information)

The right to adequate facilities to prepare a defense requires that the ac-

cused be granted access to appropriate information, including documents, information and other evidence that might help the accused prepare their case, exonerate them or, if necessary, mitigate a penalty. [*Principle 21 of the Basic Principles on the Role of Lawyers, Article 67(2) of the ICC Statute, see also Rules 66 and 68 of the Yugoslavia Rules, Rules 66 and 68 of the Rwanda Rules.]*

The European Commission has stated that the right to adequate facilities to prepare a defense implies a right of reasonable access to the prosecution's files. [*X v. Austria*, (7138/75), 5 July 1977, 9 DR 50] However, this right may be subjected to reasonable restrictions, on grounds including security. [*Haase v. Federal Republic of Germany*, (7412/76), 12 July 1977, 11 DR 78] It has ruled that the right may be satisfied when the accused's lawyer, but not the accused, has access to a case file. [*Ofner v. Austria*, (524/59), 3 Yearbook 322, 19 December 1960]

(Right to information about charges)

One essential part of the information necessary for the realization of the right to adequate time and facilities to prepare a defense is the right of the accused to receive prompt notice of the charges against him or her.

All people charged with a criminal offence, whether or not detained before trial, have the right to be promptly informed of any charges against them. [*Article 14(3) (a) of the ICCPR, Article 8(2) (b) of the American Convention, Article 6(3) (a) of the European Convention, Article 20(2) of the Yugoslavia Statute, Article 19(2) of the Rwanda Statute, Article 67(1) (a) of the ICC Statute.]*

In order to comply with fair trial rights, the notification of charges before

trial must be "in detail" and must provide information about the "nature and cause of the charges" against the accused.

In interpreting Article 14(3) (a) of the ICCPR, the Human Rights Committee has explained that the information should be given "as soon as the charge is first made by the competent authority. *[Human Rights Committee General Comment 13, para.8]*

(Access to Experts)

The right to adequate facilities to prepare a defense includes the right of the accused to obtain the opinion of independent experts in the course of preparing and presenting a defense.

Article 8(2) (f) of the American Convention expressly provides the right of the defense to obtain the appearance of experts as witnesses.

Published:
"Meridiani" publisher
45, Kazbegi Ave. Tbilisi
T. 239-15-22, E-mail: meridiani777@gmail.com