№14

MONITORING OF CRIMINAL TRIALS REPORT

Monitoring period: March 2019 - February 2020

GEORGIAN YOUNG LAWYERS' ASSOCIATION

Georgian Young Lawyers' Association

MONITORING OF CRIMINAL TRIALS
REPORT №14

(In Tbilisi, Kutaisi, Batumi, Gori, Rustavi and Telavi Courts)

Period covered: March 2019 - February 2020

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EXECUTIVE SUMMARY

The aim of the report is to identify gaps in the legislation and practice, as well as positive trends, by attending criminal court trials and analyzing identified cases. The report covers issues persistent in criminal proceedings from March 2019 to February 2020 and key trends revealed since the commencement of the monitoring to the present day.

The given reporting period was no exception in terms of identification of certain problems, including formal and in some cases inadequately substantiated motions presented by the prosecution. The role of the judge acquires more importance in such cases to ensure proper judicial control, yet the monitoring has shown that the judge often plays a formal or insufficient role in implementing judicial control.

During the first appearance court trials, judges, in majority cases, do not publicly discuss the lawfulness of remand detentions. Judges, as a rule, assess the legality of detentions if the defense counsel challenges the lawfulness of detention. Delivering a decision after the examination of the legality of the remand detention at a public trial and hearing the opinions of the parties orally will render the process a higher legitimacy, further ensuring the provision of equal conditions for the parties.

Judges show reluctance to a periodic revision of imprisonment and in almost all cases, leave the detention in force, and in most cases, the courts do not substantiate the need to extend the term of such imprisonments.

Very little has changed with regard to searches and seizures conducted in urgent necessity. The Prosecutor's Office almost always, even in cases when the need for conducting the investigative action in urgent necessity is not explicit, conducts searches and seizures on the basis of urgent necessity, by averting the court and without obtaining a relevant court warrant. The court fails to exercise proper judicial control thereof and, in most cases, declares the interference with the private life of individuals without the prior permission of the court to be lawful.

The last two reporting periods have been marked by a critical growth in the number of accused presented as detainees before the first appearance court sessions. Against this background, the definition of bail secured with remand detention established in practice becomes even more problematic. The court, on the one hand, notes in its decision that the bail can ensure the proper conduct of the accused, and on the other hand, in all cases, leaves the person in the detention facility without any substantiation, until the bail is posted.

During the given reporting period, the rate of the imposition of the most severe preventive measures - bail and imprisonment - was extremely high and other alternative measures of restraint were hardly ever applied in practice. The rate of releasing detainees without a preventive measure was quite low as well. There were cases when the court had to use a strict preventive measure due to the flaws in the legislation, which is due to an insufficient number of alternative preventive measures and legislative restrictions on the use of the existing ones. As a result, the accused is imposed a more severe coercive measure even though there might not be the need to do so.

The court still formally examines the fairness and lawfulness of a sentence when entering into a plea agreement. The courts must show more diligence regarding the matter during the court trials and declare explicitly whether they agree with the qualification of the crime and punishment or not.

Delayed court hearings are a problem. In some cases, defendants are deprived of the opportunity to fully enjoy the right to have their cases heard within reasonable timeframes. Neither the workload of the courts nor any other circumstances that hinder the enforcement of the law may be referred to as a relevant argument to justify the delay in a case proceeding.

GYLA highly appreciates the amendments introduced to the legislation, through which the role of the judge in terms of handling the complaints on ill-treatment has enhanced, and we also welcome that the State Inspector's Office has embarked on exercising the investigative powers entrusted with it.

We hope that the findings identified during the reporting period will ensure that all parties involved in a criminal proceeding acknowledge their share of responsibility for creating a better legal environment. The findings and recommendations provided in the report will facilitate the establishment of a higher standard of human rights protection.

METHODOLOGY

Georgian Young Lawyers' Association (GYLA) has been implementing the court monitoring project since October 2011. The monitoring project was initially implemented in the Criminal Cases Panel of Tbilisi City Court. From 1 December 2012, GYLA expanded the scope of the monitoring to involve Kutaisi City Court as well. In March 2014, the monitoring was launched in Batumi City Court. And since September 2016, the Telavi and Gori district courts have been added to the monitoring. The identical methodology of monitoring is used in all five cities.

GYLA has prepared 13 monitoring reports so far, covering the trends identified from October 2011 to March 2019. This time, we present №14 Monitoring Report prepared by GYLA, covering the period from March 2019 to February 2020. All the information provided in the report has been obtained by attending and observing court trials. GYLA monitors did not communicate with the parties and did not review case materials or final decisions delivered by the courts.

Similar to the previous reporting periods, GYLA monitors utilized questionnaires prepared specifically for the monitoring project. The information obtained by the monitors and the compliance of the court's activities with the international standards, the Constitution of Georgia and the applicable domestic laws were evaluated by GYLA's analysts. The questionnaires included close-ended questions requiring "yes" or "no" answers as well as open-ended questions that allowed the monitors to interpret and record the results of their observations in detail. Besides, as in the previous reporting periods, the GYLA monitors, in some cases, made transcripts of court hearings and particularly important motions to give more clarity and context to their observations. Through this procedure, the monitors were able to collect impartial, measurable data and, simultaneously, identify other important facts.

The report does not review or process all court proceedings or hearings, yet the information presented contains important and noteworthy data for members of the judiciary, the Prosecutor's Office and the Bar Association of Georgia, as well as for members of the legislative and executive branches of the government. Furthermore, the factual circumstances of cases, the statements made by the participants of court trials and the content of case materials did not fall within the scope of this court monitoring. In particular, GYLA has not analyzed the circumstances concerning specific criminal cases that could determine the guilt or innocence of the individuals.

Given the length of criminal proceedings and the various stages therein, the GYLA observers attended individual trials on a random basis rather than all hearings. However, there were several exceptions:

- The so-called "high-profile" cases that concerned former political officials;
- GYLA also monitored cases involving gross violations of human rights, cases of high public interest, or other specific factors.

From March 2019 to February 2020, GYLA monitored 2,744 court trials, including as follows:

- 619 - first appearance court hearings;
- 527 - plea agreement court hearings;
- 478 - pre-trial court hearings;
- 1103 - hearings on the merits;
- 17 - merits hearings in the Court of Appeals.

KEY FINDINGS

Preventive measures:

- As in the previous reporting period, the total number of bail and pre-trial detentions imposed as a measure of restraint accounted for 98%. The GYLA monitors attended 619 first appearance court hearings against 686 defendants. Of these, the preventive measures were used in 667 cases, of which 653 were bails or remand detention. In actuality, the courts do not apply alternative measures of restraint.
- Relatively better statistics have been shown by Batumi City and Telavi District Courts with regard to using the agreement on not to leave and to behave properly. The Batumi Court imposed the above type of preventive measure in the case of six defendants, and the Telavi Court in five cases. The Tbilisi and Kutaisi City Courts applied an agreement on not to leave and proper conduct in single cases only.
- The unsubstantiated imposition of remand detention and bail as a measure of restraint was a problem during the reporting period. The rate of unsubstantiated bail and remand detention increased significantly. Of the 334 detentions, 69 (21%) were unsubstantiated, so as were 98 court rulings ordering bail in 320 cases.
- During the given reporting period, the Prosecutor's Office motioned for the pre-trial detention against 454 (66%) out of 686 defendants. This figure is 6 percent higher compared to the previous reporting period.
- During the reporting period, the court did not uphold motions requesting the imprisonment of 116 (26%) accused. The rate of granting motions for the remand detention by the court has reduced by 7 percent compared to the previous reporting period.
- Of the 320 court rulings imposing bail, 179 were the so-called bail secured with remand detention (56%), of which 56 (30%) were unsubstantiated and/or inadequately substantiated. The rate of the unsubstantiated imposition of the bail secured with remand has decreased by 7 percent.

Proper judicial control:

- For the last two reporting periods, the number of defendants appearing before the first court hearing with the status of the detainee has been rising significantly. In particular, out of 686 defendants, 518 (76%) appeared before the court as the detainees, which is 8 percent higher than in the previous reporting period, and if we compare the statistics of two years ago, it is 20 percent more.
- In most cases, the proper judicial control over the lawfulness of the arrest is not implemented at a court hearing. In the majority of 518 arrested defendants - 448 (86%), the lawfulness of the pre-trial detention was not examined at all during the court hearing.
- GYLA attended 213 pre-trial court hearings reviewing the expediency and lawfulness of the remand detention. The court left the imposed measure of restraint unchanged in 195 (92%) cases out of 213. In 155 (80%) cases, the court did not substantiate or insufficiently substantiate why the custody was required. In 18 (4%) of the 213 cases, the court changed the pre-trial detention of the accused with bail.
- Similar to the previous reporting period, the prosecution carries out searches and seizures mainly as an exception. The motions submitted by the prosecution to the pre-trial court hearings showed that only 17 (10%) out of 167 cases of searches and seizures were conducted with a prior warrant of the court, and in 150 (90%) cases, the searches and seizures were carried out under urgent necessity.
- The analysis of the information received from Tbilisi, Rustavi, Kutaisi City and Telavi District Courts regarding searches and seizures has revealed that the courts, as a rule, grant the motions of the Prosecutor's Office on the recognition of the lawfulness of searches and seizures carried out without a prior court warrant. Out of 16226 motions requesting searches and seizures, only 19 (0.1%) were rejected by the court.
- The court judgments retrieved from the Tbilisi, Rustavi, Kutaisi City and Telavi District Courts are drawn up in a template manner. The courts mainly refer to legislative norms, but do not focus on the actual circumstances of the case, nor do they consider the specific expediency of conducting searches and seizures in urgent necessity.

Plea agreements:

- In 98 (18%) of 558 court trials, the factual circumstances of the case were not mentioned at the hearing and only the operative part of the judgment was presented. There were 11 (2%) cases where the judge approved the plea agreement in less than five minutes, with a number of procedural violations and without hearing the opinions of the parties.
- In 190 (34%) of 558 cases, the judge did not fully inform the defendants of their rights with respect to a plea agreement.
- In the reporting period, the court did not approve the plea agreement in four cases. In merely 48 (9%) cases, the judge noted that the sentence was legal and fair.
- Plea agreements in majority cases of crimes against life, bodily health and personal property were signed so that the prosecutor did not focus on the victim's position or interests at the court hearing.
- The inadequate communication between lawyers appointed by the state and their clients has been identified in 18 (6%) out of 293 cases. This data has significantly reduced compared to the previous reporting period, which should be highly appreciated.

Merits hearings:

- During the given reporting period, GYLA attended 1103 merits hearings reviewing criminal cases. Of these, the information on the court trials had not been made available (was neither included in the schedule of court trials nor published on the court's website) in 89 (8%) cases.
- The court hearings were adjourned in 456 (41%) cases out of 1103. In most cases, the delay in the proceedings was due to the absence of witnesses from the prosecution (30% of the postponed proceedings) or the conclusion of a plea agreement (18%). Among other reasons, the absence of a defense lawyer (13%) or a prosecutor (10%) was recorded.
- The monitoring has shown that court hearings were mainly (in 38% of the cases) delayed for up to 30 minutes. Frequently, the court pro-

ceedings were delayed for more than 30 minutes - 26%. In the majority of the cases, the reason for the lateness was the court (36%) or another court trial in progress in the same courtroom (17%). As a result of the lateness of the parties, the commencement of the court trials was delayed in 11% of the total cases.

- GYLA attended 149 merits hearings in which the verdicts were announced: 20 (13%) - acquittals, 122 (82%) – guilty verdicts, 7 (5%)-partial acquittals. The rate of the acquittals is virtually identical to the data of the previous reporting period.

Domestic crimes:

- During the reporting period, we monitored 121 first appearance court hearings on domestic violence cases (Article 126[1] of the Criminal Code of Georgia) against 122 defendants, amounting to 18% of the total number of court proceedings during the reporting period. In 115 out of 122 cases, the accused was a male, and in 7 cases, a female.
- The monitoring of litigations showed that apart from domestic violence - in 122 out of 282 (23%) cases, the individuals were charged with threats.
- At the initial court hearings, 109 (90%) defendants appeared as the detainees. The court imposed bail as a measure of restraint against 60 (49%) defendants, in one case, the court applied personal surety, in 59 (48%) cases, it was imprisonment, and in two cases, the defendants were released without a preventative measure.
- The prosecution's approach to domestic crimes has been tightened, and in actuality, no plea agreements are signed on the type of crime. In the reporting period, only 5 cases against 7 detainees out of 523 (against 558 defendants) were reported where a plea agreement was signed with the individuals charged with a domestic crime.
- GYLA observed 162 substantive court hearings deliberating the cases of domestic crimes. In 56 cases, the final verdict was delivered: 39 (70%) – guilty verdicts, 3 (5%) partial acquittals, 14 (25%) acquittals. In 7 out of 14 cases, the acquittal of the defendant was made possible by the refusal of the victim to testify against the accused.

Drug-related crimes:

- GYLA attended 136 first appearance court trials against 143 accused that were charged with drug-related crimes. The court did not grant the motion of the prosecutor to impose pre-trial detention as a measure of restraint in 4 out of 71 cases.
- Preventive measures applied in relation to drug-related crimes are more unsubstantiated and/or insufficiently substantiated than in other types of crimes. During the first appearance court hearing of 667 defendants in the reporting period, we identified 167 (25%) unsubstantiated and/or insufficiently substantiated court rulings imposing the measure of restraint, of which 69 (41%) cases concerned drug-related crimes.
- Among the monitored court trials concerning drug-related crimes, plea agreements were signed with 160 defendants, accounting to 29% of the total number of court hearings attended.
- There is still the trend growing that the average amount of fines for drug-related offences imposed under plea agreements exceeds the average amount of fines applied for other categories of crimes. The average amount[1] of fines used for drug-related crimes during the reporting period decreased and amounted to GEL 3,850,[2] while the average fine for other crimes was GEL 3,201.[3]
- The GYLA monitors attended 65 court hearings on the merits deliberating the crime envisaged under Article 260 of the Criminal Code, of which 4 were adjudicated. In all of the cases, the court rendered guilty verdicts and sentenced the defendants to term imprisonment.

[1] It does not include the fines imposed on the crimes provided for in Articles 273 and 273 [1] of the Criminal Code.

[2] In the previous two reporting periods, the average amount of fine was GEL 6,778.

[3] In the previous reporting period, the figure was 4238 GEL.

TRENDS IDENTIFIED DURING THE FIRST APPEARANCE COURT HEARINGS - GENERAL OVERVIEW

The most important part of a criminal proceeding is the first appearance hearing of the accused in the court. This is the stage of litigation when the majority of citizens first come into contact with the judicial system. The right to a fair trial is guaranteed by the Constitution of Georgia[4] and international acts,[5] therefore, each individual case requires strict control by the court from the very first stage of the hearing. At the national level, legislators provide a strict list of the goals and grounds for the use of any measure of restraint, thus protecting people from the inappropriate imposition of the most severe form of preventive measure - imprisonment.

In case of detention of a person pursuant to Article 196 of the Criminal Procedure Code of Georgia (CPC), the prosecutor shall submit a motion to the magistrate judge on the application of a measure of restraint according to the place of investigation.

Among the types of coercive measures provided for in Article 199 of the Criminal Code, such as bail, agreement on to leave and to behave properly, personal surety, supervision by the commander of the behaviour of a military service member and remand detention, the court shall impose the most effective and least restrictive measure to fulfill the goal of a preventive measure selected. Furthermore, leaving a person without a restraining order should be the initial task in the case of all defendants in criminal prosecution.[6]

Upon the use of the strictest measure of restraint, the judge must, in each specific case, substantiate why a less severe preventive measure cannot achieve the goals of the law. In each case, the needs and risks, in addition to the provisions prescribed by the legislation, must be measured based on the personal characteristics of an accused and should not be tailored to all cases under consideration in a template manner. The charge shall be imposed on a particular individual for a particular action.

[4] The Constitution of Georgia, Article 31.

[5] The European Convention on Human Rights and Fundamental Freedoms, Article 6.

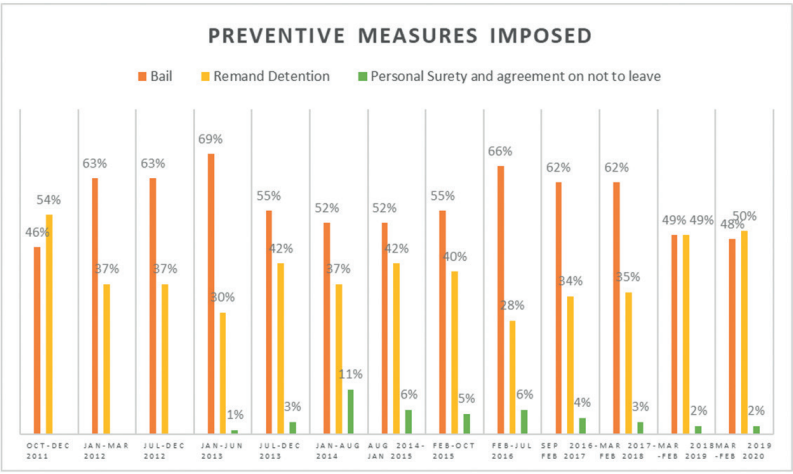
[6] GYLA's research "Preventive Measure Usage Standards", page: 78, 2020. Available at: https://bit.ly/3cjtDpi

ANALYSIS OF COURT TRIALS

In the given reporting period, the GYLA monitors attended 619 initial appearance court hearings against 686 defendants. As in the previous reporting period, the court mainly used two measures of restraint - bail and remand detention. Only in the case of 14 (2%) defendants, alternative preventive measures were applied. The court did not impose any preventive measures against the accused in 19 (3%) cases. During the court trials of 69 (21%) defendants, the necessity of sending defendants to prison was not sufficiently substantiated, neither was the bail in the case of 98 (31%) accused.

The following chart illustrates the situation with the use of preventive measures throughout the monitoring period (from October 2011 to February 2020).

Chart №1



PREVENTIVE MEASURES ACCORDING TO CITIES/DISTRICTS

During the reporting period, the GYLA monitors attended 306 pre-trial court hearings against 343 defendants in Tbilisi City Court. The court imposed bail in the cases of 152 (44%) accused and imprisonment against 178 (52%). Only in one case a personal surety and an agreement on not to leave and behave properly was imposed. Like in the previous reporting period, the rate of the use of alternative measures of restraints was almost

identical. In 11 (3%) cases, the court left the defendants without a preventive measure.

Compared to Tbilisi City Court, the Batumi City Court more frequently imposes the agreement on to leave and to behave properly. The court used the preventive measure in the case of 6 (5%) defendants. The GYLA monitors attended 121 first appearance court sessions against 126 accused, during which the court ordered bail in 68 (54%) cases, remand detention in 49 (39%) cases, and released the accused in 3 (2%) cases without imposing any measures of restraint.

We attended 111 court hearings against 120 individuals in Kutaisi City Court, during which 64 (53%) defendants were sentenced to bail, 54 (45%) were remanded in custody, and in one case only, the agreement on to leave and to behave properly was used. In only one case, the court released the defendant without assigning a preventive measure.

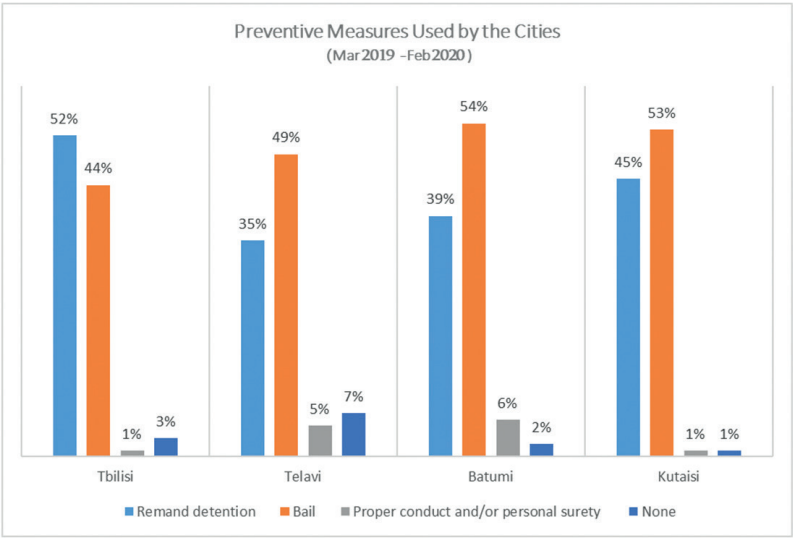
We attended 52 first appearance court hearings against 57 defendants in Telavi District Court, in 28 (49%) cases, the court used bail against the accused, 20 (35%) defendants were remanded in custody, in 5 (9%) cases – the court applied the agreement on not to leave and to behave properly, in none of the cases was personal surety imposed, and in 4 (7%) cases, the court released the defendants without a preventive measure.

In Rustavi City Court, bail was applied in 6 (20%) cases during 19 first appearance court hearings against 30 individuals, and in 24 (80%) cases, the defendants were remanded in custody. The alternative preventive measures were not applied.

The situation is almost the same with Gori District Court. During ten first appearance court hearings against ten individuals, bail was imposed only once, and in the remaining nine cases, the court ordered to remand the defendants in custody.

The following chart shows the statistics on preventive measures used by cities, from March 2019 to February 2020.

Chart №2



DURATION OF INITIAL APPEARANCE COURT HEARINGS

Article 197 of the CPC determines what information a judge should find out at the initial hearing of a defendant and what rights he or she must inform the accused about. It is necessary that the accused should fully understand the essence of the charge and be informed of the rights in a language he or she understands, including the right to file a complaint in the event of torture or inhuman treatment, the right to sign a plea agreement. The court shall find out whether an agreement has been reached with the prosecution, explain to the accused the type and size of the sentence, and enquire whether the accused has any complaint or motion concerning the infringement of his or her rights.

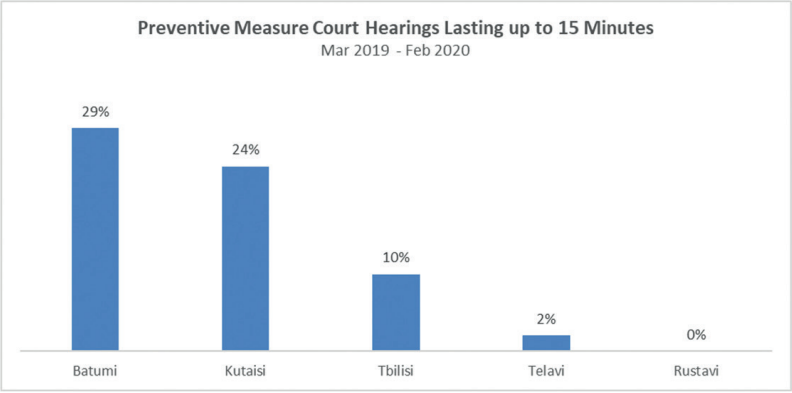
If the accused appears before the court as a detainee, the judge shall investigate the lawfulness of the detention, hear the motion regarding a restraining order filed by the Prosecutor's Office and the opinion of the defense counsel. It is of crucial importance that all the above-mentioned should not be done in a template manner and the judge should devote

adequate time to informing the defendant of his or her rights as well as explaining the contents of the motion submitted by the Prosecutor's Office.

In the reporting period, the finalization of court proceedings within 15 minutes or less remained a problem. Less than 10 minutes was dedicated to 26 (4%) court hearings, no more than 15 minutes to 112 (18%) cases, which means that the figure has increased by 4 percent compared to the previous reporting period. The completion of the first appearance court hearing in less than 15 minutes raises doubts about whether the defendants are informed comprehensively about their rights.

The following chart shows the length of court trials, which did not exceed 15 minutes, from March 2019 to February 2020, according to the cities.

Chart № 3



In the previous reporting period, the rate of court hearings in the Kutaisi City Court lasting for approximately 15 minutes was 43 percent, in the given reporting period, this figure decreased to 24 percent, which is a positive downward trend.

A positive assessment should be given to Rustavi City Court, as case proceedings that lasted for up to 15 minutes were not reported. Moreover, the duration of the trials in the court always exceeded 20 minutes.

Approaches of the Prosecutor's Office

In the reporting period, several motions submitted to the court by the Prosecutor's Office were drawn up in a stereotyped manner. This is especially noticeable when the Prosecutor's Office in most cases requests the same amount of bail against defendants for a particular crime, while the expected threats from the defendants and their financial situations differ in almost every case.

The prosecution, in all motions submitted for a measure of restraint, indicates the goals and grounds, yet the argumentation thereof is often not related to the specific factual circumstances of a case and the actual threats posed by the accused.

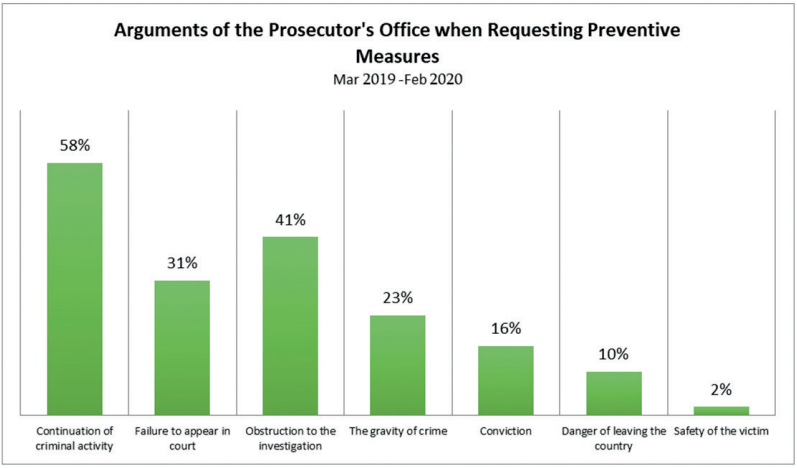
During the reporting period, the prosecution maintained the trend of indicating a possible aggravation of charges against the accused as one of the arguments for the imposition of remand detention. Another problem is that the Prosecutor's Office does not request pre-trial detention in exceptional cases but rather continues to demand detention under the pretext of the severity of the charges, backed up by the homogenous judicial practice. Furthermore, there were cases when the prosecution pointed out the mental state of the accused and the need to place him in a hospital for the medical examination as the argument to substantiate the remand detention.

Frequently, there are cases in drug-related crimes where the prosecution has seized evidence and the persons questioned at the court hearing are police officers, though the Prosecutor's Office makes allegations that there is the threat of influencing witnesses and destruction of evidence.

There were also cases where the prosecution indicated the threat of absconding, yet did not present any evidence confirming that the defendant had crossed the border in the past. The Prosecutor's Office, like in the previous reporting period, to the readiness of the defense to surrender the passport of the defendant in order to completely exclude any possibility of him or her leaving the country legally, answers that the country's border may be crossed through the occupied territories. This cannot be referred to as a valid argument to balance the defense counsel's point.

The following chart provides information on the goals and grounds indicated in the motions filed by the prosecution requesting the application of restraining measures (March 2019 to February 2020).

Chart №4



The data on the diagrams show that upon the substantiation of the motion for a preventive measure, the prosecution diligently indicates several grounds simultaneously to prove the expediency of using the preventive measure, although, as noted above, the grounds may not be actually relating to the factual circumstances of a particular case.

Position of Defense Counsel

Although defense lawyers are not often provided with sufficient time to collect evidence and present it to the court in order to fully exercise the right to a fair trial, the participation of the lawyer at this stage of the proceeding is crucial. The role of the lawyer is often irreplaceable for the full enjoyment of the right to a fair trial, especially if the case concerns an arrested person.

During the reporting period, there were cases when lawyers did not object to the type of restraining measures demanded by the prosecution, and the reason for the above was a plea agreement. A plea agreement is the right of the accused and the negotiations for the conclusion of the one cannot be assessed negatively, yet the negotiations for a plea agreement do not impose an obligation on the prosecution to accept any plea agreement offered by the defense lawyer. Furthermore, in such cases, the reluctant attitude of the lawyer may also have a negative impact on the defendant's interests.

To illustrate this, please see the following example:

A person was accused of failing to comply with the court ruling (the offence under Article 381 (1) of the Criminal Code). According to the prosecutor, the defendant was deprived of his driving license for five years under the court ruling in effect, yet he was still driving his vehicle.

The prosecutor declared that the accused had been convicted several times in the past. Due to this circumstance, there was, therefore, a risk of him committing a new crime. The prosecutor added that the accused refused to take a drug test after being stopped by a patrol police officer. The prosecutor had examined the financial condition of the accused and added that the parents of the accused possessed a real property, the accused was not a socially vulnerable person and he worked as a car mechanic. The prosecutor requested bail in the amount of 3000 GEL.

According to the defense counsel, the accused pleaded guilty, as it was not the first time he was charged with the same offence, and was ready to sign a plea agreement. The goal of the defense was to achieve detention that would be considered as a suspended sentence. The lawyer requested a bail of 1000 GEL. With respect to the fact that it was not his first conviction under the above article, the accused pointed out that he was a car mechanic and had to drive short distances to repair vehicles, which he did not deem as a violation.

The judge expressed concern regarding the above and called on the prosecutor to respond. The judge did not grant the motions of the prosecutor and the lawyer, and released the accused without the imposition of any form of restraint.

GYLA may not assess the strategy determined by the defense lawyer, but had it not been for the judge's correct assessment of the circumstances of the case and the goals of the measure of restraint, the accused would have been imposed the preventive measure. The above example is a good illustration of how the judge should act.

During the reporting period, there were cases when the position of the defense lawyer and the accused did not coincide, or the lawyer was not properly prepared, which allowed us to believe that the defense did not have sufficient time to prepare for the trial which is why he or she failed

to communicate effectively with the accused to agree upon the defence strategy.

To illustrate this, please see the example below:

> An accused was charged with illegal carrying of firearms and the purchase of a small amount of narcotic drug (the crime under Article 236, paragraphs 3 and 4 and Article 273[1], paragraph 2 of the CC). At the first appearance court hearing, the defense filed a motion to render a court judgment without merits consideration of the case. When reviewing the motion, the defense lawyer voiced a position which was completely different from the one of the defendant, saying that the accused legally had the right to use the narcotic substance based on a doctor's prescription and to the question of the judge whether the accused was under the influence of the substance which he was not allowed to take without a doctor's prescription, the defendant replied that he was under the influence of such a drug.
>
> Given the differences in the positions of the accused and his lawyer, the Court did not approve the plea agreement, noting that the approval of the said plea agreement would be a violation of the right to a fair trial. At the same court hearing, the prosecutor requested the bail in the amount of 5 000 GEL as a measure of restraint, which the defense lawyer objected to as the financial condition of the defendant was not favourable and asked the court to reduce the amount. The court did not use any form of restraining measure against the accused.

IMPRISONMENT AS A PREVENTIVE MEASURE

A Brief Overview of the Legislation

The Constitution of Georgia guarantees the right to freedom. Under the Georgian legislation, a person must be free unless the necessity for his or her arrest is confirmed. This right protects a person from unlawful and arbitrary deprivation of liberty within a legal proceeding.[7]

The burden of proving the use of imprisonment as a measure of restraint

[7] GYLA's research "Preventive Measure Usage Standards", page: 18, 2020. Available at: https://bit.ly/3cjtDpi

rests with the prosecution. The latter shall confirm why other lenient measures of restraint cannot achieve the goals set by law and why the interference with the human right to liberty is justified and proportionate.

Pursuant to Article 31 (5) of the Constitution of Georgia, a person shall be presumed innocent until proved guilty in accordance with the procedures established by law, and the court's judgment of conviction that has entered into legal force. The legislator restricts both the prosecution and the court and defines that remand detention as a measure of restraint shall be used only if it is the only way to prevent the accused from absconding and interfering with the administration of justice, the accused from obstructing the collection of evidence, the accused from committing a new crime.[8]

The legislation of Georgia allows for a possibility to review remand detention. By doing so, the legislator has created a mechanism to prevent unlawful interference with the human right and allows the judge at different stages of a proceeding to reconsider the appropriateness of detention and change the measure of restraint for a person in whose case the grounds for his or her custody no longer exist.

Analysis of court hearings

At the 295 first appearance court hearings in the reporting period, the court sentenced 334 persons to remand detention. The detention imposed against 69 (21%) individuals was unsubstantiated or overly strict. Compared to the previous two reporting periods,[9] the number has significantly increased.

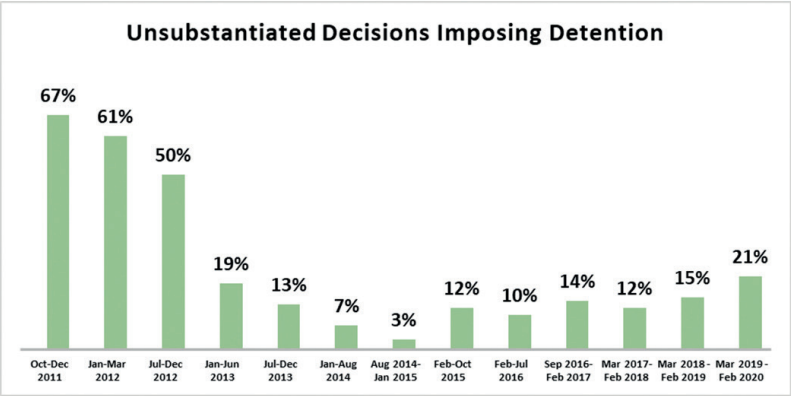
As in the previous reporting period, it again became clear that the prosecution and the court referred to the gravity of the crime committed as one of the main arguments when requesting or granting the custody against 127 (38%) defendants.

The following chart shows the decisions on unsubstantiated remand detentions during the entire monitoring period (from October 2011 to February 2020).

[8] The Criminal Procedure Code of Georgia, Article 205.

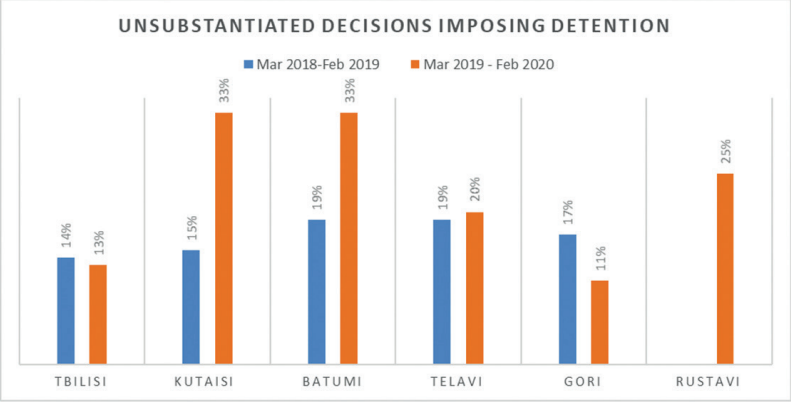
[9] In the previous two reporting periods, 12% and 15% of remand detentions, respectively, were unsubstantiated.

Chart №5



The chart below shows the unsubstantiated decisions imposing remand detention by the cities, from March 2018 to February 2020.

Chart №6

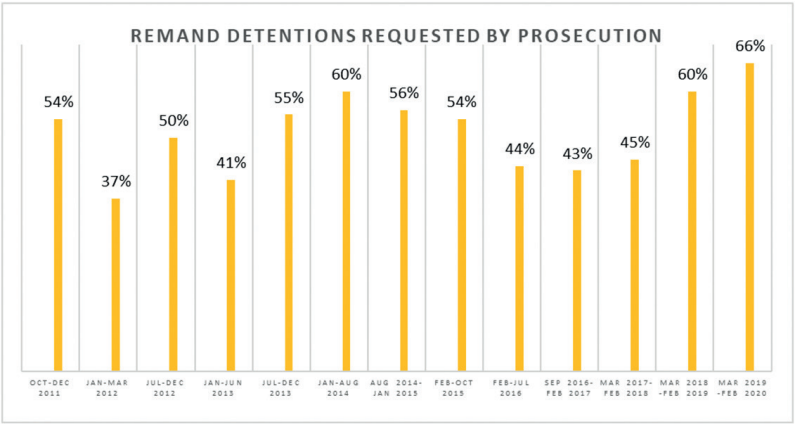


During the course of the monitoring, unsubstantiated remand detention was imposed against 24 of 178 defendants in Tbilisi, 6 out of 24 accused in Rustavi were sentenced to unsubstantiated imprisonment, 16 out of 49 in Batumi, 4 out of 20 in Telavi, and 18 out of 54 in Kutaisi. A positive assessment should be given to the fact that Gori District Court substantiated the expediency of imposing remand detentions in 8 out of 9 cases.

The rate of requesting remand detention has increased compared to the previous reporting period.[10] During the given reporting period, the Prosecutor's Office demanded pre-trial detention against 454 (66%) of the 686 defendants, of which the court did not grant the measure against 116 (26%) accused. It should be highly appreciated that compared to the previous reporting period, the rate of granting the motions for the imprisonment requested by the Prosecutor's Office has reduced by 8 percent.

The following chart shows the frequency of custody requested by the prosecution during the entire monitoring period (October 2011 to February 2020).

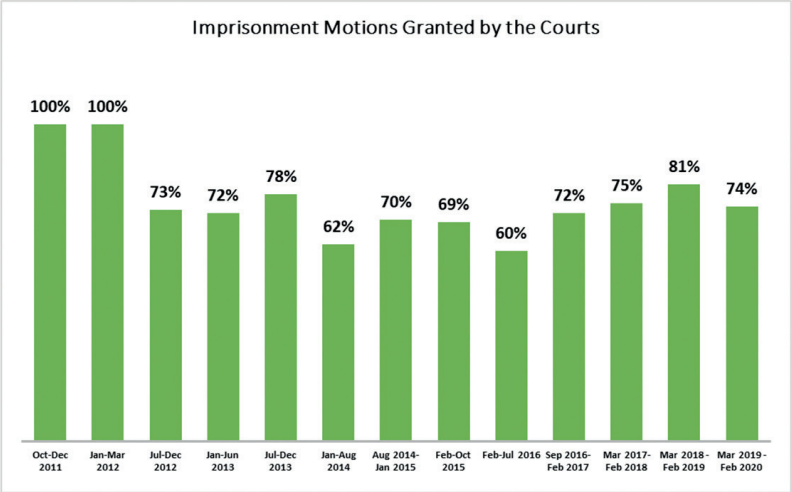
Chart №7



[10] During 594 court trials, the Prosecutor's Office demanded remand detention against 399 (60%) out of 668 defendants. The General Prosecutor's Office position is that the tougher approach toward domestic crimes and the increase in diversions for less serious and serious crimes have led to an increase in the overall rate of imprisonment.

The chart below shows the statistics of the remand detention motions granted by the court during the entire monitoring period (October 2011 to February 2020).

Chart №8



BAIL AS A PREVENTIVE MEASURE

A brief overview of the legislation

Pursuant to Article 200 of the Criminal Procedure Code - "Bail is a monetary sum or immovable property." The same article determines the minimum amount of bail - 1000 GEL. There are two types of bail: bail with and without remand detention. The bail secured with remand detention means that the accused shall remain in a penitentiary institution until he or she deposits the bail amount (or 50% of the bail amount).[11]

Only the accused that appears before the initial court hearing as a detainee may be imposed bail with remand detention. However, it is absolutely not required to impose bail with remand detention provided that bail is used as a coercive measure against the detained person.

Hence, an unsubstantiated and excessively large amount of bail, in fact,

[11] The Criminal Procedure Code, Article 200(6).

can be equivalent to the imprisonment of a person (the so-called "unacknowledged detention"). An unsubstantiated or large amount of bail poses a particularly high risk when it is secured with custody. It is of particular importance that the bail should have a restraining effect, in particular, the defendant shall experience significant material loss in the event of not fulfilling the bail terms, which is why the accused will try to comply with the terms and conditions of the bail.[12]

If the imposed bail amount cannot be posted, the bail **may** be replaced with a more severe measure of restraint - detention. This provision implies that it is not obligatory to tighten the preventive measure against the accused on the grounds that he or she is not able to pay the bail. At the initial stage, the prosecutor can decide whether to appeal to the court to change the measure of restraint, while at a later stage it is the court who must review the necessity to change the measure of restraint. First, the prosecutor and then the court has to find out why the bail was not deposited, whether the defendant deliberately avoided posting the bail or it was due to some serious circumstances.

Analysis of court hearings

During the reporting period, GYLA attended 291 first appearance court hearings, where bail was used as a measure of restraint against 320 defendants. The bail against 98 (31%) accused was unsubstantiated.[13]

It is still an alarming trend that the prosecution refers to the property of family members and close relatives of the accused in the reasoning part of

[12] Commentary on the Criminal Procedure Code of Georgia, the group of authors, editor: Giorgi Giorgadze, Tbilisi, 2015, 577-578.

[13] GYLA considers that the bail is unsubstantiated when, for example, a judge decides to grant the motion of the Prosecutor's Office requesting bail without producing a relevant substantiation. The latter shall be based on the analysis of the charge, the personality of the accused, his or her financial capabilities and other circumstances relating to the case. The failure of the judge to examine the above circumstances is even more detrimental if the accused is not represented by a lawyer; Even when the Prosecutor's Office requests bail instead of imprisonment, the judges tend to not investigate the financial situation of the accused and other important circumstances for the imposition of bail; It is true that the defense agrees with the prosecutor on the use of bail, however, despite the consent of the defense regarding the imposition of bail, GYLA still deems the bail imposed by the Court unsubstantiated, considering that the consent or desire of the defense to pay the bail does not exacerbate or neutralize the threats against which a particular measure of restraint is applied.

the charge, while the accused may not have the necessary consent of the mentioned persons for securing the bail.

Unlike remand detention, the prosecution spends less time substantiating bail and finding relevant documentation thereof. Frequent are cases where the prosecution indicates abstract threats and cannot substantiate why the bail of 2000 GEL can ensure the proper conduct of the accused and why, for example, bail of 1000 or 1500 GEL can fail to do so. It should be noted as a positive fact that similar questions were raised by lawyers and judges in a number of court proceedings.

The GYLA monitors also attended court trials in which the judges attentively examined the financial situation of the accused and merely due to the gravity of the crime committed did not impose the amount of bail that would be a hard burden for the accused or his or her family to post.

During the reporting period, the prosecution requested bail against 221 defendants. In 17 (8%) cases, the court did not grant the motion of the prosecution, in 5 cases released the defendant without a restraining measure. In the 12 motions for bail, the court applied the agreement on not to leave and to behave properly, including in two cases, without the motion of the defense, on its own initiative.

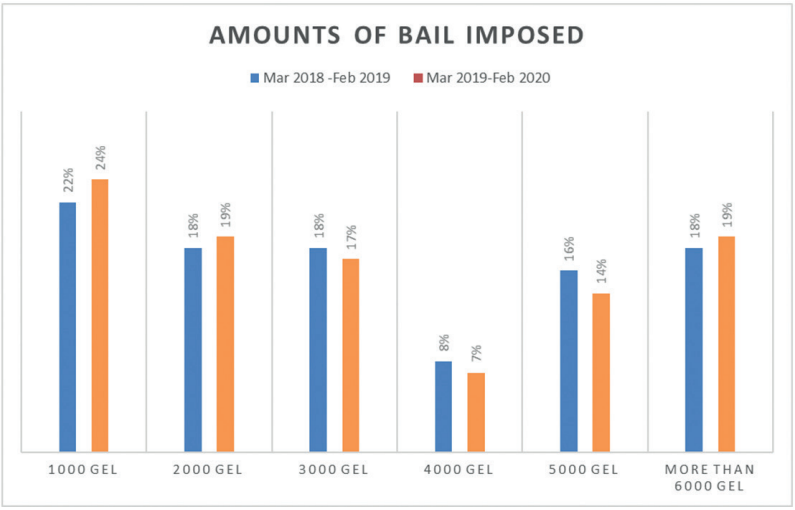
Among 204 bail motions requested by the prosecutor and granted by the court, the judge reduced the bail amount in the case of 178 (87%) defendants. This once again proves that the motions submitted by the Prosecutor's Office are not substantiated in the part of the bail amount or the reasoning presented is not so strong for the court to accept.

The minimum amount of bail was used against 76 (24%) of 320 defendants during the reporting period.[14]

In the following chart, you can see the percentage of bail used by the courts, from March 2018 to February 2020:

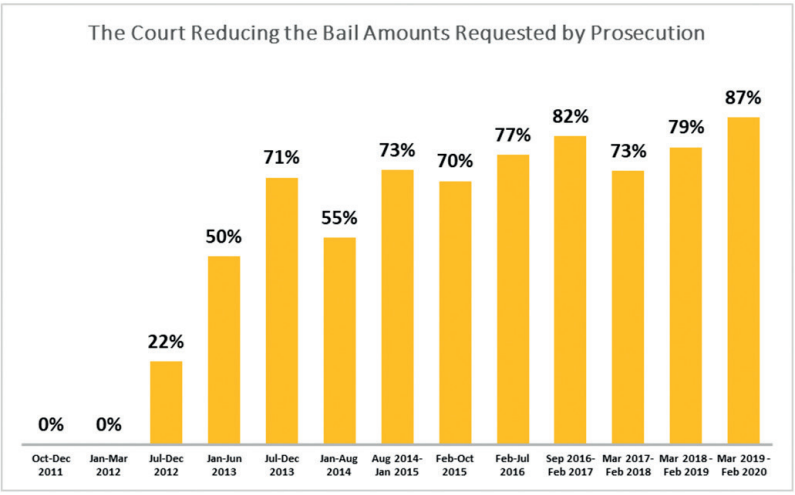
[14] The rate of imposing the minimum amount of bail in the previous reporting period was 22%.

Chart №9



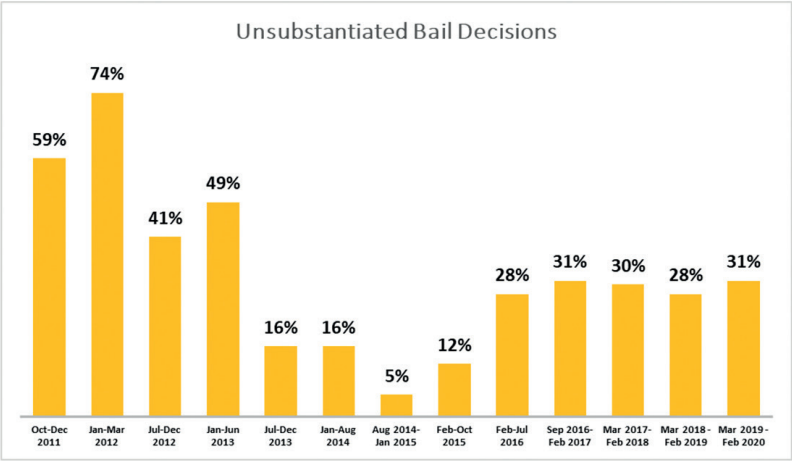
The chart below shows the court's tendency to reduce the amount of bail requested by the prosecutor during the entire monitoring period (from October 2011 to February 2020).

Chart №10



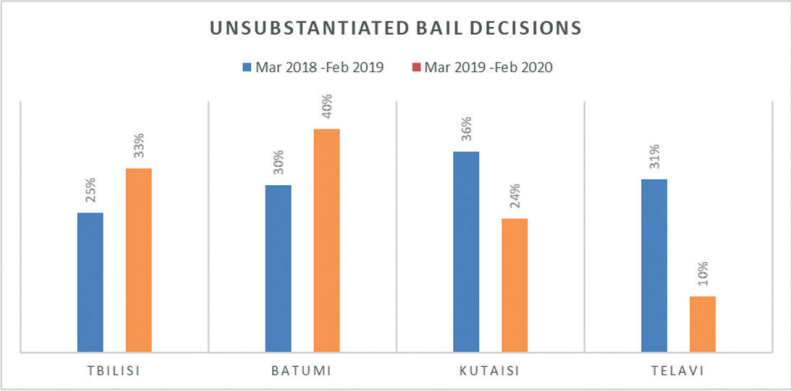
The following chart shows the trend of unsubstantiated application of bail throughout the entire monitoring period (October 2011 to February 2020).

Chart №11



The following chart demonstrates the unsubstantiated decisions on bail by the cities, from March 2018 to February 2020.

Chart №12

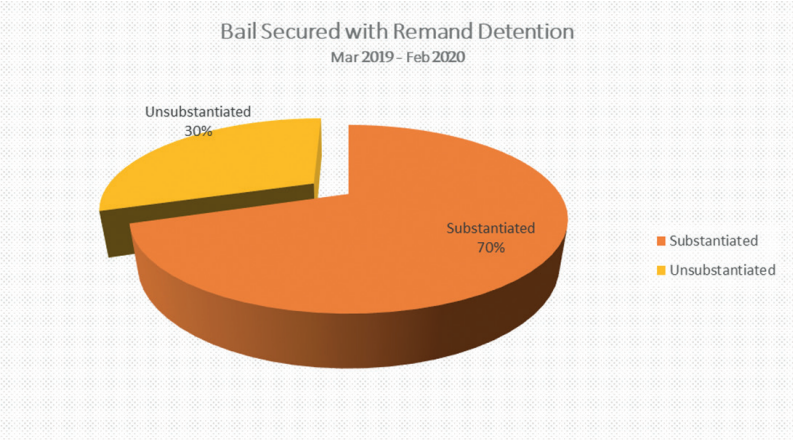


The bail imposed against 51 out of 154 defendants in Tbilisi was unsubstantiated, 16 out of 66 in Kutaisi, 28 out of 70 in Batumi, and only 3 out of 29 in Telavi. Compared to the previous reporting period, the rate of unsub-

stantiated bail has significantly increased in Tbilisi and Batumi.[15]

The following chart provides information on the number of unsubstantiated bail with remand detention, the data represent the period from March 2019 to February 2020.

Chart №13



The court imposed bail with remand detention in 179 cases (the bails in 179 of 320 cases were the so-called custodial bail (56%), of which 59 (33%) were unsubstantiated and/or insufficiently substantiated. The rate of custodial bail has increased by 5 percent compared to the previous reporting period and the rate of unsubstantiated use of the bail has decreased by 4 percent.[16]

GYLA believes that in case of imposition of bail as a measure of coercion against a detainee, it is not necessary to use custodial bail. It remains unclear why a detainee can be released immediately from the courtroom (regardless of whether the detention has been recognized unlawful or not) in the case of a personal surety, agreement on not to leave and proper conduct or other preventive measures, but not in the event of bail. The

[15] The percentage of the unsubstantiated bail in the previous reporting period was determined as follows: Tbilisi -25%, Telavi-31%, Batumi 30%, Kutaisi-36%.

[16] In the previous reporting period, the bail in 164 out of 320 cases was the bail secured with remand detention (51%), 61 (37%) of which were unsubstantiated.

argument that the so-called custodial bail guarantees the payment of bail cannot be considered as a valid reason. If the accused fails to post the bail within the specified timeframes, the legislation provides for corresponding leverage, and the prosecutor can appeal to the court with the request for a more severe measure of restraint.[17]

PERSONAL SURETY

Pursuant to Article 203 of the Criminal Procedure Code, in the case of personal surely, trustworthy persons shall assume a written obligation to ensure the appropriate behaviour of the accused and his or her appearance before the investigator, the prosecutor, and the court. The personal guarantee is allowed only with the mediation or consent of the guarantor, as well as with the consent of the accused. The guarantor shall be informed of the essence of the charge in connection with which the measure of restraint was chosen, the punishment that may be imposed on the accused, and the liability imposed on the guarantor if the accused commits an act for the prevention of which the personal surety was imposed. In addition, each guarantor shall be asked to provide his or her handwritten guarantee, which shall be attached to the criminal case.[18]

During the reporting period, the court used personal surety only in one case, based on the motion of the Prosecutor's Office. Unlike the agreement on not to leave and to behave properly, the personal guarantee is not a sentence-dependent measure and the judge can apply the measure to any category of crimes if the defendant's personal characteristics, the reputation of the guarantor, the guarantor's convincing arguments to ensure the defendant's proper conduct, and the actual circumstances of the case allows the judge to do so. Despite this possibility, during the reporting period, the defense requested the personal surety only four times, yet the court did not grant it in any of the mentioned cases.

AGREEMENT ON NOT TO LEAVE AND TO BEHAVE PROPERLY

The agreement on not to leave and to behave properly can be applied only in crimes that do not envisage the imprisonment for a term of more than one year.[19]

[17] GYLA's research "Prevention Measure Usage Standards", 2020, page: 31. Available at: https://bit.ly/3hT8XbE

[18] The Criminal Procedure Code, Article 203 (4)

[19] The Criminal Procedure Code, Article 202

During the reporting period, the Prosecutor's Office and the court could have applied the agreement on not to leave and proper conduct in 57 cases pursuant to the law but used it in merely 13 (22%) cases. It should be positively assessed that the judge applied the above-mentioned preventive measure on its own initiative in two cases while the prosecution was demanding and the defense was agreeing with the bail as a preventive measure in both cases.

To illustrate this, please see the following example:

> In the Telavi District Court, an accused was charged with inflicting less serious bodily harm with negligence (Article 124 of the Criminal Code). The prosecution requested 4,000 GEL bail as a measure of restraint against the defendant. As the prosecution declared, there was a risk of the defendant to commit a new crime and influence witnesses. The threat of committing a new crime was not substantiated with any arguments, and the risk of influencing witnesses was substantiated by the fact that the witnesses were the friends of the accused. The prosecutor did not have information about the financial situation of the accused. The threats indicated by the prosecutor were unsubstantiated and formal. The defendant agreed to the bail and requested the court to reduce the amount. Nevertheless, the judge did not grant the motion of the prosecution and ordered the defendant to sign an agreement on not to leave and to behave properly.

GYLA highly appreciates the attitude of the court towards the mitigation of the condition of the accused based on the assessment of individual risks and taking into account the socio-economic situation of the defendant.

COURT HEARINGS THAT DID NOT IMPOSE ANY PREVENTIVE MEASURES

During the reporting period, the court did not impose any kind of measure of restraint in the case of 19 (3%) defendants. In 10 cases, the coercive measure was not imposed as the individuals were already in custody or serving their sentences. In 4 cases, the court did not support the remand detention requested by the prosecution and refused to apply any form of preventive measures against the accused, and in 5 cases, the same decision was made by the court with respect to the bail requested by the prosecution.

To illustrate this, please see the following example:

> An accused was charged with intentional infliction of minor injury to bodily health (Article 120 of the Criminal Code). In 2019, the Prosecutor's Office demanded bail of GEL 2 000 at the initial court hearing, explaining that there was a risk of influencing witnesses since the key witness was a friend of the accused. The defendant agreed to the bail but requested the amount to be reduced. The judge did not use any form of preventive measure against the accused, noting that the arguments referred to by the prosecutor could not have been real threats given that two years had passed since the incident and there was no risk of destruction of evidence and exerting influence on witnesses on the part of the defendant.

COURT TRIALS REVISING PREVENTIVE MEASURES

Analysis of the legislation

The judge of the preliminary court hearing, at his or her initiative, shall be obligated to review, revise and, unless it is necessary to use the deprivation of liberty, change the measure of restraint used against a defendant. If the accused has been remanded in custody, the judge shall, at his or her own initiative, at the pre-trial court hearing, review the need to remand the defendant in custody, regardless of whether the party filed a motion for the replacement or cancellation of the detention. The court shall review the expediency of keeping a person in custody once every two months at his or her own initiative.[20]

Analysis of court hearings

GYLA attended 221 preliminary court hearings in which the defendants appeared before the court from a detention facility. In 213 cases, the court examined the detention as a measure of restraint on its own initiative, and in 8 cases, the preventive measure was not reconsidered, as the pre-trial hearing was postponed and/or the hearing was extended further.

It is noteworthy that the court left unchanged the measure of restraint in

[20] The Criminal Code of Georgia, Article 219.

195 (92%) out of 213 cases, and the court did not substantiate or insufficiently substantiated why it was required to leave the accused in custody in 155 (80%) cases.[21]

In 40 (20%) cases, the court fully substantiated the decision to leave the sentence unchanged. In the reasoning part, the court noted that replacing the measure of restraint would result in the accused posing certain risks, such as the threat of committing a new crime, the threat of absconding, the safety of the victim, the possible interference on the part of the accused into the investigation of the evidence obtained, etc. In 18 (8%) of the 213 cases, the court changed custody of the accused with bail.

To illustrate this, please see the following example that shows the judge providing a proper legal assessment of the imprisonment.

The prosecutor filed a motion to change the bail used as a preventive measure with detention, substantiating it with the argument that the defendant failed to pay the bail of GEL 2,000. The defense did not agree to the motion and explained that the goals of the restraining measure were already being met; the defendant was reimbursing the damages piece by piece and that is why he failed to post the bail. The defense also produced a receipt confirming the compensation for damages. The judge rejected the prosecutor's motion and explained that the goals of the preventive measure were being fulfilled and the mere fact of non-payment of the bail could not have been employed as the ground for the detention. Therefore, the prosecutor's motion was not upheld due to the lack of substantiation.

[21] In the previous reporting period, the court left the detentions imposed on 182 (96%) defendants unchanged. In 137 (75%) of these, the court inadequately substantiated or did not substantiate at all why the detention was necessary.

IMPLEMENTATION OF JUDICIAL CONTROL OVER THE LAWFULNESS OF DETENTIONS

A BRIEF OVERVIEW OF THE LEGISLATION

An arrest is a short-term restriction of a person's liberty.[22] The Constitution of Georgia protects the right to human freedom[23] and allows detention of a person in cases strictly defined by law, by a person authorized by law. The basis for the arrest of a person shall be a reasonable presumption that the individual has committed a crime for which the law envisages imprisonment, the person may go hiding or not appear before the court, destroy important information for the case proceedings or commit a new crime. Upon the existence of the above-mentioned grounds, the court shall issue a court ruling without an oral hearing on the arrest of the person according to the place of investigation, upon the motion of the prosecutor.[24]

For obtaining a prior warrant of the court to arrest a person, the prosecutor shall file a motion to the court, and the latter shall issue a relevant ruling without an oral hearing. This decision may not be appealed.[25] In case of urgent circumstances for arresting a person, the legislator also allows detaining a person without a prior court ruling. In the event of persons detained on the grounds of urgent necessity, the judge, at the initial court hearing of the accused, shall review the lawfulness of the arrest as well as the necessity of the arrest of the individual carried out without a court ruling. Provided that the arrest is deemed unlawful, the legislator gives the accused the possibility to request civil and administrative proceedings to receive compensation for the damage caused by the illegal procedural action.[26] Reviewing the lawfulness of detention at the preliminary court hearing protects the accused from gross, unlawful interference with his or her right to liberty. It is important that at the initial court hearing, both the arrest with a prior court ruling as well as the one carried out on the grounds of urgent necessity must be examined. This legal mechanism aims at minimizing the risks of arbitrary decision-making by law enforcement authorities.[27]

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[22] The Criminal Procedure Code, Article 170.

[23] The Constitution of Georgia, Article 13.

[24] The Criminal Procedure Code, Article 171(1).

[25] Ibid.

[26] The Criminal Procedure Code, Article 38(11); The Constitution of Georgia, Article 18(4).

[27] Niparishvili B., Imprisonment as a Measure for Securing Bail, Journal "Justice and Law," 2016, №2,53.

ANALYSIS OF COURT HEARINGS

A public review at the initial court hearing of the lawfulness of the arrest of an accused carried out under the extreme urgency remained a problem in the given reporting period. Concerning the issue, judges argue that they examine the lawfulness and assess the grounds of the arrest before the court hearing is held. Despite the above argument, we deem it important to consider the matter in public, especially when the accused is not represented by a defense counsel. The above approach of the court deprives the accused of the opportunity to submit to the court and present his or her arguments/position with regard to the arrest. Where the lawfulness of the arrest is assessed outside the courtroom, the judge relies mainly on the points of the prosecution indicated in the arrest protocol.

During the reporting period, 518 (76%) defendants appeared before the preliminary court hearing as the detainees. The above number has been growing for the last two reporting periods and has further increased by 8 percent in this reporting period compared to the previous one.[28] In the majority of 448 (86%) cases, the lawfulness of the detention was not investigated at the court hearing.

In the remaining 17 (23%) out of 70 cases, the judge's preliminary warrant to arrest the person had already been provided. The court hearings revealed that 53 defendants were arrested under the urgent necessity. The court reviewed and regarded the arrest lawful in the case of only 10 defendants. Generally speaking, the court starts analyzing the lawfulness of an arrest once the defense files a motion concerning thereof. Notwithstanding that, there were cases in the given reporting period during which the court dealt with the matter in a standardized and template manner.

[28] In the previous reporting period, 452 (68%) of the 668 defendants appeared before the court as the detainees.

To illustrate this, please see the following example:

A detainee was accused of committing robbery (Article 179 of the Criminal Code). At the first appearance court hearing, the defense lawyer filed a motion to declare the arrest unlawful and corroborated his position with the argument that the terms of the detention established by law had expired. The defendant agreed with the lawyer as well noting that he had been restricted in his freedom of movement much earlier than it was indicated in the arrest protocol. In particular, the accused explained that the police took him from the house, drove him around the city for several hours demanding from him to admit to the robbery, after which he was taken to the police station where he had spent several hours before the arrest protocol was drawn up. The judge asked the defendant if he had been handcuffed and whether he had wanted to leave, to which the defendant replied that he had not been handcuffed nor had he expressed a desire to leave as he unequivocally assumed that no one would allow him to leave. The accused also mentioned that the arrest protocol was not handed to him upon the arrest.

The judge held that the person cannot be considered a detainee unless he or she is handcuffed.

The above attitude demonstrated by several judges allows us to believe that proper legal control over detention is not executed, which encourages the prosecution to restrict the right to liberty of individuals, even in cases when there are no grounds for the arrest under urgent necessity.

ADMISSIBILITY OF EVIDENCE AT PRELIMINARY COURT HEARINGS

INTRODUCTION

The preliminary court hearing is the most important part of a criminal proceeding. At a pre-trial court hearing, the judge examines the admissibility of presented evidence. The interim court hearing may be also considered as the final stage of the criminal proceeding if the criminal persecution is terminated. The judge of the pre-trial court hearing is entitled to terminate the ongoing criminal prosecution against the accused if the evidence presented by the prosecutor fails to provide the grounds to believe with a high degree of probability that the accused committed the act.[29] Evidence that is considered admissible at the preliminary court hearing can largely determine the outcome of a merits hearing.

The court's decision concerning the motions submitted by the prosecution to the preliminary hearing must be impartial and without prejudice to the interests of either party. The right of the accused to impartial court proceedings is recognized by Article 62 of the Constitution of Georgia, Article 6 of the European Convention on Human Rights, and furthermore, guaranteed under the Criminal Procedure Code of Georgia.

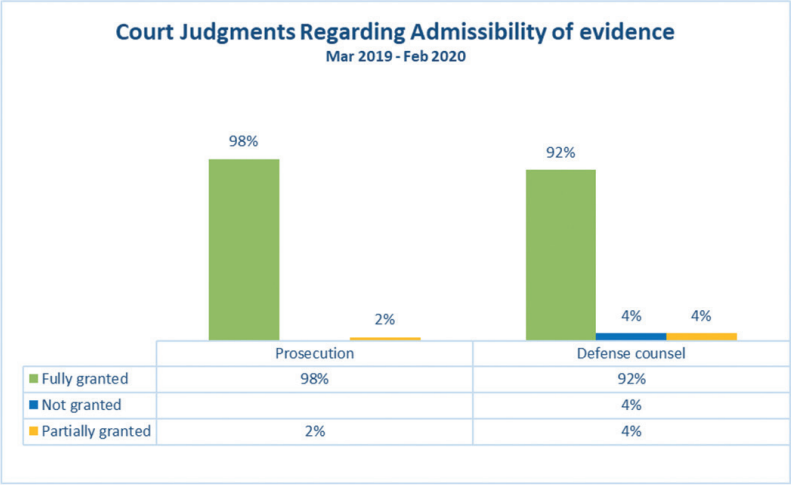
ANALYSIS OF COURT HEARINGS

The GYLA's monitoring did not reveal any biased attitudes of the court to the parties at the preliminary court hearings reviewing the admissibility of evidence during the given reporting period. Judges mostly granted both the motions presented by the prosecution on the admissibility of relevant evidence obtained under the applicable law and evidence presented by the defense.

The chart below shows the percentage of decisions rendered by the court on the admissibility of evidence presented by the prosecution and defense during the reporting period, from March 2019 to February 2020.

[29] Criminal Code, Article 219(6).

Chart №14



The motions submitted by the prosecution were upheld in 462 (98%) cases and partially upheld in 8 (2%) cases during 470 pre-trial court hearings. The defense presented evidence to the court in 141 cases. In 131 (92%) cases, the motions of the defense were granted, in 5 (4%) cases partially granted, and in 5 (4%) rejected.

Motions of the prosecution regarding the admissibility of evidence:

The prosecution filed motions regarding the admissibility of evidence at 470 preliminary court sessions. During the court hearings, 387 (82%) defendants were represented by defense lawyers.[30]

The position of the defense counsel concerning the admissibility of motions presented by the Prosecutor's Office:[31]

- In 39 (8%)cases, partially agreed with the prosecution on the admissibility of evidence;

[30] In the previous reporting period, 77% of the accused were represented by defense lawyers.

[31] In the previous reporting period, defense fully supported the admissibility of evidence in 201 (48%) cases.

In 141 (34%) cases,[32] the defense presented evidence to the court and requested to recognize it as admissible. Of these, in 94 (66%) cases, the prosecution fully disputed the evidence presented by the defense, in 12 (9%) cases, partially disputed, and in 35 (25%) cases, the prosecution agreed to deem the evidence presented by the defense undisputed.

It is true that the legislation imposes the burden of proof on the prosecution, but within the environment of adversariality, the role of the defense is important, especially in terms of refuting evidence submitted by the prosecution and presenting own evidence. However, the above statistics show that the defense remains rather passive in the process of gathering evidence and presenting it to the court.

During the given reporting period, as in the previous one, in none of the cases were the criminal proceedings terminated.

[32] An identical 141 (34%) rate was recorded in the previous reporting period.

SEARCHES AND SEIZURES CARRIED OUT ON THE GROUND OF URGENT NECESSITY AND JUDICIAL CONTROL

INTRODUCTION

Searches and seizures are a massive interference with the right to privacy of a person and violate the rights guaranteed by the Constitution. Therefore, for ensuring that the risks of unlawful interference in the private life of a person are minimal, the legislator determined strict judicial control over the above types of investigative actions.

According to Article 112 of the Criminal Procedure Code, a judge shall issue a court warrant for a search and seizure, and, if the investigative action is conducted as an exception, the court shall investigate the lawfulness of searches and seizures conducted under the grounds of urgent necessity. In the latter case, the court shall analyze whether the procedures provided for in the law for searches and seizures were observed during the search and seizure carried out under urgent necessity, whether there were grounds for conducting the investigative actions without the judge's prior ruling, namely, whether the factual circumstances in the case provided the sufficient grounds for conducting the investigative actions, whether there was the expediency for conducting the search or seizure under urgent necessity and what possible consequences may have occurred provided that the investigative activities were delayed.

ANALYSIS OF COURT HEARINGS

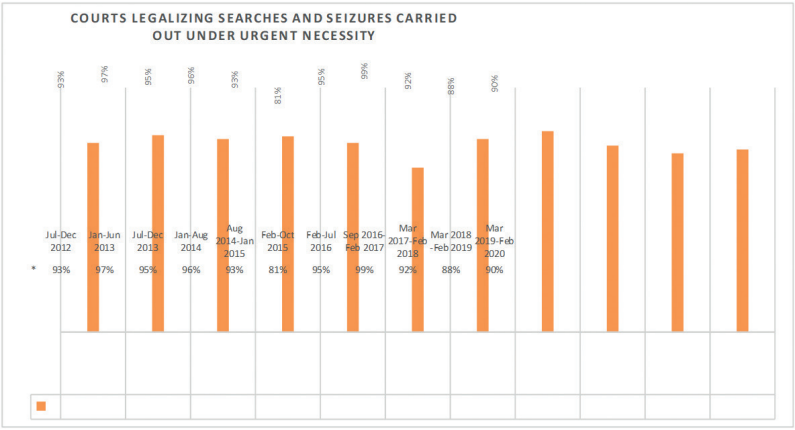
During the given reporting period, the prosecution conducted searches and seizures mainly on the grounds of urgent necessity. During 191 (41%) out of 470 preliminary court hearings, the prosecutor produced a search and seizure protocol and requested it to be admitted as evidence. In 24 above cases, it remained unknown based on what procedure the search and seizure had been conducted.

The motions filed by the prosecution showed that out of 167 cases of searches and seizures, only 17 (10%) were carried out with a prior court ruling, and in 150 (90%) cases, the searches and seizures were conducted under urgent necessity. The motions of the prosecution requesting the searches and seizures under urgent necessity were granted by the court in 143 (95%) cases, and in 7 (5%) cases, it is unknown whether they were granted or not.

Searches and seizures on the grounds of urgent necessity were carried out for drug-related offences in 53 (35%) cases,[33] in 29 (19%) cases within the investigation of crimes against property,[34] in 40 (27%) cases, for the crimes against life and bodily health,[35] and in 28 (19%) cases, for crimes envisaged under other articles of the Criminal Code.

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

Chart №15



Obviously, the search and seizure are the most widely applied investigative actions. In the majority of cases, evidence obtained as a result of the investigative actions is so important for the proceedings that the legislator has allowed the restriction of the human right guaranteed by the Constitution.[36] However, the frequency of searches and seizures as well as the intensity of the intrusion into private life impose even greater responsibility on the prosecution and the court to examine the necessity for the investigative actions in proportion to the interference with a person's private life.

The above chart clearly shows that the Prosecutor's Office has been large-

[33] The provided data refer to Articles 260, 273 and 265 of the Criminal Code.

[34] The presented data refer to Articles 177, 178 and 179 of the Criminal Code.

[35] The data presented refer to Articles 108, 109, 117, 126, 126[1] and 120 of the Criminal Code.

[36] The Constitution of Georgia, Article 15.

ly conducting the above type of investigative actions for years under urgent necessity. Moreover, the rate of legalizing by the court the searches and seizures without a prior court ruling is significantly high.

SEARCHES AND SEIZURES WITHOUT A COURT'S PRIOR RULING

Merely the attendance at the court hearings does not allow us the possibility to assess the level of substantiation of court rulings permitting searches and seizures under urgent necessity. Therefore, in order to further elaborate the report, GYLA requested Tbilisi, Rustavi, Kutaisi, Batumi City and Telavi District Courts to provide us with relevant court rulings sanctioning searches and seizures and any corresponding information thereof during the reporting period.[37]

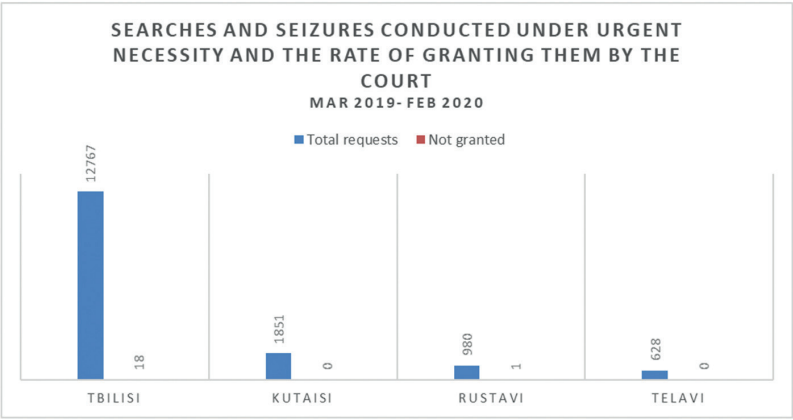
GYLA requested the following information from the courts in the period from March 2019 to February 2020 as part of the preparation of the report:

- The number of cases where the Prosecutor's Office of Georgia appealed to the court or the investigative panel with the request to issue a court ruling permitting to carry out searches and seizures, and the number of motions granted and/or rejected.
- The number of cases when the Prosecutor's Office filed a motion with the court to recognize searches and seizures conducted without prior permission of the court as lawful and the number of motions granted and/or rejected.
- Randomly selected 30 (thirty) court judgments granting and/or refusing to grant the motions to carry out the investigative actions - searches and seizures- without a prior warrant of the court.

The chart below shows information regarding searches and seizures conducted without a prior court ruling and the court's refusal to grant the said investigative actions.

[37] The Batumi City Court did not provide us with court judgements warranting searches and seizures.

Chart №16



The information provided confirms that in almost all cases the court upholds the motions for a search and seizure without a prior court ruling.

Analysis of court judgments

The analysis of court judgments provided by all four courts has vividly shown that the court rulings are in most cases of a template nature and create the impression in the reasoning part as if all judgments were delivered concerning one case.

GYLA studied 20 court judgments received from Tbilisi City Court, the analysis of which revealed the following trends: 70% of the decisions of the court on the satisfaction of the prosecutor's motions do not contain any arguments as to what factual evidence served as the basis for the investigative action, and merely provide the formulaic explanation that "the combination of facts and information relating to the given criminal case presented by the prosecutor provide sufficient factual grounds for the reasonable assumption." The only difference between the documents under consideration is the type of investigative action (search or seizure), the time of the execution of the action, and a target person, which indicates the formal nature of the court decisions.

The court rulings contain the description of the investigative activity copied from criminal case files, and nowhere in the reasoning part, it is provided what information the judge relied on, or which piece of information

the court deemed as a valid argument for interfering with a person's private life.

In 30% of the cases, the court judgments are more or less substantiated, yet neither of them provides the justification that the factual circumstances of a specific case and the necessity of conducting the investigative actions in the above manner are definitely in line with the procedural law.

With respect to the above, the practice of the European Court on Human Rights is significant, which requires the existence of "sufficient" and "relevant" reasons as the actual precondition for carrying out a search.[38]

Among the retrieved court judgments, there were cases where the motions submitted by prosecutors requesting to legalize the investigative actions conducted without the permission of the court were not granted. In all the cases studied, the breach of the 24-hour timeframe for appealing to the court under Article 112, paragraph 5 of the Criminal Procedure Code is referred to as the reason for the refusal. The judges show a diligent approach to the issue, as they carefully study and note down even several minute deviations (e.g. 6 minutes), but on the other hand, the fact that the refusal of motions is based merely on the violation of the timeframes while other procedural or substantial violations are not touched upon can prove that the reasoning offered above regarding the judges failing to pay due attention to the matter is correct.

The Rustavi City Court forwarded to GYLA ten court judgments on the legality of the searches and seizures conducted without a judge's prior ruling. The quality of describing the factual circumstances did not allow us to discern specifically what risks of destruction or damage to evidence the court was referring to. The court applies the same wording in all judgments:

> "... the combination of facts and information concerning the criminal case presented by the prosecutor provided sufficient factual grounds for the reasonable assumption that ... the

[38] In the case of Smirnov v. Russia, where the violation of Article 8 of the Convention was established, the court pointed out, among other reasons, the following circumstance in its part of the argumentation:"The Oktiabrski Court resorted to only the conclusion that the order was substantiated. It referred to four titled documents and other unidentified materials, without describing their contents. The court did not comment on the relevance of the materials... The state authorities failed to perform their duties to provide relevant and sufficient evidence for obtaining an order for the search and seizure." The case: Smirnov v. Russia (71362/01), par. №47.

> seized ... was an important item for the case proceedings and the delay in the removal thereof may have caused the damage or destruction of evidence…"

We received 30 court judgments from Kutaisi City Court. As in the case of the previous two courts, the court rulings examined do not meet the high standard of substantiation. Similarly, it is not clear from the judgments on what factual circumstances the court relied on or what the court considered as a relevant argument for ordering searches or seizures under urgent necessity.

The five court rulings provided by Telavi District Court are no different from the judgments issued by the above-mentioned courts other than with the geographical location. Here, as in all other cases, the court mainly refers to the provisions of the law, fails to focus on the actual circumstances of the case, does not examine the expediency of conducting a search or seizure under urgent necessity, nor does it mention what risks may have occurred in terms of destruction of evidence provided that the investigative actions had been delayed.

PLEA AGREEMENT COURT PROCEEDINGS

A BRIEF OVERVIEW OF THE LEGISLATION

A plea agreement is an instrument allowing the court to render a verdict into a case without a merits hearing. According to a plea agreement, the accused pleads guilty and agrees with the prosecutor to a sentence proposed, to mitigation or partial removal of charges.[39] The plea agreement is a special, simplified case proceeding through which the judge declares a verdict without a merits consideration of the case, and without direct and oral examination of evidence.

Provided that a plea agreement is reached, a case is reviewed in an expedient and efficient manner, which saves time, material and human resources. According to Article 213 of the Criminal Procedure Code, if a judge considers that sufficient evidence has been presented to render a judgment without the main hearing of the case, and if the judge has received convincing answers from the accused concerning the circumstances provided for in the law, and if the sentence requested by the prosecutor is lawful and fair, the court may decide to deliver a judgment without a merits hearing. Otherwise, the court may return the case to the prosecutor and/or continue the hearing of the case in accordance with the procedure established by law.

IDENTIFIED TRENDS

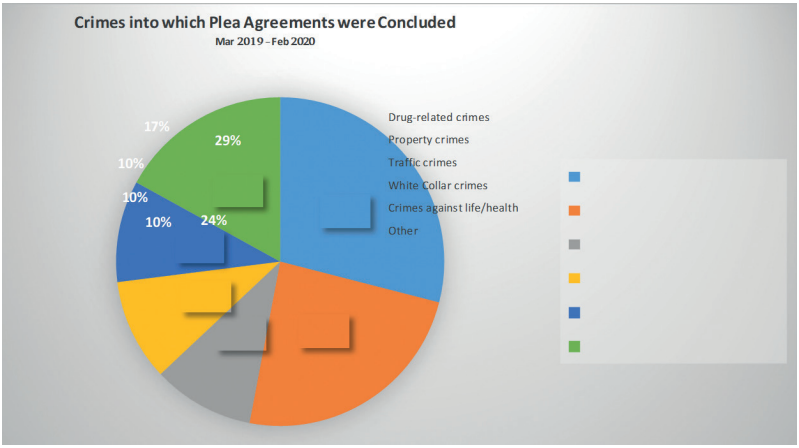
In the reporting period, the GYLA's monitors attended 527 plea agreement court hearings against 558 defendants. In 4 cases only, the court did not grant the motion submitted by the Prosecutor's Office on a plea agreement.

As in the previous reporting period, most frequently plea agreements were signed on drug-related offences – 160 defendants, 135 cases were related to property crimes, 55 cases - traffic crimes.

The following chart demonstrates the crimes in relation to which the plea agreements were signed, from March 2019 to February 20120.

[39] The Criminal Procedure Code of Georgia, Article 209 (1).

Chart №17



Informing defendants of their rights to plea agreements

Providing the accused with comprehensive information on his or her rights to a plea agreement, and thoroughly examining all the items provided for in Article 212 of the Criminal Code by the judge facilitates the implementation of judicial control, and allows the judge to exclude any contradiction to the institution of the plea agreement. If the judge does not receive convincing answers from the accused/convict concerning the circumstances provided for in the law, the judge may refuse to approve a plea agreement.

Identified trends

Of the 558 case proceedings, the GYLA monitors attended 190 (34%) court hearings where the judges did not fully inform the defendants of their rights relating to the plea agreement. In 52 (9%) cases, the judge did not ask the accused whether he had been subjected to torture, inhuman or degrading treatment by law enforcement officials. In 80 (14%) cases, the judge failed to inform the defendants of their right that a complaint against any fact of his or her torture, inhuman or degrading treatment would not prevent the approval of a plea agreement. The latter trend has worsened compared to the previous reporting period.[40]

[40] In the previous reporting period, this figure was 10%.

The practice of presenting only the operative part of judgments

As a rule, criminal cases are considered and the evidence thereof is examined in an open court hearing. This general rule also applies to the examination of a motion requesting a plea agreement and delivering a verdict without merits hearing.[41] A case must be reviewed in full compliance with the rules of procedure, openly and publicly.

Identified trends

During the court trials against 98 (18%) of 558 defendants, the factual circumstances of the case were not disclosed and only the operative part of the verdict was presented.

In 85 cases, the court urged the prosecution to present only the operative part of the motion, and in 13 cases, the prosecutor voiced merely the terms of the plea agreement at his or her initiative.

There were 11 (2%) cases where the judge approved the plea agreement within less than five minutes, with a range of procedural violations and without hearing the positions of the parties. Judges formally dealt with the issue of approving plea agreements, thus failing to exercise proper control over the proceedings.

To illustrate this, please see the following example:

> At one of the court hearings considering a plea agreement, the judge announced only the essence of the charge, the parties who were present at the hearing and then directly approved the plea agreement referring to its relevant terms and conditions. It took the judge a total of two minutes to do the above. The parties could only say that they agreed to the plea agreement.

Court's approach to lawfulness and fairness of the sentence

The court is not obliged to unconditionally accept and approve a plea agreement reached between the parties. According to Article 212, para-

[41] Commentary on the Criminal Procedure Code of Georgia, the group of authors, editor: Giorgi Giorgadze, p. 639. Tbilisi, 2015. Available at: https://library.iliauni.edu.ge/wp-content/uploads/2017/03/ssssk-komentari.pdf

graph 5 of the Criminal Procedure Code, the judge shall make a decision on a plea agreement based on the law and shall not be obliged to approve the agreement reached between the accused and the prosecutor. This right of a judge is an important instrument to ensure proper control over the terms of the plea agreement and prevent the abuse of this institute.

Identified trends

Of the 558 cases in which the plea agreement was approved, the judge noted in merely 48 (9%) cases that he or she considered the sentence lawful and fair. This figure has improved by 7 percent compared to the previous reporting period.[42]

There were cases where the prosecutor could have refused to initiate criminal proceedings and/or offer the diversion to the party. On its part, the court could have declined the plea agreement because of the minor importance of the act.[43]

To illustrate this, please see the following example:

- A person was charged with theft (Article 177, paragraph 1 of the Criminal Code). According to the factual circumstances of the case, the accused secretly appropriated pieces of metal (scrap) for illegal possession, thus causing 35 GEL damage to the victim.

  The judge approved a plea agreement, as a result of which the defendant was fined with the amount of 1000 GEL.

- A person was accused of attempted theft (Article 19, Article 177, paragraph 1 of the Criminal Code), in particular, he tried to steal beer and "Churchkhela" to secretly appropriate the property illegally, which caused the victim the damage in the amount of 10 GEL and 30 tetri. According to the plea agreement, the accused was sentenced to 6 months of imprisonment, which was considered as a suspended sentence and 1 year of probation.

[42] In the previous reporting period, this figure included 11(2%) cases.

[43] According to Article 7 of the Criminal Code, an act that formally contains elements of a crime, but does not cause any damage that would necessitate criminal liability for its commission does not constitute a crime.

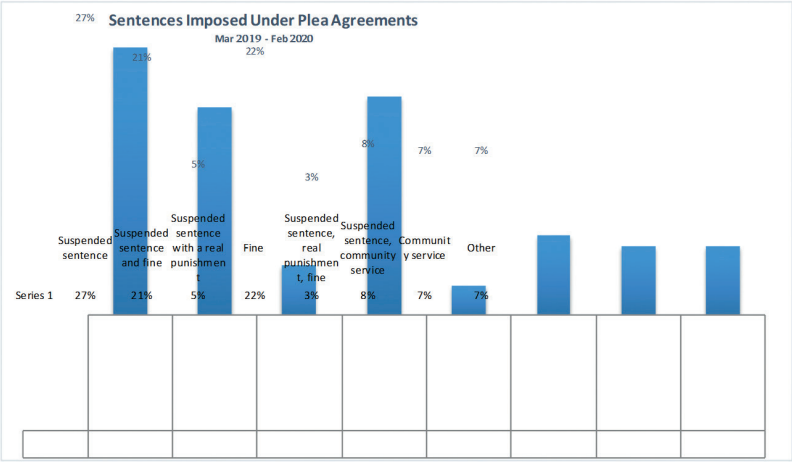
Significant state resources should not be wasted on the cases similar to the above, and humane practice should be established, both by the court and prosecution. The latter exercises the discretionary power of prosecution under the Criminal Procedure Code, which allows the prosecutor to refuse to prosecute or resort to an alternative mechanism of prosecution - diversion.

SENTENCES IMPOSED

As a result of the monitoring of court proceedings, it was revealed that in the given reporting period, most frequently plea agreements imposed suspended sentences, either independently or in addition to other types of sentences.

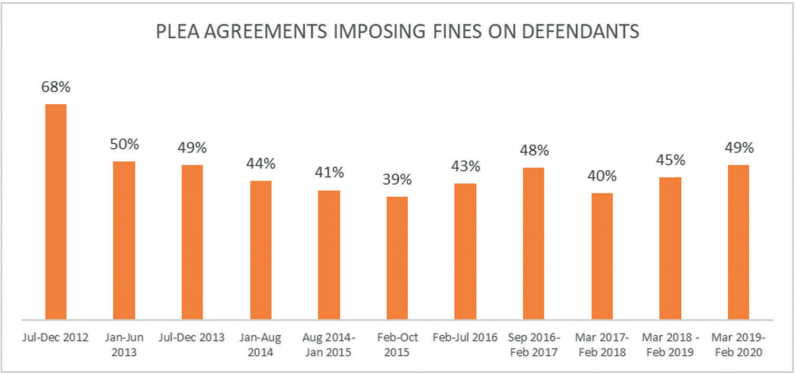
The chart below shows the percentages of sentences imposed under plea agreements.

Chart №18



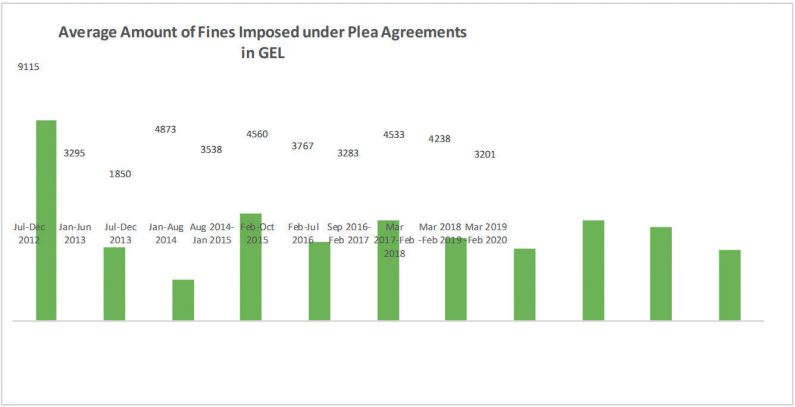
A fine is still one of the most widely imposed forms of punishment. The last two reporting periods have seen an increasing trend in the application of fines.

Chart №19



On the other hand, the average amount of the fine has decreased to 3201 GEL.[44]

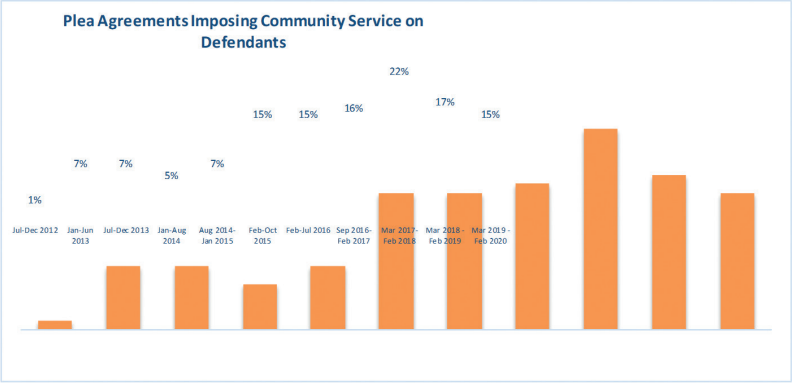
Chart №20



A new trend has been identified showing that the last two reporting periods have seen a decline in sentencing defendants to community service as a preventive measure. In the previous reporting period, the judge imposed community labour as a form of punishment in 17% of cases, while the figure was reduced by two percent and amounted to 15% in the given reporting period.

[44] In the previous reporting period, the figure amounted to 4238 GEL.

Chart №21



CONSIDERING THE INTERESTS OF VICTIMS IN INDIVIDUAL TYPES OF CRIMES

Crimes against life, bodily health and property

The refusal of the victim shall not become an obstacle to reaching a plea agreement, however, the law stipulates that the prosecutor shall consult with the victim before concluding a plea agreement.[45] The goal of the above provision is that the Prosecutor's Office and thereafter the court shall render a decision on the plea agreement taking into consideration the interests of the victim, especially in sensitive cases that have resulted in the loss of human life.

Identified trends

Of the GYLA-monitored cases, 190 concerned crimes against life, bodily health and property. During the 176 (93%) court hearings, nothing was said about the victim's opinion, and at the remaining 14 (7%) hearings, the prosecutor voiced the victim's position. This figure has significantly decreased compared to the previous reporting period.[46]

[45] The Criminal Procedure Code, Article 217, paragraph 1.

[46] During the previous reporting period, the position of victims at the court trial was examined and/or the prosecutor presented a protocol of consultation with the victims in 29% of the cases.

In this reporting period, plea agreements were signed with 55 defendants accused of committing traffic-related crimes. In 12 of these, the crime resulted in a human's death, and the prosecutor mentioned the position of the victim's legal successor in one case only, stating that the victim did not have any financial or emotional complaints against the accused.

Although the Prosecutor's Office is not obliged under the law to completely share the victim's position when reaching a plea agreement, GYLA deems it important that the position of the victim's successor should be voiced during the court hearings; the opinion of victims should be clearly and explicitly announced as well as the reason why the victim would not initially consent to a plea agreement.

PARTICIPATION OF THE PARTIES IN REVIEWING PLEA AGREEMENTS

The role of the defense counsel

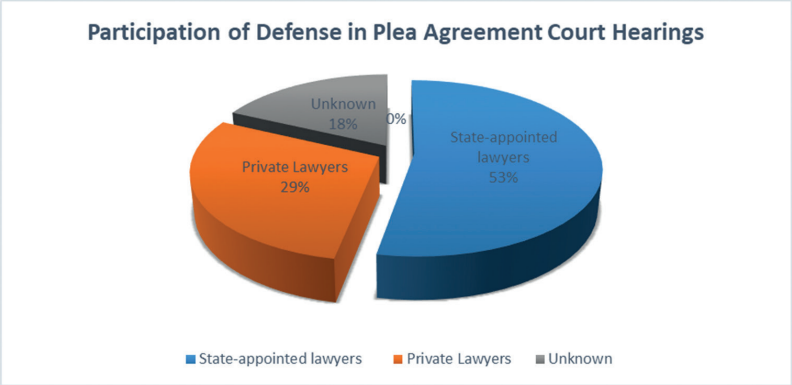
It is mandatory that the accused be represented by a defense counsel if negotiations are underway with him or her on a plea agreement.[47] The right to legal protection is particularly significant in a plea agreement. The participation of the defense must be expressed in the provision of comprehensive legal consultation for the defendant on a plea agreement, as well as informing the defendant of the legal consequences of signing the plea agreement.

Identified trends

As a result of the monitoring, it was not identified whether the lawyer was appointed at the expense of the state or hired by the accused in 103 (18%) cases.

[47] The Criminal Procedure Code, Article 45, sub-paragraph "f".

Chart №22



The problem of communication between the accused and the defense counsel, where the accused was represented by a private lawyer, was identified in a minimal number of 4 (3%) cases out of 162. Inadequate communication between state-appointed attorneys and their clients was detected in 18 (6%) out of 293 cases. The data has significantly decreased compared to the previous reporting period,[48] which should be assessed positively.

Nevertheless, against this background, the following cases were still revealed:

- ❖ The interests of an accused were represented by a state-appointed lawyer who was unable to show up for the court trial, which is why another lawyer appeared at the hearing, with the participation of whom a plea agreement was signed. The new lawyer met with the accused for the first time prior to the court hearing.
- ❖ A defendant asked the court at the plea agreement court hearing what the probation period meant. The lawyer then explained the essence of the probation period to the accused during the court hearing. The above indicates that the accused had not been provided with thorough and qualified legal services during the negotiation for the plea agreement.

[48] The problem of communication between defendants and lawyers appointed at the expense of the state was identified in 56 (23%) cases out of 247.

Approaches of the Prosecution to Plea Agreements

A plea agreement is signed in agreement with the superior prosecutor. For the conclusion of a plea agreement, the prosecutor shall take into consideration the public interest to the case which is determined by the prosecutor based on the state's legal priorities, the severity and gravity of the crime committed and expected punishment, the gravity of the crime, the degree of charge, the risks posed to the public by the accused, his or her personal characteristics, past conviction, cooperation with the investigation and the analysis of the defendant's behavior in terms of his or her willingness to compensate for the inflicted damages. While doing so, the prosecutor shall be guided by the key principles of criminal law. At the same time, the readiness of the prosecution to reach a plea agreement is important, as it is the discretion of the prosecution to agree and/or offer the defendant a plea agreement. The plea agreement, as an instrument, is in the hands of the Prosecutor's Office and there have been cases when the prosecution utilized this leverage for manipulations.

To illustrate, please see the following example:

> The lateness of the defense counsel enraged the prosecutor who then started referring to the accused in an aggressive tone. The prosecutor told the defendant that he would abandon the court hearing leaving up to the accused to decide what would happen to him or her (presumably the prosecutor was implying that he would no longer appeal to the judge with the request of a plea agreement).

TRENDS IDENTIFIED DURING COURT HEARINGS ON THE MERITS

Violation of the principle of publicity

Publicity is one of the fundamental principles of criminal proceedings, reinforced by a number of international instruments. The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms ensure the right to a fair trial.[49]

The principle of an oral and public court hearing is also envisaged by the legislation of Georgia. A court hearing, as a rule, shall be public and oral. A court trial is allowed to be closed only in the cases provided by the Criminal Procedure Code. All decisions rendered by the court shall be made public.[50] Publicity of criminal proceedings, first of all, means that the hearing of a case shall be conducted at open and public court sessions. Publicity of court hearings ensures civil control over the activities of the body administering case proceedings and raises the authority of the judiciary.[51]

The right to a public court hearing is not an absolute right and may be restricted in order to prevent the dissemination of materials containing state secrets, in order to protect personal data, professional or commercial secrets, and in other cases provided so by law.[52] Furthermore, the decision of the court to close a court hearing must be legally substantiated.

IDENTIFIED CASES

During the reporting period, GYLA attended 1103 hearings on the merits. Of these, information on the court trial was not available (neither the timetable nor the court's website provided it) in 89 (8%) cases.

The court should make every effort to ensure that interested persons wishing to attend the case proceedings should have information about the schedule of the court hearing and, on the other hand, the practical possibility to attend the proceedings. In 9 cases, not everyone wishing to attend the court trial was allowed to do so because the hearing was being

[49] UDHR, Articles 10 and 11 (1); ICCPR, Article 14 (1); ECHR, Article 6 (1)

[50] The Criminal Procedure Code, Article 10.

[51] "Criminal Proceedings (individuals Institutions of the General Part)," the group of authors, R. Gogshelidze, (Ed.), Tbilisi, 2009, 157-158.

[52] The Criminal Procedure Code, Article 182.

held in a small courtroom. The court trials in 7 cases were closed. In one of the above, the judge closed the hearing on his or her own initiative to ensure the public order.

> During the hearing, the judge found it difficult to maintain order in the courtroom. Two or three individuals were frequently shouting remarks including phrases with inappropriate terminology in them. Following several warnings, the judge closed the hearing on his or her own initiative to ensure order.
>
> There was a high public interest into the case so the judge should have resorted to another measure, for example, fined and/or expelled from the courtroom those who were violating the order, and should not have closed the hearing completely.
>
> In making such a decision, the principle of publicity of the court trial should be a priority.

In three cases, the closure of the court hearing served the interests of the victim, in particular, the interests of a victim of domestic crime. In the other three cases, the court trial was closed to protect personal and private information.

EXPEDIENCY OF JUSTICE

The right to a fair trial is guaranteed by both national legislation[53] and international instruments.[54] The OSCE member states are committed to "ensure [...] the effective administration of justice and the proper administration of the judiciary."[55]

The accused has the right to receive a fair and expedite trial, and the court is obliged to consider the criminal case in which imprisonment is applied as a measure of restraint against the accused as a priority.[56]

The administration of justice must be carried out in a timely manner, without undue delay. This requirement is imbedded in the timeframes envis-

[53] The Criminal Procedure Code, Article 8(2).

[54] The International Covenant on Civil and Political Rights, Article 14 (3); European Convention on Human Rights, Article 6 (1)

[55] Decision of the Council of Ministers 5/06, The Fourteenth Meeting of the Council of Ministers, Brussels, (2006), par. 4.

[56] The Criminal Procedure Code, Article 8(3).

aged for criminal proceedings under the Criminal Procedure Code. For example, the total term for the consideration of custodial cases may not exceed 9 months.[57] For other non-custodial cases, a 24-month (two-year) period of review is set.[58] In addition, with respect to criminal cases filed to the first instance court prior to the enactment of Article 185, paragraph 6 of the Criminal Procedure Code, the court shall deliver a court judgment within no later than 36 months after the enactment of the above amendment (1 January 2016), which means that such cases should have been finalized by 1 January 2019 at the latest.

The court monitoring conducted by GYLA has revealed multiple cases of delay and lateness for the case proceedings, which is leading to delays in the administration of justice.

IDENTIFIED RESULTS

GYLA is monitoring several cases proceedings that have been deliberated for years without a specific legal outcome. The cases are the so-called "The Case of 7th November"[59] (been considered on the merits since 2015), "The Case of Suits"[60] (been considered on the merits since 2016),[61] "The Case of Former Heads of Batumi Prison"[62] (been considered on the merits since 2014).

The timeframes for the consideration of the case proceedings as stipulated by the legislation has been violated in relation to the latter. In the remaining two cases, it is true that the court did not directly breach the timeframes set by law,[63] yet the proceedings being in progress over the

[57] The Criminal Procedure Code, Article 205(2).

[58] The Criminal Procedure Code, Article 185(6).

[59] Giorgi Ugulava (former mayor of Tbilisi), Ivane Merabishvili (former Minister of Internal Affairs), Davit Kezerashvili (former Minister of Defense), Zurab Adeishvili (former Prosecutor General, then Minister of Justice), Mikheil Saakashvili (former President of Georgia) are the defendants into the case; The charges are as follows: Article 333, paragraph 1 of the CC; Article 25, Article 182, paragraphs 2 and 3 of the CC; Article 25, Article 194, paragraph 3 of the CC; Article 333, paragraph 3 of the CC; Article 333, paragraph 2 of the CC; Article 194, paragraph 3 of the CC; Article 333, paragraph 3 of the CC; Article 333, paragraphs 2 and 3 of the CC.

[60] Mikheil Saakashvili and Teimuraz Janashia are defendants in the case; The charge is Article 182, paragraph 3 of the Criminal Code.

[61] The court trials were conducted at one-month intervals.

[62] The former director of the Batumi Prison №3 and his deputy are defendants in the case.

[63] The timeframes specified in paragraph 6 of the Criminal Procedure Code shall not apply to a criminal case in which the accused avoids appearing in court and / or the accused is wanted.

years create the impression in the eyes of an impartial observer that the administration of justice is hampered.

Another allegedly delayed case is "The case of premeditate homicide of Badri Patarkatsishvili." The doubts that the case consideration is delayed have been deepened by the fact that no court hearing has been held since 20 November 2019.[64] The case proceedings have reached the final stage, aka the defense speech, yet no court hearing has been scheduled for unknown reasons for six months, raising suspicions that the trial is suspended on purpose. It is true that according to Article 185 (6) of the Criminal Procedure Code, "the court of the first instance shall render a judgment not later than 24 months after the judge of preliminary proceedings makes a decision to refer the case for the main hearing", but the 24-month term implies maximum period, depending on the complexity of a case.

In contrast to the above, there were two cases where the court scheduled non-custodial case hearings in a hasty manner. In particular, in the case of Mamuka Khazaradze, Badri Japaridze and Avtandil Tsereteli, the judge speedily scheduled the hearings without taking into account the interests of the defense.[65] At almost all court trials, the defense counsel reiterated his dissatisfaction with that regard and later filed a motion on the recusal of the judge on the grounds that the case was being considered hastily. The judge later reduced the number of court trials and scheduled them on average twice a week.

Another case is so-called "Rustavi 2 case", where accused are Nika Gvaramia, Kakhaber Damenia and Zurab Iashvili.[66] At the first, the court unilaterally determined the dates of the hearing, not to take into account

[64] The information was processed as of 27 March 2020.

[65] On 27 December 2019, the Judge scheduled the dates of the subsequent court hearings, namely, 9 January, 14 January, 15 January, 17 January, 20 January, 22 January, 27 January, 29 January, 30 January, 3 February, 6 February, 10 February, 12 February, 17 February, 19 February, 25 February, 28 February, 4 March, 6 March, 10 March, 12 March, 17 March, 19 March, 23 March, 25 March. The court hearings were scheduled to begin at 11 a.m. and continue throughout the day. The defense objected to the intensity of the court proceedings, but the judge did not change the above schedule at the initial stage.

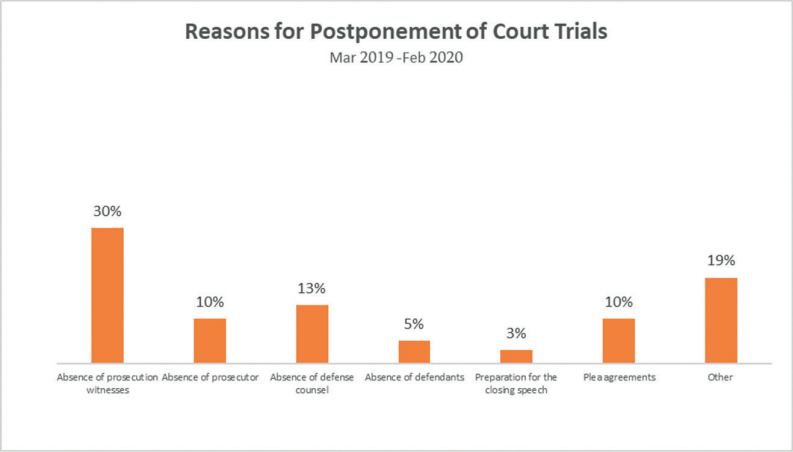
[66] Nika Gvaramia (Former General Director of Rustavi-2), accusation – article 182, paragraph 2, "a" and "d" and paragraph 3, "b" of the CC. Article 221, paragraph first of the CC, article 362, paragraph 2, "b" of the CC, article 194, paraghraph 3, "c" of the CC and article 220 of the CC.
Zurab Iashvili (Director of the Intermedia Plus), accusation - article 362, paragraph 2, "b" of the CC, Article 221, paragraph first of the CC.
Kakhaber Damenia (Former Finance Director of Rustavi2), accusation - article 182, paragraph 2, "a" and "d" and paragraph 3, "b" of the CC.

the position of the defense. The defense lawyers said that other processes coincided with these dates and demanded to set another time for hearings. Despite protests from the defense, the judge adjourned the hearings at very close intervals.[67] 10th of January, the judge declared self-recus, the reason given was the confrontation between him and the accused took on a personal character and he may not have been able to proceed objectively.[68] The case was then referred to another judge, after which the approach was changed and the hearings were not marked with such intensity.[69]

Postponement of Court Trials

The court hearings were postponed upon their opening in 456 cases (41%) out of 1103. In the majority cases, the adjournment of the court hearing was due to the absence of witnesses from the prosecution (30% of the adjourned court trials) or a plea agreement (18%). Among other reasons, the absence of a defense lawyer (13%) or the prosecutor (10%) was reported.

Chart №23



[67] On 3 January 2020, the Judge scheduled the dates of the subsequent court hearings, namely 6 January, 10 January, 13 January, 20 January, 23 January, 25 January and 7 February.

[68] The reason for the dismissal, according to the judge, was insult to the court, which was expressed by Mr. Gvaramia in a briefing and Facebook status in the title of obscene words for the judge (for ex. bastard), and the court considered insulting Gvaramia's statement about his inadequacy.

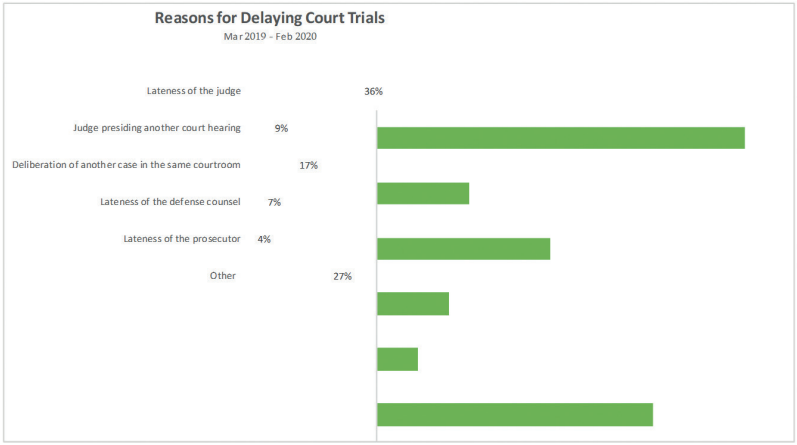
[69] On 24 January 2020, the Judge scheduled the dates of the subsequent court hearings, namely 30 January and 17 February.

Delayed Opening of Court Hearings

Delayed opening of court hearings have been identified as a problem, in particular, 324 out of 1103 cases were opened behind the schedule. In 38% of the cases, the court trials tend to start 15 to 30 minutes late. Moreover, in 85 (26%) cases, the opening of court trials was delayed for more than 30 minutes.

In majority cases, the court hearings were delayed due to the court reasons (36%) or the progress of other court trials in the same courtrooms (17%). In some cases, the lateness of the parties resulted in the failure to start the court hearing on time (11%). The other reasons include delays in the transportation of the defendants by the escort service, technical shortcomings, lateness of witnesses, lateness of interpreters, and the cases where the reason for the late opening of the court hearing remained obscure to the monitors.

Chart №24



Court Judgments

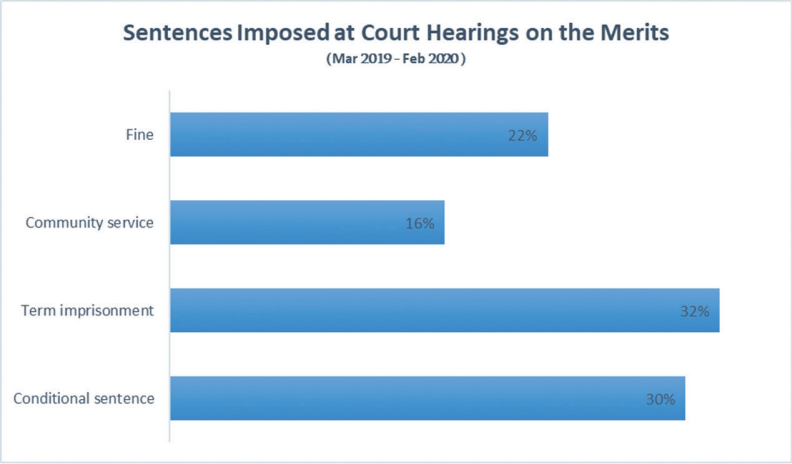
In total, the GYLA monitors observed 1103 main court hearings, during which the final court rulings were declared into 149 (14%) cases: 20 (13%) - acquittals, 122 (82%) – guilty verdicts, partial acquittals - 7 (5%).

The percentage of acquittals is virtually identical to that of the previous reporting period, just with a minor increase of one percent. Most of the

acquittals concerned domestic crimes, namely 14 out of 20 acquittals. The monitoring showed that in 7 out of 14 cases, the victims exercised their right granted under the law and refused to testify. Besides, there was no conclusive evidence in these cases to prove beyond a reasonable doubt the guilt of the defendants, which served as the prerequisite for the acquittal of those accused of domestic crimes.

After the main court hearings, the court, as in the previous reporting period, most frequently imposed the term imprisonment as a form of punishment (32%), and community service most rarely. However, the use of the latter type of sentence has increased by 5 percent.[70]

Chart №25

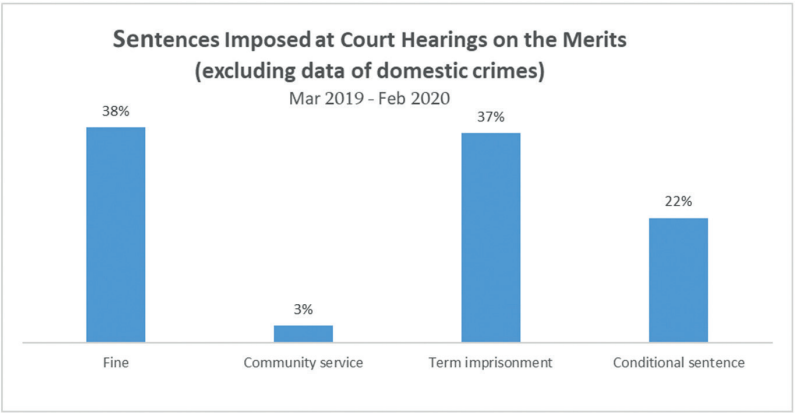


The sentences imposed during the merits hearings with the exclusion of domestic crimes show a different picture. In particular, the rate of term imprisonment is higher and accounts for 37%. The imposition of fine is also high - 38%.

(The data in the following chart do not contain information on the fines for domestic crimes).

[70] In the previous reporting period, community service as a punishment was used in 11% of convictions.

Chart №26


Sentences Imposed at Court Hearings on the Merits
(excluding data of domestic crimes)
Mar 2019 - Feb 2020
38%
3%
37%
22%
Fine
Community service
Term imprisonment
Conditional sentence

TRENDS DETECTED THROUGH THE MONITORING OF DOMESTIC CRIMES

A BRIEF OVERVIEW OF THE LEGISLATION

The combat against domestic violence, domestic crimes and violence against women has become especially important after the ratification of the Istanbul Convention by Georgia,[71] which resulted in undertaking a number of commitments by the state and legislative amendments.

Article 11^1 of the Criminal Code of Georgia provides for the criminal liability for domestic crimes,[72] and the explanatory note added to the article defines the category of family members for the Criminal Code.[73] According to Article 126^1 of the Criminal Code, violence, systematic insult, blackmail or humiliation by one member of the family against another family member, which has resulted in physical pain or suffering, but did not result in intentionally serious, less serious or intentionally minor damage of bodily health shall be considered domestic violence.[74]

ANALYSIS OF PREVENTIVE COURT HEARINGS

The monitoring has revealed that the causes of domestic crimes are often complex and largely determined by psycho-social environment, as well as prejudiced gender stereotypes rooted in the society over the years, which are the most frequent factors leading to violence against female victims of domestic violence.

During the given reporting period, we monitored 121 first appearance court hearings of domestic violence (Article 126^1 of the Criminal Code)

[71] The Council of Europe Convention "On Preventing and Combating Violence against Women and Domestic Violence."

[72] Domestic crime means committing offences under Articles 109, 115, 117, 118, 120, 126, 133^1, 133^2, 137, 141, 143, 144, 144^3, 149, 151^1, 160, 171, 187, 253, 255^1, 381^1 and 381^2 of the Criminal Code by one member of the family against another family member.

[73] For the purposes of this article, the following persons shall be considered family members: mother, father, grandfather, grandmother, spouse, child (stepchild), adoptee, foster child, adopting parent, adopting parent's spouse, foster family (foster mother, foster father), stepmother, stepfather, grandchild, sister, brother, parents of the spouse, son-in-law, daughter-in-law, former spouse, persons in unregistered marriage and their family members, guardian, carer, supporter, also any persons who permanently maintain or maintained a common household.

[74] The Criminal Code, Article 126^1.

against 122 defendants, representing 18% of the total number of case proceedings analyzed during the reporting period.

In the cases of domestic violence, 115 of the 122 defendants were men and 7 women. It was identified during the court hearings that domestic crime is not a category of crimes where the victim of violence reports to law enforcement authorities immediately upon the occurrence of violence. The condition of the victim might be further aggravated if the perpetrator is a member of the law enforcement agencies. During the monitoring period, there were reported cases when the abusers in domestic crimes were law enforcers.

To illustrate this, please see the following example:

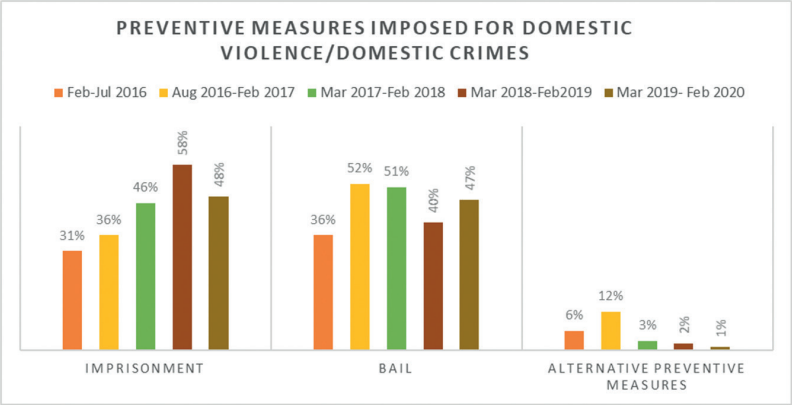
A patrol inspector was accused of violence against his wife in the presence of minor children (Article 126^{1}(2)(B) of the Criminal Code). As the prosecution pointed out at the court hearing, the crime allegedly committed by the accused was systematic involving both physical and psychological violence. The prosecutor added that at the moment of the crime the accused was aware that he was committing a crime, yet it did not serve as a deterrent. The Prosecutor's Office requested remand detention and also filed a motion to remove the accused from the office. The court upheld the remand detention, yet did not grant the other motion on the grounds that the alleged crime had no direct connection with the official position of the accused.

During the case proceeding, it was revealed that the accused had responded to domestic crimes multiple times while performing his work-related duties.

With regard to domestic crimes, GYLA believes that particular attention should be paid to the attitudes demonstrated by law enforcement officers involved in case investigations towards the vicious perceptions and prejudices, which often lead to domestic crimes. This will prevent to the maximum degree a potential abuser to utilize his influence acquired through the concentration of power to the detriment of the victim.

The following chart provides information on preventive measures imposed into domestic crimes.

Chart №27



At the initial court hearing of the accused, 109 (90%) defendants appeared before the court as the detainees. Prosecutors requested imprisonment in 87% of the cases as a measure of restraint.[75] Out of 122 individuals accused of committing domestic crimes, the court imposed bail against 60 (49%) defendants, in one case personal surety, and in 59 (48%) cases – remand detention. Two cases of domestic violence were reported during which the Prosecutor's Office requested remand detention, yet the court released the accused without a measure of restraint. Both cases are noteworthy for the fact that the defendants were charged with committing an offence under Article 381 of the Criminal Code along with the domestic crime.[76]

During the given reporting period, only one case was identified in which the statement of the defense counsel claiming that the victim had no complaints against the accused significantly changed the course of the preventive measure. The monitoring of the court trials also revealed that domestic violence in 28 (23%) cases was accompanied by threats of death or threats to inflict health injuries (Article 151 of the Criminal Code).

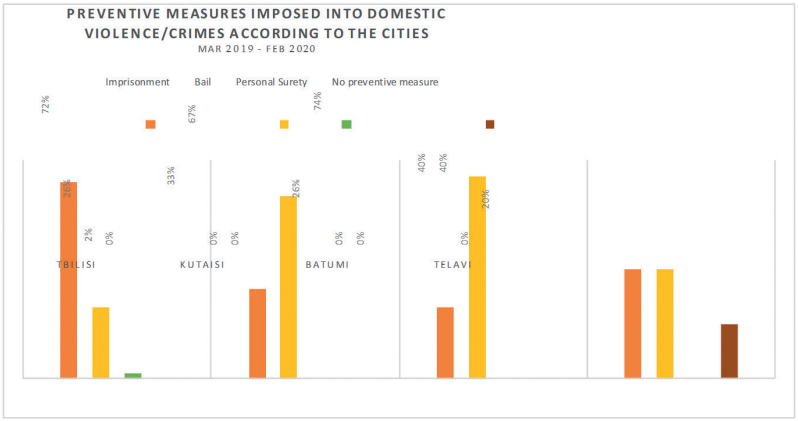
The following chart shows the preventive measures imposed into domes-

[75] In 106 cases out of 122, the Prosecutor's Office filed a motion for remand detention.

[76] The failure to comply with a court judgment or other court decision in effect or interference with the execution thereof.

tic violence cases (the offences envisaged by Article 11[1] of the Criminal Code) according to the cities, from March 2019 to February 2020.[77]

Chart № 28



SENTENCES IMPOSED UNDER PLEA AGREEMENTS INTO DOMESTIC CRIMES

The approach of the prosecution has tightened in relation to domestic crimes, and plea agreements for these types of crimes are literally not signed any longer. During the given reporting period, out of 523 cases (against 558 defendants), only 7 cases were reported where a plea agreement was signed with the accused in domestic crime. Despite the scarcity of such cases, there was still one case in which a person committed a new crime two days after signing the plea agreement.

[77] The number of individuals accused of domestic violence by cities; Tbilisi-54; Kutaisi-31: Batumi-18; Telavi-10; Rustavi-4; Gori-5

A person was charged with two counts of violence against his wife in the presence of minor children (systematic physical and years of verbal insult were reported) and two counts of threatening to kill his wife and failing to comply with the requirements of the court ruling.

The defendant fully admitted to the crime and although the victim did not testify against the accused, a plea agreement was signed with the defendant and 9-month custody was ultimately determined as the form and size of the sentence based on the total number of crimes he had committed. The court upheld the plea agreement.

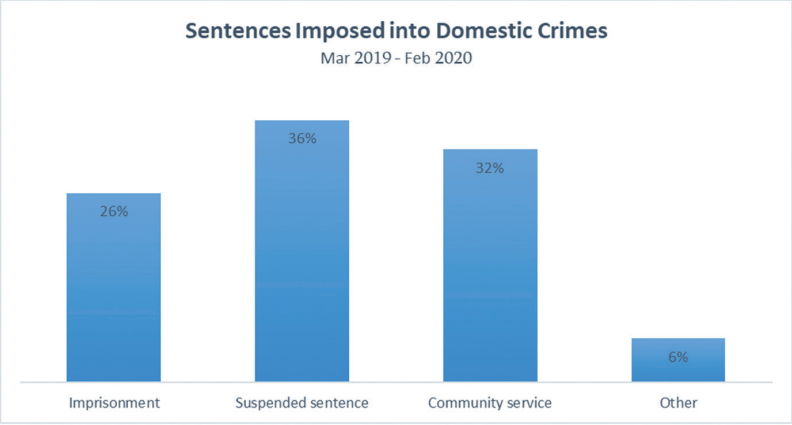
The convict left the penitentiary facility shortly after the plea agreement was signed, and two days after his release, he went back to the victim's house, his ex-wife, and smashed the house windows with stones. He then went on hiding but was later arrested by law enforcement authorities.

Sentences imposed by merits court hearings into domestic violence and domestic crimes

GYLA attended 162 court trials concerning domestic crimes, during which the court judgments were delivered against 56 defendants - 39 (70%) guilty verdicts, 14 (25%) acquittals, and 3 (5%) partial acquittals.

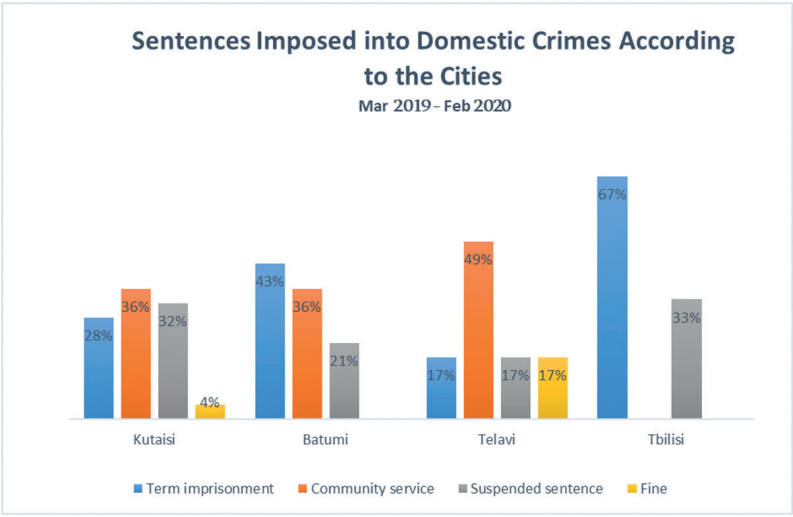
The following chart shows the types of sentences imposed for domestic crimes, from March 2019 to February 2020.

Chart №29



Tbilisi City Court still maintains a strict approach to domestic crimes, and the imposition of long-term imprisonment is particularly high here, accounting for 67%.

Chart №30



TRENDS REVEALED AS A RESULT OF OBSERVATION OF DRUG-RELATED CRIMES

PREVENTIVE MEASURES AGAINST DRUG-RELATED CRIMES

A brief overview of the legislation

A disorderly legal framework relating to narcotic drug offences remains a serious issue, just as it was in the previous reporting period. The court judgments delivered by the Constitutional Court of Georgia clearly show that the provisions provided in the articles relating to narcotic drug offences in the Criminal Code are not adequately regulated.[78]

The Constitutional Court's decision of 2 August 2019[79] clearly demonstrated the necessity for the introduction of amendments to the Criminal Code, yet neither the amendments nor the list specifying a small, large and especially large amount of drugs and psychotropic substances seized from illegal possession or circulation has been regulated to date.

On 4 June 2020, the Constitutional Court delivered another precedential decision according to which the normative content of the provision of Article 260, paragraph 3 of the Criminal Code, namely, "shall be punishable with imprisonment for a term of five to eight years" providing for the possibility to arrest a person for illegal purchase of a very small amount of narcotic drug not fitting even for personal consumption, was declared unconstitutional.[80]

The Constitutional Court furthermore determined the amounts of narcotic drugs that can be deemed an adequate amount for consumption. The amount should be determined in relation to every specific substance by the Criminal Court reviewing each individual case.

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[78] Court judgment №3/1/855 of the Plenum of the Constitutional Court of Georgia dated 15 February 2017 – the website, 21.02.2017
Court judgment №1/8/696 of the Constitutional Court of Georgia dated 13 July 2017– the website, 20.07.2017
Court judgment №1/9 /701, 722,725 of the Constitutional Court of Georgia dated 14 July 2017, - the website, 20.07.2017.
Court judgment №1/9/701,722,725 of the Constitutional Court of Georgia dated 14 July 2017 - the website, 20.07.2017.
Decision № 1/13/732 of the First Panel of the Constitutional Court of Georgia dated 30 November 2017.

[79] The application: Public Defender of Georgia v. Parliament of Georgia; 1/6/770; 2 August 2019.

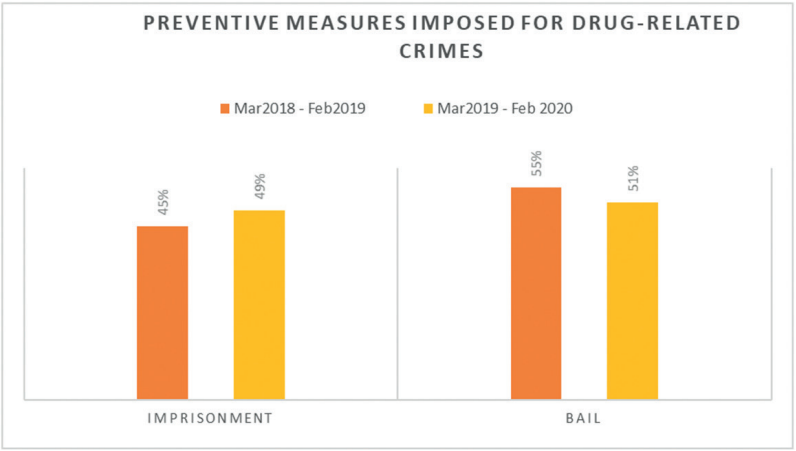
[80] Decision № 1/19/1265,1318 of the First Panel of the Constitutional Court of Georgia dated 04 June 2020, the website, 04.06.2020.

Analysis of court hearings

GYLA attended 136 initial court hearings against 147 defendants accused of drug-related crimes. Only 9 of them were charged with committing an act incriminated under Articles 273 or 273[1] of the Criminal Code, which is a significantly reduced number compared to the previous reporting period.[81]

The chart below shows the measures of restraint imposed on drug-related crimes. The diagrams do not list the measures of restraint used in relation to Articles 273 and 273[1] of the Criminal Code.

Chart №31



The approaches of the court and the Prosecutor's Office to the above type of crime have not changed and are literally similar to the previous reporting period. It is noteworthy that out of 143 defendants, 127 (89%) appeared before the court as the detainees. In the given reporting period, **the court granted the motions presented by the Prosecutor's Office requesting imprisonment in 67 (94%) out of 71 cases, while in other crimes, the court supported the motion of the Prosecutor's Office in 73% of the cases.**

The court imposed bail in 71 cases, of which 56 (79%) were bail secured with remand detention.

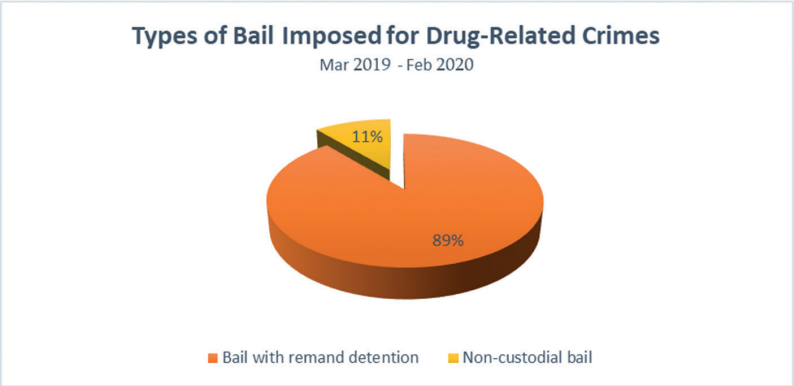
[81] During the previous reporting period, 23 individuals were charged with committing an act incriminated under Articles 273 or 273[1] of the Criminal Code.

Preventive measures into drug-related crimes are more unsubstantiated and/or insufficiently substantiated than in other types of crimes. During the reporting period, we identified a total of 167 unsubstantiated and/or insufficiently substantiated court judgments on preventive measures, of which 69 (41%) cases concerned narcotic drug crimes.[82] In the given reporting period, the Prosecutor's Office, in all cases, formally indicates the following grounds for the imposition of the measure of restraint: 1. the risk of continuing criminal activities - as the drug-related crimes are characterized by recurrence; 2. the severity of the offence, and 3. the risk of absconding.

This suggests that, as in the previous reporting period, the motions for the remand detention or bail submitted by the Prosecutor's Office in relation to narcotic drug crimes compared to other categories of crimes are more formulaic and largely unsubstantiated.

The following chart demonstrates the types of bail imposed for drug-related offences. The diagrams do not include the types of bail applied for crimes under Articles 273 and 273[1] of the Criminal Code.

Chart № 32



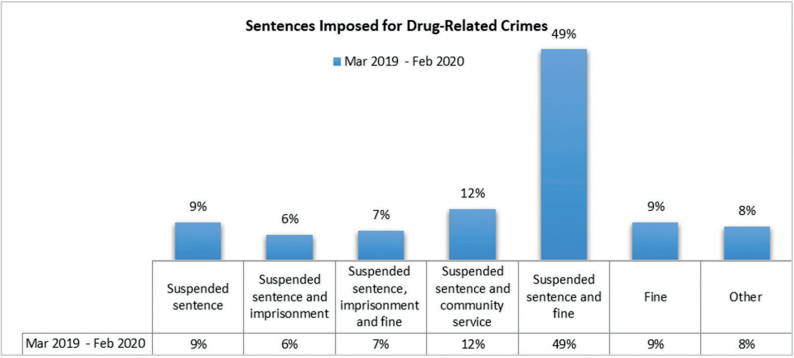
[82] Of the 67 remand detentions imposed, 33 (49%) were unsubstantiated or insufficiently substantiated;
Of the bail imposed in 71 cases, 36 (51%) were unsubstantiated or insufficiently substantiated.

SENTENCES IMPOSED FOR DRUG-RELATED CRIMES AT PLEA AGREEMENT COURT HEARINGS

Among the monitored case proceedings related to drug crimes – a plea agreement was signed with 153 accused. Of these, 115 defendants were charged with committing an act incriminated under Articles 260-267 of the Criminal Code, and the rest with an offence under Article 273-273[1] of the Criminal Code.

Below are shown the sentences imposed for drug-related crimes. The diagrams do not provide the types of sentences imposed for offences under Articles 273 and 273[1] of the Criminal Code.

Chart №33



The average amount[83] of fines imposed for drug-related offences in the given reporting period was reduced to GEL 3,850,[84] whereas the average fine for other crimes is 3201 GEL. The trend that the average amount of fines for narcotic drug offences exceeds the average fine for other categories of crimes remains persistent.

[83] Do not contain the fines used as a punishment for the crimes provided for in Articles 273 and 273[1] of the Criminal Code.

[84] In the previous reporting periods, the average amount of fine was GEL 6,778.

SENTENCES IMPOSED AT COURT HEARINGS ON MERITS

The GYLA monitors attended 65 main court hearings adjudicating the crime under Article 260 of the Criminal Code (illegal manufacture, production, purchase, storage, transportation, shipping or sale of narcotic drugs, their analogues, precursors or new psychoactive substances). The court judgment was announced in 4 cases of the above. In all cases, the court rendered a guilty verdict and sentenced the convicts to term imprisonment.

During the merits hearing, defendants charged with the crime under Article 260, paragraph 3 of the Criminal Code were sentenced to six years of imprisonment, while in a plea agreement of the same charge, defendants were sentenced to a non-custodial sentence, a suspended sentence or a suspended sentence and a fine in two cases.

Out of the crimes provided for in Articles 273 and 273[1] of the Criminal Code, GYLA monitored only one court hearing of the merits, at which the verdict was rendered and the court imposed a fine in the amount of 2,500 GEL.

OTHER ISSUES IDENTIFIED THROUGH THE MONITORING

THE RIGHT TO AN INTERPRETER

The right to an interpreter is an important component of a fair trial. Defendants who do not have a good command of the language that is used in the criminal proceedings and find it difficult to understand the ongoing proceedings shall be provided with the services of an interpreter. The right is guaranteed by international legislation,[85] the Constitution of Georgia[86] and the Criminal Procedure Code of Georgia.

Analysis of court hearings

Within the framework of the monitoring, GYLA observed 190 court trials where the defendants were provided with the service of an interpreter. In most cases, no violations of the above right of the accused were identified. GYLA noted down three cases where the interpreter was not able to ensure proper translation for the accused.

To illustrate this, please see the following example:

> At one of the court hearings, an interpreter of the Armenian language was invited. However, his or her qualification was doubted since the interpreter was not able to provide a synchronous translation. The judge noticed it as well. Despite having suspicions regarding the interpreter's skills, the judge carried on the court trial with the participation of the interpreter.

[85] Convention on the Protection of Human Rights and Fundamental Freedoms, Article 6, Paragraph 3 (e); International Covenant on Civil and Political Rights, Article 14, Paragraph 3 (f).

[86] The Constitution of Georgia, Article 62 (4); Criminal Procedure Code Article 11, Article 38 (8).

In another case, the right of the accused to the services of an interpreter was breached:

> An accused was provided with the services of an interpreter of the Azerbaijani language, but the defendant requested an interpreter of the Russian language. The judge asked the interpreter
>
> "Did he answer what you have translated for him?" The interpreter replied that the defendant found it difficult to understand the Azerbaijani language but he still managed to understand the content. The judge assumed that since the accused was ethnically Azerbaijani, he would speak his native language and that is why the judge did not invite an interpreter of Russian.

ALLEGED ILL-TREATMENT CASES BY LAW ENFORCEMENT OFFICERS

Article 191[1] of the Criminal Procedure Code came into force in 2019, which allows the judge to apply to relevant investigative bodies for a response if the judge suspects that an accused/convict has been subjected to torture, degrading and/or inhuman treatment at any stage of the criminal proceedings.

Of the 686 defendants presented before the first appearance court hearings, the judge did not ask 105 (15%) defendants whether any of them had a complaint relating to the violation of the above right. Of the other 578 defendants questioned, 15 accused presented their complaints, out of which 14 defendants noted that law enforcement officials had physically or psychologically abused them, and one accused alleged that he had been subjected to torture by police officers. The judge called on the prosecutor to respond to 12 cases. In two cases, the judge said that he or she would appeal to relevant authorities for the response, and in one case, the defense counsel had already reported to relevant authorities thereupon.

INTERFERENCE WITH THE EQUALITY OF ARMS AND ADVERSARIALITY

Criminal proceedings in Georgia are based on the principle of equality of arms and competition of parties, which means that upon the initiation of a criminal proceeding on the basis of equality and adversariality, the party has the right to request, obtain, retrieve, present and examine all relevant evidence.[87]

[87] The Criminal Procedure Code, Article 9 (1,2).

The court shall be prohibited independently obtain and investigate evidence proving an accusation or supporting the defense. Obtaining and presenting evidence falls within the responsibility of the parties, and the judge is entitled to ask clarifying questions in exceptional cases and with the consent of the parties if so required for ensuring a fair trial.[88]

Analysis of court hearings

The monitoring identified that judges rarely exercise the right to ask questions. Witnesses were questioned in 404 court trials, among which the judge exercised the above right to ask a clarifying question in 48 (12%) cases. In 18 (38%) cases, the judge did not seek the permission of the parties to question the witness. Furthermore, in 11 (23%) cases, the judge asked a completely new question and/or conducted a new interrogation.

There was a fact where the judge intervened within the defense's competence, by giving him or her instructions. In one of the cases where the witness was being questioned, the judge called on the lawyer to ask specific questions as the interrogation took a long time. In doing so, the judge harshly interfered with the parties' competence to examine the evidence. During the given reporting period, none of the judges demonstrated a familiar and/or ironic attitude to the parties.

APPLYING VISUALLY DEGRADING MEASURES AGAINST DEFENDANTS

At all stages of the criminal proceeding, the dignity of the accused and the presumption of innocence shall be protected. The European Court on Human Rights deals with the use of visually degrading measures against the accused within the scope of the above principle.[89] The issue is highlighted in the OSCE/ODIHR Court Monitoring report. The UN Human Rights Committee reiterates that any person charged with a crime should be treated in accordance with the presumption of innocence. This means that "defendants should not usually be handcuffed, should not be placed in a cage during a court trial, and should not be brought before a court as dangerous offenders.[90]

[88] The Criminal Procedure Code, Article 25 (2).

[89] Piruzian v. Armenia, ECtHR, 26 June 2012, par 73; Ramishvili and Kokhreidze v. Georgia, ECtHR, 27 January 2009, par. 100-101.

[90] General Opinions №32, Quote from the paper, Note 113, para. 30.

Analysis of court hearings

For the main court hearings, 489 defendants were brought to the court from the detention facilities. During the court hearing, 157 (32%) accused were placed in a cage/glass structure, which is five percent higher compared to the previous reporting period.[91]

Sixty-eight defendants placed in the cage had committed non-violent crimes (mainly theft or drug-related offences), and they were not demonstrating any threats, attempts to escape, aggression, or disrespect to the court, which might have served as the basis for placing them in the cage.

[91] In the previous reporting period, this figure was 27%.

CONCLUSION AND RECOMMENDATIONS

The criminal court monitoring conducted by GYLA has identified some shortcomings and problems in the administration of criminal proceedings caused by the court or the participants of proceedings, as well as improved approaches in a range of issues.

At the initial court hearings, the court still uses two types of preventive measures – remand detention and bail, and in rare cases, other preventive measures. Only once during the given reporting period, a personal guarantee was granted on the basis of the motion of the prosecutor. The lack of the types of preventive measures and/or their inadequate legislative regulation is still an issue on the agenda. It is rare for a defendant to be released without a preventive measure.

In the given reporting period, the number of unsubstantiated remand detentions further increased, so did the number of unsubstantiated bails.

The number of defendants appearing as the **detainees** before the initial court hearings increased, so as the number of imprisonment requested by the Prosecutor's Office. In such cases, it is very important to exercise proper judicial control, but reviewing the lawfulness of detentions by the court at hearings remains a problem.

For years, carrying out the **investigative action –searches and seizures** – under urgent necessity has been a major practice. The investigative action is rarely conducted with a prior warrant of the court. The GYLA requested the court judgments delivered for searches and seizures, the analysis of which shows that the courts grant the motions of the Prosecutor's Office on the legality of searches and seizures carried out without prior court permission in 99.9% of cases. Generally speaking, the court's approach is marked by superficiality as it does not review the expediency of conducting searches and seizures under an urgent necessity in specific cases.

In majority cases, the court upholds the motions submitted by the Prosecutor's Office concerning **plea agreements**. However, the examination of the fairness and lawfulness of the sentence is still a challenge for the judiciary, although this approach has improved slightly compared to the previous reporting period. The plea agreement court proceedings were characterized by the tendency of ignoring the procedural rules, as the factual circumstances of the case were not voiced and only the operative part was presented, which rendered the plea agreement hearings more formal.

The activeness of the defense **at pre-trial court hearings** has not changed

in terms of presenting evidence, and with virtually the same frequency does the defense request the court to admit evidence presented. Here, the court does not demonstrate unequal attitudes when granting the motions of the parties.

The publicity of **merits court hearings** is problematic. There were several cases where everyone wishing to attend the court trials was not able to attend due to the fact that the hearing was held in a small courtroom or information about the court hearing had not been made available to interested parties in advance. Several cases have been identified of delaying the case proceedings. There were also cases where the court violated the timeframes set by the law.

The approach of the prosecution regarding **domestic crimes** is still severe. The Prosecutor's Office usually submits motions to the court requesting the remand detention. A plea agreement is very rarely signed into the above crimes. The court imposes preventive measures - bail or imprisonment – with an almost equal proportion in domestic crimes.

As for drug-related crimes, the court grants the remand detention requested by the prosecution in almost all cases. Against this background, the number of unsubstantiated or inadequately substantiated remand detentions is quite high. The judicial practice still confirms that the provisions with respect to drug-related crimes require timely regulation. It is necessary to update the list of narcotic drug quantities and revise the sentences thereof so that those accused/convicted of this category of crime are not subjected to inappropriately harsh sentences.

GYLA hopes that the shortcomings identified in the report will be addressed, and more positive trends will be revealed in the future. GYLA prepared the following **recommendations** for the agencies based on the monitoring results:

For Common Courts

- Judges should exercise the discretionary power granted to them under the legislation with regard to preventive measures. Judges should more often apply less severe measures of restraint (alternative measures vis-à-vis imprisonment and bail) or otherwise refuse to impose a restraining measure provided that the prosecutor fails to substantiate the need to use it.
- Courts should require the Prosecutor's Office to substantiate appro-

priately motions requesting preventive measures and impose the burden of proof on the prosecution.

- At a court hearing revising the remand detention as a measure of restraint, the judge should devote more time and duly substantiate the need to replace or leave the preventive measure in effect.
- With the view to increasing the involvement of the defense, the judge should publicly review the issue of the lawfulness of an arrest. Each of these deliberations should aim at establishing a high standard for the prevention of human rights restrictions.
- The judge should exercise strict judicial control over the motions of searches and seizures, each time assessing the relevance and proportionality of conducting the above actions. Judges must not allow unlawful violation of a person's right to privacy.
- The court should carry out adequate judicial control over the approval of plea agreements. Judges should pay more attention to a public and thorough consideration of cases with the observance of procedural requirements so that the plea agreement court hearings do not acquire on a formal character.
- Judges should fully and comprehensibly inform the accused of his or her rights granted by law, especially those defendants who are not represented by a lawyer.
- For the avoidance of the delay in court proceedings, the court should respond adequately to lateness or non-appearance of parties at court hearings for non-good reasons and apply the sanctions envisaged in the law.
- Whenever judges believe that the size of the sentence for a specific act definitely exceeds the degree of gravity of the crime, they should exercise their power granted by law and apply to the Constitutional Court of Georgia before making a final decision.

For the Prosecutor's Office of Georgia

- Prosecutors should substantiate the requested measure of restraint based on the circumstances of a particular case, personal characteristics and threats posed by a particular accused.

- Prosecutors should better substantiate the necessity and expediency of application of a specific preventive measure, as well as explain why other less stringent measures can fail to achieve a specific goal of the law;
- Prosecutors should substantiate the amount of bail demanded and thoroughly examine the financial and material capabilities of accused individuals;
- Investigative and prosecuting authorities should conduct searches and seizures without a prior court ruling and under the grounds of urgency only in exceptional cases.
- During plea agreement court trials reviewing the cases of defendants charged with crimes against life, health or property, the prosecution should pay due attention to the position of victims and submit a report of the consultation and/or voice the position of victims.
- In all respective cases of violence against women and domestic violence, the prosecution should refer to discriminatory motives and investigate the case from a gender perspective.

For the Parliament of Georgia

- Article 199, paragraph 1 of the Criminal Procedure Code should be amended and the number of basic preventive measures should be increased.
- Relevant amendments should be made to the Criminal Procedure Code of Georgia exempting the measure of restraint - agreement on not to leave and to behave properly - from the dependence on the gravity of a sentence or the category of a crime.
- Legislation should regulate the mechanisms and procedures for reviewing the lawfulness of remand detention. The obligation of the judge to always examine the legality of detention at the first court hearing, both in the presence of prior court ruling and urgent necessity, should be determined;
- The legislation relating to narcotic drug crimes should be brought in line with the decisions of the Constitutional Court.

For Bar Association of Georgia

- Regular and mandatory training courses on preventive measures should be provided. This will help lawyers request alternative types of preventive measures and/or release of the accused without a measure of restraint with a greater enthusiasm.
- The Bar Association should ensure that the qualifications of lawyers are improved and they are permanently trained in a variety of issues concerning criminal proceedings so that defense lawyers can fully and convincingly exercise the right to a fair trial at all three stages of court deliberations.