GEORGIAN YOUNG LAWYERS' ASSOCIATION

RESULTS OF THREE-YEAR TRIAL MONITORING PROJECT – INITIAL PROBLEMS, CHANGES IN TRENDS, AND EXISTING CHALLENGES

(OCTOBER, 2011 – AUGUST, 2014)

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

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The Judicial Independence and Legal Empowerment Project (JILEP)

Georgian Young Lawyers' Association

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

Author: **TINATIN AVALIANI**

Editor: **KHATUNA KVIRALASHVILI**

Tech. Editor: **IRAKLI SVANIDZE**

Responsible of publication: **TAMAR GVARAMADZE**

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15, J. Kakhidze st. Tbilisi 0102, Georgia
(+99532) 293 61 01, 295 23 53

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INTRODUCTION

In October 2011, Georgian Young Lawyers' Association (GYLA) launched its monitoring of criminal proceedings in Georgian Courts. Over the last three years GYLA collected voluminous objective information, which made it possible to assess the competencies and shortcomings of criminal justice in Georgia, changes that have been made, and the situation that exists today.

The present document reviews and summarizes the information collected. It includes the reasons why it was necessary to launch the monitoring project, the problems that existed in criminal justice at that time, how the implementation of the monitoring started and what it aimed for, the results and the nature of criminal proceedings today.

Problems in the Judiciary Prior to the Monitoring

In 2008-2010, the integrity of the justice system in Georgia, and the criminal justice in particular, as well as the independence of courts was a subject of dispute. A number of actors at that time (including political actors, local experts, local and international NGOs) were reporting about alleged political persecution of the opposition and some civil activists. These reports and GYLA's independent assessment suggested that there were cases of alleged falsification of the charges, planting of evidence (especially with the regard to the illicit drug and firearms cases), and flagrant violation of the fair trial guarantees at the trial stage. These doubts and assessments were also reflected in the periodic reports of the Public Defender[1] and the U.S. Department of State's Country Reports on Human Rights Practices.[2]

Based on GYLA's experience GYLA also concluded that the absence of meaningful equality of arms in criminal proceedings – one of the key determinants of the quality of criminal justice – was also a problem. While the prosecution had the right to mandatory questioning of witnesses and to collecting all evidence, the defense did not (this regret-

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[1] http://ombudsman.ge/uploads/other/0/82.pdf; http://ombudsman.ge/uploads/other/0/83.pdf.

[2] http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136032.htm.

tably remains a problem). Further, there was a reasonable concern that, in addition to privileges given to the prosecution by legislation, courts were also favoring the prosecution to a certain extent. The concerns were further reinforced by the 2008-2010 statistics of criminal cases from the Supreme Court[3], suggesting that the rate of acquittal by courts was only 0.1-0.2%. Also, based on the 2010 statistics from the Supreme Court, in half of the cases where court ordered a preventive measure it applied custodial measure (54%), and bail accounted for 98% of the non-custodial measures.[4] This reinforced the public's belief that the judiciary was pursuing the "zero-tolerance" policy launched by the government in 2006[5].

The limited role of judges to address acts of ill-treatment was also, and still remains, a problem. In particular, judges could hear a complaint about ill-treatment, but did not have the right to take meaningful measures to demand an investigation of the alleged ill-treatment.

The public also questioned the institution of plea-agreement. In particular, a judge had a very limited role in reviewing a plea agreement made by the prosecutor and defendant. These agreements were almost always automatically approved, and the rate of plea agreements returned back to the prosecution was 0.2%. Further, the issue of fines imposed under the plea agreements was also of concern. In most of the cases, the use of a fine as an additional punishment raised the suspicion that the plea agreements were used as a means of budget revenue collection.[6]

Despite the number of concerns, no organization had systemati-

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[3] http://www.supremecourt.ge/information-on-basic-statistical-data-of-common-courts-of-georgia-for-2008/.
http://www.supremecourt.ge/information-on-basic-statistical-data-of-common-courts-of-georgia-for-2009/.
http://www.supremecourt.ge/information-on-basic-statistical-data-of-common-courts-of-georgia-for-2010/.

[4] http://www.supremecourt.ge/information-on-basic-statistical-data-of-common-courts-of-georgia-for-2010/.

[5] Zero-tolerance policy was introduced by president Saakashvili, during his annual address to the parliament on February 14, 2006.

[6] This problem was comprehensively examined in a 2010 report by the "Transparency International – Georgia" - "Plea Bargaining in Georgia: Negotiated Justice" - http://transparency.ge/en/post/report/plea-bargaining-georgia-negotiated-justice.

cally collected and published information to substantiate or dispel criticism of the judiciary. To examine the process in a comprehensive manner, GYLA decided to implement a large-scale monitoring project to obtain and analyze the facts.

Purpose of the Monitoring, Early Stages, and its Further Developments

The purpose of GYLA's monitoring was to increase the transparency of criminal hearings by observing hearings, provide a clearer picture of processes in court, and promote informed debates about judicial reform.

The monitoring was launched in October 2011, initially covering only Tbilisi City Court (TCC). On December 1, 2012, GYLA broadened the scope of monitoring and included Kutaisi City Court (KCC). Starting from January 2013, the scope of the monitoring was extended to the Tbilisi and Kutaisi appellate courts, and from March 2014 the monitoring was extended to Batumi City Court (BCC) as well. Since it began trial monitoring, GYLA has prepared a total of six monitoring reports.

Throughout the monitoring project, GYLA's monitors attended hearings based on random selection, with the exception of high-profile cases. The hearings attended by GYLA's monitors only accounted for a small share of the criminal proceedings in Georgian courts, and therefore could not cover all the information in a comprehensive manner; however, the data from GYLA's monitoring did not differ essentially from the Supreme Court's statistical data in any of the reporting periods, which allow us to generalize GYLA's discoveries to the judiciary processes as a whole and indicate that findings made on the basis of information obtained through the monitoring project reflected the reality in courts at that time.

INITIAL STAGES OF MONITORING AND PROGRESS OVER THE PERIOD OF THREE YEARS

I. First Appearances

The initial stage of the monitoring project (October 2011-September 2012) revealed that during first appearance hearings judges had an apparent bias in favor of the prosecution. At the hearings monitored by GYLA, courts upheld every single one of the prosecution's motions for preventive measures. The court granted pre-trial detention in *all* of the cases where the prosecution requested it, and in *all* of the other cases where the prosecution requested bail, the court ordered the exact amount of bail requested by the prosecution. The initial monitoring period did not reveal a single case when the judge made a decision that differed from what was requested by the prosecution.

It should be noted that during the first year of monitoring GYLA did not observe any first appearance hearings where the court left a defendant without a preventive measure. Courts used exclusively two types of preventive measures: detention and bail. Even in cases involving only minor crimes, courts never applied less strict alternative preventive measures. This reinforced public perception that the judiciary was pursuing the "zero-tolerance" policy of the government at that time.

Substantiation of a court decision is also important. Observation revealed that in parallel to granting all of the prosecution's motions for preventative measures, judges rarely provided their reasoning. Further, the court did not attempt to get additional information by asking questions that would enable it to deliver more substantiated decisions. For example, when requesting imprisonment the prosecution often failed to substantiate the necessary circumstances established by law for imprisonment. However, the court did not attempt to determine the necessity of the custodial measure or the possibility of applying a less strict preventive measure. When the prosecution fell short in submitting relevant information when requesting bail, the court did not attempt to determine the financial status of a defendant or to substantiate the reasonability of the requested amount. As a result, courts often ordered bail with no possibility of payment and defendants were effectively left in custody.

An absolute majority of the prosecution's motions were granted notwithstanding their reasoning, and therefore at that time the presence of defense counsel was just a formality. This may partially explain why frequently the defense was passive and did not attempt to use all of the possible remedies for protection of defendant's interests.

Since the third monitoring period (July-December, 2012), the situation has improved considerably. The first observed change was courts sometimes rejecting the prosecution's motion for preventive measures. Notably, this change coincided with the period when the cases against former high-ranking officials were brought before court following the parliamentary elections in October 2012. At that point it was too early to conclude whether the change was broad-based, or whether it applied only for cases brought against the ex-officials. During 2013, this trend away from the prosecution held. Courts were relatively active in examining motions for preventive measures, and were not merely bound by the prosecution's demand.

The charts below illustrate the situation over the course of the monitoring project regarding the court's rulings on prosecution motions on preventive measures.

Chart N1

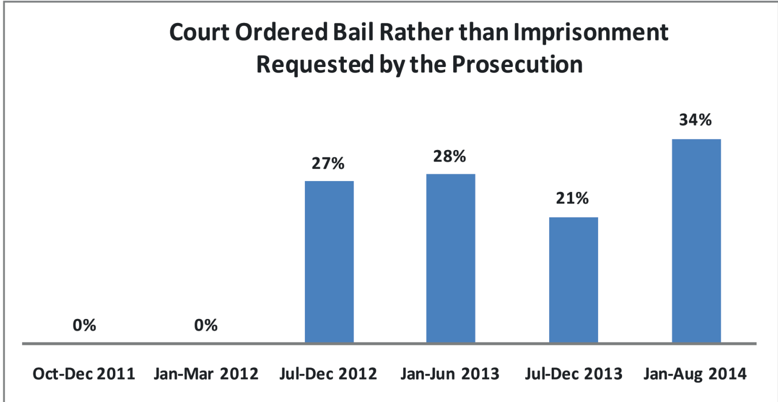
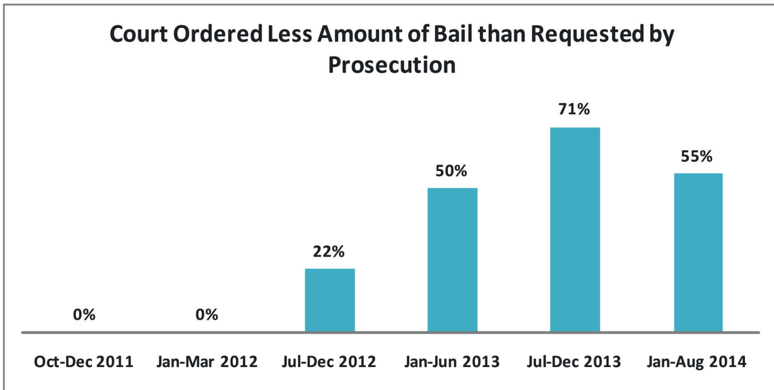


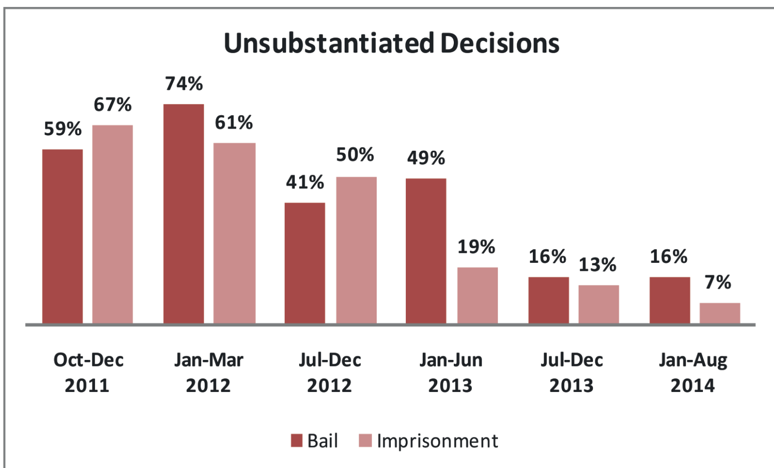
Chart N2



In 2014 the situation has improved even further, and judges showed more effort to determine the grounds of prosecution's motions and defense position. In addition, the prosecution attempted to provide the court with more reasoned motions. Accordingly, the number of substantiated preventive measures has increased significantly.

The chart below illustrates the situation over the course of the monitoring project regarding unsubstantiated decisions on preventive measures.

Chart N3

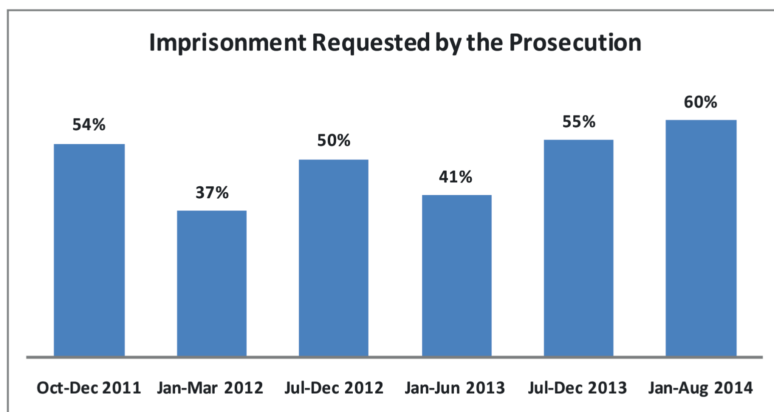


In 2014 the motions of the prosecution became more substantiated when they requested imprisonment. However, when requesting bail as preventive measure the prosecution's motions still lack support, since they seldom submit information about the defendant's financial status. Though in such cases, the court now often plays its positive role and attempts to acquire information from the defendants. GYLA should note that the situation is best in TCC; the worst in BCC, where judges maintain their passive role and do not attempt to collect all necessary information in the course of examining motions on preventive measures.

In 2014, progress was revealed in terms of applying imprisonment as preventive measure. Though prosecution's requests for imprisonment as preventive measure became more frequent, they became more substantiated. Moreover, when the prosecution's requests for imprisonment as a preventative measure are not substantiated, courts less frequently grant those requests.[7]

The chart below illustrates the situation over the course of the monitoring project regarding the prosecution's request for imprisonment.

Chart N4

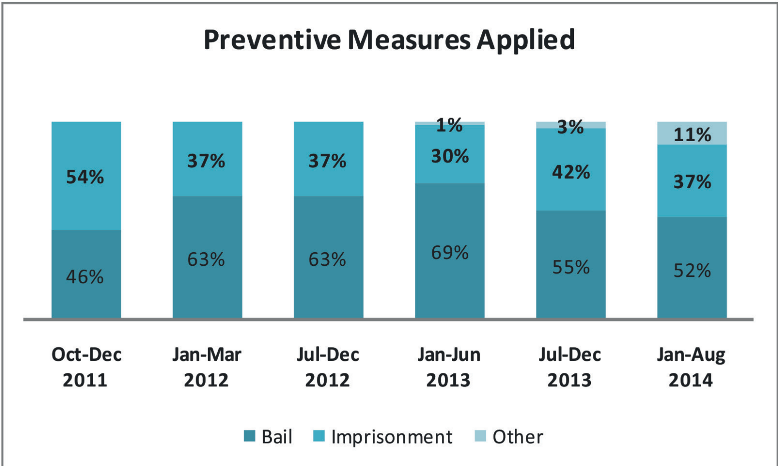


[7] Until October 2012 GYLA did not observe the fact when the court did not grant prosecution's motion to order imprisonment as a preventative measure.

The practice of applying only two types of preventive measures observed from October 2011 through December 2012 began to change in 2013, when the court released two defendants on personal security and an agreement of proper conduct and not leaving the country. The courts' practice of ordering preventive measures in all cases also began to change by 2013, when the court released two defendants without ordering a preventive measure. The situation further improved throughout 2014 (January-August), when the court released more defendants without ordering preventive measures. The rate of applying alternative measures also increased in the latest periods of the monitoring project. In addition, prosecutors also requested alternative preventive measures and sometimes asked for pre-trial hearings without requesting any preventive measure.

The diagram below illustrates the situation over the course of the monitoring project regarding the use of preventive measures.

Chart N5



II. Plea Agreement Hearings

The monitoring of plea agreement hearings revealed that, despite the obligations that legislation imposes on the court, judges were extremely passive. In the initial monitoring period they approved plea agreements almost automatically, without any consideration as to whether an agreement was lawful or appropriate. They approved every plea agreement brought before them, and in *none* of the cases observed did the judge take any significant interest in whether the punishment was fair.

In order to ensure that a punishment is fair, a judge should consider the actual circumstances involved, taking into consideration the individual characteristics of a defendant, the circumstances under which a crime was committed, and the agreed-to punishment. The law does not specify how to guarantee fair punishment. However, based on the general principles of sentencing, when ordering a fine a judge could have looked into the financial capacity of a defendant; whether s/he was able to pay the fine; whether the fine was proportionate to the damage inflicted; the circumstances under which the crime was committed; and the proposed punishment. Further, a judge could also suggest changes in a plea agreement.[8] This grants a judge certain limited leverage to influence the fairness of punishment. However, GYLA observed that judges performed only their procedural obligations and asked only *pro forma* questions as to whether a defendant agreed with the prosecutor's motion. In doing so, judges violated their obligation of making sure that the punishment was fair.

Starting in July 2012, GYLA also monitored the fines applied in the plea agreements. The initial six-month results demonstrated that fine was used as an additional penalty in 68% of the plea agreements. Further, the average amount of the applied fines was high - 9,115 GEL per defendant.

Furthermore, GYLA observed so called "green checks" brought by defendants' relatives at the plea agreement sessions to the prosecutors, as a confirmation that the fine agreed to in the plea agreement had already been paid. This illustrated the judiciary's insignificant role in the approval of plea agreements, as parties had an absolute expectation of approval of a plea agreement.

[8] Criminal Procedure Code, Article 213.6.

Starting in the second half of the 2013, judges became more active at plea agreement hearings. Judges became even more active in 2014, and for the first time the court refused to approve three agreements when the judge was not convinced about the legitimacy of the agreements and the parties refused to make changes. GYLA welcomes the improvement and remains hopeful that judges will take on a more active role in determining fairness and legitimacy of plea agreements and approve them accordingly.

The high rate of use of fines as additional punishment detected in the beginning of the monitoring also decreased in 2013. Further, the amount of fine ordered to individual defendants decreased. Although the average amount of fine increased in 2014, it remained well below the 2012 average fine. The charts below illustrate findings of the monitoring from July 2012 through August 15, 2014.

Chart N6

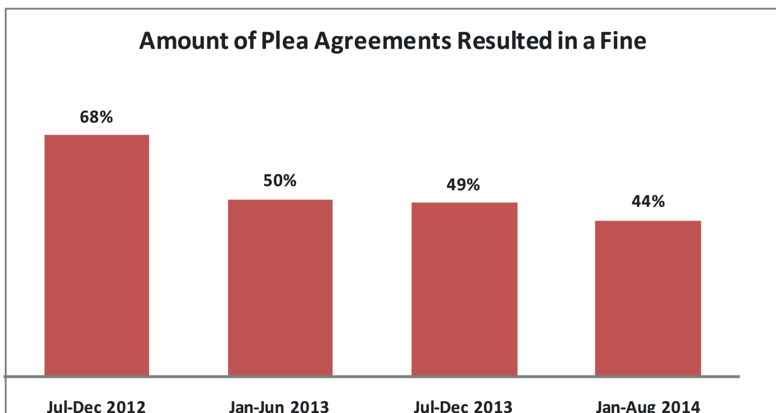
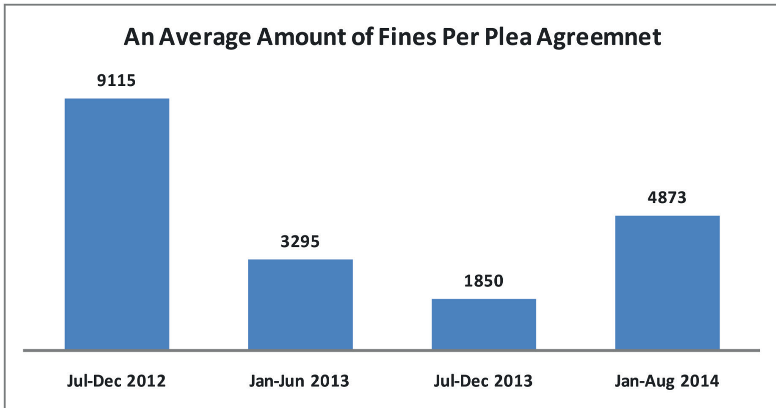


Chart N7



III. The Right to Public Trial

The initial stage of monitoring revealed problems related to the right to a public hearing. To make this right effective, it is not sufficient for the public to merely have the right to attend a criminal proceeding; the public must also have the right to be informed in advance about the proceeding so that it has the opportunity to attend. Therefore, the right to a public trial obligates the court to publish in advance the date and place of the all hearings hearing, the full name and a surname of a defendant, and the articles with which s/he has been charged. The monitoring revealed that the court was often not successful in ensuring the right to public trial. The problem was especially significant in first appearance and jury selection sessions.

In *none* of the first appearances monitored by GYLA during its three-year monitoring project did the court publish information about those hearings in advance. Despite GYLA's active involvement in raising the awareness of the judiciary about this situation, it remains unchanged. Representatives of TCC claimed that this was because of technical limitations associated with the fact that first appearances were held shortly after a defendant's arrest and expressed readiness to resolve the technical problem. Nevertheless, no meaningful measures were implemented. The situation was somewhat better in BCC and KCC, where court bailiffs announced information about the

place of the pending sessions and gave the name of a defendant some time before start of the sessions. However, GYLA considers BBC's and KCC's efforts insufficient, since individuals wanting to attend first appearance sessions were deprived of the chance to determine the time and place earlier. Furthermore, the public was not informed about the charges.

As for jury selection hearings, no advance information was published about the sessions during the initial monitoring periods. Further, in none of the jury selection processes monitored by GYLA during the initial periods did individuals have an opportunity to attend the hearing, since bailiffs were guarding the entrance to the courtroom. Although the session was not closed by the judge, neither bailiffs nor jury coordinators allowed interested individuals to attend the sessions. GYLA monitors had to communicate with the court assistant several times and explain to bailiffs and jury coordinators that all interested individuals are entitled to attend a session unless it is closed upon the judge's order.

Violations of the right to a public trial identified in early stages of the monitoring by GYLA remain a problem. However, there have been improvements to the public's right to access the jury selection hearings. In 2013, after GYLA complained, GYLA's monitors were allowed to attend these hearings. After GYLA continued to complain, in 2014 the jury selection hearings became open to the public.

IV. Equality of Arms and Adversarial Principle

GYLA found it particularly interesting to monitor fulfillment of the principles of equality of arms and the adversarial system, considering that equality of arms is of particular importance in criminal proceedings, where the prosecution has state resources and power and the defense is in a disadvantaged position.

Even during the initial monitoring period, GYLA observed that the judges whose trials were monitored seemed neutral and respectful to the parties, and that none of the judges acted in a way that could have been viewed as pressuring any of the parties. However, statistical analysis of court decisions showed that the system was biased against defendants.

As discussed above, courts followed all of the prosecution's requests for preventative measures. In addition, courts granted all motions of the prosecution for submission of evidence, whether objected to by the defense or not. Similarly, courts never approved the defense's lists of evidence unless the prosecution supported it. This illustrated the bias of judges in favor of the prosecution.

Main hearings also illustrated that courts favored the prosecution. Over the period of one year, GYLA did not witness a single acquittal. Further, judges often failed to explain to defendants their main rights, which limited their enjoyment of these rights.

In GYLA's first year of monitoring criminal trials, it is safe to conclude that the prosecution enjoyed favorable conditions vis-a-vis the defense, favored both by court and the legislation. Several instances of pressure and ill-treatment toward witnesses strengthened GYLA's concern that the regulation of witness testimony is a problem, as it gives possibility for the prosecution to use the mandatory and stressful process of questioning for exerting influence on witnesses to force witnesses to testify in their favor. For example, during one of the main hearings GYLA monitored in 2012, a witness stated that he remembered only some episodes of the case and had forgotten the rest because he was constantly subjected to pressure. The witness then started crying. He declared that he did not agree with any of the statements, but was forced into signing the papers and writing that he agreed with the statements. It is clear that existing regulation for questioning a witness puts the defense at a disadvantage, thus violating the equality of arms and the principle of adversary proceedings.

Another important problem regarding the adversarial process was detected on pretrial hearings related to search and seizure. At the time the monitoring project was launched the regulations gave the right of search and seizure to only the prosecution, while the defense had no such right.[9] Further, in nearly all cases observed by GYLA during the three years where search and seizure was conducted, they were conducted without a court order and were approved later by court, with the prosecution claiming the search was done under ur-

[9] In August 2014, the Criminal Procedure Code was amended to allow the defense to perform search and seizure by means of an independent investigator after applying to court.

gent necessity[10].

GYLA was unable to determine whether the after-the-fact legalizations of searches and seizures were substantiated, due to the fact that they are not discussed in open court. However, the fact that 96% of searches were only justified after having been performed, engenders doubt as to as to the compliance of law enforcement authorities and the courts with their obligations not to conduct or approve searches that are not appropriately justified on the basis of urgent necessity.

Faced with that reality, the defense sometimes used what little possibility was left to it for obtaining evidence and applied to court with motions to compel an institution to provide evidence if the institution refused to do so. Courts refused to grant the defense's motion, stating that it would constitute a measure of seizure, which was the exclusive right of the prosecution. Under these circumstances, the defense's right to obtain evidence was significantly hindered and their position vis-a-vis the prosecution was greatly weakened.

In this light, it is safe to conclude that the early stages of the monitoring project revealed court bias in favor of the prosecution, partly if not fully promoted by legally enforced unjustified advantages of the prosecution. This was in conflict with, and to some extent continues to be in conflict with, the principle of equality of arms and adversary proceedings.

It should, however, also be noted that compared to the prosecution the defense was generally passive during hearings. It rarely presented evidence or objected to the motions of the prosecution. This may have been caused by the reality of the criminal justice system at that time, de-motivating the defense. Nevertheless, GYLA believes that this does not justify the lack of qualification or the indifference of the defense revealed during the monitoring.

The above mentioned problems identified during the early stages of monitoring, related to advantages that the prosecution enjoys at the legislative level regarding equality of arms and adversarial proceedings, remain a problem. As to another problem – the advantages that

[10] Of 196 cases of search and seizure, only eight were performed with a court's warrant, while the remaining 188 cases were legalized later by the court.

the prosecution enjoys from the court – there have been gradual improvements since 2013, as a court's approach towards the defense and prosecution became more balanced. These improvements were noticeable both during initial appearances and pretrial hearings, as well as during hearings where plea agreements were discussed. Although progress has been made in some areas, there has not been a significant progress in the acquittal rate.

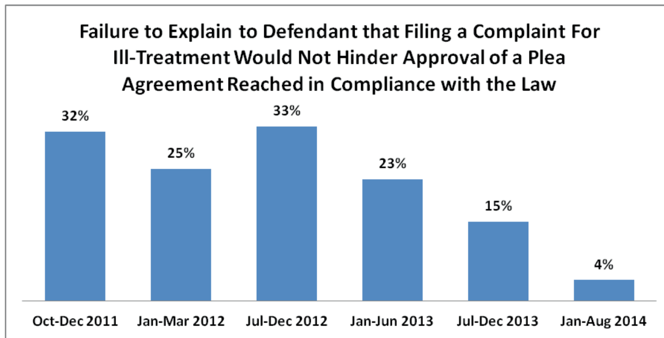
During initial appearances of the defendants, the courts no longer grant all motions of the prosecution for preventative measures without providing any justification or an opportunity to appeal. Further, the rate of using alternative preventive measures is growing slowly but steadily. The number of cases where the court released defendants without ordering any preventive measure has also increased. The courts also took an active role in demanding substantiated motions from the prosecution and started delivering decisions about preventive measures with far more substantiation. GYLA believes that these are important steps forward.

During pre-trial hearings, courts have abandoned the practice of unconditionally upholding all of the motions of the prosecution for submitting evidence. Further, the Court's granting of defense motions no longer depends on the prosecution's approval. In some of the cases, courts approved the list of evidence submitted by the defense even though the prosecution objected.

In the second half of 2013, GYLA found the very first case when court completely refused to grant a motion of the prosecution to submit evidence and found the most important piece of evidence inadmissible. As a result, the criminal prosecution was completely terminated in the case concerned. GYLA found another similar case this year.

Monitoring also revealed that judges are now better at fulfilling their obligation to explain to defendants their rights in a more comprehensive manner. This improvement is especially noticeable in regard to explaining defendants' rights on plea agreement hearings, as shown in the chart below.

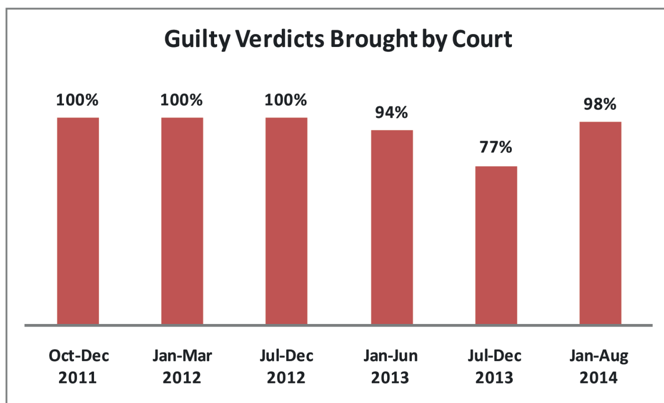
Chart N8



Regrettably, while the court's approach improved, defense remained passive during trials. GYLA found the prosecution to be far more active compared to the defense. The latter rarely files motions or objects to motions of the prosecution, with the only exception of the so-called high-profile cases where the defense was far more active than the prosecution.

Almost no changes were found with respect to acquittals. Although GYLA began monitoring in October 2011, it only observed the first verdict of not guilty in the first half of 2013. In the second half of the 2013, GYLA observed three acquittals. In 2014 (January-August) the rate of observed acquittals decreased to a single case. The chart below illustrates findings throughout the monitoring project.

Chart N9



CONCLUSION

GYLA's three years of monitoring results suggest important improvements in some areas of the criminal justice system, while in some other areas little progress was observed:

- In the initial stages of monitoring, courts seemed to be favoring prosecution, at pretrial hearings, always granting prosecutions motions and often ordering unsubstantiated preventive measures. This trend began to change after elections 2012 and since that time, courts continued to improve in certain aspects. The percentage of unsubstantiated preventative measures has further decreased significantly, especially in terms of imprisonment decisions.
- The picture has also changed regarding the types of preventive measures used. Since the elections of 2012, courts stopped simply following the prosecution's recommendation and often started ordering bail even though the prosecution requested imprisonment. Since 2014, there has been a more frequent use of measures other than bail and imprisonment, although those other measures are still used in only a small percentage of cases.
- The motions of the prosecution for preventive measures remain unsubstantiated mostly when it comes to bail, rather than imprisonment. One positive change is that the court now often tries to look into the financial capacity of defendant. Courts no longer grant the prosecution's motion for imprisonment automatically. Consequently, its decisions imposing imprisonment are more substantiated.
- Since the 2012 elections, courts no longer only grant the defense motion on presenting evidence if the prosecution agrees. Since 2013, courts also no longer grant all of the prosecution's motions on pretrial hearings. From 2013 through August 15, 2014, GYLA observed two cases when the court terminated criminal prosecution during pretrial hearing. No such cases were observed before 2013.
- Courts also solved the problem of public attendance at jury selection hearings, which are now accessible for everyone. How-

ever, courts still do not publish the schedule of initial appearances before the court in advance.

- As to searches and seizures, GYLA continues to question the fulfillment of their obligations by law enforcement authorities and courts to not conduct or approve searches and seizures without prior court authorization where urgent necessity is not properly documented.
- Unlike the initial stages of monitoring, when judges were extremely passive and approved every plea agreement without taking interest in the fairness of punishment in any of the cases, starting in the second half of the 2013, judges became more active at plea agreement hearings. Judges became even more active in 2014, and for the first time GYLA found three cases in which judge deemed the punishment determined by a plea agreement illegal and refused to approve the plea agreement. Also, the percentage of plea agreements that ordered fines has decreased. The average amount of fine also decreased, but during the most recent monitoring period (January-August 2014) it increased again.
- In regard to informing defendants of their rights, some improvements have been made. Judges inform defendants about their rights against ill-treatment more effectively, and their practice of examining whether plea agreements are the result of ill-treatment improved.

The above mentioned changes may have been the result of changes in political environment, as courts began to act differently when they started hearing “high profile” cases. The changes may have been associated with the change of government. However, it also appears to be the result of GYLA’s efforts to identify problems through the monitoring of hearings, the public discussion of these problems, and the elaboration of recommendations. Interestingly, the level of improvements in individual courts seems proportionate to the length of time that they have been monitored by GYLA. Regrettably, courts not monitored by GYLA do not seem to be taking into account GYLA’s recommendations based on problems identified in other courts, even where these problems are inherent to the system in general.

GYLA continues its trial monitoring in three city courts and appellate courts, and remains hopeful that its past recommendations and future conclusions will be followed by judges in both the courts monitored by GYLA and the regional courts of Georgia where the monitoring is not performed. GYLA believes this will encourage the process of improving criminal justice system in Georgia.