

LEGAL ANALYSIS OF THE
CRIMINAL CASES COMMENCED
IN CONNECTION

Criminal Case
of Giorgi Rurua
Legal Analysis

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AGENCY

LEGAL ASSESSMENT
OF THE CRIMINAL CASES
LAUNCHED AGAINST
IRAKLI OKRUASHVILI

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ASE AGAINST
KA GVARAMIA

MONITORING OF THE ALLEGEDLY POLITICALLY MOTIVATED CASES

2020



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CHAPTER

1

LEGAL ASSESSMENT OF THE
CRIMINAL CASES LAUNCHED
AGAINST **GIORGI UGULAVA**

INTRODUCTION

In the past few years, criminal proceedings started against several political leaders in Georgia that raised questions over partiality and independence of investigative bodies and judiciary authority.

In some instances, criminal liability of political leaders raises quite well-grounded doubts of the Georgian society, politicians and international partners with regard to political motives of the imposed charges.

Despite increasing number of accusations against the Government of Georgia, there is no common position in the Georgian society about the criminal prosecution and liability of opposition political leaders or activists.

The analytical document below aims to assess the criminal cases launched against the former Tbilisi City Mayor Giorgi Ugulava through the analysis of the international practice and Georgian context.

The former mayor of the Georgian capital Giorgi Ugulava was a prominent opposition political leader, and the Government of Georgia may have some political interests to launch the criminal cases against him. The accusations of the political opposition parties, statements of the international partners and the questions of the Georgian society are the reasons why HRC found it important to monitor ongoing criminal cases against the active politician.

The survey was conducted based on the study and analysis of the decrees on evidence in the criminal cases, solicitations of the defense side and prosecution, court rulings, interim decisions, verdicts, two judgments of the Constitutional Court of Georgia with regard to Giorgi Ugulava's case, the materials provided by the lawyers, criteria of a political prisoner elaborated by the Council of Europe and international organization Amnesty International and the international practice. In addition to that, the survey provides comparative legal analysis of the national legislation and the case law in relevance to the respective case law of the European Court of Human Rights.

The number of criminal cases launched against Giorgi Ugulava, chronology of bringing charges and imposing compulsory measures against him, dragged out or/and accelerated proceedings and other factual circumstances cause concerns of local and international human rights organizations and raise doubts over alleged

political motives in them. Therefore, these cases require particular scrutiny of an independent observer. If there are political motives, there is high probability of unfair litigation that may blatantly violate the rights and basic freedoms guaranteed by the Constitution of Georgia and European Convention on Human Rights.

CASE OF THE TBILISI DEVELOPMENT FUND

- **MAIN POINTS OF THE CHARGE BROUGHT AGAINST GIORGI UGULAVA OVER THE CASE OF THE TBILISI DEVELOPMENT FUND**

Charges were brought against Giorgi Ugulava in relation with the activities of the Tbilisi Development Fund on December 18, 2013. In accordance with the evidence decree, the LEPL Tbilisi Development Fund, several times, illegally funded the pre-election activities of the political party before the 2012 Parliamentary Elections. For the purpose, Giorgi Ugulava - the Tbilisi City Mayor, who also chaired the Tbilisi organization of the United National Movement, Giorgi Sabanadze – the chairman of the LEPL Tbilisi Development Fund, Aleks Tabuashvili - the head of the city service of the municipal procurements at the Tbilisi City Hall and organizational secretary of the UNM's Tbilisi office, and Davit Alavidze - deputy city mayor planned in autumn of 2011 and then created an organized group of some public officials and servants. According to the plan, the group members, upon preliminary agreement and in coordination, for joint goals, unlawfully wasted the funds of the Tbilisi Development Fund on the pre-election activities of the UNM.

In accordance with the indictment, based on the preliminarily agreement of the organized group, from August to November 2011, upon the decision of the mayor Giorgi Ugulava and respective resolution of the city government, 100 000 000 GEL was accumulated on the accounts of the LEPL Tbilisi Development Fund in the JSC Liberty Bank to cover the pre-election expenses of the political party. Afterwards, based on the order of the Mayor Giorgi Ugulava, the chairman of the LEPL Tbilisi Development Fund Giorgi Sabanadze applied to the JSC Liberty Bank on November 9, 2011 to prepare plastic cards for 719 specialists, who were to

assess the building of the Fund. However, according to the prosecution's allegation, those people were not employees of the Fund but were the activists of the political union United National Movement.

In accordance with the indictment, in Tbilisi, every month, UNM activists - heads of 719 election districts and about 20 000 micro-coordinators, used to get salaries from the ATM machines with their plastic cards. However, the real owners of the plastic cards did not know where the money was coming from.

According to the prosecutor's office, from November 2011 till June 2012 (including), the members of the organized criminal group, for the interests of the political party, unlawfully wasted particularly large amount of money - 13 852 497 GEL of the LEPL Tbilisi Development Fund.

Pursuant to the indictment, after the salaries paid to the fictitious employees of the Tbilisi Development Fund – so called “building assessment specialists” amounted to 40 000 GEL, from where the company was obliged to pay income tax¹ and the real owners of the cards could learn about criminal activities, based on the order of Giorgi Ugulava, Tbilisi City Mayor and chairman of the UNM Tbilisi organization, it was decided to stop paying the salaries via electronic transactions and to continue funding the UNM activists by paying them salaries in cash.

In accordance with the indictment, from November 2012 to October 2012 (including), Tbilisi City Mayor Giorgi Ugulava and other members of the organized criminal group unlawfully wasted particularly large amount of sum - 48 180 960 GEL of the LEPL Tbilisi Development Fund on the needs of the political party.

Giorgi Ugulava was charged under the Article 182 Part II – d and Part 3 – “a” and “b” of the Criminal Code of Georgia (*embezzlement of another person's property or property rights using the official position by an organized group*).

- **THE DECEMBER 21, 2013 RULING OF THE CRIMINAL LAW PANEL OF THE TBILISI CITY COURT**

On December 21, 2013, Prosecutor Malkhaz Kapanadze petitioned the Criminal Law Panel of the Tbilisi City Court and requested to use imprisonment

¹ See the Article 206 of the Tax Code of Georgia

as a compulsory measure against Giorgi Ugulava in order to prevent him to hide from the judiciary proceedings, to combat his illegal activities and to ensure execution of the judgment. Pursuant to the prosecutor's solicitation, in the course of the investigation, they had identified that much important evidence were destroyed. Also, the prosecutor noted that Gigi Ugulava was already convicted on February 21, 2013 for the similar crime - waste of the money of Ltd TbilService Group using the same scheme.

The court examined the solicitation of the prosecutor and concluded not to satisfy it and imposed a bail – 5 000 GEL on Gigi Ugulava.

Pursuant to the Article 198 Part I of the Criminal Procedure Code of Georgia, a compulsory measure shall be applied to ensure that the accused appears in court, to prevent his/her further criminal activities, and to ensure execution of the judgement. Remand detention or any other compulsory measure may not be applied against the accused if the purpose stipulated by this paragraph can be achieved through another less severe measure. In addition to that, pursuant to the Article 6 Part 3 of the Criminal Procedure Code of Georgia, preference shall always be given to the most lenient form of restriction of rights and liberties. Article 198 Part 5 of the same law states that when deciding to apply a compulsory measure and its specific type, the court shall take into consideration the personality, occupation, age, health status, marital and material status of the accused, restitution made by the accused for damaged property, violation of any of the previously applied measures of restraint, also in accordance with the ECtHR case law – probable length of punishment and evidence , and other circumstances.

- **DECEMBER 22, 2013 RULING OF THE TBILISI CITY COURT**

After the abovementioned ruling was announced, which was positively evaluated, next day – on December 22, 2013, the same judge, **without the participation of the parties**, examined the solicitation of the prosecutor's office to remove Gigi Ugulava from the position of the Tbilisi City Mayor and satisfied it.

Pursuant to the Article 159 of the Criminal Procedure Code of Georgia, an accused person may be removed from his/her position (work) if there is a probable cause that by staying at that position (work), he/she will interfere with an

investigation, with the reimbursement of damages caused as a result of the crime, or will continue criminal activities.

Based on the prosecutor's solicitation, with the court decision, accused Giorgi Ugulava was removed from the position of the Tbilisi City Mayor before the court passed final judgment.

The ruling was appealed in the Appellate Court but on December 26, 2013, the Tbilisi Appellate Court upheld the December 22, 2013 ruling of the Tbilisi City Court with the ruling №1c/791-13.

- **MAY 23, 2014 JUDGMENT OF THE CONSTITUTIONAL COURT OF GEORGIA IN THE CASE – GIORGI UGULAVA VS THE PARLIAMENT OF GEORGIA**

On February 11, 2014, Gigi Ugulava's lawyers lodged constitutional lawsuit in the Constitutional Court of Georgia against the decision of the court to remove the Tbilisi City Mayor from his position.

On May 23, 2014, the Constitutional Court of Georgia passed judgment² and satisfied the constitutional lawsuit of Giorgi Ugulava. With the judgment, normative context of the Article 159 of the Criminal Procedure Code of Georgia was declared unconstitutional, which removes the officials elected based on general, equal and direct elections and through secret balloting from the positions. Also, the second sentence of the Article 160 Part 1 of the same law was declared unconstitutional, which allows the court to make similar decisions without oral hearing.

The Constitutional Court also ruled that removal of an individual from the position without oral hearing disproportionately restricts the right to fair trial and constitutional rights.

- **THE FEBRUARY 28, 2018 JUDGMENT OF THE TBILISI CITY COURT OVER THE CASE OF THE TBILISI DEVELOPMENT FUND**

With the February 28, 2018 judgment of the Criminal Law Panel of the Tbilisi City Court, the charges brought against Gigi Ugulava under the Article 182 Part II – d and

² See the May 23, 2014 Judgment of the Constitutional Court of Georgia; Citizen of Georgia Giorgi Ugulava v. The Parliament of Georgia <https://bit.ly/2yddjd3>

Article 3 – “a” and “b” of the Criminal Code of Georgia were requalified into the Article 333 Part I of the Criminal Code of Georgia.

The Tbilisi City Court did not share the position of the prosecution, which claimed that the action committed by Giorgi Ugulava contained the signs of the crimes punishable under the Article 182 of the CCG (embezzlement) and decided to change the qualification of the imposed charge into the Article 333 Part I of the CCG (exceeding official powers), that may be assessed as correct qualification because the Article 182 of the CCG envisages punishment for the unlawful appropriation or embezzlement of another person's property or property rights provided this property or property rights was lawfully held or managed by the embezzler. The necessary sign of the unlawful appropriation or embezzlement is to misappropriate another person's property for unlawful possession. In case of waste, the perpetrator acknowledges that he/she appropriates another person's property, which was managed by him/her and with his/her action harms the property owner. The perpetrator acts with self-interest and aims to gain unlawful income at other person's expense. At the same time, when this crime – embezzlement - is committed, another person's property is not only under lawful ownership of the perpetrator but also he/she has some rights over it like it was in Giorgi Ugulava's case but was not confirmed by the court. Therefore, Giorgi Ugulava was found guilty for the crime punishable under the Article 333 Part 1 of the CCG and was sentenced to imprisonment for 1 year and 8 months in length. Above that, he, pursuant to the Article 43 of the CCG, was deprived of the right to occupy an official position in state agency for 8 months.

Based on the Article 16 of the Law of Georgia on December 28, 2012 Amnesty, finally, Giorgi Ugulava's imprisonment term was one year, three months and 22 days and deprivation of the right to occupy an official position in the state agency for six months.

With the punishment imposed based on the February 28, 2018 judgment pursuant to the Article 59 Part 2 and 4 of the CCG, the principle of concurrent sentence was applied because of Giorgi Ugulava was already convicted under the January 6, 2017 judgment of the Criminal Law Chamber of the Tbilisi Appellate Court for the TbilService Group Case. With the January 6, 2016 judgment, the Tbilisi Appellate Court had reduced the punishment term over the TbilService

Group Case, which was imposed in 2015. Consequently, Giorgi Ugulava had already served the sentence passed by the Tbilisi Appellate Court as he was in prison from 2015 to January 6, 2017. Therefore on January 6, 2017 Giorgi Ugulava left prison.

- **THE DECEMBER 10, 2018 JUDGMENT OF THE CRIMINAL PANEL OF THE TBILISI APPELLATE COURT**

The prosecutor's office appealed the judgment of the first instance court claiming that it was unlawful and ungrounded and requested to aggravate the charges against Giorgi Ugulava. On the other hand, Giorgi Ugulava's lawyer also appealed the judgment of the first instance court and requested to annul it and release Giorgi Ugulava from prison. The Appellate Court did not satisfy either appeals, fully shared the judgment of the first instance court and ruled that the defendant exceeded his official powers that is punished under the Article 333 of the CCG, which applies to exceeding of official powers by an official that has resulted in the substantial violation of the lawful interests of the public or state. *Consequently, the February 28, 2018 judgment of the Criminal Panel of the Tbilisi City Court was upheld by the Tbilisi Appellate Court as lawful, well-grounded and fair.*

- **THE FEBRUARY 10, 2020 RULING OF THE SUPREME COURT OF GEORGIA**

Any Chamber of the Supreme Court (other than the Chambers of Disciplinary and Qualification Cases) is a court of review examining, under procedures defined by procedural law, appeals of the decisions of courts of appeals, also examining, where provided and under procedures determined by law, any other cases falling within its jurisdiction³.

The Criminal Law Chamber of the Supreme Court of Georgia, considered the qualifications of Giorgi Ugulava's actions differently from previous two instances of the court and ruled that the judgment of the Appellate Court was not lawful and amended it. According to the Chamber's assessment, the Tbilisi Appellate Court incorrectly qualified the charge. Namely, **the Cassation Court did**

³ See Article 16 of the Organic Law of Georgia on Common Courts

not share the position of the Appellate Court to qualify the charge with the Article 333 of the CCG, because, according to the Supreme Court, by applying this general norm, incorrect practice of the criminal proceedings is established, which aims to qualify all crimes committed by an official or person equal thereto as exceeding of official powers.

The cassation court apparently paid particular attention to the differentiation of the legal benefits of the Article 182 and Article 333 of the CCG, with which it verifies the amended qualification of the charge. Namely, the cassation court clarified that Article 333 of the CCG applies to abuse of power. Its subject is a state official or a person equal thereto, whose action substantially violated the rights of a physical or legal person, public or state interests; as for the Article 182 of the CCG, it applies to an economic crime committed against property rights. Part 2 – “d” of the same article applies to the crime qualified as an offence committed through the abuse of official power and another person’s property is the subject, which is under the lawful ownership or management of the perpetrator.

There is an impression, that the Supreme Court’s chamber, in this particular case, strictly singled out only one special character – economic nature of the crimes committed by a public official or equal person in order to use the qualification under the Article 182 (embezzlement) instead the Article 333 of the CCG regardless the fact whether both signs – economic nature and lawful ownership or management – are cumulatively presented in it.

The cassation chamber did not agree with the argumentation of the Tbilisi Appellate Court, according to which, pursuant to the Organic Law of Georgia on Local Self-Governments and Law of Georgia on the Capital of Georgia – Tbilisi, the municipal assembly is authorized to approve and amend the budget of the Tbilisi City Hall and the City Hall, as an executive collegial body, executes the decisions of the assembly. *The Cassation Chamber clarified that it cannot share the verification of the Tbilisi Appellate Court, according to which, “the abovementioned individuals were separate members of the government and they were not the only persons who were authorized to transfer the funds of the City Hall to the accounts of the Fund”, because the funds accumulated on the bank accounts of the Fund were managed according to the preliminarily elaborated criminal scheme of the organized group, whose member was Gigi Ugulava and the concrete offensive activities are directly connected with the*

embezzlement of particularly large amount of budget funds of the City Hall. At the same time, the transfers were made based on the decrees of the Tbilisi City government and Giorgi Ugulava was the member of the government.

The Criminal Law Chamber of the Supreme Court of Georgia, unlike previous two instances of the court, ruled that Giorgi Ugulava's action shall be qualified in accordance with the Article 182 Part II – “d” and Part III –“a” and “b” of the Criminal Code of Georgia, that entails unlawful appropriation or embezzlement of another person's property which was lawfully held or managed by the misappropriator or embezzler, committed by using the official power and by an organized group. In order to prove that, the Criminal Law Chamber of the Supreme Court stated that the crime punishable under the Article 182 of the CCG – embezzlement is an offence of economic nature, namely it is committed against property. Therefore, the objective side of the offence is provided in the form of embezzlement. The person committing it, as a special subject, shall hold or manage “another person's property” under an undisputed authority. Unlike the Appellate Court, the Criminal Law Chamber of the Supreme Court clarified that this authority shall cumulatively mean implementation of various lawful or unlawful actions implemented by holding, managing, selling of the property or other actions related to it.

The Cassation Chamber acted in accordance with the Article 301, Article 307 Part I – “c” and Part III of the Criminal Procedure Code of Georgia and found Gigi Ugulava guilty under the Article 182 Part II – “d” and Part III “a” and “b” of the Criminal Code of Georgia and sentenced him to nine-years imprisonment; above that, based on the Article 43 of the CCG, he was deprived of the right to occupy official position in the state agency for 8 months.

Also, pursuant to the Article 12 of the December 28, 2012 Law of Georgia on Amnesty, the imposed imprisonment term was half-reduced for Giorgi Ugulava and finally he was sent to prison for 4 years and 6 months and was deprived of the right to occupy the position in the state institution for 4 months.

Besides the abovementioned, convicted Giorgi Ugulava with January 6, 2017 judgment of the Criminal Law Panel of the Tbilisi Appellate Court was sentenced to imprisonment for 1 year, 3 months and 22 days and with additional punishment

he was deprived of the right to occupy the position in the state institution for 6 months. It was calculated into the imposed prison term.

Finally, Giorgi Ugulava has to serve imprisonment term of 3 years, 2 months and 8 days in length and an additional punishment, based on which he was deprived of the right to occupy position in the state institution for four months was concluded already served.

ALLEGED POLITICAL MOTIVE AND JUDICIAL MISCARRIAGES

This chapter, based on the international practice and in the view of Georgian context, analyzes the criteria necessary to grant the status of a political prisoner to an individual and the details of Gigi Ugulava's cases, former Tbilisi City Mayor, were assessed in this regard.

On June 26, 2012, the Parliamentary Assembly of the Council of Europe adopted the resolution which established the criteria about the status of a political prisoner⁴.

It is noteworthy that term "political prisoner" does not mean full innocence of such individuals. In some cases, political prisoners are guilty, but, the fact that they committed a crime shall not be used by a government for its purposes and the punishment, due to political goals, shall not be irrelevantly severe⁵.

Granting the status of a political prisoner does not discharge an individual from criminal liability and it does not contain moral assessment of his/her action unlike – "prisoner of conscience." According to the definition of the Amnesty International, "prisoner of conscience" is an individual who is imprisoned because he/she peacefully expressed his/her political, religious or scientific views, or does not advocate violence. In similar case, it is not determined that an individual has committed a crime⁶.

⁴ See the criteria of the political prisoner elaborated by the June 26, 2012 Resolution of the PACE <https://assembly.coe.int/nw/xml/xref/Xref-XML2HTML-en.asp?Fileid=18995&lang=en>

⁵ See criteria of the coe <https://assembly.coe.int/nw/xml/xref/Xref-XML2HTML-en.asp?Fileid=17179&lang=en>

⁶ See the Research of the Amnesty International: "Yugoslavia Prisoners of Conscience" p. 23 <https://www.amnesty.org/download/Documents/200000/eur480201985en.pdf>.

Anyone, who is granted status of a political prisoner, does not automatically gets right to claim immediate and non-conditional release from prison, instead he/she shall be guaranteed to have access to fair trial.

Pursuant to the criteria of the CoE, “a prisoner” may receive a status of “a political prisoner” if his/her imprisonment was result of violation of procedural guarantees and there is a ground of assumption that it was associated with the political motives of the government⁷. Above that, these criteria coincide with the ones of the Amnesty International. Namely: the case contains “obvious political element”; “the Government fails to ensure fair trial in accordance with the international standards.”⁸

According to the criteria of the CoE and the Amnesty International, Human Rights Center identified a set of procedural-legal shortcomings in the criminal cases against Giorgi Ugulava.

1. 6-MONTH TERM TO EXAMINE THE CASSATION LAWSUIT WAS VIOLATED

In accordance with the Article 31 of the Constitution of Georgia, every person has the right to apply to a court to defend his/her rights. The right to a fair and timely trial shall be ensured. The right to a fair and timely trial includes to examine the case in a reasonable timeframe, which on its side, affects access to court and relatively the justice. Besides that, the Article 6 of the Convention on Human Rights and Basic Freedoms guarantees right to fair trial, when determining civil rights and obligations or researching the reasonability of any criminal charge, everybody is entitled to have a right to fair and public hearing of his/her case by independent and impartial court⁹.

⁷ See <https://assembly.coe.int/nw/xml/xref/Xref-XML2HTML-en.asp?Fileid=17179&lang=en>.

⁸ See Manual on Political Prisoners in Georgia, Tbilisi, 2012
http://assembly.coe.int/Communication/2012-06-26_enpressajdoc21.pdf.

⁹ See the rulings of the ecthr over the cases: Dombo Beheer B.V. v. The Netherlands, and Levages Prestations Services v. France,

Pursuant to the case law of the ECtHR, **reasonable time** for the civil cases, **is counted** after the litigation starts while **for the criminal cases, it is counted from the moment the criminal charges are brought against the defendant**¹⁰.

In the case of the Tbilisi Development Fund, in the frame of the practical aspects of the access to justice, violation of six-month term of examining the cassation lawsuit is substantial violation of the Criminal Procedure Code of Georgia.

The court was entitled to finish case examination **in July 2019**, instead, through the violation of the requirements of the Article 303 Part 8 of the Criminal Procedure Code of Georgia, the Criminal Law Chamber of the Supreme Court announced its ruling in the case **on February 10, 2020**.

At the same time, in terms of effective judiciary, it is important to evaluate how ready the judiciary system is to defend human rights within the reasonable timeframe and to take respective measures against the violation of their rights.

In this regard, in relation to the trust towards independence and partiality of the court, *it is essential to evaluate such factual circumstances, which are connected with the activities of Giorgi Ugulava, as a leader of the political party European Georgia, which became particularly active after the large-scaled protest demonstrations in Tbilisi on June 20-21, 2019.*

“Revival” of the case of the Tbilisi Development Fund against Giorgi Ugulava by (after the six-month term for the cassation lawsuit was already expired) coincided with the ongoing tense and significant political processes in Georgia in time and space, in which Ugulava played an active role. Current social-political developments undermined political stability of the acting government, for which the GoG took several repressive steps¹¹. It significantly influenced the public trust towards judiciary authority and feeling of justice in the state and raised questions over the “selective justice” and political motives of the state.

Therefore, prompt and qualified justice, which is one of the indicators of the fair trial, has huge practical importance. Right to fair trial is fiction, unless it is realized reasonably, for the restoration of breached rights within the reasonable

¹⁰ See Case of buchholz v. Germany 1981, 6 May 1981: <https://www.legal-tools.org/doc/36ea8a/pdf/>

¹¹ See the report State of Human Rights in Georgia, 2019, Human Rights Center <http://hridc.org/admin/editor/uploads/files/pdf/report2020/annual%202019-eng.pdf>

timeframe. Unless the court ensures defense of the right and existence of timely mechanisms of the restoration of breached rights, not only the right to fair trial but even the idea is lost. It, quite fairly, indicates at the signs of influence of state authority on the judiciary authority, when the state tries to use them for its political interests.

2. THERE WAS GROUND TO RECUSE ONE OF THE JUDGES – SHALVA TADUMADZE

When the case was examined in the appellate court and the prosecutor's office lodged the cassation lawsuit to the Supreme Court of Georgia, Shalva Tadumadze was the Prosecutor General of Georgia. On December 12, 2019, the Parliament of Georgia supported the appointment of Shalva Tadumadze, former prosecutor general, on the position of a judge in the Supreme Court of Georgia. There were acute questions over independence and partiality of Tadumadze. Therefore, the decision of the parliament was largely criticized by human rights civil society organizations but through neglecting the opinion of the civil society, Shalva Tadumadze was elected to the position of the judge in the Supreme Court of Georgia¹². Although Shalva Tadumadze did not personally represent the Prosecutor's Office in the Appellate Court, when it examined Giorgi Ugulava's case, it is important to mention that there is a strictly vertical subordination system established in the Georgian Prosecutor's Office, where all prosecutors are obliged to follow the instructions of the superior prosecutor and all employees of the office shall be subordinated to the Prosecutor General¹³. The vertical subordination and communication is particularly actual when the cases against former senior officials or other high-profile cases are litigated.

When the cassation court examined the case, convicted Giorgi Ugulava's lawyer solicited the Criminal Law Chamber of the Supreme Court of Georgia to recuse Judge Shalva Tadumade. According to the solicitation, when the prosecutor's office presented the in the Appellate Court, and then lodged the cassation lawsuit in the Supreme Court, Shalva Tadumadze was the Prosecutor

¹² See http://coalition.ge/index.php?Article_id=220&clang=1; see also http://coalition.ge/index.php?Article_id=236&clang=1

¹³ See the Organic Law of Georgia on the Prosecutor's Office, Article 9

General. Considering the high public resonance and political interest in the case, the defense side believed it was impossible that the Prosecutor General of Georgia was not interested in the ongoing litigation and results of the proceedings in the appellate court. In parallel to that, the defense side stated that it was impossible that prosecutors of the Office of the Prosecutor General had not informed Judge Shalva Tadumadze about the case. Therefore, the defense side stated that there were basis to recuse the judge in accordance with the Article 59 Part I –“a” of the Criminal Procedure Code of Georgia (*A judge of the court session may not participate in criminal proceedings if there are other circumstances that question his/her objectivity and impartiality*). The solicitation of the defense side was not supported.

It is interesting that former deputy prosecutor general Mamuka Vasadze self-recused the case based on the same ground, who had to examine the case against Giorgi Ugulava in the Supreme Court of Georgia.

In accordance with the ECtHR case law, personal opinion and conduct of the judge in the court shall provide feeling of his/her impartiality in the society. A judge, whose partiality is questioned, **shall not participate in the case examination**. A judge shall respect and comply with the law, the judge’s oath and responsibilities in performing judicial duties. His/her decision should not depend on the interests of any political or social party, public pressure or any other influence and/or fear of criticism¹⁴. Impartiality of a judge is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made¹⁵.

The European Court of Human Rights has already ruled violation in the case, where an individual participated in two cases – in the first case he acted as the legal representative of the defendant against the applicant, while later he acted as a judge in the case against the same person¹⁶.

Partiality of the judge, who examined the case of Gigi Ugulava in the Supreme Court, who before that acted as a prosecutor general when the same case was examined in the lower instance of court, is questioned.

¹⁴ See the Judges Ethics Code of Georgia, Article 2

¹⁵ See the Bangalore Principles of Judicial Conduct, Value 2 – Impartiality

¹⁶ See *Wettstein v. Switzerland* 33958/96, paragraph 47. <https://hudoc.echr.coe.int/fre?I=001-63679>

According to the assessment of the Public Defender of Georgia, Gigi Ugulava's case includes shortcomings in terms of impartiality of the judge, as well as with regard to the appointment of a judge on the basis of the law¹⁷.

It is noteworthy that in a case, where similar miscarriage related with the judges' appointment procedures were identified, ECtHR's chamber ruled violation of the right to fair trial¹⁸.

3. MULTI-VOLUME CASE WAS STUDIED AND VERDICT WAS PASSED IN THIRTEEN DAYS

Giorgi Ugulava's defense lawyers stated during the meeting with the HRC monitors that **judges - Merab Gabinashvili and Shalva Tadumadze, studied the case, where dozens of witnesses were questioned, and passed verdict within 13 working days.** The lawyers believe this circumstance raises doubts that they did not substantially study the case and made the decision in accordance with the political orders.

A court judgement shall be legitimate, reasoned and fair¹⁹. It is impossible that the court judgement met these requirements, unless the accused person's right to fair trial was not ensured during the court proceedings. During the substantial examination of the case, the evidence is examined and it is important that the right to fair trial is guaranteed that, first of all, shall be realized by comprehensive and impartial examination of the evidence and case circumstances.

4. CASE WAS EXAMINED BY THE CASSATION COURT WITHOUT ORAL HEARING

Giorgi Ugulava was convicted for particularly grave crime without oral hearing, while, the first and second instances of the court had qualified his charge as less grave. **The Supreme Court of Georgia changed the qualification of the charge brought against Giorgi Ugulava without enabling him and his lawyer to present their positions.**

¹⁷ See the Statement of the Public Defender of Georgia <https://bit.ly/2yrx7rg>

¹⁸ See Cudmundur Andri Astradson v. Iceland 26374/18. <https://hudoc.echr.coe.int/fre?I=001-191701>.

¹⁹ See the Criminal Procedure Code of Georgia, Article 259

The Criminal Procedure Code of Georgia authorizes the cassation court, like the appellate court, to examine the case without oral hearing but unlike the appellate court, the cassation court is not restricted with the categories of the crimes and claim of the lawsuit. Relatively, if the cassation court concludes it is necessary to organize oral hearing of the case and invite the person to attend it to correctly qualify the charge, the court may invite him/her to the process. Besides that, **oral hearing of the case is the important part of the right to fair trial.**

Consequently, if there are no particular circumstances that may justify cancelled oral hearing, Article 6 Paragraph I of the European Convention on Human Rights right to public hearing means oral hearing at least in front of the first instance²⁰. Having that, *the Criminal Law Chamber of the Supreme Court of Georgia could examine Giorgi Ugulava's case with oral hearing as there were disputed facts related with the case circumstances and qualification, which were necessary to be considered orally and it could promote the public trust towards the court judgment. Therefore, there is an impression that the case examination without oral hearing, which was subject of high public interest, aimed to hold judicial process in secret and avoid public criticism.*

5. PROBABLE DEFENDANT AND SELECTIVE JUSTICE

It is noteworthy that the prosecutor's office did not charge, even did not question the Tbilisi City Vice-Mayor Davit Ninidze at least as a witness in front of the court, who had signed the acts, based on which the LEPL Tbilisi Development Fund had allocated funds and for whose embezzlement Giorgi Ugulava was convicted. Based on this circumstance, one may assume that the prosecutor's office and the court did not aim to implement impartial justice but they wanted to apply selective justice against Gigi Ugulava in order to hinder his political activities.

²⁰ See Fischer v. Austria, § 44; <https://hudoc.echr.coe.int/fre-press?I=001-59475>. Salomonsson v. Sweden, § 36. <File:///C:/Users/Administrator/Downloads/001-60736.pdf>.

6. ASSESSMENT OF ALLEGED VIOLATION OF THE PRINCIPLE “PROHIBITION OF REPEATED CONVICTION” IN GIORGI UGULAVA’S CASE

Ugulava’s lawyer, part of the society and politicians assumed that *the principle of the prohibition of repeated conviction* was violated in relation with Giorgi Ugulava. They appealed that in 2017, the Supreme Court of Georgia upheld the qualification of less grave crime over the similar case against Giorgi Ugulava (so-called Ltd TbilService Group case) for which he had already served his term. Therefore, Giorgi Ugulava’s lawyer Beka Basilaia believes that with the February 10, 2020 judgment, Ugulava was punished twice.

HRC has different position with regard to this allegation and believes that the action, for which Giorgi Ugulava was convicted, did not originate from the identical or substantially similar facts of the so-called Ltd TbilSerevice Group case. Above that, there is no unity of concrete circumstances, which refers to the same accused person and the convicted person is completely inter-connected in time and space with those factual circumstances, for which he serves imprisonment term in the penitentiary establishment.

Pursuant to the Article 31 Paragraph 8 of the Constitution of Georgia, no one shall be convicted again for the same crime. The same right is guaranteed under the Article 4 of the Protocol No 7 of the European Convention on Human Rights. The norm aims to protect an individual from the resumption of already finished criminal prosecution against him/her for the same crime. Prohibition of the repeated conviction aims to ensure legal peace and to respect human honor with it. It refers to the particularly fundamental right guaranteed under the Convention, which, as stipulated in the third paragraph of the Article 4, Protocol No 7 of the Convention, shall not be derogated in time of war or other public emergency²¹. Prohibition of the repeated conviction aims to ensure stability of material legal power of the judgment²². Its key component is the notion of “one and the same crime.” *Principle of the prohibition of the repeated conviction (ne bis in idem) is clarified*

²¹ See Different Understanding of the Constitutional Principle on Inadmissibility of Double Punishment for the Same Action Pursuant to the coe and EU Law; See, Turava, European Criminal Law, 2010, 137; Turava, Criminal Law, Crime Doctrine, 2011, 140

²² See NJW (47) 2004, 279.

in the precedential judgment of the ECtHR - Zolotukhin v. Russia²³, which envisages a relatively innovative approach. ECtHR ruled that Article 4 of Protocol No. 7 prohibits, among other things, repeated convictions based on the same conduct of the accused if in essence the conduct was substantially similar to that previously shown.

According to the assessment of Human Rights Center, similar circumstances are not identified in Giorgi Ugulava's case.

The principle of prohibition of repeated conviction is violated when there are four cumulative elements: (1) during the new conviction there is a previous judgment of the first instance court in the criminal case; (2) new conviction is used for the same action; this issue is not homogenously settled in the rulings of the Strasbourg Court²⁴; (3) regardless of legal power, repeated criminal prosecution or conviction is applied in the same state²⁵; (4) absence of newly discovered circumstances to renew proceedings. It is also important to underline that the principle of the repeated conviction is not violated if it refers to the resumption of the proceedings based on new circumstances²⁶. We did not identify any of the abovementioned circumstances in Giorgi Ugulava's case; consequently, the state did not violate the principle of the prohibition of the repeated conviction.

THE CASE OF THE AIRPORT INCIDENT

The criteria elaborated by both the Amnesty International and CoE include all cases, where alleged political motives are identified in the detentions. In accordance with one of the criteria, **an individual is a political prisoner, who has not committed a criminal case and his/her case was completely fabricated.** More

²³ See the February 10, 2009 ecthr ruling on the case Zolotukhin v. RUS, application 14939/03, par. 53 <https://hudoc.echr.coe.int/eng?I=001-80962>

²⁴ See three rulings of the ecthr CASE OF GRADINGER v. AUSTRIA, 23.10.1995; [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57958%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57958%22]}). Oliveira v. Switzerland, 30.7.1998: <https://hudoc.echr.coe.int/eng?I=001-5334> ;

29. 5. 2001, Franz Fischer v. AUT. <https://hudoc.echr.coe.int/fre-press?I=001-59475>.

²⁵ See the ecthr ruling of July 20, 2004 over the case Nikitin v. RUS, application 50178/99, para 37; http://sutyajnik.ru/rus/echr/judgments/nikitin_eng.html;

March 15, 2005 ruling over the case Horciag v. ROU, application 70982/01

²⁶ See the July 20, 2004 ruling of the ecthr over the case Nikitin v. RUS, application 50178/99, para 37; http://sutyajnik.ru/rus/echr/judgments/nikitin_eng.html;

precisely, the case when an individual was detained based on inadequate and disputed evidence and there is reasoned assumption that the evidence or/and witness statement is fake, based on which the individual was imprisoned.

The criteria elaborated by the representatives of the Georgian human rights CSOs in 2012 are also interesting, which, in due respect to the Georgian context, stated that **a crime may be provoked with political motives**. In accordance with the document, sharing the criteria determined by the CoE and Amnesty International, and in due respect to the Georgian practice and tendency, an individual may become a political prisoner if he/she **was detained, arrested or his/her freedom was restricted for an offence or a crime, which was provoked based on political motives, by the government or/and other interested individuals**²⁷.

In this regard, another case launched against Giorgi Ugulava attracts attention – the so-called airport incident case.

On December 11, 2019, at about 12:00 am, B.G and D.P attacked Giorgi Ugulava and Giorgi Gabashvili, who were sitting in the café *Efes Bear Port* in the departure hall of the Tbilisi Shota Rustaveli International Airport; they verbally and physically assaulted Giorgi Ugulava and Giorgi Gabashvili.

Based on the December 11, 2019 indictment, Giorgi Ugulava was charged under the Article 126 Part 1 of the Criminal Code of Georgia. According to the indictment, Giorgi Ugulava had injured B.G.

As the first statement of the accused person in the court and the court ruling read, on December 12, 2019, **prosecutor Tamar Zakutashvili petitioned the Tbilisi City Court. She requested the Tbilisi City Court to impose a bail of 5 000 GEL on the accused Giorgi Ugulava and as an additional measure to order him to hand passport and ID documents to the investigative bodies to combat his further criminal activities and to ensure execution of the judgment and other goals of procedural law.**

²⁷ See the Manual about Political Prisoners, 2012, P. 32

<http://www.humanrights.ge/admin/editor/uploads/pdf/angarishebi/hrh/politikuri%20patimrebi-gzamkvlevi-geo.pdf>

The judge concluded that in order to prevent the accused person to destroy the evidence and influence the witnesses, bail would be an adequate compulsory measure. Therefore, he satisfied the solicitation of the prosecutor.

On December 18, 2019, the defense side petitioned the City Court with the solicitation for video recordings and the court refused them on the same day clarifying²⁸ that the defense side has right to examine the video-recordings based on the respective permission and if the obtained information improves the state of the accused person, the defense side may submit relevant solicitation to the court. The Appellate Court also upheld the ruling of the City Court in its December 25, 2019 ruling²⁹.

On February 18, 2020, patrol police together with investigator Grigol Javakhia, based on the January 28, 2020 ruling #1c/1374-20 of the Tbilisi City Court, the defense side examined the WD recordings of the surveillance camera. The recordings revealed that B.G and D.P had ambushed Giorgi Ugulava and Giorgi Gabashvili. The examination of the recording revealed that Giorgi Ugulava and Giorgi Gabashvili, being in the café-bar Efes Beer Port, became subjects of B.G and D.P-s attention and they are waiting for the appropriate moment to assault them, which, as the lawyer clarified, *was successfully executed. Besides that, the solicitation shows, that the examination of the video-recordings disclosed another interested person, who purposefully starts video-recording as soon as the incident started. Afterwards, he enters the room of the departure hall of the airport, where citizens are not allowed to enter, and speaks with the security officers and other employees. The lawyer clarified that this person is an officer, who was preliminarily informed about the planned attack, for which Gigi Ugulava was charged. It is noteworthy that his companion Giorgi Gabashvili has victim status in the same case*³⁰.

The case files revealed that the defense side sent application to the prosecutor in charge of the case and attached the video-recording, as clarified by the lawyer,

²⁸ See the refusal on the solicitation for the investigative activities, ruling #20703-19 of December 19, 2019

²⁹ See the refusal on the solicitation for the investigative activities, ruling #33072301900340443 of December 25, 2019

³⁰ See information at <https://netgazeti.ge/news/413364/>

where B.G (who attacked Giorgi Ugulava and Giorgi Gabashvili in the Tbilisi International Airport) participated in provoking incidents during peaceful protest demonstrations. In his communication, the lawyer indicated that there is a high probability that B.G acts according to the instructions of the representatives of law enforcement bodies. Additionally, in the airport, he may have implemented the order of any state official. **This allegation is reinforced with the circumstance that the incident happened in the neutral zone of the departure terminal, where Giorgi Ugulava's personal guards cannot enter and defend him.** Giorgi Ugulava's lawyer petitioned the prosecutor in charge of the case and requested to change the qualification of the case from Article 126 into Article 332 of the Criminal Code of Georgia, which refers to the abuse of professional power by the individuals, who ordered B.G and D.P to attack the leaders of the opposition.

On March 9, 2020, the Tbilisi City Court satisfied the solicitation of the defense side over the case of the Tbilisi Airport incident and annulled the 5 000 GEL bail imposed on Giorgi Ugulava as a compulsory measure. Judge Aleksandre Iashvili discharged Giorgi Ugulava from the obligation to hand his passport to the investigative body. *No more hearings of this case were held afterwards.*

ONE-DAY FREEDOM AFTER 14-MONTH PRETRIAL IMPRISONMENT

It is important to analyze one more case launched against Giorgi Ugulava. Namely, in accordance with the indictment, on July 4, 2014 Giorgi Ugulava was arrested for the charge punishable under the Article 194 Part 2 and 3 of the Criminal Code of Georgia and the court sentenced him to nine-month pretrial imprisonment. After this judgment, on July 28, 2014 Giorgi Ugulava was charged under the Article 333 Part I of the CCG over the so-called November 7 case. Naturally, the prosecutor's office did not solicit any form of compulsory measure in the case as Giorgi Ugulava was already in prison for the other charge. It must be noted that for the charge brought against him on July 4, 2014, the nine-month preliminary imprisonment term was due to expire on April 2, 2015 after what, in accordance with the acting law, he was to be immediately released.

At that time, it was already evident that the court was unlikely able to pass the judgment in the case even after the nine-month. Therefore, the prosecutor's office tried to manipulate with the obscurity in the law and extend Ugulava's nine-month pre-trial imprisonment with the new nine-month pre-trial imprisonment term under the second accusation. It directly indicated at the particular interest of the state prosecution to extend pretrial imprisonment term for the former mayor. It is noteworthy that on July 4, 2014 the EU released a statement underling that the EU was closely following the arrest of a United National Movement (UNM) opposition party leader Gigi Ugulava and called on the GoG to ensure "that the judicial process is fully independent, transparent, and free of political influence, in line with the commitments undertaken by Georgia when it signed the Association Agreement with the European Union last week on 27 June 2014³¹."

Under the new charge, on August 4, 2014, the prosecutor's office solicited the court to fix the date of the pre-trial hearing of Giorgi Ugulava's case³². Afterwards, the term of pre-trial session was many times extended and the prosecutor's office did not appeal the court with the request of compulsory measure against Giorgi Ugulava throughout eight months after the charges were brought against him³³.

In the period from July 28, 2014 to March 13, 2015 no new evidence were obtained against Giorgi Ugulava. Nevertheless, on March 14, 2015, the prosecutor's office solicited the Criminal Law Panel of the Tbilisi City Court to use imprisonment as a compulsory measure against Giorgi Ugulava³⁴. On March 15, 2014 the judge satisfied the solicitation and repeatedly sentenced defendant Giorgi Ugulava to imprisonment³⁵. The defense side appealed the decision in the Investigative Panel of the Appellate Court but with the March 20, 2015 ruling, the Appellate Court did not accept the solicitation of the defense side³⁶.

On April 30, 2015, Giorgi Ugulava lodged the constitutional lawsuit to the Constitutional Court of Georgia to declare the extension of the nine-month

³¹ See the statement of the EU, July 4, 2014 <https://agenda.ge/en/news/2014/1629>

³² See <https://www.constcourt.ge/ka/judicial-acts?Legal=1478>

³³ See <https://www.constcourt.ge/ka/judicial-acts?Legal=1967>

³⁴ See <https://www.constcourt.ge/ka/judicial-acts?Legal=1478>

³⁵ Ibid

³⁶ Ibid

imprisonment term as unconstitutional³⁷. With the September 15, 2015 ruling of the Constitutional Court of Georgia, Giorgi Ugulava's lawsuit with regard to the nine-month imprisonment term was satisfied³⁸. The Constitutional Court of Georgia ruled that imprisonment of a defendant equally ensures achievement of the goals of compulsory measure in each case. Relatively, nine-month term for each criminal case was to be calculated within this period of time, which the defendant spent in imprisonment for other criminal proceedings ongoing against him. According to the abovementioned clarifications, when calculating the imprisonment term under the March 15, 2015 ruling, Giorgi Ugulava's imprisonment term was to be calculated into the pre-trial imprisonment term, which had already spent in prison under the July 28, 2014 charge (over the case of November 7)³⁹. At the same time, the Court found the normative context of the Article 205 Part 2 of the Criminal Procedure Code of Georgia unconstitutional, which allowed the court to send a defendant to prison for concrete criminal case, if he had spent nine months in imprisonment in the frame of ongoing criminal case proceedings after the sufficient ground of bringing new charges against him/her was determined⁴⁰. In case of Giorgi Ugulava, in the frame of other case, he had already spent nine months of pre-trial imprisonment in prison⁴¹.

The ruling of the Constitutional Court of Georgia should have become the basis of Gigi Ugulava's release. However, formally, the common courts were entitled to pass the final decision on the release of the defendant Ugulava from pretrial imprisonment⁴².

After the Constitutional Court satisfied Giorgi Ugulava's lawsuit with regard to the terms of pre-trial imprisonment, the defense side solicited immediate release of Giorgi Ugulava. The defense side clarified that, although no compulsory measure was used against Gigi Ugulava over this case, pursuant to the ruling of

³⁷ See <https://matsne.gov.ge/ka/document/view/2998549>

³⁸ Ibid

³⁹ Ibid

⁴⁰ See the ruling of the Plenum of the Constitutional Criminal Court of Georgia №3/2/646, September 15, 2015 <https://matsne.gov.ge/ka/document/view/2998549?Publication=0>

⁴¹ See Case Giorgi Ugulava v. The Parliament of Georgia <https://matsne.gov.ge/ka/document/view/2998549>

⁴² See <https://matsne.gov.ge/ka/document/view/2998549?Publication=0>

the Constitutional Court of Georgia, any judge could consider the issue of Giorgi Ugulava's release from pre-trial imprisonment.

On September 17, 2015, the Court satisfied the solicitation of the defense side and Giorgi Ugulava was released from the courtroom after 14-month pretrial imprisonment⁴³. Gigi Ugulava, who was set free on September 17, 2015, next day, on September 18, 2015, based on the judgment of the Tbilisi City Court, after one-day freedom, was sent back to the so-called Matrosov Prison. According to the judgment, with regard to the TbilService Group episode, he was sentenced to imprisonment for 4 years and 6 months. The Judge did not satisfy the solicitations of the defense side and the defendant to give one-week time to prepare the final speech⁴⁴.

INTERNATIONAL REACTIONS ABOUT THE CHARGES BROUGHT AGAINST GIORGI UGULAVA

The February 10, 2020 judgment of the Criminal Law Chamber of the Supreme Court against Giorgi Ugulava was critically assessed by the western partners. Several hours after the Court's judgment was released, the US Republican Congressman and Chairman of the Georgia's Support Group **Adam Kinzinger** reacted to it⁴⁵ and twitted that *"To say this is disturbing would be an understatement. Using courts as a weapon is NOT democracy."* Several hours later after Kinzinger's statement, **Senator Jim Risch** also criticized the ruling of the Supreme Court. Senator Risch chairs the Foreign Affairs Committee of the US Senate. He stated: *"As I told the Georgian foreign minister last week, the collapse of judicial independence and persecution of the opposition is unacceptable behavior."*⁴⁶

Alongside with the US politicians, the US Embassy in Georgia also expressed its position with regard to the detention/imprisonment of people in parallel to ongoing political development. **"The U.S. Embassy is disappointed that the**

⁴³ See <https://bit.ly/2z3ny2a>

⁴⁴ See <https://bit.ly/3d3ufx4>

⁴⁵ See <https://twitter.com/repkinzinger/status/1226955819201245192?Lang=en>

⁴⁶ See the statement of Senator Risch <https://twitter.com/senateforeign/status/1227019806395600896>

timing and context of the conviction and sentencing of an opposition leader last night has put the dialogue at risk⁴⁷.”

The Foreign Affairs Minister of Lithuania also criticized Giorgi Ugulava’s imprisonment. He tweeted that is “Concerned by the court decision to sentence G. Ugulava, one of the leaders of European Georgia. The judiciary shouldn’t be used to persecute the opposition, which is a must for democratic societies. Upcoming parliamentary elections will be a litmus test for democracy in Georgia⁴⁸.”

The critical letter of 26 members of the European Parliament to the Prime Minister of Georgia Giorgi Gakharia is particularly important, which criticized the renewed prosecution against the members of the opposition political parties. The letter mentions the judgment of the Supreme Court of Georgia and arrest of Giorgi Ugulava. According to the MEPs, the current case launched against Gigi Ugulava raises questions regarding the procedure, timing and motivation behind the ruling of the Supreme Court.

The most notable part of the letter is that representatives of all political group of the European Parliament signed it, among them are the members of the political group (Social-Democrats- S&D), whose member is the ruling political party of Georgia – “Georgian Dream –Democratic Georgia.” Namely, among the signatories are – 10 members of the EFA, 6 members of the EPP, 7 members of the S&D and 3 members of the RENEW⁴⁹.

According to the under-signatory MEPs, as real allies of Georgia, the MEPs “worry over Georgia backsliding regarding the rule of law and democratic principles.” According to their assessment, impartial, transparent and independent judiciary system is a foundation of a democratic society. While the selection and appointment of new Supreme Court judges for lifetime tenure lacked transparency and merit-based objectivity. MEPs called on the Georgian Parliament to ensure that “the judges who remain to be selected meet highest professional and reputational standards.”

⁴⁷ See the statement of the US Embassy <https://ge.usembassy.gov/u-s-embassy-statement-on-political-dialogue-and-conviction-of-opposition-leader-february-11/>

⁴⁸ See the statement <https://www.georgianjournal.ge/politics/36232-embassies-and-politicians-commenting-on-gigi-ugulavas-arrest.html>

⁴⁹ See the statement <https://civil.ge/archives/341052>.

The MEPs noted that it is necessary to uphold the rule of law and end political influence on the judiciary. According to their assessment, the political influence on the judiciary seems increasing. They also mention the statement of the chairman of the ruling political party Bidzina Ivanishvili, where he threatened the opposition with jail time, as well as reopening of previously dormant criminal cases which put several opposition leaders under investigation or in custody.

On March 6, 2020, the statement of the Vice-President of the European People's Party (EPP) *Siegfried Muresan* was published, where he stated that if events will continue to negatively develop in Georgia, the European Parliament may consider the issue of sanctions. **The MEP also mentioned Giorgi Ugulava's case and noted that prosecution and arrest of opposition politicians is not a norm.** He also underlined that in some instances, rule of law is not functioning and judges are under oppression⁵⁰.

Georgian human rights civil society organizations expressed concern over the judgment passed against Gigi Ugulava. The statement, which is signed by 12 organizations, reads that the ruling is a continuation of the government's **political persecution** of the opposition and that it **is problematic due to a number of reasons**⁵¹.

According to the assessment of the Public Defender of Georgia, the practice of European Court of Human Rights determines that the personal attitude and behavior of a judge should create the sense of impartiality in the society. A judge, whose impartiality raises obvious questions, should not participate in the consideration of the case⁵².

It must be noted that Georgian politicians, who were the members of the Georgian Dream in the past and opposed Giorgi Ugulava, also criticized the arrest of Ugulava. Among them was ex-president Giorgi Margvelashvili⁵³, ex-PM Giorgi Kvirikashvili⁵⁴,

⁵⁰ See the statement of the EPP Vice-President Siegfried Muresan <https://bit.ly/2ksp7ea>.

⁵¹ See the statement of csos at <https://bit.ly/2L1KH87>

⁵² See the statement of the Public Defender with regard to the judgment of the Supreme Court against Gigi Ugulava <https://bit.ly/2zztm3z>

⁵³ See Giorgi Margvelashvili's statement at <https://bit.ly/3cmexkw>.

⁵⁴ See Giorgi Kvirikashvili's statement at <https://bit.ly/2zsuhvj>.

Aleksandre Elisashvili⁵⁵ and MP Tamar Chugoshvili⁵⁶. They evaluated the court judgment as political prosecution.

OBJECTIVES AND SIGNIFICANCE OF THE POLITICAL AGREEMENT OF MARCH 8, 2020

On March 8, 2020, the Government and opposition parties signed two documents of agreement⁵⁷. We may state that the separation of the topics of agreement was rational. Also, in the process of the consensus achievement, the role of the US Ambassador Kelly Degnan, Head of the EU Delegation in Georgia Carl Hartzell, German Ambassador Hubert Knirsch, Head of the CoE Office in Georgia Cristian Urse and US Deputy Ambassador Elizabeth Rude, was particularly outstanding⁵⁸. As the opposition leaders, before starting negotiations with the government, requested to release the detained political leaders, this issue was settled with the separate document. The Memorandum of Understanding includes the details about the election system. **The second document regulates the issue of the imprisoned opposition leaders and activists. The document acknowledges that the parties agree that “highest standards” shall be ensured in the judiciary system. The document stressed out that it is necessary to address actions that could be perceived as inappropriate politicization of Georgia’s judicial and electoral processes and avoid any such actions in the future⁵⁹.**

The document also refers to the authority of the President of Georgia, and we may assume that one of the instruments for the release of the detainees may be the President’s pardon to fix the legal problem.

⁵⁵ See Aleksandre Elisashvili’s statement <https://bit.ly/3cvgfml>

⁵⁶ See Tamar Chugoshvili’s statement <https://bit.ly/2s5trso>.

⁵⁷ See 1) Memorandum of Understand https://ge.usembassy.gov/wp-content/uploads/sites/165/Memorandum-of-Understanding.pdf?_ga=2.144348789.1719382843.1588687416-1519128025.1515774247; 2) joint statement: <https://ge.usembassy.gov/wp-content/uploads/sites/165/Joint-Statement.pdf>

⁵⁸ See information on the website of the Parliament of Georgia <https://bit.ly/2wuqizn>

⁵⁹ See the joint statement at <https://ge.usembassy.gov/wp-content/uploads/sites/165/Joint-Statement.pdf>

In the follow-up public statements, the representatives of the opposition stated that they believe similar provision in the document meant the “government will free political prisoners;” while the representatives of the government believed “there are no political prisoners” in Georgia and the judiciary system shall independently regulate legal issues regarding the defendants.

On March 9, 2020, the President of Georgia Salome Zurbashvili stated that she will grant a pardon based on her judgment. She added that the pardoning has clearly prescribed procedures that were adopted last year. She said, there is no single person in this country who is subject to specific preferential pardoning regulations and every individual is aware how to appeal the President.⁶⁰

On March 10, 2020, Chairman of the US Senate Foreign Relations Committee Jim Risch and Senator Jeanne Shaheen echoed the agreement between the Government of Georgia and majority of opposition political parties in Georgia. *Jim Risch stated that expect to see its full implementation in the coming weeks and months. He said, earlier this year, my colleague Senator Shaheen and I wrote to Prime Minister Gakharia to express our concern with recent events in Georgia and advise that the Georgian government put an end to democratic backsliding. Senator Shaheen said, the reached agreement is crucial for their nation’s democracy*⁶¹.

CONCLUSION

Although starting from 2012, on the institutional level, many positive reforms were implemented to free the judiciary authority from political influence and to ensure independence of judges, nowadays, the questions over the cases with political context processed in the courts and over the criminal cases against Giorgi Ugulava, prove that the independence of the judges is challenged.

In this research, *in order to identify alleged political motives in the criminal cases processed against Giorgi Ugulava*, in respect to the international practice and Georgian context, the criteria necessary to grant political status to an individual

⁶⁰ See the statement of the Georgian President Salome Zurbashvili about pardoning of the so-called political prisoners <https://bit.ly/3ckbcfz>.

⁶¹ See the statements of the chairman of the US Senate Foreign Relations Committee Jim Risch and Senator Jeanne Shaheen at <https://bit.ly/35zzxxk>

elaborated by the Council of Europe and the international organization Amnesty International, were analyzed. The CoE elaborated the criteria on May 3, 2001 and they were applied for the identification of political prisoners in Armenia and Azerbaijan in 2001-2004. On June 26, 2012, the Parliamentary Assembly of the Council of Europe adopted the resolution, which determines the criteria about “political prisoners”. Although the experts group did not consider the case of Georgia, their criteria may be applied during the assessment of the cases processed in Georgia⁶². Shortcomings in Gigi Ugulava’s case were identified based on those criteria. *Namely, the 6-months term to examine the cassation lawsuit was violated; one of the judges examining his case in the Supreme Court of Georgia – Shalva Tadumadze was not recused, who before that was the chief prosecutor (prosecutor general) when the city and appellate courts examined the case of Ugulava; the multi-volume case was examined and judgment was passed within 13 working days; the cassation court processed the case without oral hearing while there was high public interest in the case because of alleged political motives in it; there are few other signs of selective justice.*

After the Supreme Court of Georgia violated the six-month term to consider the cassation lawsuit in Giorgi Ugulava’s case, it started the examination of the case in an accelerated manner, which coincided with the politically active period and new charges brought against the defendant by the investigative bodies. In addition to that, other judgments of the court, strict statements of the international partners and influential politicians cast doubts over the political motives in these cases and allegation that the Government of Georgia used the judiciary authority for political revenge.

When the investigation started against Giorgi Ugulava seven years ago, in parallel to which criminal prosecutions were launched against some more opposition party leaders, there were well-grounded doubts that the Government uses the criminal prosecution against opponents as an instrument of oppression.

Dragged out investigations and court proceedings against the representatives of various opposition political parties has acquired quite a common nature.

⁶² See the Manual about Political Prisoners, 2012

<http://www.humanrights.ge/admin/editor/uploads/pdf/angarishebi/hrh/politikuri%20patimrebi-gzamkvlevi-geo.pdf>

Apparently, the Government effectively uses this method to indirectly oppress its opponents and activates old cases when it is advantageous. In this regard, it is worth to mention, that the common courts are processing one more case against Giorgi Ugulava, which refers to the mass dispersal of the demonstrators and raid in the TV-Company Imedi 13 years ago, on November 7, 2007. Ex-president Mikheil Saakashvili and few more former senior officials– Ivane Merabishvili, Zurab Adeishvili, Davit Kezerashvili and Giorgi Ugulava are also charged in the case⁶³. Human Rights Center monitors court proceedings in those cases and the report on monitoring findings will be published in future.

⁶³ See the press-release of Human Rights Center
<http://humanrights.ge/index.php?A=main&pid=20135&lang=eng>

CHAPTER

2

LEGAL ANALYSIS OF THE
CRIMINAL CASES COMMENCED
IN CONNECTION WITH THE **JUNE**
20-21, 2019 EVENTS

INTRODUCTION

Dispersal of the protest demonstration on June 20-21, 2019 played crucial a role in the recent history of Georgia. The multi-thousand protest demonstrations started after the Inter-Parliamentary Assembly on Orthodoxy was organized in Tbilisi, in the frame of which, the member of the Russian Duma Sergei Gavrilov sat in the chair of the Georgian Parliament's Speaker and led the session in the Russian language. The dispersal of the assembly with the excessive force drastically changed the political and social life of Georgia. Local⁶⁴ and international stakeholders expressed doubts over the independence and impartiality of the law enforcement bodies that was connected with the commenced criminal proceedings against the citizens. Criminal prosecution started against many civil activists, demonstrators and political activists; among them past crimes, guilty verdicts and imprisonment terms were revived, where alleged political motives are identified⁶⁵.

In connection with the June 20-21, 2019 events, local and international organizations⁶⁶⁻⁶⁷ and state institutions⁶⁸, among them Human Rights Center⁶⁹, paid particular attention to the following issues: legitimacy and proportionality of the decision to disperse the demonstration; criminal proceedings against the individuals participating in the June 20-21 events, and court proceedings over those cases; imposed imprisonment terms and guilty verdicts; cases of interference in the journalistic activities; refusal to grant victim status to the individuals who suffered during the dispersal; facts of physical and verbal assault, ill treatment

⁶⁴ See the statement of the Human Rights House Tbilisi and its member organizations <https://bit.ly/2URFGUM>, August 9, 2019

⁶⁵ See the statement of HRC <https://bit.ly/37edpfs>, last seen on June 6, 2020

⁶⁶ See the statement of HRC, FIDH and NHC at <http://humanrights.ge/index.php?A=main&pid=19893&lang=eng>

⁶⁷ See the statement of the Amnesty International at <https://bit.ly/2AR3IIA>

⁶⁸ See the special report of the Public Defender of Georgia "Interim Report about the Investigation of June 20-21 Events, 2020" <https://bit.ly/2Afi5WV>; also, the report of the US Department of State "Country Reports on Human Rights Practices: Georgia", 2020. <https://bit.ly/30karas>

⁶⁹ See the legal analysis of Human Rights Center – "June 20-21 Events" <http://hrdc.org/admin/editor/uploads/files/pdf/hrc2019/20-21%20ivnisi-eng..pdf>. *HRC's Legal Analysis was one of the sources of the US Department of State in its annual report.*

from the side of law enforcement officers and a lack of effective and impartial investigation of those facts from the side of the state.

In accordance with the assessment of Human Rights Center and other human rights organizations⁷⁰, individuals, who were under the effective control of law enforcement officers after the detention, also became subjects of ill-treatment from the side of the police officers. Physical and verbal abuse of the detainees has reached the minimum level of severity that constitutes degrading treatment against detainees and requires an investigation to identify and impose criminal liability on perpetrators. Although a long time has passed since those events, investigation into alleged facts of the excessive use of force was commenced only against a few police officers and their cases are still processed in the first instance of the court (Tbilisi City Court) and no verdicts have been passed against them so far. In parallel to that, criminal proceedings are actively conducted against civil or political activists into criminal cases; some of them were already convicted of the imposed charges⁷¹.

The below document aims to legally assess the facts of the criminal proceedings commenced after the June 20-21 events and the criminal cases against different individuals through the analysis of the international practice and the Georgian context. The document analyzed the cases of civil activists, representatives of the opposition political parties and media, whose rights guaranteed under the Constitution of Georgia and the international human rights conventions were breached: among them freedom of expression, right to be protected from ill-treatment, right to prompt and quality justice, right to fair trial.

⁷⁰ See the legal analysis of the June 20-21 events by the Georgian Young Lawyers' Association, 2019 "Beyond the Lost Eye" <https://bit.ly/3femofl>; See the initial legal assessment of the Human Rights Education and Monitoring Center (EMC) Events of 20 June: Dispersal of the Rally and Related Practices of Human Rights Violation (Initial Legal Assessment) <https://bit.ly/2ziffld>.

⁷¹ See the statement of Human Rights Center <https://bit.ly/3equqnv>; and "Legal Assessment of the Criminal Cases Launched against Giorgi Ugulava," Human Rights Center, 2020 <https://bit.ly/3efzavn>

METHODOLOGY

The below survey was carried based on the analysis of trial monitoring reports of the HRC monitors, of the identified problematic material and procedural-legal issues, of the information collected through the interviews with the defendants/convicted people and their lawyers, findings from various documents and survey reports. In the course of the survey, the indictments, motions of the defense and prosecution sides, court rulings, interim decisions, rulings, Amicus Curiae sent by the Public Defender of Georgia to the common courts and the Constitutional Court of Georgia, reports/conclusions of the Venice Commission, and the criteria on the political prisoners elaborated by the Council of Europe and international organization Amnesty International were analyzed.

Based on the comparative analysis of the national legislation and court rulings with the Case Law of the European Court of Human Rights, the Report reveals problematic legal issues, alleged interest of the authority in those cases, interference in the independence and impartiality of justice bodies, which blatantly violates basic human rights and freedoms.

CRIMINAL CASES RELATED TO THE JUNE 20-21 EVENTS

In parallel to the trial monitoring, by assessing the criminal cases listed in this document, Human Rights Center does not aim to determine guiltiness/innocence of the defendants/convicted individuals, but identify the miscarriages and problems observed in the course of criminal and judicial proceedings. At the same time, each problematic issue is assessed in coherence with the national and international laws and the standards and requirements established by the European Court of Human Rights.

- **CASE OF IRAKLI OKRUASHVILI**

Founder of the political party Victorious Georgia Irakli Okruashvili was arrested on July 25, 2019⁷². The prosecutor's office accused him of leadership of group violence during June 20-21, 2019 events (Article 225 Part 1 of the Criminal

⁷² See information at <https://bit.ly/36Tylc5> Last seen on 29.05.2020

Code of Georgia) and participation in the group violence (Article 225 Part 2 of the CCG)⁷³.

The Tbilisi City Court acquitted Irakli Okruashvili in the charge brought under the Article 225 Part 1 of the CCG (leadership of a group violence⁷⁴). The prosecutor's office of Georgia tried to prove Irakli Okruashvili's guiltiness in the imposed charge in two episodes. In accordance with the indictment, the first episode referred to the fact when Irakli Okruashvili approached law enforcement officers at the entrance of the Parliament of Georgia on Tchitchinadze Street; the second episode fully relied on the testimony of only one witness police officer, who stated that protesters tried to break into the yard of the Parliament building and had noticed Irakli Okruashvili thereto, who was shouting together with the crowd: "Go ahead, go ahead!" and was moving towards the Parliament's building⁷⁵. In accordance with the judgment of the Tbilisi City Court, signs of criminal offence were not identified in the first episode of the case, which could prove Irakli Okruashvili's guiltiness in the leadership of the group violence, which in accordance with the Court's clarification, excluded leadership of the group violence by Irakli Okruashvili. As for the second episode, the Court fairly concluded that words "Go ahead, Go ahead!" could not become grounds to assess the action as a leadership of a group violence without identifying its context and addressees.

The Court found Irakli Okruashvili guilty of a crime punishable under the Article 225 Part 2 of the CCG (participation in the group violence)⁷⁶. The Tbilisi City Court concluded that Irakli Okruashvili committed violence when he pushed the police cordon, also grabbed and pulled a police officer. The guilty verdict relied on the testimonies of four witnesses. All of them were police officers. The analysis of the court judgment revealed that court's clarification of the Article 225 of the CCG in Irakli Okruashvili's case is problematic. It does not envisage the objective of a law-maker to qualify only those actions with this article, which were committed against the state authority and public interest; therefore the article shall not be applied to other relatively similar criminal cases punishable under other articles of the CCG.

⁷³ See the indictment, Tbilisi, 26.07.2019. Document N0013218149

⁷⁴ See full information at <https://bit.ly/2yadh6f> Last seen on 01.06.2020

⁷⁵ See the report of the HRC monitor from the trial monitoring, trial on merits: 10.01.2020; 13:20-14:12

⁷⁶ See information at <https://bit.ly/2yadh6f>; last seen on 01.06.2020

As a result of huge international oppression⁷⁷, which indicated at the signs of alleged political motives in Irakli Okruashvili's case, the President of Georgia pardoned the leader of the political party Victorious Georgia Irakli Okruashvili based on the pardon act on May 15, 2020⁷⁸. The convicted person left the penitentiary establishment on the same day – on May 15, 2020.

Human Rights Center actively monitors the hearings of the criminal case against Irakli Okruashvili in the court, which refers to the death of Amiran (Buta) Robakidze during the special operation of law enforcement officers in 2004. Charges against Irakli Okruashvili over this criminal case were officially brought on November 19, 2019, a few days before the remoteness of the crime was due to expire⁷⁹. The prosecutor's office of Georgia accused him of the crime punishable under the Article 332 Part 3 – "c" of the CCG, which refers to the abuse of official power by a political official.

HRC will publish separated document on the legal assessment of the criminal cases launched against Irakli Okruashvili in the near future.

- **NIKANOR MELIA'S CASE**

On June 25, 2019, the Prosecutor's Office of Georgia brought charges against the Member of the Parliament, the chairman of the political council of United National Movement Nikanor Melia with regard to the leadership and participation in the group violence during the protest demonstration in front of the Parliament of Georgia on June 20-21, 2019⁸⁰.

Indictment

In accordance with the indictment, during the protest demonstration of June 20, 2019, at about 21:00 pm, the Member of the Parliament of Georgia Nikanor

⁷⁷ See the statement of the US Embassy in Georgia about Irakli Okruashvili's arrest <https://bit.ly/3e98pfr>; Statement of U.S. Senators Jim Risch (R-Idaho), chairman of the Senate Foreign Relations Committee, and Jeanne Shaheen (D-N.H.), <https://civil.ge/archives/341896>; see the joint statement <https://bit.ly/2axet9n>;

See the statement of the meps at <https://bit.ly/3fmlqun>.

⁷⁸ See full information at <https://bit.ly/37sxaaf>; last seen on 01.06.2020

⁷⁹ See full information at <https://bit.ly/2xysntz>; last seen on 01.06.2020

⁸⁰ See the statement of the Prosecutor's Office of Georgia at <https://bit.ly/3f0Ze0z>. Last seen on 01.06.2020

Melia addressed the citizens of Georgia and stated that unless their requirements were satisfied within one hour, everybody should have entered the building of the Parliament of Georgia⁸¹. As the requirements of the protesters were not satisfied, part of the citizens gathered in front of the Parliament building, and under leadership and participation of Nikanor Melia started to use violence against the law enforcement officers deployed on the area; they used various items to assault them, damaged and destroyed the belongings of the law enforcement officers. Pursuant to the indictment, as a result of the violent action, both the police officers and citizens, who were gathered for peaceful protest, received various injuries.

Address of the Prosecutor General to suspend the mandate of the MP

On June 25, 2019, the Prosecutor General's Office of Georgia addressed the Parliament of Georgia to suspend the mandate of the Member of Parliament to Nikanor Melia⁸². In accordance with the Article 39 of the Constitution⁸³ and the Article 11 Part 1 of the Rules of Procedures of the Parliament of Georgia⁸⁴, a Member of the Parliament can be detained only with the Parliament's preliminary consent. In this light, to use imprisonment as a measure of constraint against Nikanor Melia, the Prosecutor General's Office of Georgia addressed the Parliament of Georgia to issue an order of consent in accordance with the law to arrest him⁸⁵.

In accordance with the Constitution of Georgia, the Member of the Parliament is protected with the immunity but it cannot be a guarantee if the MP commits a crime. An MP shall not be held liable for the views expressed inside or outside

⁸¹ See the legal analysis of Human Rights Center "June 20-21 Events", p 5-6, 2019 <https://bit.ly/2Bg4uim>.

⁸² See the address of the Prosecutor General of Georgia N013/4 to the interim chairperson of the Parliament of Georgia Tamar Chugoshvili, 25.06.2019 <https://bit.ly/2uqlhgi>. Last seen on 01.06.2020

⁸³ See the Article 39 of the Constitution of Georgia at <https://bit.ly/30Tq9HS>

⁸⁴ See the Article 11 Part 1 of the Rules of Procedures of the Parliament of Georgia <https://bit.ly/2ykqmrV>

⁸⁵ See the address of the Prosecutor General of Georgia N013/4 to the interim chairperson of the Parliament of Georgia Tamar Chugoshvili, 25.06.2019 <https://bit.ly/2uqlhgi>. Last seen on 01.06.2020

Parliament while performing his/her duties. However, the immunity can be removed if there is reasonable doubt about a commission of a crime⁸⁶.

In accordance with the allegation of the Prosecutor General⁸⁷, both formal and factual grounds were on place to use imprisonment as a measure of constraint against defendant Nikanor Melia. The Prosecutor General indicated in its motion that the measure of constraint is used when there is a well-grounded doubt that the defendant will hide, commit a new crime and hinder the rendering of justice and collection of evidence⁸⁸.

Human Rights Center believes that the motion of the Prosecutor General's Office to the Parliament of Georgia was formal and the significant aspects necessary to use the imprisonment against a person were not adequately verified, as for the Case Law of the ECtHR⁸⁹, which is referred by the Prosecutor's Office, considering the factual circumstances and verification standard, do not match the case against Nikanor Melia.

In accordance with the report of the Venice Commission, the procedures both for establishing and lifting immunity should be transparent and open. The Commission states that in modern life, the parliamentary immunity mostly acts as a guarantee of the monitory⁹⁰. It means that guarantees of the individual freedom under the Constitution of Georgia cannot protect an MP from endless legal proceedings for his/her opinions and views, which may be initiated by the executive government or other members of the society. Similar legal disputes, de facto, may restrict the MPs to enjoy their right to freedom of expression⁹¹. Therefore, parliamentary immunity and special rules to free an MP from civil and criminal liability ensure protection of an MP from the prosecution of political

⁸⁶ See Article 39 Paragraphs 2 and 3 of the Constitution of Georgia <https://bit.ly/3eehbpi>

⁸⁷ See the address of the Prosecutor General of Georgia N013/4 to the interim chairperson of the Parliament of Georgia Tamar Chugoshvili, 25.06.2019 <https://bit.ly/2uqlhgi>. Last seen on 01.06.2020

⁸⁸ See the Article 205 Part 2 of the Criminal Procedure Code of Georgia <https://bit.ly/2blclg2>

⁸⁹ See *Wettstein v. Switzerland*, January 26, 1993 paragraph 33, Strasbourg, Judgment of December 11, 2000 <https://bit.ly/2zdawg7>; see *Barfuss v. The Czech Republic*, August 1, 2000, Strasbourg <https://bit.ly/2asintv>; see *Punzelt v. The Czech Republic*, April 25, 2000, Strasbourg; also see *Conrad v. Italy*, 2000

⁹⁰ See the May 14, 2014 report of the Venice Commission <https://bit.ly/2mhk9cq>.

⁹¹ See the general proposal of the Public Defender of Georgia to avoid fact of discrimination and to start fight against it <https://bit.ly/2Yau7dr>. Last seen on 01.06.2020

opponents, executive authority and other members of the society⁹². Above that, freedom of expression of an MP is one of the significant subjects of the parliamentary immunity. Freedom of speech is an ultimate privilege for a member of the representative body rather than for an ordinary citizen of a country⁹³.

Despite that, on June 26, 2019, the Parliament of Georgia, at the special session, when opposition political parties boycotted the sessions⁹⁴, with 91 votes against no objections, lifted Nikanor Melia's parliamentary immunity to enable the prosecutor's office to address the Court to arrest him⁹⁵.

Assessment of the Tbilisi City Court's ruling

On June 27, 2019 the Tbilisi City Court did not share the position of the prosecutor's office and imposed a bail on the MP as a measure of constraint instead of imprisonment. The Court concluded that the objectives of the measure of constraint could be achieved with less severe measure – 30 000 GEL bail⁹⁶. The defendant was to pay the bail within 20 days. The Tbilisi City Court made the decision with regard to the measure of constraint in accordance with the Criminal Procedure Code of Georgia and did not clarify the special mandate of the MP in its ruling.

In accordance with the Criminal Procedure Code of Georgia, when making the decision about the measure of restraint, the Court, alongside with other circumstances, takes the activities of the defendant into account though in this particular case the Court failed to take this circumstance into account. If the Court had considered this important circumstance, it could have impacted the court ruling and would not have restricted Nikanor Melia's rights and used any measure of constraint.

⁹² See European Commission For Democracy Through Law (VENICE COMMISSION), REPORT ON THE SCOPE AND LIFTING OF PARLIAMENTARY IMMUNITIES Adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014), Strasbourg, 14 May 2014, Study No. 714 / 2013, § 82.

⁹³ See the May 14, 2014 report of the Venice Commission <https://bit.ly/2mhc9cq>.

⁹⁴ See full information at <https://bit.ly/2xjieuu>, June 26, 2019, last seen on 01.06.2020

⁹⁵ See full information at <https://bit.ly/2uqxckc>. Last seen on 01.06.2020

⁹⁶ See full information at <https://bit.ly/2uogoyz>. Last seen on 01.06.2020

Based on the court's ruling, additional restrictions were imposed on Melia; namely, he was prohibited without informing and consent of the investigating authority, making public announcements at public places and any kind of communication with witnesses; he was also ordered to hand in passport and ID documents to the investigative body; finally, with the increased amount of the bail and additional restrictions, the Court concluded the objectives of the measures of constraint would be achieved completely. According to the Court's clarifications, if the bail requirements and other obligations were breached, the measure of constraint could be changed with more severe measure⁹⁷.

Assessment of the Tbilisi Appellate Court's ruling

On July 2, 2019 Tbilisi Appellate Court upheld the ruling of the Tbilisi City Court. Besides that, the Appellate Court ordered the prosecutor's office to monitor the movement of Nika Melia with the special tracking bracelet⁹⁸.

Regardless of the electronic monitoring, in accordance with the public statements of the Prosecutor's Office of Georgia⁹⁹, on September 10, 2019, Nikanor Melia demonstratively violated the prohibition imposed by the Tbilisi City Court Judgment, when he left his place of residence, went to the TV-Company Kavkasia and participated in the TV-program. According to the Prosecutor's Office, Nikanor Melia's participation in the public-political TV-program was violation of the prohibition imposed by the court. The defendant was clarified that in case of repeated violation, a more severe measure of constraint may be applied. The PO added that Nikanor Melia was given consent to appear in the Parliament of Georgia. In addition, he had full communication with the media from his home¹⁰⁰.

The strict position of the Prosecutor's Office contradicts the authority of public activities of an MP. An MP may need permanent communication with people and representatives of various organizations; he/she shall enjoy unlimited right to

⁹⁷ See the statement of the Tbilisi City Court about Nikanor Melia's case at <https://bit.ly/3chutxn> last seen on 01.06.2020

⁹⁸ See full information at <https://bit.ly/3dk2nbz>. Last seen on 01.06.2020

⁹⁹ See the statement of the Prosecutor's Office of Georgia with regard to Nikanor Melia's case, September 13, 2019 <https://bit.ly/37m9uym> last seen on 01.06.2020

¹⁰⁰ Ibid

freedom of expression that cannot be effectively achieved without leaving a place of residence. Therefore, within the scope of the measure of constraint imposed by the court, the Prosecutor's Office may refuse the MP to leave house only for clear and very important legitimate purposes, which, if violated, may harm the best interests of the electorate. At the same time, in exceptional cases, if it is the only and necessary option, the court may restrict the right through contemplated, clear and strictly regulated procedures, which are based on the fair balance of best interests. So, seizure of the mandate granted to an MP through direct election or its restriction not only violates the right of the mandate-bearer to occupy the position in a public agency, but also restricts the will of those voters, who granted the mandate to the public official¹⁰¹.

In accordance with the report of the Venice Commission, rules on parliamentary immunity today function primarily as a minority guarantee and it cannot be perceived as a personal privilege of any MP¹⁰². Therefore, the ruling of the Tbilisi Appellate Court does not meet the requirements of the Constitution of Georgia either. Namely, it contradicts the proportionality of the restriction of power.

Trial monitoring

Human Rights Center's monitor observes the hearings of Nikanor Melia's criminal case in the court. Based on the findings from the trial monitoring, one might assume that the testimonies of the witnesses in the June 20-21 events related criminal case fail to prove guiltiness of Nikanor Melia. As of now, the principle of equality of arms and adversarial principle are respected during the proceedings¹⁰³. The parties are able to make solicitations and express their opinions about the solicitations of the opposite party without delay. *The most recent hearing of the criminal case, which was scheduled on March 18, 2020, was postponed for uncertain time because of the spread of the COVID-19 and related state of emergency in the country. The date of the next hearing is not scheduled yet.*

¹⁰¹ See the constitutional lawsuit <https://bit.ly/37E4Aw9>.

¹⁰² See the May 14, 2014 Report of the Venice Commission at <https://bit.ly/2mhk9cq>.

¹⁰³ See the Article 9 of the Criminal Procedure Code of Georgia <https://bit.ly/3dn6u6r>.

Amicus Curiae of the Public Defender of Georgia to the Tbilisi City Court on Nikanor Melia's case

The Public Defender considers that a substantial restriction on freedom of speech may be seen as a disproportionate restriction of the exercise of authority by a parliamentarian¹⁰⁴. Therefore, on November 28, 2019, the Public Defender filed an amicus curiae brief with the Tbilisi City Court¹⁰⁵.

The Public Defender, after the Constitutional Court of Georgia, is the second independent constitutional body in Georgia, which is equipped with significant functions to defend basic freedoms and human rights on the national level. Although the Public Defender in Georgia is elected by the supreme legislative body, it is absolutely independent from the legislative body and in the frame of the abstract control mechanism of the norms, in accordance with the Article 21 – “i” of the Organic Law of Georgia on the Public Defender of Georgia, the Ombudsperson is authorized to file a constitutional lawsuit to the Constitutional Court of Georgia¹⁰⁶. Legal publications often indicate that the purpose of the institute of the ombudsman in the national legal system is to fight against the violations committed by the administrative bodies¹⁰⁷. The Administration of Justice is also subject of the control of majority of ombudsmen. The Administration of Justice includes administrative body of the judiciary authority, disciplinary measures against the judges and more. Ombudsman's sanctions, in this particular case, include only giving recommendations to the judges with regard to respective problematic issues or to the officials authorized to impose disciplinary measures on judges, also about the disciplinary liabilities to be imposed on a violator, etc.¹⁰⁸

As for the amicus curiae on Nikanor Melia's case, according to the Public Defender, the inability to carry out parliamentary activities, such as to make public statements, as well as the obligation to warn the Prosecutor General's Office about

¹⁰⁴ See the statement of the Public Defender about the Amicus Curiae on Nikanor Melia's Case at <https://bit.ly/3ddgwpr>

¹⁰⁵ See the Amicus Curiae on Nikanor Melia's case <https://bit.ly/30i8Vnj>.

¹⁰⁶ See the Article 21 – “i” of the Law of Georgia on Public Defender <https://bit.ly/3exuunq>.

¹⁰⁷ See the comment on the Constitution of Georgia, chapter 2; Georgian citizenship. Baic human rights and freedoms, p 576 <https://bit.ly/2upjigf>.

¹⁰⁸ See Kucsko-Stadlmayer, Gabriele (Hrsg.), Europäische Ombudsmann-Institutionen. Eine rechtsvergleichende Untersuchung zur vielfältigen Umsetzung einer Idee, Wien, 2008, S. 29, 54-61.

arriving at TV channels for participating in programs, is an important problem. In addition, it is unclear why the Member of Parliament should not be allowed to participate in TV programs from the building of the TV channels instead of his own home. Even the elementary parliamentary activity, such as arrival at the administrative building of the Parliament, depends on the good will of the Prosecutor General's Office.

The Public Defender considers that a substantial restriction on freedom of speech should only be used in an extreme case and should not restrict free political debate in the Parliament. The Public Defender also draws attention to the practice of the Constitutional Court of Georgia, according to which, the officials democratically elected by people have special legitimacy, and limiting their authority requires special grounds and justification. The Public Defender further considers that a substantial restriction on freedom of speech should only be used in an extreme case and should not restrict free political debate in the Parliament¹⁰⁹. According to the Public Defender, the measures used against Nikanor Melia, namely: communication with the witnesses, prohibition to cross the state border and electronic monitoring disproportionately restricted his ability to undertake parliamentary activities. In accordance with the *Amicus Curiae*, the restriction of movement shall not be applied for the administrative building of the parliament, in order to meet the requirement of the Constitution and enable the MP to perform his main duties. At the same time, similar restrictions are not justified in respect to the criminal law. More precisely, if Nikanor Melia is prohibited to make public statements to prevent him from committing a new crime, neither could he be allowed to have communication with media and be interviewed; if he was allowed to communicate media, it is unclear, why the MP was allowed to do it from his house but not from the premises of the TV-Company while being under electronic monitoring to prevent him from hiding from the investigation.

The Public Defender of Georgia also refers to the clarification of the Constitutional Court of Georgia: "It is particularly important to protect the officials democratically elected by people from groundless and selfish restriction

¹⁰⁹ See the May 14, 2014 Report of the Venice Commission <https://bit.ly/2mhk9cq>.

of the authority delegated on them by the electorate.¹¹⁰ According to the source of legitimacy of a public official, their constitutional status, competence and responsibility, the guarantees of their independence and inviolability differ and consequently, the pre-conditions and procedures to interfere in these rights shall also differ¹¹¹.

Regardless many substantiated and critically important assessments of the Public Defender of Georgia, the Tbilisi City Court did not take the Amicus Curiae of the Public Defender into account on Nikanor Melia's case.

With the rulings of the Tbilisi City Court and the Tbilisi Appellate Courts, with the restricted freedom of expression of the MP, we may observe disproportionate restriction of his authority that comes in conflict with the Constitution of Georgia.

The rights of the MP Nikanor Melia would not have been restricted so disproportionately, if the Tbilisi City and Appellate Courts had considered the case in complicity of the requirements of the Constitution of Georgia, Criminal Procedure Code of Georgia and the Rules of Procedures of the Parliament of Georgia and if the court had taken the peculiarities of the MP's immunity into account.

Early termination of Nikanor Melia's parliamentary authority

On December 2, 2019, the Tbilisi City Court found MP Nikanor Melia guilty of the so-called Cartu Bank's case¹¹² based on the Article 332 Part I of the CCG¹¹³. The Court imposed 25 000 GEL bail on him. At the same time, in accordance with the Article 43 Part 2 of the CCG¹¹⁴, Nikanor Melia was deprived of the right to occupy an official position for three years. Based on the Article 16 of the December 28, 2012 Law of Georgia on Amnesty¹¹⁵, the additional sanction imposed on Nikanor Melia with regard to the deprivation of the right to occupy the official position was reduced at ¼. In the end, Nikanor Melia was ordered to pay 25 000 GEL bail and was restricted to occupy an official position for 2 years and 3 months.

¹¹⁰ See the May 23, 2014 ruling of the Constitutional Court of Georgia on the case: "Citizen of Georgia Giorgi Ugulava v. The Parliament of Georgia," II-27 <https://bit.ly/2yhqxqs>.

¹¹¹ Ibid II-23

¹¹² See full information at <https://bit.ly/3ckb34v>.

¹¹³ See the Article 332 of the CCG at <https://bit.ly/2ckthcl>

¹¹⁴ See the Article 43 Part 2 of the CCG <https://bit.ly/2ckthcl>

¹¹⁵ See the Article 16 of the Law of Georgia on Amnesty at <https://bit.ly/2Yom23w>.

The resolution part of the Tbilisi City Court's December 9, 2019 judgment was sent to the Committee of Procedures and Regulations of the Parliament of Georgia¹¹⁶. Based on December 12, 2019 Resolution N5544 of the Parliament of Georgia, in accordance with the Constitution of Georgia¹¹⁷ and the Rules of Procedures of the Parliament of Georgia¹¹⁸, Nikanor Melia's parliamentary authority was terminated early in term¹¹⁹. On December 23, 2019, the decision was appealed in the Constitutional Court of Georgia¹²⁰. In the lawsuit, the applicant requested to declare the parliament's resolution unconstitutional, based on which his parliamentary authority was terminated¹²¹.

On February 10, 2020, the Public Defender of Georgia filed an Amicus Curiae to the Constitutional Court of Georgia on Nikanor Melia's constitutional lawsuit. The amicus curiae brief explains in which case the guilty verdict may serve as grounds for deprivation of parliamentary power. According to the practice of the Constitutional Court, the notion of a 'verdict that has entered into force' has autonomous content, and it is necessary to protect the principle of proportionality when depriving an elected MP of his/her authority¹²². **The amicus curiae brief addresses exactly the issue of proportionality. Consequently, it concludes that an MP can be deprived of his/her authority only if the court of first instance imposes custodial penalty, while in case if non-custodial penalty, an MP can be deprived of his/her authority only after there are no more opportunities for appealing against the verdict or the term of appealing expires.** The Constitutional Court of Georgia accepted the lawsuit for further consideration in relation with the Article 25 Paragraph 1 of the Constitution of Georgia¹²³ (right to hold public office) and the Article 39 paragraph 5 –“d” of the Constitution of

¹¹⁶ See full information at <https://bit.ly/2uwxjio>. Last seen 09.06.2020.

¹¹⁷ See the Article 39, Paragraph 5 – 'd' of the Constitution of Georgia <https://bit.ly/30tucwp>

¹¹⁸ See the Article 6 Paragraph 1 and Article 2 – “d” of the Rules of Procedures of the Parliament of Georgia at <https://bit.ly/2N95GH5>

¹¹⁹ See full information at <https://bit.ly/2uwxjio>. Last seen 09.06.2020.

¹²⁰ See full information at <https://bit.ly/2zphmnw>. Last seen 09.06.2020.

¹²¹ See the case Nikanor Melia v. The Parliament of Georgia, Constitutional Court of Georgia, January 27, 2020 <https://bit.ly/3drdwar>.

¹²² See the Amicus Curiae brief of the Public Defender of Georgia relating Nikanor Melia's case, February 11, 2020 <https://bit.ly/3fd8tdx>

¹²³ See the Article 25 Paragraph 1 of the Constitution of Georgia <https://bit.ly/2bmquyb>

Georgia¹²⁴ (the power of a Member of Parliament shall be terminated early if he/she has been convicted by a court judgment that has entered into legal force). The Constitutional Court did not accept the lawsuit in relation with the right to fair trial, as Nikanor Melia's parliamentary authority was terminated by the Parliament of Georgia and not by the Court¹²⁵.

When the judgment is considered to be enforced – when the first instance court has passed verdict or when the Supreme Court of Georgia delivers the final decision? The Constitutional Court of Georgia concluded it as a rare and significant problem. Therefore, the Plenum of the Constitutional Court, which is composed of all acting judges of the Court, examines the lawsuit.

Human Rights Center believes that the Article 31 Paragraph 5 of the Constitution of Georgia (procedural rights) – “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” – shall be clarified as the judgment of the final instance court – Supreme Court of Georgia on the concrete criminal case.

- **CASE OF GIORGI RURUA**

Indictment

A share-holder in the TV-company “Main Channel” Giorgi Rurua was arrested on November 19, 2019. In accordance with the indictment, Rurua was charged of the commitment of an action punishable under the Article 236 Part 3 and 4 of the Criminal Code of Georgia¹²⁶, which refers to the illegal purchase, storage and carrying of firearms, ammunition, explosives or explosive devices. In accordance with the indictment, unity of the information obtained by the prosecution in the case files indicate that according to the operative information, Giorgi Rurua, on November 18, 2019, was traveling from Tbilisi to Tskneti by his car and unlawfully carried firearms with him. Patrol police stopped Giorgi Rurua nearby the Vake district cemetery to search and withdraw unlawfully possessed firearms.

¹²⁴ Ibid Article 39 paragraph 5 – “d”

¹²⁵ See the case Nikanor Melia v. The Parliament of Georgia, Constitutional Court of Georgia, January 27, 2020 <https://bit.ly/3drdwat>.

¹²⁶ See the Article 23 Parts 3 and 4 of the CCG

On December 25, 2019, one more charge was brought against the defendant Giorgi Rurua based on the Article 381 Part 1 of the CCG, which refers to failure to execute or the interference with the execution of a judgement or other court decisions. The case concerns Giorgi Rurua's refusal, to take DNA and finger tests as it was required by the court ruling.

Alleged political motive

Pursuant to the criteria determined by the June 26, 2012 resolution of the Parliamentary Assembly of the Council of Europe¹²⁷ "A person deprived of his or her personal liberty is to be regarded as a 'political prisoner' if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."¹²⁸ These criteria coincide with the criteria established by the Amnesty International. Namely, if a case contains "tangible political element"; "if the authority fails to ensure fair trial in accordance with the international standards."

The arrest of Giorgi Rurua and the criminal proceedings against him, together with the cases of Irakli Okruashvili and Giorgi Ugulava, were soon followed by political evaluations¹²⁹ from various opposition political parties, international partners, particularly from the US Senators and Congressmen. The arrest of Giorgi Rurua is mostly evaluated as a political decision and his imprisonment was declared to be a violation of the March 8, 2020 memorandum¹³⁰.

Trial monitoring

Human Rights Center observes the hearings of the criminal case against Giorgi Rurua in the Tbilisi City Court. The Court started trial on merits on his case on February 10, 2020. During the monitoring several violations were identified¹³¹, which refer to: 1) *breached right to have an access to defense*; 2) *clarification of the*

¹²⁷ See the definition of a political prisoner determined by the June 26, 2012 Resolution of the PACE at <https://bit.ly/3dnt6dn>

¹²⁸ *ibid*

¹²⁹ See full information at <https://bit.ly/37seotf>; and also at <https://bit.ly/3hrbikf>.

¹³⁰ See the joint statement at <https://bit.ly/3fzfw7n>. Last seen on 05.06.2020

¹³¹ HRC trial monitor's report from the court hearing of Giorgi Rurua's case

defendant's responsibilities and obligations; 3) refusal to take tests and commencement criminal proceedings against the defendant for the failure to execute the court decision (Article 381 Part 1 of the CCG); 4) issue of proportionality of the interference during taking a test, and more.

Human Rights Center will publish separate analytical document on the criminal case against Giorgi Rurua, which will evaluate the abovementioned problems and other procedural miscarriages in more details.

- **CASE OF GIORGI JAVAKHISHVILI AND TORNIKE DATASHVILI**

Indictment

Pursuant to the indictment, during June 20-21, 2019 events, Giorgi Javakhishvili and Tornike Datashvili, together with other individuals, actively participated in the violent actions, which aimed to break into the administrative building of the Parliament of Georgia. Namely, Javakhishvili was beating police officers with the special tool – shield, which he had seized from the law enforcement officers and actively participated in the violent actions. As for Tornike Datashvili, he resisted the law enforcement officers, he pushed a police officer out of the police cordon by force and with his action participated in other violent actions. Both of them were charged of the crime punishable under the Article 225 Part 2 of the CCG (participation in the group violence)¹³².

Trial monitoring

Pursuant to the first introduction of the defendants to the court and July 27, 2019 ruling on the measure of constraint, imprisonment was used against Giorgi Javakhishvili and Tornike Datashvili. The prosecutor indicated at the risk of abscond, interference in the execution of justice and collection of evidence, risks of commitment of repeated crimes in its motion, which was shared by the court. The defense side appealed the ruling in the Tbilisi Appellate Court but the latter rejected the appeals. The upper instance court concluded that the Tbilisi City

¹³² See the Article 225 Part 2 of the CCG <https://bit.ly/2Bog1fo>

Court's ruling was substantiated and lawful¹³³. On October 18, 2019, the defendants admitted the imposed charges during the court hearing¹³⁴. At the trial, both defense lawyers solicited to change the measure of constraint. Namely, they requested to change the imprisonment into a bail. The defense lawyers informed the judge about family/economic state of the defendants and requested to change the imposed imprisonment into 2 000 GEL bail that was satisfied by the court and the defendants were released from the courtroom¹³⁵. Afterwards, on March 4, 2020, the plea-agreement was signed with the defendants¹³⁶. According to the defense lawyers, the defendants pleaded the imposed charges and did not argue about the evidence provided by the prosecutor's office¹³⁷.

- **CASE OF TAMLIANI, BUDAGASHVILI, KUPREISHVILI AND SOSELIA**

Indictment

MIA carried out intensive investigation of the cases in connection with the June 20-21, 2019 events¹³⁸. In the frame of the investigation, based on the judge's ruling, on July 4, 2019, MIA arrested four individuals: Zurab Budagashvili, Kakhaber Kupreishvili, Tsotne Soselia and Besik Tamliani. On July 5, 2019, the Prosecutor's Office of Georgia, officially brought charges against them under the Article 225 Part 2 of the CCG (participation in the group violence), accompanied by violence, raid, damage or destruction of another person's property, use of arms, armed resistance to or assault on representatives of public authorities. The crime is punished by imprisonment of four to six years.

Pursuant to the indictment, during the ongoing developments in front of the Parliament of Georgia, the defendants participated in the group violence, when they assaulted the police officers with different items and resisted them. Namely, Zurab Budagashvili several times attacked law enforcement officers with a club and used violence against them. Kakhaber Kupreishvili was throwing various

¹³³ See the July 31, 2019 ruling n1c/1272 of the investigative collegium of the Tbilisi Appellate Court

¹³⁴ HRC trial monitor's report from the trial monitoring; trial on merits: **18.10.2019, 11:00- 11:16**

¹³⁵ See full information at <https://bit.ly/2Afy3QY>. Last seen 02.06.2020

¹³⁶ HRC trial monitor's report from the trial monitoring; trial on merits: **04.03.2020; 16:25-16:40**

¹³⁷ Ibid

¹³⁸ See full information at <https://bit.ly/3dp8qvm>.

subjects in the direction of the police, aggressively assaulted them and used violence against them. Tsotne Soselia attacked a law enforcement officer with a club and physically abused him. Besik Tamliani also assaulted several police officers¹³⁹.

On June 20, 2019 Besik Tamliani was arrested under the administrative law. The Tbilisi City Court sentenced him to 13-day administrative imprisonment but as a result of noisy protest demonstrations, he was released from prison on the fifth day¹⁴⁰. Besik Tamliani stated that the grounds of the criminal proceedings and charges brought against him were the circumstances mentioned in the decision on his administrative imprisonment, where the prosecutor's office attached only one video-recording as an additional proof¹⁴¹. Besik Tamliani believes the criminal proceedings against him are unfair because he was already in administrative imprisonment for the same action. In accordance with the Constitution of Georgia, a citizen shall not be punished for one and the same action twice¹⁴².

Trial monitoring

On July 6, 2019, the Tbilisi City Court imposed imprisonment on all four defendants.

At the court hearing on November 8, 2019, the defense side made the introductory speeches¹⁴³. On November 13, 2019 the interrogation of the witnesses started. Three experts - witnesses of the defense side were questioned, who conducted expertize of the video-recordings in connection with the June 20-21 case. Besik Tamliani did not attend that hearing¹⁴⁴. The expertise of the video-recordings concluded that the concrete individuals, among them the defendants,

¹³⁹ HRC monitor's report from the trial monitoring, 29.02.2020; also see <https://bit.ly/30r6gaz>. Last seen 04.06.2020

¹⁴⁰ HRC monitor's report from the trial monitoring of Besik Tamliani's case, 29.02.2020; also see <https://bit.ly/3hjmnuu>.

¹⁴¹ See full information at <https://bit.ly/3hjmnuu>.

¹⁴² See the Article 31 Paragraph 8 of the Constitution of Georgia <https://bit.ly/2zmeh7l>

¹⁴³ HRC monitor's report from the trial monitoring of the case of the individuals charged for June 20-21 events 29.02.2020

¹⁴⁴ Ibid. Also see <https://bit.ly/3csbel4> Last seen 04.06.2020

participated in the June 20-21 protest demonstration. The experts did not conclude anything else from the expertise of the video-recordings. The action of the defendants, which became the basis to bring charges against them, was not examined and investigated¹⁴⁵. *On November 27, 2019, there was noise during the court hearing – Zurab Budagashvili stated that in the penitentiary establishment he was forced to make testimonies against the opposition political leaders – Nikanor Melia, Giorgi Ugulava and Irakli Okruashvili. He said that he was threatened with the arrest of his relatives. Several days after his statement, Zurab Budagashvili's brother was arrested. Reportedly, the MIA arrested him under the charge of destroying the evidence obtained in the frame of the investigation of drug-related crime. The Tbilisi City Court imposed 2000 GEL bail on him*¹⁴⁶.

*The mother of the defendant Zurab Budagashvili stated that the representatives of the law enforcement bodies permanently watched her. Human rights defenders and Zurab Budagashvili's mother requested to start investigation of this fact*¹⁴⁷. *On December 4, 2019, it was announced during the court hearing that investigation was commenced into illegal surveillance*¹⁴⁸.

Zurab Budagashvili, after his statement made in the courtroom, was placed in the isolation cell, which was next to a room, where a generator-like machine was working permanently and the defendant was bothered with the noise 24 hours. The defense lawyer stated that it was done to punish him and this action can be assessed as equal to torture. The representatives of the penitentiary department claimed that Budagashvili was moved out of the cell based on the request of his cell-mates.

On January 10, 2020, defendants Tsotne Soselia and Kakhaber Kupreishvili started hunger-strike¹⁴⁹. On January 13, the defendants did not attend the trial, where the witnesses of the prosecutor's office were questioned in front of the judge¹⁵⁰. The defense lawyer stated at the trial that Tsotne Soselia and Kakhaber

¹⁴⁵ Ibid, also see <https://bit.ly/2auyuxe>.

¹⁴⁶ See full information at <https://bit.ly/3e51qko>. Last seen 04.06.2020

¹⁴⁷ See full information at <https://bit.ly/3cv9psl>. Last seen 04.06.2020

¹⁴⁸ HRC monitor's report from the trial monitoring of the case of the individuals charged for June 20-21 events 29.02.2020; also see <https://bit.ly/3cv9psl>. Last seen 04.06.2020

¹⁴⁹ HRC monitor's report from the trial monitoring of the case of the individuals charged for June 20-21 events 29.02.2020;

¹⁵⁰ Ibid

Kupreishvili asked the prosecutor's office for plea-agreement. On January 17 and 20, none of the defendants attended the hearings. Kupreishvili and Soselia continued hunger-strike. The detainees protested the use of imprisonment term as a compulsory measure against them¹⁵¹. On January 22, two witnesses of the prosecutor's office were questioned together with the video-evidence during the trial. They failed to prove the charges brought against the defendants¹⁵². At the January 23 trial, where two witnesses of the prosecutor's office were questioned, only Kakhaber Kupreishvili and Besik Tamliani attended the hearing. The others did not appear in the courtroom in protest. On February 10 and 14, the witnesses of the prosecutor's office were questioned again. With the initiative of the judge, as two-month term of the pre-trial imprisonment was due to expire, the court considered the change of the compulsory measure. However, the judge did not change the compulsory measure and left the defendants in prison again¹⁵³.

At the trial on February 25, 2020 the lawyers of the defendants Kakhaber Kupreishvili and Tsotne Soselia solicited plea-agreement. *On February 27, it was announced at the court hearing that the case of Zurab Budagashvili, Kakha Kupreishvili and Tsotne Soselia was to be examined separately. They admitted the imposed charges and negotiated the conditions of the plea-agreement*¹⁵⁴. *At the March 6 court hearing, the prosecutor motioned to render judgment without main hearing of the case and to sign plea-agreement with the defendants.* The judge examined the motion pursuant to the Article 212 of the Criminal Procedure Code of Georgia¹⁵⁵. *After he received "convincing" answers from the defendants, the judge approved the plea-agreement between the parties.*

According to the HRC assessment, the conditions of the plea-agreement were not substantiated in the case of these defendants either¹⁵⁶. The court did not take into account and did not examine¹⁵⁷ the new circumstances as well as Zurab Budagashvili's statement about his intimidation in prison that contradicts the

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ See the Article 212 of the Criminal Procedure Code of Georgia at <https://bit.ly/2AR5UQv>

¹⁵⁶ See the Article 210 of the Criminal Procedure Code of Georgia <https://bit.ly/2AR5UQv>

¹⁵⁷ See the Article 215 of the CPCG <https://bit.ly/2AR5UQv>

Article 2015 of the CPCG. According to the signed plea-agreement, Kakhaber Kupreishvili, Tsotne Soselia and Zurab Budagashvili were found guilty under the Article 225 Part 2 of the CCG and they were sentenced to 3-year imprisonment each though it was changed into a conditional, probation sentence. Above that, 2 000 GEL bail was imposed on each of them¹⁵⁸. As the defendants stated, they pleaded guilty because the charges were politically motivated and consequently, “it was useless to stay in prison.”¹⁵⁹ *Unlike them, Besik Tamliani has not pleaded guilty and refuses to sign plea-agreement.*

On March 6, 2020, another hearing of Besik Tamliani’s case was held in the court. Two witnesses of the prosecutor’s office were questioned – they were employees of the MIA. They spoke about the factual circumstances they were aware of. However, none of them could confirm that Besik Tamliani was in the Rustaveli Avenue. They could not recall whether they had noticed the defendant on the site of violence. On March 13, the court continued examination of the videotape requested from the MIA’s press-center. The other evidence were also examined. Besik Tamliani’s contact with almost all items withdrawn during the search was not confirmed. In the end of the hearing, the defense side solicited to change imprisonment into 1000 GEL bail. The judge refused to satisfy the solicitation because no new circumstances were presented during the hearing (Article 206 of the CPCG¹⁶⁰).

On March 23, 2020 Besik Tamliani was released from prison. Although the defense side did not mention new circumstances the judge did not satisfy their solicitation based on that argument on March 13. It must be noted that Besik Tamliani’s 9-month pre-trial imprisonment was due to expire on April 4¹⁶¹ and it could become the ground to change the measure of constraint against him. In this light, measure of constraint – imprisonment was changed into 4 000 GEL bail

¹⁵⁸ HRC monitor’s report from the trial monitoring of the case of the individuals charged for June 20-21 events; plea-agreement: 06.03.2020

¹⁵⁹ Ibid

¹⁶⁰ See the Article 206 of the CPCG <https://bit.ly/2AR5UQv>

¹⁶¹ HRC monitor’s report from the trial monitoring of Besik Tamliani’s case, 23.04.2020

against Besik Tamliani¹⁶². Above that, the defendant is deprived of the right to leave Georgia and was ordered to hand in his passport to the investigative body.

According to the defense side's assumption, although the case files cannot prove Besik Tamliani's guiltiness, the court will most probably pass guilty verdict against him for the commission of the crime punishable under the Article 225 Part 2 of the CCG (participation in the group violence), otherwise verdicts against other individuals and legitimacy of plea agreements with the other defendants will be questioned and it will create negative impression about the alleged political motives in the June 20-21 related criminal cases in the society. Also, the court may requalify the charge into a less grave crime and pass guilty verdict afterwards.

Assessment of Zurab Budagashvili's solitary confinement

Pursuant to the position of the ECtHR, the removal from association with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or degrading punishment. In assessing the fact, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned¹⁶³. Any form of involuntary separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, shall always be subject to authorization by law¹⁶⁴. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence¹⁶⁵. Isolation for uncertain or prolonged period of time shall be viewed as ill-treatment and is prohibited¹⁶⁶. In accordance with the European Prison Rules, solitary

¹⁶² See full information at <https://bit.ly/2xvseyx>.

¹⁶³ See Van der Ven v. The Netherlands Application no. 50901/99, ecthr ruling February 4, 2003 paragraph 51 available at [https://hudoc.echr.coe.int/eng#{"itemid":\["001-60915"\]}](https://hudoc.echr.coe.int/eng#{)

¹⁶⁴ See the Nelson Mandela's Rules, Rule 37 <https://undocs.org/A/RES/70/175>; UN Committee against Torture also believes it is inadmissible to isolate a prisoner based on the court ruling: see CPT's 21st general report Paragraph 56(a)

¹⁶⁵ See the Nelson Mandela's Rules, Rule 45 paragraph 1 <https://undocs.org/A/RES/70/175>;

¹⁶⁶ See the Nelson Mandela's Rules, Rule 45 paragraph 2 <https://undocs.org/A/RES/70/175>;

confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible¹⁶⁷. The decisive body (the court) shall primarily determine whether the special regime was regulated by the law (principle of legality) and whether it serves the legitimate objective to ensure public safety, to prevent disorder and crime; it shall evaluate the criteria of proportionality in relation with the estimated objective (necessity in the democratic society)¹⁶⁸. *In Zurab Budagashvili's case, it is unclear and unsubstantiated, there are no factual circumstance and argument why such a severe punishment was applied against him. We may declare that his solitary confinement was equal to the action prohibited by the Article 3 of the European Convention on Human Rights, which prohibits torture, inhuman and degrading punishment or treatment*¹⁶⁹.

- **CASE OF MORIS MACHALIKASHVILI AND BEZHAN LORTKIPANIDZE**

Indictment

Moris Machalikashvili was cousin of Temirlan Machalikashvili, killed as a result of the special operation in the Pankisi Gorge on December 26, 2017. He, for more than one year, together with his uncle Malkhaz Machalikashvili had been requesting fair investigation of Temirlan Machalikashvili's murder and punishment of perpetrators in front of the Parliament of Georgia.

On July 26, 2019, Moris Machalikashvili was arrested¹⁷⁰ based on the Article 225 Part 2 of the CCG together with Bezhan Lortkipanidze, who was the head of the conservation program of the Conservation Center Nakresi and a researcher of the National Geographic.

The Prosecutor's Office of Georgia blamed Moris Machalikashvili and Bezhan Lortkipanidze for the participation in the group violence during the June 20-21, 2019 protest demonstration in front of the Parliament of Georgia. With regard to

¹⁶⁷ See the European Prison Rules, Rule 60.5 <https://bit.ly/3hksj2p>

¹⁶⁸ See (Harachiev and Tolumov v. Bulgaria), Applications nos. 15018/11 and 61199/12, July 8, 2014, available at <http://hudoc.echr.coe.int/eng?I=001-145442>. Paragraphs 203-214 and 260.

¹⁶⁹ See the Article 3 of the European Convention on Human Rights, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁷⁰ See the Article 225 of the CCG at <https://bit.ly/3hirbhr>

Lortkipanidze, the MIA stated that he *“was particularly aggressive towards police officers, verbally and physically assaulted them and tried to break their cordon with force”*¹⁷¹ The Prosecutor’s Office blamed Machalikashvili, too for the violence against law enforcement officers.

Trial monitoring

On July 27, 2019, the Tbilisi City Court made decision on the measure of the constraint against Moris Machalikashvili and Bezhanishvili and sent them to pre-trial imprisonment. The Tbilisi Appellate Court upheld the decision of the Tbilisi City Court with regard to Moris Machalikashvili’s case. These judgments, like the court decisions on the cases of other defendants reviewed in this survey, are superficial and unsubstantiated. The court abstractly indicates that there are legal grounds to use imprisonment against the defendants. However, their arguments are not well-substantiated, which concrete evidence in the case files created assumption that real threat was coming from Bezhan Lortkipanidze and Moris Machalikashvili to hide from justice, hinder execution of justice or influence the witnesses. Imprisonment term against Machalikashvili was left in force during the pre-trial session too, though the defense side claimed there were no grounds to keep him in prison. Neither the petition to drop criminal prosecution against Machalikashvili because of lack of sufficient evidence was satisfied during the pre-trial session¹⁷².

On August 2, 2019, the Human Rights Education and Monitoring Center (EMC) published the preliminary observations on Moris Machalikashvili’s case. According to the EMC, the information presented by the Prosecutor’s Office did not prove that Moris Machalikashvili had committed an act prescribed under Article 225 of the Criminal Code of Georgia. Namely, the presented evidence did not create a reasonable doubt to state that Moris Machalikashvili had an intent to act violently against Police and that he exercised offending, attacking, repeating and intense violence for that purpose. The video recording, which is the main and the only evidence, shows that he was trying to be next to his uncle, he was

¹⁷¹ See full information at <https://bit.ly/2Uy8phb>. Last seen 04.02.2020

¹⁷² See EMC’s comment <https://bit.ly/2Ao0bBu>. Last seen 04.06.2020

substantively in passive position and when he got crushed as a result of pushing between the Police and the protesters, he tries to escape from the crush. That time he moves his hand and accidentally, only once, touches the Police shield. The video tape does not show that he is attempting to break or attack the Police cordon, to exercise violence against the Police, to grab police equipment or even to attempt the self-defense¹⁷³.

On August 1, 2019, the Appellate Court examined the case of Bezhan Lortkipanidze. Before that, his wife stated that “his arrest was politically motivated and it was an example of selective justice”¹⁷⁴. On August 10, 2019, the court changed the measure of constraint against Bezhan Lortkipanidze into 5 000 GEL bail¹⁷⁵.

At the hearing on September 17, 2019, the court left Moris Machalikashvili in imprisonment. As for the motion of Bezhan Lortkipanidze’s lawyer to terminate criminal proceedings against his client, the judge did not satisfy it.

At the hearing on September 24, 2019, the judge did not satisfy any motions of the defense side again¹⁷⁶. Moris Machalikashvili’s lawyer Keti Chutlashvili stated that the defense side requested to remove one of the police officers from the list of witnesses. In his June 20, 2019 report the police officer wrote that he had received an operative information that Moris Machalikashvili “actively participated in various violent actions.” The judge did not satisfy this solicitation either. According to the defense side, none of the witnesses stated that Moris Machalikashvili was participating in the violence¹⁷⁷.

On October 7, 2019, the court started trial on merits on the case. At the trial on October 8, 2019, the defense side made introduction speech. The hearing was postponed based on the motion of the prosecutor because he had another parallel hearing at the same time. On October 15, the defense side requested to change the imprisonment into a bail but it was not satisfied.

¹⁷³ See the EMC’s preliminary observation on Moris Machalikashvili’s case at <https://bit.ly/30xwfss>

¹⁷⁴ See the statement of Bezhan Lortkipanidze’s wife <https://bit.ly/30Rmn1I>. Last seen 07.06.2020

¹⁷⁵ HRC monitor’s report from the trial monitoring of the case of the individuals charged for June 20-21 events; also see <https://bit.ly/2AWT6aW>. Last seen on 29.02.2020

¹⁷⁶ Ibid

¹⁷⁷ Ibid

According to Moris Machalikashvili's lawyer, the evidence presented at court hearings were absolutely identical. They were composed of the interrogation protocols and big part of the interviewees were police officers¹⁷⁸. Also the prosecutor's office presented a video-tape and examination reports from the site of incident, which were not relevant to alleged criminal offence committed by Machalikashvili¹⁷⁹.

At the trial on November 13, 2019, the defense side declared mistrust towards the witnesses, as they could not recall the events of June 20-21, 2019. At the trials on November 25 and December 19, the witnesses of the prosecutor's office – three police officers were questioned. According to the defense lawyer, none of them stated that Moris Machalikashvili used violence against police officers. Also, the testimonies of the witnesses did not match. On January 14, 2020, two more witnesses were questioned in the court but the third one did not appear, for what the process was postponed. On January 21, two more police officers were questioned. Their testimonies failed to prove the guiltiness of Bezhan Lortkipanidze in the imposed criminal charge.

On February 3, 2020, Moris Machalikashvili's lawyer Mariam Kublashvili petitioned the court to separate Machalikashvili's case from the main case. She also solicited to declare the evidence of the prosecutor's office non-disputable. The negotiations were going on plea agreement. The prosecutor's office and the defense side could not agree on the part of accusation, they had imposed on Moris Machalikashvili – namely, his participation in the state coup. The prosecutor, as Bezhan Lortkipanidze found the evidence disputed, solicited to separate Moris Machalikashvili's case from the main case.

On February 6, 2020, plea agreement was signed with the defendant Moris Machalikashvili and he was released from the courtroom¹⁸⁰. The Tbilisi City Court approved the plea agreement between the parties, found Machalikashvili guilty of the crime punishable by the Article 225 Part 2 of the CCG (participation in group violence) and sentenced him to 2-year conditional sentence¹⁸¹. Moris

¹⁷⁸ See full information at <https://bit.ly/2Ao18d2>. Last seen 04.06.2020

¹⁷⁹ See full information at <https://bit.ly/3hi6tmi>. Last seen 04.06.2020

¹⁸⁰ See full information at <https://bit.ly/3hdozi9>. Last seen 04.06.2020

¹⁸¹ See full information at <https://bit.ly/2yhnjvu>. Last seen 04.06.2020

Machalikashvili stated that he pleaded guilty but did not agree with the imposed charge in relation with his intention to break into the parliament. He said that he was protecting his uncle – Malkhaz Machalikashvili.

On February 11, 2020, at the trial on merits, the prosecutor's office solicited to add new evidence to the case files. They said, that Moris Machalikashvili's case was separated from Bezhan Lortkipanidze's case, where the parties signed plea agreement and the court passed guilty verdict. This case was directly connected with the accusation against Bezhan Lortkipanidze, for what the prosecution solicited to add the verdict passed against Machalikashvili to Lortkipanidze's case. The solicitation was satisfied. The witness of the prosecutor's office was questioned at the same hearing, who spoke about the developments in front of the Parliament on June 20-21, 2019.

On February 20, 2020, the witnesses of the prosecutor's office were questioned. They did not say that the defendant used violence against the police officer or tried to break into the parliament. Two more witnesses were questioned at the trial on March 11. Afterwards, due to the spread of the Novel Coronavirus, the court did not hold hearings of the case¹⁸².

PRACTICE OF PLEA AGREEMENT

*Individuals arrested during the June 20-21 events, mostly were released based on plea agreement or under the bail*¹⁸³. In accordance with the Article 209 of the Criminal Procedure Code of Georgia, plea agreement means to pass a verdict without a trial on merits, when the defendant pleads guilty and agreement on the accusation or punishment is achieved¹⁸⁴. In the examined cases, it is important to note that, often the defendants have to accept extremely severe conditions as they have to admit to the crimes, which they may not have committed and above that there are no neutral evidence to prove their guiltiness besides the testimonies of the police

¹⁸² HRC monitor's report from the trial monitoring of the case of the individuals charged for June 20-21 events; 31.03.2020

¹⁸³ HRC monitor's report from the trial monitoring of the case of the individuals charged for June 20-21 events; trial on merits; 20.11.2019; 16:10- 16:12

¹⁸⁴ See the Article 209 Part 1 of the CPCG

officers. The defendants need to make similar choice when imprisonment is used as a measure of constraint against them. The courts, mostly, rely on the testimonies of the law enforcement officers, who are questioned by the prosecution as witnesses in the court proceedings. The judges, mostly accept their testimonies as valid evidence.

At the same time, it shall be taken into account that the court is authorized to offer the parties to change the conditions of the plea-agreement that shall be agreed with the senior prosecutor¹⁸⁵. The defendant has right to reject the plea-agreement at any stage of court proceedings before the verdict is passed but the prosecutor enjoys a wide discretion to offer the measure of punishment¹⁸⁶. As for the judge, who is not authorized to interfere in the negotiations and independently, in due respect to reasonability, change the conditions of the agreement¹⁸⁷, may approve the plea agreement or reject it¹⁸⁸.

When making a decision on the plea-agreement, the court shall examine whether the accusation is substantiated, whether the requested punishment is just and whether there are valid evidence to prove the guiltiness of the defendant, etc.¹⁸⁹ However, these requirements were not met in the criminal cases related with the June 20-21 events. Furthermore, the representatives of the defense side told Human Rights Center that plea agreement in the surveyed criminal cases was “purposeful policy” of the law enforcement bodies, as in similar cases, for various reasons, the defendants admit the charges brought against them.

The plea-bargain has become a topic of study and criticism in Georgia many times. The problems of the plea-bargain are related with the weak legislative guarantees and the use of the plea-agreement for such an unlawful objectives like: depositing money to the state budget, inappropriate influence on the defendant in the course of investigation and more. In response to that, the judicial authority has only formal and weak control role to combat the use of the plea-agreements for unlawful goals.

¹⁸⁵ See Article 210, Part 1 of the CPCG

¹⁸⁶ See Article 210 Part 2 of the CPCG

¹⁸⁷ See Article 210 Part 6 of the CPCG

¹⁸⁸ See Article 210 Part 3¹ of the CPCG

¹⁸⁹ See Article 210 Part 3 of the CPCG

PRACTICE OF THE USE OF THE MEASURES OF CONSTRAINT

It also constitutes a problem that the prosecutor's office often fails to provide sufficient evidence to create factual and formal grounds for the use of the measure of constraint. Relatively, the court judgments are abstract and unsubstantiated. The solicitations of the prosecutor's office on pre-trial imprisonment are mostly banal and rely on general allegations. The measures taken by the investigative body, in some instances, make an impression that they do not aim to comprehensively and impartially investigate the case but form a negative opinion about the defendant in the society. For example, Zurab Budagashvili was associated with the political party United National Movement, that created various perceptions about him for objective observers¹⁹⁰. Also, biased and tendentious was the edited video-tape¹⁹¹ aired by the MIA in connection with Bezhan Lortkipanidze's case, which was different from the full video-tape aired by the media at a later stage¹⁹².

Article 3 Part 11 of the Criminal Procedure Code of Georgia determines the standard for the use of the measure of constraint¹⁹³. Namely, in order to impose a measure of constraint on an individual, it is necessary to have substantiated assumption – unity of facts or information, which will encourage an objective person to conclude that the defendant allegedly committed the crime. In the abovementioned criminal cases, although the prosecutor's office had formulated the charges in accordance with the provision in the CPCG, the provided case files failed to create substantiated assumption that the convicts/defendants participated in the violent action, moreover, they assaulted the police officers. In order to prove the participation of an individual in group violence, the prosecutor's office shall collect such evidence, which clearly demonstrated the intention of the individual to participate in the group violence, attack law enforcement officers and support group violence with his/her activities.

¹⁹⁰ See full information at <https://bit.ly/2udhyom>. Last seen 04.06.2020

¹⁹¹ See the video released by the MIA at <https://bit.ly/2c5odsm>. Last seen 03.06.2020

¹⁹² See the video aired by media sources at <https://bit.ly/2zaeyc0>. Last seen 03.06.2020

¹⁹³ See Article 3 Part 11 of the CPCG

In this particular case, unity of facts and information in the indictment and case files – witness testimonies, search and evidence withdrawal protocols, examination protocols, expertise conclusions, have general character and are not sufficient basis not only for the accusation but also for the use of imprisonment as a measure of constraint.

The European Court of Human Rights¹⁹⁴ and the Criminal Procedure Code of Georgia¹⁹⁵ believe that the significant grounds to use the imprisonment as a measure of constraint are: the threat that the accused may hide from justice, or may destroy evidence, or influence the witnesses, hinder the rendering of justice or may continue committing a new crime. The imprisonment will be justified if the accused creates real and significant threat to the society and this threat cannot be neutralized otherwise. These circumstances and factors were absent in the abovementioned criminal cases.

Furthermore, in accordance with the Article 205 Part 1 of the CPCG, remand detention as a measure of restraint shall be applied only if it is the only means to prevent the accused from hiding and from interfering with the rendering of justice; from interfering with the collection of evidence; and from committing a new crime. These risks were absolutely unsubstantiated by the prosecution in the abovementioned cases.

Comparative analysis of the cases of the law-enforcement offices and protest participants detained in relation with the June 20-21 events revealed that the State often demonstrated different approach to similar cases, without reasonable and impartial grounds, that was demonstrated into the commencement of the criminal prosecution against the protesters who were sent to prison; above that, the court used the pre-trial imprisonment against all accused protesters based on banal, abstract and often identical solicitations of the prosecutors.

¹⁹⁴ See the ecthr ruling on Van Alphen v. The Netherland, 305/1988, Strasbourg July 23, 1990, <https://bit.ly/3h6meix>.

¹⁹⁵ See the Article 205 of the CPCG

SELECTIVE JUSTICE

The Article 14 of the Constitution of Georgia guarantees that all individuals are equal before the law. The principle of equality before the law means equal respect for the human rights and basic freedoms of all individuals, who are in equal conditions and have adequate approach to the issue regulated by the law. The principle includes the legislative activities of the government, in order to grant equal privileges to the individuals in equal conditions and environment and to impose equal responsibilities on them. Different legislative regulation will not be considered to be a violation of the equality principle before the law. A law-maker has right to determine different conditions by the law, but the difference shall be substantiated, reasonable and appropriate. At the same time, it should ensure equal level of differentiation for the individuals in similar situations.

When determining the violation of the Article 14 of the European Convention on Human Rights (prohibition of discrimination), the ECtHR relies on the following criteria: the Article 14 is violated if it observes: a) differentiated approach towards equal cases without reasonable and objective grounds and b) proportionality between the objective and the means used to achieve the objective is not ensured.

The principle of equality before the law requires the State to have adequate response to all violations whether they were committed by a protester or a police officer, to start respectively procedural and investigative activities, and to conduct them impartially and transparently. All similar reactions shall be performed in due respect of the Constitution and international standards, shall meet requirements of the law and satisfy high standard of substantiation, and shall provide the society with information about the conducted activities.

Criminal and administrative proceedings started against the demonstrators at night from June 20 to June 21 and afterwards were some of the examples of the selective justice in the state. An obvious difference between the number of the citizens injured and convicted for the June 20-21 events and the number of the law enforcement officers injured and convicted for the same actions prove the selective justice of the State institutions.

According to official data, June 20-21 events resulted in 275 victims who suffered bodily injuries of various severity, among them 187 were civilians, 39¹⁹⁶, and 73 employees of the Interior Ministry. 28 persons had to undergo surgery due to the sustained injuries. Of these, 8 underwent an ophthalmologic operation and 4 had a neurosurgical surgery¹⁹⁷. It has been confirmed that 3 civilians lost their eyes due to the inflicted trauma- Mako Gomuri, Giorgi Sulashvili and Koba Letodiani¹⁹⁸. Davit Kurdovanidze, can see only light from his injured eye, on which he had undertaken five surgical operations¹⁹⁹. Letodiani is blind in both eyes because he had lost sight in one eye during the 1990s war in Abkhazia and then lost the sight in his second eye during the dispersal of June 20 protest demonstration. By now, the prosecutor's office has granted the victim status only to 8 citizens. However, 68 employees of the MIA received the victim status in relation with the June 20-21 events. So, the other people who received injuries do not hold official status of victims so far that means they do not have access to their criminal case files²⁰⁰.

In the frame of the investigation conducted by the MIA, charges were brought against 17 participants of the protest demonstration, and all of them were sentenced to pre-trial imprisonment while the prosecutor's office used commenced criminal prosecution only against three police officers and the court sentenced only one law enforcement officer to imprisonment that was later changed into a bail.

It is a problem to grant victim status to the people who inflicted injuries. Initially, together with other people, the prosecutor's office refused Mako Gomuri and Giorgi Sulashvili to grant victim status who lost eye as a result of shot rubber bullets²⁰¹. However, after a months-long fight, they received the status²⁰². Like other individuals, the journalists, who received grave injuries, have not yet received the status²⁰³.

¹⁹⁶ See the list of injured journalists at <https://bit.ly/3e1fy1m>. Last seen 04.06. 2020

¹⁹⁷ See the GYLA's Legal Analysis of the June 20-21 Events "Beyond the Lost Eye" at <https://bit.ly/3ekoa4w>

¹⁹⁸ See full information at <https://bit.ly/3e1ftke>. Last seen 04.06.2020

¹⁹⁹ see full information at <https://bit.ly/3esnmlt>

²⁰⁰ See the Article 56 of the CPCG <https://bit.ly/2zou1kl>

²⁰¹ See full information at <https://bit.ly/3fgntto>. Last seen 04.06.2020

²⁰² See full information at <https://bit.ly/3fkbp42>. Last seen 04.06.2020

²⁰³ See full information at <https://bit.ly/3d0ypp1>. Last seen 04.06.2020

Human Rights Center defends legal interest of three journalists injured during June 20-21 events – Merab Tsaava (Guria News), Beslan Kmuzoff (Caucasian Knot) and Zaza Svanadze. HRC several times petitioned the Prosecutor's Office of Georgia for the victim status of the journalists but they refused each time. After the refusal, the HRC lawyers appealed the Tbilisi City Court to claim the victim status for Beslan Kmuzoff, Merab Tsaava and Zaza Svanadze. On December 9, 2019, the collegium of the Tbilisi City Court on criminal investigation, pre-trial session and trial of merits decided to decline the petition of the HRC without substantial consideration of the case files and positions of the parties. According to the HRC, the applicants could not enjoy their right to fair trial²⁰⁴.

After the HRC applied to all legal mechanisms to request the Prosecutor General's Office to grant victim status to the journalists and to conduct timely, effective and unbiased investigation of their cases, the organization appealed the Strasbourg Court to determine the violation of the Article 10 (Freedom of Expression), Article 11 (Freedom of Assembly and Association) and Article 13 (Right to an Effective Remedy) of the European Convention on Human Rights. The ECtHR accepted the applications of HRC submitted on behalf of the three journalists²⁰⁵.

The state has not yet taken steps to identify and punish the perpetrator law enforcement officers. At the same time, the Minister of Interior did not take over the political responsibility for the violations; neither the systemic problems revealed during the dispersal of the demonstration were analyzed and considered. The crimes allegedly committed by police officers, except few cases, the Prosecutor's Office of Georgia did not evaluate the responsibility of the senior officials of the MIA.

In accordance with the special report of the Public Defender of Georgia, three cases were separated from the main criminal cases commenced against the law enforcement officers, where the necessary evidence to launch criminal proceedings against the three police officers for injuring the citizens with physical violence and groundless use of non-lethal weapon was obtained as a result of the investigative

²⁰⁴ See the Article 6 of the European Convention on Human Rights and Fundamental Freedoms <https://bit.ly/2ATK0Mv>

²⁰⁵ See the press-release of HRC at <https://bit.ly/2bpkv7r>

activities carried out in July-August, 2019²⁰⁶. The prosecutor's office solicited the court to use imprisonment as a measure of constraint against the three defendants, one of who was sentenced to imprisonment (which was later changed into a bail) and the other two were released under the bail²⁰⁷. According to the Public Defender's assessment, the examination of the case files did not reveal the circumstances which could satisfy lawful obligation of the police officers' imprisonment as there was no threat of their hiding from and hindering of rendering the justice, hindering collection of evidence and concrete threat of committing a new crime²⁰⁸. As for the prosecutor's office solicitation on imprisonment, they acted to mitigate the negative feelings of the society to their request for less grave measure of constraint.

The Tbilisi City Court has not yet passed verdict over the criminal cases against the law enforcement officers. HRC monitors the hearings of those cases in the court.

CONCLUSION

Grave human rights violations, violations committed by police officers and practice of the criminal prosecution commenced in relation with the June 20-21 events raise many questions over the selective justice of the state towards concrete individuals, purposeful commencement of the criminal cases that instead elimination of the systemic miscarriages turned into the punishment and imprisonment of the protesters. The examination of the cases revealed that the investigation often had the only goal – to use imprisonment as a measure of constraint.

The survey revealed that:

- ✓ *The investigation into the cases related with the June 20-21 events is conducted in two directions: organization, leadership and participation in the group violence*

²⁰⁶ See the Special Report of the Public Defender of Georgia, Interim Report of the Investigation of June 20-21 Events, p. 26, 2020 <https://bit.ly/2UF7Sdi>.

²⁰⁷ Ibid, p 27

²⁰⁸ See Article 205 Part 1 of the CPCG

and into the facts of the use of excessive force against demonstrators from the side of police officers. The evident difference between the number of the demonstrators, who were injured and convicted for the June 20-21 events and the number of the police officers, who were also injured and convicted for the same actions on the same days, demonstrates that activities of the investigative bodies in some instances aim to punish the protesters and send warning messages to the participants of future protest demonstrations;

- ✓ *In Irakli Okruashvili's case, solicitation of the Prosecutor General's Office of Georgia on the request of pre-trial imprisonment was unsubstantiated and banal. The motion relied on the abstract allegation and suspicious assumptions. All witnesses in the court, when the measure of constraint was discussed, were police officers;*
- ✓ *The prosecutor's office motion on the imprisonment of Nikanor Melia was also banal and the motive to use the pre-trial imprisonment as a measure of constraint was not adequately substantiated either. Besides, the Tbilisi City Court's ruling to suspend and later to terminate the authority of the parliamentarian for Nikanor Melia was not substantiated either. The Prosecutor General's Office referred to several cases processed by the ECtHR to justify its motion, but majority of them were not relevant to Nikanor Melia's case;*
- ✓ *In Giorgi Rurua's case the following legal miscarriages were identified: 1) his right to have access to defense was violated; 2) the right/obligation to clarify rights and responsibilities to the defendant was not respected by police officers; 3) commencement of the criminal proceedings against the defendant for his refusal to take test based on the Article 381 Part 1 of the CCG (failure to enforce the court ruling) was problematic; 4) the issue of proportionality of interference when taking the test was problematic; and more.*
- ✓ *The Tbilisi City Court, when suspending the authority of the Member of the Parliament, did not consider well-grounded evaluations of the Public Defender of Georgia in her Amicus Curiae; as a result, Nikanor Melia's rights of the Member of Parliament was unlawfully terminated. The Tbilisi City Court and the Appellate Court, in the course of the case examination, did not consider the case in complicity of the Constitution of Georgia, Criminal Procedure Code of Georgia and*

the Rules of Procedures of the Parliament of Georgia. At the same time, the Court did not take the MP's immunity into account at all;

- ✓ *The rulings on the pre-trial imprisonment, verdicts and other decisions were abstract and unsubstantiated. The survey identified a tendency that plea agreements were not signed with almost all of the detainees (approximately 98%) based on the first solicitations claiming that they were not substantiated. However, afterwards, before the nine-month pre-trial imprisonment term was due to expire, without identifying new circumstances in the case files, the court used to approve the plea-agreements between the prosecutor's office and the defendant; afterwards the Court passed guilty verdicts and released the defendants from the courtroom. This problem is particularly acute with regard to the use of the pre-trial imprisonment. This approach comes in conflict with the standards established by the Georgian Legislation and the Case Law of the European Court of Human rights, which were reviewed above.*
- ✓ *There is an assumption that plea-agreements are the results of the purposeful policy of the prosecutor's office and the court, because in similar cases, the individuals admit the imposed charges and the Court passes guilty verdicts. **Nowadays, only Bezhan Lortkipanidze and Besik Tamliani of the people convicted for the June 20-21 events do not plead guilty and do not agree to sign the plea-agreement.***
- ✓ *In the course of the investigation carried out by the MIA, charges were brought against 17 participants of the protest and imprisonment was used as a measure of constraint against all of them; however, the prosecutor's office started criminal prosecution only against three police officers and the court sent only one of them to pre-trial imprisonment. Finally, the police officer was released under bail.*
- ✓ *The issue of granting the victim status was also problematic. As of now, only 8 civilians have victim status, while 68 officers of the MIA hold the status;*
- ✓ *The prosecutor's office and the court refuse to grant victim status to the injured protesters and journalists without any clarifications.*

CHAPTER

3

LEGAL ASSESSMENT OF THE
CRIMINAL CASES LAUNCHED
AGAINST **IRAKLI OKRUASHVILI**

INTRODUCTION

The President of Georgia used her constitutional power and pardoned the leader of the political movement “Victorious Georgia” Irakli Okruashvili and former Tbilisi Mayor Giorgi Ugulava. This fact once again demonstrated huge influence of political processes on the Georgian judiciary. “I am not pardoning political prisoners. I assume full responsibility for stating that there are no political prisoners in Georgia,” stated the President of Georgia²⁰⁹ and underlined that she shared the position of the executive authority, parliamentary majority and the ruling party Georgian Dream in regard with the political prisoners in Georgia.

Regardless of the position of the Georgian Dream or the President, considering the political context in Georgia, ongoing criminal prosecution against concrete political leaders, obscurity, shortcomings, insufficient evidence in the case files and other circumstances raise doubts among the Georgian civil society organizations and international partners that there are political motives in these cases. The international partners, without any diplomatic subtexts, directly recommended the Government of Georgia (GoG) to implement the March 8, 2020 agreement between the ruling party and the opposition political parties and free political prisoners²¹⁰. Although the GoG and the opposition differently interpreted the agreement, the President of Georgia welcomed the process and the agreement and connected her decision on pardoning Irakli Okruashvili and Giorgi Ugullava with this process in order to avoid “a danger of a severe political crisis” in the country²¹¹.

The report below aims to assess the criminal cases launched against the leader of the Victorious Georgia Irakli Okruashvili - criminal proceedings, his conviction and pardoning. The document evaluates two recent criminal cases launched against Irakli Okruashvili. One case is related with the June 20-21, 2019 events, for which the police arrested Irakli Okruashvili on July 25, 2019 and accused him of the organization, management or participation in the group violence. The Tbilisi

²⁰⁹ See the statement of the President of Georgia <https://bit.ly/3gowzmz>

²¹⁰ See more information in the article of the Radio Liberty <https://bit.ly/2mqixe2>

²¹¹ See the statement of the President of Georgia <https://bit.ly/3gowzmz>

City Court announced the judgment on the case on April 13, 2020²¹². The second charge was brought by the prosecutor's office in relation with the so-called Amiran (Buta) Robakidze's case under the Article 332 Part 3 –c of the Criminal Code of Georgia – abuse of official power.

The document also analyzes the criminal case launched against Koba Koshadze, whose arrest was most probably connected with the political activities of Irakli Okruashvili.

The criminal prosecution against Irakli Okruashvili started under the previous government and he was acquitted in majority of the imposed charges. After the Georgian Dream took office, before the Law of Georgia on Amnesty²¹³ was announced on January 12, 2013, Irakli Okruashvili was considered to be a political refugee²¹⁴. Finally, he was not inserted on the list of political refugees. At the same time, the Georgian Dream's government continues criminal prosecution against the active opposition politician.

CONTROVERSY WITH THE PREVIOUS GOVERNMENT

During the governance of the United National Movement, Irakli Okruashvili, at different times, occupied the positions of the Shida Kartli regional governor, Prosecutor General, Minister of Internal Affairs, Minister of Defense and Minister of Economic Development. In 2004, on June 7, he was appointed to the position of the Minister of Interior²¹⁵ but several months later, on December 16 he became the Minister of Defense²¹⁶.

In 2005, for the purpose of the enhanced fight against smuggling, the personnel changes started in the Shida Kartli regional police department that was viewed as a campaign to reduce the influence of Irakli Okruashvili in the region. However, the members of the government denied the spread information²¹⁷. Later,

²¹² See full information at <https://bit.ly/3i18ivi>.

²¹³ See the Law of Georgia on Amnesty, January 12, 2013 <https://bit.ly/3em1uzz>.

²¹⁴ See full information at <https://bit.ly/3ds5dsg>.

²¹⁵ See full information at <https://bit.ly/3hucux1>.

²¹⁶ See full information at <https://bit.ly/3fl2cgw>.

²¹⁷ See full information at <https://bit.ly/3179y3c>.

in July, 2005, in his interview with the newspaper Resonance, Irakli Okruashvili openly spoke about the intrigues against him²¹⁸.

On November 10, 2006, President Saakashvili carried out personnel changes in the Government of Georgia. As a result, Irakli Okruashvili left the position of the Minister of Defense and took up the portfolio of the Minister of Economics²¹⁹. Since that, rumors about Irakli Okruashvili's conflict with his team members, among them with then Minister of Internal Affairs Vano Merabishvili, was spread²²⁰. Okruashvili stayed on the new position only few months and on November 17, 2006 he quitted the position of the Minister of Economic Development based on his own decision²²¹. Almost a year after his resignation – on September 25, 2007, Irakli Okruashvili accused the President of Georgia Mikheil Saakashvili of the anti-state activities²²² and of ordering the murders²²³. On the same day, speaking on Imedi TV, he said that President Saakashvili had personally ordered him to liquidate business tycoon Badri Patarkatsishvili and to physically assault former MP Valeri Gelashvili. He also stated that the official version of the death of late Prime Minister Zurab Zhvania and the evidence in the case were fabricated²²⁴.

Two days after Irakli Okruashvili voiced grave accusations against President Saakashvili and announced creation of the opposition political party, on September 27, 2007, he was arrested in the office of his political party For the United Georgia. *Charges were brought against him for the abuse of official power (Article 332 of the CCG), accepting a bribe-taking (Article 338 of the CCG,) and neglect of professional duties (Article 342 of the CCG)*²²⁵. In October 2007, almost two weeks after his arrest, Okruashvili retracted his accusations against Mikheil Saakashvili and pleaded guilty in the imposed charges²²⁶. He left penitentiary establishment after paying the 10 million GEL bail but the investigation over his case

²¹⁸ See full information at <https://bit.ly/2zu7mbf>.

²¹⁹ See full information at <https://bit.ly/2bpxhcn>.

²²⁰ See full information at <https://bit.ly/2ayjnyu>.

²²¹ See full information at <https://bit.ly/2Yo5bPJ>.

²²² See full information at <https://bit.ly/2zugtn9>.

²²³ See full information at <https://bit.ly/2bvk31m>

²²⁴ Ibid

²²⁵ See full information at <https://bit.ly/31comca>.

²²⁶ See full information at <https://bit.ly/2VEX6o4>

continued²²⁷. Afterwards, he was forced to flee from the country and travelled to France, where he received a status of a political refugee and an asylum²²⁸.

On March 28, 2008, the Tbilisi City Court found Irakli Okruashvili guilty of “large-scale extortion” and sentenced him to 11 years in prison in absentia. At the same time, the court lifted two charges on money laundering and professional negligence from him²²⁹.

The guilty verdict mostly relied on the testimony of Dimitri Kitoshvili, the former head of the Parliamentary Secretary of President Mikheil Saakashvili and the former Head of the Georgian National Communications Commission. Dimitri Kitoshvili himself was sentenced to five-year conditional sentence for the same case. Years later, when the government changed in Georgia, Kitoshvili altered his testimony and told the Appellate Court that he was forced to make false testimony against Okruashvili²³⁰.

On June 18, 2011, the Prosecutor’s Office of Georgia started criminal prosecution against Irakli Okruashvili for the formation and leadership of and illegal armed formation. On January 18, 2013, this charge was lifted from Okruashvili²³¹. Besides of that, on January 8, 2013, the Chief Prosecutor’s Office of Georgia dropped prosecution with regard to those accusations, which referred to the abuse of official power and money laundering, which were connected with the period of being the Minister of Defense. The Chief Prosecutor’s Office stated that there was no evidence to prove that Okruashvili really committed those crimes²³².

On November 20, 2012, Irakli Okruashvili returned to Georgia; upon arrival he was arrested and taken to the Gldani prison²³³. The Minister of Justice Thea Tsulukiani echoed Orkuashvili’s return with special briefing, who stated that during the UNM government Irakli Okruashvili was persecuted on political grounds²³⁴.

²²⁷ See full information at <https://bit.ly/2zzb0ew>

²²⁸ See full information at <https://bit.ly/37xtx19>.

²²⁹ See full information at <https://bit.ly/3dwbzno>

²³⁰ See full information at <https://bit.ly/3epkwgn>.

²³¹ See full information at <https://bit.ly/3dsoz9z>.

²³² See full information at <https://bit.ly/3inu94s>

²³³ See full information at <https://bit.ly/3egd0rp>.

²³⁴ See full information at <https://bit.ly/2Nh4n8W>.

In 2013, Irakli Okruashvili received a status of a political refugee²³⁵ and the court lifted all charges from him and released from the courtroom. Before that, on November 1, 2012, at the session of the Parliamentary Committee on Human Rights and Civic Integration, a working group was established²³⁶ to study the cases of the people convicted or persecuted based on political grounds. Initially, the working group members planned to insert Irakli Okruashvili on the list of the politically persecuted persons²³⁷. Irakli Okruashvili told Human Rights Center during the meeting in 2020²³⁸ that the members of the parliamentary committee removed his name from the list based on the request of the government. Finally, based on the January 12, 2013 Law of Georgia on Amnesty²³⁹, the parliament recognized 190 inmates²⁴⁰ as political prisoners and 25 people as political refugees²⁴¹.

I - CRIMINAL CASE COMMENCED IN CONNECTION WITH THE JUNE 20-21 EVENTS

Indictment

In accordance with the July 26, 2019 indictment²⁴², Irakli Okruashvili was accused of the leadership of group violence that is accompanied by violence, raid, damage or destruction of another person's property, use of arms, armed resistance to or assault on representatives of public authorities (Article 225 Part 1 of the CCG). In addition to that, he was accused of the participation in group violence (Article 225 Part II of the CCG).

²³⁵ See full information at <https://bit.ly/3ifw1wf>.

²³⁶ See the resolution of the Parliament of Georgia about "The People Convicted and Persecuted based on Political Grounds."

²³⁷ See the list published by the working group in media <https://bit.ly/3ds5dsg>

²³⁸ See information about the meeting at <http://humanrights.ge/index.php?A=main&pid=20164&lang=eng>

²³⁹ See the Article 22 of the Law of Georgia on Amnesty, January 12, 2013 <https://bit.ly/3em1uzz>

²⁴⁰ See the full list at <https://info.parliament.ge/file/1/billreviewcontent/24682?>

²⁴¹ See the full list at <https://info.parliament.ge/file/1/billreviewcontent/24683?>

²⁴² See the indictment, Tbilisi 26.07.2019, Document N0013218149.

In accordance with the indictment, Irakli Okruashvili participated in the violent actions committed during the June 20-21, 2019 events, and he verbally and demonstratively called on the protesters to break the cordon of the law enforcement officers by force and enter the protected territory of the building of the Parliament of Georgia. He, among others, personally participated in the group violence, which aimed to surmount the police cordon deployed alongside the parliament building and to break into the protected territory. As a result of the violent action, representatives of the law enforcement bodies and the participants of the protest demonstration received various injuries. The active and passive special equipment of the police was also damaged and destroyed.

Based on these accusations, Irakli Okruashvili was arrested on July 25, 2019²⁴³. The prosecutor's office accused him of the leadership of the group violence (Article 225 Part 1 of the CCG) and participation in the group violence (Article 225 Part II of the CCG).

- **ASSESSMENT OF THE CHARGES BROUGHT AGAINST IRAKLI OKRUASHVILI – ARTICLE 225 OF THE CRIMINAL CODE OF GEORGIA**

In accordance with the Article 225 Part 1 of the CCG, “organization or management of a group activity accompanied by violence, raid, damage or destruction of another person's property, use of arms, armed resistance to or assault on representatives of public authorities shall be punished by imprisonment for a term of six to nine years.”

Before 2007 legislative amendments²⁴⁴, the norm was named as “mass disorder”. It entailed crowd, several hundred people committing the action. Nowadays, the scope of this provision widened and it can be committed by a group of people composed of two persons or more. At the same time, at least two persons shall participate in the violence (Part 2). In accordance with the criticism by the legal scientists about the private part of the criminal law, a law-maker additionally widened the scopes of this provision and with the acting edition, participation of three persons, including an organizer, is enough to regard the

²⁴³ See full information at <https://bit.ly/36Tylc5>

²⁴⁴ See the Law of Georgia on the Amendments to the Criminal Code of Georgia, 2007

action as group violence²⁴⁵. Besides that Article 225 Part 1 of the CCG mentions such alternative actions, one of which shall necessarily be committed during the group action in order to qualify the action under this article. Violence is on the list. There is an opinion in the scientific literature that one of the actions mentioned in the disputed article, as well as the violence, cannot be considered to be a committed offence unless it is committed by an organized group. At the same time, it is important to note that organization of group violence is demonstrated with specific signs like: selection of the place for the disorder, fixing the time and selecting method of the action, collecting group of people in concrete area and more. Leadership of the group violence may be demonstrated in giving instructions to the group members during disorder, what to do and also by calling on them not to stop violence, and more²⁴⁶.

The action provided²⁴⁷ under the Part 1 of the article is accomplished not only when the person organizes the group violence, but when the organization or leadership of the group violence is accompanied by violence, raid and more²⁴⁸. Despite that, the crime has formal composition because it is not necessary that these violence actions were followed with negative outcome. For example, violence may not result into a physical pain either²⁴⁹. Also, damage of other's property may not result into a significant loss and more. If the group violence ends up with the abduction of property, grave injury of health or death, the action will be qualified based on the totality of crimes.

As for the Part 2 of the Article 225 of the CCG, in accordance with the provision, "Participation in the act provided for by paragraph 1 of this article - the responsibility is envisaged for the participation punishable by paragraph 1 of this article." Therefore, the Part 1 punishes an organizer or leader of the group violence

²⁴⁵ See M. Lekveishvili, N. Todua, G. Mamulashvili, Private Part of the Criminal Law, Book 1, fifth edition, publishing house Meridiani, Tbilisi 2014, p. 599

²⁴⁶ Ibid p. 600

²⁴⁷ In the literature "group action" is also mentioned as "group violence." The Supreme Court of Georgia also uses the same term

²⁴⁸ See M. Lekveishvili, N. Todua, G. Mamulashvili, Private Part of the Criminal Law, Book 1, fifth edition, publishing house Meridiani, Tbilisi 2014, p. 600

²⁴⁹ In the literature "group action" is also mentioned as "group violence." The Supreme Court of Georgia also uses the same term

and the Part 2 punishes ordinary participant of the group action, which is accompanied by the alternative actions envisaged in the Part 1. Among them is violence, which may be demonstrated into beating, breaking the door of or breaking into the protected area, minor or grave injury of another person's health, etc. In accordance with the widely spread opinion in the legal literature, there must be several significant circumstances to qualify an action under the Article 225 Part 2 of the CCG:

1. The group action, for the participation in which an individual can be charged under the Article 225 part 2 of the CCG, shall necessarily be an organized action. The fact that conjunction "or" is used between the "organization" and "leadership" does not exclude the abovementioned. The issue is that a different person can be an organizer and a leader of the same action, and unless conjunction "or" is used in the definition, these people could not be fall under the regulation of the part 1 of the article²⁵⁰. Therefore, it is true that the organizer of the group violence may be not identified but when qualifying the action under the Article 225 Part 2 of the CCG, it is necessary to determine that the group action, participation of which an individual is charged for, was preliminarily organized. For the substantiation of this argument, we can refer to one of the 2018 rulings of the Supreme Court of Georgia, where the court defined similar actions as group violence and not as organization of group violence. The resolution stated: "unidentified individuals or group of people organized a group violence for the purpose of protest, as a result of which the protesters blocked the Street "Tch" and did not obey the lawful demands of the police officers to unblock the road."²⁵¹
2. Participation in the action provided by the part 1 of the abovementioned article means – co-perpetration. In accordance with the Article 22 of the CCG, "A principal is a person who immediately commits or has immediately participated in the commission of a crime together with

²⁵⁰ See M. Lekveishvili, N. Todua, G. Mamulashvili, Private Part of the Criminal Law, Book 1, fifth edition, publishing house Meridiani, Tbilisi 2014, p. 600

²⁵¹ See the November 9, 2018 ruling of the Criminal Law Chamber of the Supreme Court of Georgia case №23-28833.-18.

another person (joint principal) [...]”. As defined by the Supreme Court of Georgia, an individual shall perpetrate at least one of the listed actions in the Article 225 Part 1 of the CCG to determine that he/she has committed the crime. These actions are: violence, raid, damage or destruction of another person's property, use of arms, armed resistance to or assault on representatives of public authorities. The Supreme Court underlines that unless an individual perpetrates at least one of the listed actions, he/she cannot be regarded as a perpetrator and shall not be punished under the Article 225 Part 2 of the CCG. The Court concluded that “the participation of the defendant in the group violence, who was standing together with the participants, was not proved. In one of the episodes, he was moving around the area by car, was making voice signals, was scolding police officers, was shouting and whistling [...]”²⁵².

3. The crime punishable under this law means only intention. Subjectively, motive and objective of the action does not have any meaning for the qualification. It may be revenge against a public official or agency and other personal motive, which shall be taken into account when determining the punishment²⁵³. We should also exclude anti-state goal of the action. The accusation against the actions listed in the law is demonstrated with direct intention, but with regard to the results, which are not necessary for the completion of the action and which may be a result of group violence (minor or less minor injury of health, devastation or damage of other's property), intention may be direct and indirect. Consequently, an individual, who co-perpetrates any of the actions punishable under the Article 225 Part 11, shall be aware that his action is unlawful and shall have a desire to receive the result of the unlawful action²⁵⁴. If a person is charged under the Article 225 Part 2 of the CCG, it

²⁵² Ibid

²⁵³ See M. Lekveishvili, N. Todua, G. Mamulashvili, *Private Part of the Criminal Law*, Book 1, fifth edition, publishing house Meridiani, Tbilisi 2014, p. 600

²⁵⁴ Ibid

should also be proved that he was acting intentionally²⁵⁵. It is not necessary that the action had a result to declare it as a committed crime. It is important to determine that the fact of armed resistance really happened. In this view, organization of group action is formal offence.

Georgian Democracy Initiative (GDI) analyzed the same document when evaluating the charges brought against Irakli Okruashvili under the Article 225 of the CCG²⁵⁶. In accordance with the GDI's analysis, although the court made number of correct and fair clarifications in the judgment, particularly those made with regard to the accusations under the Article 225 Part 1 of the CCG, Irakli Okruashvili's case and judgment contain significant miscarriages.

- **ASSESSMENT OF THE TBILISI CITY COURT'S JUDGMENT**

Article 225 Part 1 of the Criminal Code of Georgia (leadership of group violence)

The Tbilisi City Court clarified in its judgment that the Prosecutor's Office of Georgia tried to prove guiltiness of Irakli Okruashvili in the commission of the crime punishable under the Article 225 Part 11 of the CCG (*leadership of group violence*) in two episodes. In accordance with the indictment, the first episode referred to the fact when Irakli Okruashvili approached law enforcement officers at the entrance of the Parliament of Georgia on Tchitchinadze Street; the second episode fully relied on the testimony of only one witness police officer, who stated that protesters tried to break into the yard of the Parliament building and had noticed Irakli Okruashvili thereto, who was shouting together with the crowd: ""Go ahead, go ahead!" and was moving towards the Parliament's building. According to the witness, people were throwing various subjects, were pushing the police officers with the iron railing. They seized a shield from him. The witness police officer said that 2-3 minutes before the fact he saw Irakli Okruashvili and Zaal Udumashvili.

²⁵⁵ See the November 9, 2018 ruling of the Criminal Law Chamber of the Supreme Court of Georgia case №23-28833.-18.

²⁵⁶ See the Legal Analysis – Irakli Okruashvili's Case, GDI 2020 <https://bit.ly/2Bv2WB8>.

First episode: In accordance with the judgment of the Tbilisi City Court, signs of criminal offence were not identified in the first episode of the case, which could prove Irakli Okruashvili's guiltiness in the leadership of the group violence. It must be noted that a fundamental right to the fair trial, first of all, means to convict a person based on true, compliant, evident and trustworthy evidence, that is an irreplaceable method to deliver the guilty judgment and at the same time, in terms of sufficiency, proves the guiltiness of the defendant beyond reasonable doubts.

The prosecution failed to present such evidence to the court during the court proceedings, which could prove participation of Irakli Okruashvili's companions in the group violence that on its side excludes Irakli Okruashvili's leadership of the group violence.

At the same time, testimonies of the two police officers, who were witnesses of the Prosecutor General's Office, could not prove the guiltiness of Okruashvili, because in the contrary to that, the defense side brought 6 witnesses, who testified to the court that Irakli Okruashvili did not commit violence and did not call on the others to commit violence in the area mentioned by the police officers. One of the witnesses presented in the court was in Tchitchinadze street when Irakli Okruashvili arrived there and the 5 other witnesses accompanied the defendant.

The prosecution also showed a video to the court, where the witness is standing next to Irakli Okruashvili. The witness also indicated at himself in the video. As the assessment of the court judgment revealed, besides the two police officers, the prosecution did not have any other witnesses, who could describe unlawful action of the defendant or neutral evidence, like recordings of the video-cameras, which could show the activities of the defendant, which could convince the court in the guiltiness of the defendant. *Finally, as a result of legal analysis of the examined evidence the court determined that in the first episode, the position of the prosecution to find the defendant guilty in the imposed charges lacked trustworthy and sufficient evidence, as the testimonies of the witness police officers and other direct eyewitnesses interrogated during the court hearings could not prove perpetration of the crime; above that, their testimonies were consequent and compliant. They created different*

grounds for the assessment of essential factual circumstances and therefore they could not prove perpetration of the offence by the defendant.

Second episode: in accordance with the HRC trial monitoring report, one of the witnesses testified to the court that Irakli Okruashvili was calling on them “Go Ahead, Go Ahead!”, he, together with the crowd tried to break into the internal yard of the Parliament of Georgia²⁵⁷. The witness stated that he also noticed Zaal Udumashvili (one of the leaders of the UNM), who soon turned back and left the area, but Okruashvili stayed on the site and was pushing police officers. The witness also told the court that like Zaal Udumashvili, the defendant could also leave the area but he did not²⁵⁸. At the court proceeding, the prosecutor showed the video, where the witness recognized himself and showed where Irakli Okruashvili and Zaal Udumashvili were standing. Although it was difficult to distinguish the faces in the video, the witness stated that he clearly remembered where he was standing and could recognize himself in any video. The defense side inquired whether others were also shouting and calling on the people to break into the internal yard of the Parliament of Georgia and the witness answered – yes²⁵⁹. He added that Irakli Okruashvili did not abuse anybody physically. The witness said that he did not hear any other words from the defendant. The witness added that people standing behind them were pushing him, too. Finally, during the assessment of the factual circumstances and evidence, the court paid attention to the testimonies made by the witness police officers and other individuals/witnesses interrogated in the court and stated that they did not prove the fact that Irakli Okruashvili made similar appeals. *Namely, in accordance with the judgment of the Tbilisi City Court, the words “Go ahead, Go ahead!” could not become grounds to assess the action as a leadership of a group violence without identifying its context and addressees. Above that, there was no valid evidence to prove that he really shouted the mentioned words.* For example, the witness police officer told the court that during five minutes Irakli Okruashvili

²⁵⁷ Report of the HRC court monitor on the case related with June 20-21, trial on merits: 10.01.2020 13:20-14:12 pm

²⁵⁸ Ibid

²⁵⁹ Ibid

was standing on his right. He, together with the others, was pushing the police officers but he did not hear Okruashvili shouting anything²⁶⁰.

According to the assessment of Human Rights Center, in this episode, the Tbilisi City Court correctly referred to the rule of evidence assessment and standards of substantiation. The court did not find the witness testimonies and relatively the interrogation protocols, which as a rule were prepared by one person, as sufficient and valid evidence to prove the guiltiness. In accordance with the HRC trial monitoring report, in one case, the defense side indicated at the parts of the testimonies of the witnesses taken during the investigation process, in which the texts had equal spelling mistakes that proved that the investigators had preliminarily drafted the testimony texts and offered the witnesses to sign them only afterwards. The court rejected those testimonies as they did not contain accurate description of the actions committed by individuals and among them by the defendant²⁶¹. *Besides that, the court did not give preference to the police officers' testimonies and remained suspicious over the validity of their testimonies too. Similar evidence could not meet the minimal standard of evidence beyond reasonable doubt but even the minimal standard. In accordance with the judgment, there was not totality of such evidence provided by the parties, which were compliant and excluded all doubts, which could enable the court to conclude in accordance with the standard of beyond reasonable doubt that the defendant committed the unlawful action he was charged for.*

The Criminal Procedure Code of Georgia determines obligation of legality, reasonability and fairness of the court judgment²⁶². A court judgment shall be considered reasoned if it is based on the body of incontrovertible evidence that has been examined during the court hearing²⁶³. A judgment of conviction shall be based on incontrovertible evidence²⁶⁴. It is necessary to convict an individual based on the judgment of conviction based on a totality of agreed evidence²⁶⁵ beyond

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² See the Article 259 Part 1 of the CPCG at <https://bit.ly/3f7Wuig>

²⁶³ Ibid Article 259 Part 3

²⁶⁴ See Article 31 Paragraph 7 of the Constitution of Georgia at <https://bit.ly/2NV6yza>

²⁶⁵ See Article 82 Part 3 of the CPCG at <https://bit.ly/3f7Wuig>

reasonable doubt²⁶⁶. “The standard beyond reasonable doubt obliges the court to fairly resolve conflict between the evidence, appropriately examine the evidence.²⁶⁷”

*In compliance with the principle of adversarial proceedings, in the criminal proceedings against Irakli Okruashvili, the evidence presented to and examined by the court relied only on such evidence, whose reasonability needed additional proofs that were not provided in this particular case and the court received only such evidence, which did not allow to consider them as reliable. Therefore, **the Tbilisi City Court acquitted Irakli Okruashvili in the charge brought against him under the Article 225 Part 1 of the CCG (management of the group violence).***

International standard: The national common courts of Georgia actively refer to the European standards of the fair trial. The common courts of Georgia not only refer to the Article 6 of the European Convention on Human Rights and the Case Law, but also build their argumentations on the views of various judges of the European Court, recommendations of the various institutions of the Council of Europe and standards in established in their resolutions. The national courts consider the proceedings in totality as it is determined by the case law of the ECtHR and assess whether the restriction of the right to defense had legitimate objective after what they examine whether the restriction of this right was balanced with procedural guarantees or not. During the evaluation of the evidence provided in the criminal case against Irakli Okruashvili, the judge referred to the clarifications of the ECtHR in the case *Ochelkov v. Russia*, according to which, “*the police officers’ statements are of little value as they were not supported by any evidence.*”²⁶⁸ This argument brought by the judge shall be evaluated positively. He correctly quoted the rulings of the Strasbourg Court to clearly demonstrate full relevance of the judgment delivered by the national court with the respective standards of the ECtHR. This approach is particularly important with regard to the restriction of

²⁶⁶ See Article 3 Paragraph 13 of the CPGC at <https://bit.ly/3f7Wuig> “Beyond reasonable doubt - a totality of evidence required for a court to pass a judgment of conviction, which would convince an objective person of the culpability of the person.”

²⁶⁷ See the January 22, 2015 ruling of the Constitutional Court of Georgia over the case *Zurab Mikadze vs Parliament of Georgia* <https://cutt.ly/cu9naff>.

²⁶⁸ See the ecthr ruling on the case *Ochelkov v. Russia*, April 11, 2013, paragraph 90

rights. At the same time, it is important that the common courts correctly used the practice of the ECtHR during the qualification of the action in order to meet the requirements of the Article 3 of the Convention and on the other hand not to degrade the fundamental importance of the prohibition by the Article 3 with incorrect qualification.

Article 225 Part 2 of the Criminal Code of Georgia (participation in group violence)

The court convicted Irakli Okruashvili for the action punishable by the Article 225 Part 2 of the CCG (participation in group violence).

The Tbilisi City Court concluded that Irakli Okruashvili perpetrated unlawful action when pushing the police cordon, and also, when resisting one of the police officers by grabbing and pulling him with his arm. As the court judgment reads, *the verdict of conviction relied on the testimonies of four witness police officers. As for the neutral evidence, the video-recordings were requested from the TV-Companies, which were presented during the court hearing as well as the legally problematic habitoscope expertise conclusions.* More precisely, Irakli Okruashvili's lawyer asked the expert during the hearing whether other people were also detected in the video and if yes, whether they were also identified. The defense side several times repeated the question because of the obscure and indirect answer of the expert²⁶⁹. At the same time, the judge also repeated and clarified the question to him. According to the expert's testimony, other people were also detected in the video but he only examined the identification of the person mentioned in the indictment, which coincided with the description of Irakli Okruashvili. At the same time, expert's description was general for what the defense side asked the expert to read the description, which he used for the identification of the person in the video. The description was also general and obscure – "thin, middle-height young man. He was wearing short-sleeve shirt [...]."²⁷⁰

²⁶⁹ See the report of the HRC court monitor on the case related with June 20-21, trial on merits: 23.10.2019, 11:15 – 11:40 am

²⁷⁰ Ibid

According to the assessment of Human Rights Center, the court judgment fully relies on the literature reviewed in the analysis of the Article 225 of the CCG in the previous chapter²⁷¹. It is practically acceptable, when a judge refers to legal literature and opinions expressed in various document in his/her judgment, but in a similar situation, the judge shall evaluate whether similar justification of the judgment does not worsen the rights of the defendant and, relatively does not contradict the national and international human rights laws and judicial practice. When there is no joint position over complicated legal issues and existing circumstances worsen the rights of the defendant, it is risky when the judge refers to the scientific literature in his/her judgment while this position is significant evidence based on which the conviction of the defendant was built upon.

It is about the action, which did not cause physical pain – clarification of the violence punishable under the Article 225 of the CCG, which the court did not examine and consequently did not evaluate whether the defendant participated in any of the actions punishable by the Article 225 Part 1 of the CCG (violence, raid, damage or destruction of another person's property, use of arms, armed resistance to or assault on representatives of public authorities) in order to convict him for the action punishable by the Part 2 of the same article.

Furthermore, the court leaves such important issues beyond assessment, like organization of group action, because a defendant may be held responsible for the perpetration of this action only when there is an organized group. In Okruashvili's case, the court not only did not evaluate whether the violence against police officers had an organized manner, but did not mention it at all and did not clarify major peculiarities of the group action, which the prosecution claimed to be committed by Irakli Okruashvili. At the same time, when the objective signs of the *corpus delicti* are examined in coherence with the criminal law and the constitution, with high probability, the action of the defendant could not be qualified as "violence" due to the intensivity presented in his case files as it is envisaged in the

²⁷¹ See M. Lekveishvili, N. Todua, G. Mamulashvili, Private Part of the Criminal Law, Book 1, fifth edition, publishing house Meridiani, Tbilisi 2014, p. 600

Article 225 Part 2 of the CCG. The abovementioned ruling of the Supreme Court of Georgia also proves this opinion. Therefore it is unclear what the ground of the court's conviction judgment was without the assessment of the significant part of the objective *corpus delicti*.

HRC's court monitor identified a significant issue related with the evidence, when the defense side claimed that the testimonies of the two police officers were equal. It proved that they had signed already written testimonies; consequently, the court should not have taken those testimonies into account. The court did not share the position of the defense side and clarified that the witnesses had made the testimonies in compliance with the adversarial principle, which was also proved by video-recordings and "the attempt of the defense side to discredit the testimonies of the witnesses could not affect their validity and trustworthiness"²⁷².

Generally, in relation with the admissibility of evidence, the common courts of Georgia correctly state that although the Article 6 of the European Convention on Human Rights defends the right of a person to fair trial, it does not determine the rules of the evidence admissibility. It is within the competence of the domestic legislation²⁷³. Additionally, the common courts of Georgia correctly declare that with the case law of the ECtHR, as a rule, evidence and its relevance are evaluated on the level of the domestic courts²⁷⁴. The common courts of Georgia rely on the declaration of the ECtHR that it is not within its competence to deliver opinion about the relevance of the provided evidence, about guiltiness or innocence of the defendant²⁷⁵. However, the domestic courts should also take into account that the ECtHR may not agree with the evaluation of the evidence by the national courts and examine how substantiated the judgment of the domestic court is in relevance with the Article 6 of the Convention. This standard is problematic in the disputed case, because the judge did not clarify why the witness statements were similar and if they were similar why he did not question their trustworthiness.

²⁷² Report of the HRC court monitor on the case related with June 20-21, trial on merits: 10.01.2020 13:20-14:12 pm

²⁷³ See *Schenk v. Switzerland*, Application no. 10862/84, ecthr ruling July 12, 1988, paragraphs 45-46

²⁷⁴ See case *Barberà, Messegue, Jabardo v. Spain*, application nos. 10588/83, 10589/83, 10590/83, Ruling of December 6, 1988, paragraph 68.

²⁷⁵ See *Popov v. Russia*, application no. 26853/04, Ruling of July 13, 2006, paragraph 188

Besides that, although the criminal proceedings in the court are conducted in compliance with the adversarial principle, it does not free the court from the obligation to substantiate why the evidence is trustworthy and why it does not cause doubts in the third impartial person, because the judge makes decision to rely his/her judgment on the concrete evidence.

For example, in accordance with the clarifications of the Criminal Code of Germany and the Federal Constitutional Court of Germany, the court shall get convinced in the guiltiness or innocence of the defendant based on the assessment of the totality of the evidence presented during the trial on merits. On its side, the court is free to evaluate the evidence presented during the trial on merits. There are no legal acts regulating evaluation or consequence of various evidence²⁷⁶. Despite, the court shall examine all circumstances, which are decisive to assess the evidence (validity, trustworthiness). The circumstances, which demonstrate validity or invalidity of the witness testimonies, shall be referred in the motivation part of the judgment²⁷⁷. The absence of similar justification in the reasoning part of the judgment results into the mistake of the judge and consequently encourages the upper instance of the court to annul the previous judgment.

When examining the accusation of Irakli Okruashvili, the court did not consider that similar testimonies may raise reasonable doubts of the third impartial person over preliminarily agreed statements of the witnesses, which were signed by them at a later stage.

The judgment reveals that the main evidence the court relied on was the video-recording. The prosecutor's office and the court believe Irakli Okruashvili grabbed and pulled the police officer with his hand and overcame the resistance of the police which was qualified as a violent action by the court. However, as the analysis of the judgment reveals, the video does not sufficiently prove that Irakli Okruashvili really committed the action. Presumably, the prosecutor's office considered the abovementioned case as important to prove an intentional action of Irakli Okruashvili, who was moving towards the building of the parliament of his

²⁷⁶ See the collected judgments of the Federal Constitutional Court of Germany 38 p. 105 and next

²⁷⁷ Ruling of the Federal Constitutional Court of Germany, October 8, 2009, 2 bvr 547/08, footnote 9

own will and not by the crowd of people. In contrary to that, in this particular episode, when allegedly the defendant grabbed the police officer, the video showed how many people pushed Irakli Okruashvili and forced him to change the trajectory of the crowd's movement. It is proved by the testimonies of several witnesses and other evidence in the case files, which were ignored by the court. The court fully shared the position of the prosecutor's office that Irakli Okruashvili was acting according to the preliminary intention, while it is not proved at all. Also, there is no non-stop video-recording of the process in the case files. It may be said that throughout the entire process, the court unfairly imposed the verification burden on the defendant that contradicts the principle of adversarial proceedings and principle of equality of arms guaranteed by the Criminal Procedure Code of Georgia. In addition to that, the court did not follow the principle of *in dubio pro reo*, which in accordance with the Article 31 Paragraph 7 of the Constitution of Georgia, authorizes the court that any suspicion that cannot be proved in accordance with the procedures established by the law shall be resolved in the defendant's favor.

The court qualified the actions of Okruashvili as violence – grabbing and pulling of the police officer with a hand that is in conflict with the law. Namely, the judge copy pasted the opinion quoted in the legal literature, which states that the “violence” mentioned in the Article 225 of the CCG may not result into a physical pain either. Similar definition in the Article 225 Part 1 of the CCG is problematic considering the contextual meaning of the provision, because its objective is to eliminate the unlawful action, which may cause grave results and the court shall necessarily verify its judgment with high standard and qualified assessment of the identified results.

The court neglected the requirements of the provision and without identification and assessment of the individual signs of the offence, qualified the action of the defendant as violence while for the objectives of the Article 225 of the CCG, the “violence” shall be clarified as more intensive physical impact rather than in other ordinary cases. It is also worth to note that Irakli Okruashvili's action could not be qualified under the Article 126 of the CCG because this provision punishes the action which causes physical pain.

In the below analyzed case, the court clarified the physical influence with less intensiveness as “violence in group actions,” that is legally problematic. Similar clarification raises questions in terms of the outcome because **out of many people, together with whom Irakli Okruashvili participated in the “group violence”, the law enforcement officers selected only Irakli Okruashvili as an offender and arrested him. Consequently, the criminal prosecution started only against him though it was absolutely possible to identify other people participating in the same action and were standing around him. With similar approach, commencement of the criminal prosecution against Okruashvili can be evaluated as a politically motivated discrimination.**

The issue of imposed sanctions is also problematic. The court clarified the provision so that any physical impact can fall under its regulation. It originates a risk that when bringing charges against the individual by prosecution any similar action may fall under the regulation of the Article 225 of the CCG and in all cases the person may be charged for the organization of group violence regardless the fact the signs of these action were identified or not. Besides that, there is high probability that the members of the judiciary authority will share the clarifications in the below presented judgment and make similar clarifications in other judgments too that will finally result into the establishment of malicious court practice. **As a result, it is possible that like Irakli Okruashvili’s case, the defendants in other criminal cases may be convicted to disproportionate and unreasonable punishments** that violate the principle of proportionality and fairness of the punishment guaranteed by the constitution and the European Convention on Human Rights.

In accordance with the clarification of the Constitutional Court of Georgia: *“the punishment imposed for any action shall be reasonable and proportionate to the outcome of the concrete crime inflicted to individuals/societies.”*²⁷⁸

It needs to be underlined that in Irakli Okruashvili’s case, the court’s clarification of the Article 225 of the CCG is incorrect. It does not take the objective

²⁷⁸ See the July 14, 2017 ruling of the Constitutional Court of Georgia №1/9/701,722,725 over the case Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. The Parliament of Georgia

of the law-maker into account that is to qualify only the crimes committed against state authority and public interest with this article and not to apply it with regard to other criminal cases, too, regulated under other articles of the CCG. The clarifications made in Irakli Okruashvili's case turns the Part 2 of the Article 225 of the CCG into a tool of repression for the concrete government against its opponent politicians and it does not have any connection with the objectives of this provision. In case of the abovementioned clarifications, during mass disorders, individuals, who participate in similar actions, automatically fall under the regulations of the Part 2 of the Article 225 and the Government has freedom of action to select concrete unwilling individuals among them and punish only them. The signs of similar approach are observed in the criminal case against Irakli Okruashvili.

- **CASE OF Koba Koshadze**

Before Irakli Okruashvili's detention, on July 17, 2019, one of his bodyguards, driver and relative of his family Koba Koshadze was arrested, who was accused of the commission of the crime punishable under the Article 236 of the Criminal Code of Georgia – illegal purchase-possession-carriage of firearms²⁷⁹. Additionally, before his arrest, Irakli Okruashvili made scandalous statements where he openly spoke that he assisted the government in the criminal prosecution against the members of the previous government²⁸⁰. At the same time, he stated that in 2016 he was requested to decline his claims for the TV-Company Rustavi 2 but he refused to do so²⁸¹. On July 19, 2019 Irakli Okruashvili launched a court dispute over the TV-Company Rustavi 2. He appealed the court to freeze the assets of the TV-company²⁸². On July 25, 2019 Irakli Okruashvili was arrested²⁸³.

Connection with the political activities is the first and most important criterion to determine the status of a political prisoner. "Potential political prisoner" is a person whose "fundamental guarantees" are allegedly violated. In accordance

²⁷⁹ See the statement of HRC at <https://bit.ly/2ZA2fPf>

²⁸⁰ See <https://bit.ly/2afd2r8>.

²⁸¹ See <https://bit.ly/2afd2r8>.

²⁸² See information at <https://bit.ly/2WG3Th4>

²⁸³ See the statement of HRC <https://bit.ly/3gm4vha>

with the first criterion of the Council of Europe, *“a person deprived of his or her personal liberty is to be regarded as a ‘political prisoner’ if the detention has been imposed in violation of one of the fundamental guarantees set out in the European Convention on Human Rights and its Protocols (ECHR), in particular freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association.”*²⁸⁴ Wide interpretation of this criterion can be applied with regard to the cases, where imprisonment of a person may be connected with the political activity of their close relative. Arrest of the family member or relative of an active politician may be directly or indirectly connected with the intention to deprive the person from political activities or/and warn him/her to stop similar activities. Similar interpretation plays significant role in the Georgian reality because we observed similar so-called warnings against political opponents of the authorities in the recent history of Georgia during the previous governments, too. As a result of the interpretation of this criterion, arrest of such a person can be regarded as a taking a political hostage. Therefore, in accordance with the existing practice, in 2012, the Georgian human rights organizations determined the criteria, according to which **“an individual may be regarded as a political prisoner, who ... (c) was detained, arrested or imprisoned because of the political activities of his/her family member, relative or close person.”**²⁸⁵

Factually and contextually a similar case was identified in the criminal case commenced against Irakli Okruashvili. At the same time, detention of Koba Koshadze can be compared with the arrest of Nora Kvitsiani on July 26, 2009, who was a sister of Emzar Kvitsiani, former governor of the Kodori Gorge. In that period, Emzar Kvitsiani escaped the law enforcement bodies and was sought for the attempted rebel for a long time. In parallel to that, a criminal case was launched against Nora Kvitsiani based on several articles of the criminal law. She was accused of the formation of illegal armed formation, illegal storage of weapon and misappropriation of the state property when she occupied the position of the village governor. Nora Kvitsiani was arrested during the so-called Kodori Gorge developments. Before the arrest, she was a governor of the village Adjari in the

²⁸⁴ See the manual about the political prisoners in Georgia, Tbilisi, 2012, p 12
<https://osgf.ge/files/publications/GEO.pdf> .

²⁸⁵ Ibid, p 32

Kodori Gorge. Nora Kvitsiani did not plead guilty and claimed that she was innocent. She connected her arrest with the criminal prosecution started against her brother, Emzar Kvitsiani, who was hiding from police. In that period, HRC regarded Nora Kvitsiani as alleged political prisoner²⁸⁶. Case of Nora Kvitsiani was mentioned in the reports of the international human rights organizations, too²⁸⁷.

On July 19, 2019, the Tbilisi City Court sentenced Koba Koshadze to imprisonment. The defense side requested 10 000 GEL bail for the defendant but the judge satisfied the solicitation of the prosecutor and sentenced Koshadze to imprisonment. Koshadze denies accusation and claims that a firearm was planted on him. Irakli Okruashvili claims the same, who stated that the firearm was planted on Koshadze because they could not oppress him²⁸⁸. Koshadze stated that when driving to Tbilisi, police stopped him and started to search his car; at the same time, according to Koshadze's testimony, one of the officers planted a firearm in his car: *"I saw that a gun was near the hand-break next to me; I smiled and told him it was not mine; he asked "what did you see?" I told him I saw the same thing what he did (...) he asked "Is Makarov yours?" I said it was not mine... "How it is not yours? You will learn later whom it belongs and how." They started to write a protocol"*²⁸⁹.

On March 5, 2020, based on the prosecutor's solicitation, the judge at the Tbilisi City Court changed the imprisonment into 5 000 GEL bail for Koba Koshadze and the defendant left the penitentiary establishment. The Tbilisi City Court still continues proceedings over the criminal case against him.

II - SO-CALLED BUTA ROBAKIDZE'S CASE

Indictment

In accordance with the November 19, 2019 indictment²⁹⁰, Irakli Okruashvili abused his official power against the requirements of the public agency, for

²⁸⁶ See the report of HRC "Political Prisoners in Georgia", p 16, 2009 <https://bit.ly/3dmlck7>.

²⁸⁷ See the joint report of FIDH and HRC "After the Rose, The Thrones: Political Prisoners in Post-Revolutionary Georgia", 2009 p 26 <https://bit.ly/3dpohvl>

²⁸⁸ See the statement of Irakli Okruashvili <https://bit.ly/2m5qeql>

²⁸⁹ See information at <https://bit.ly/3c5prsz>.

²⁹⁰ Indictment, Tbilisi 19.11.2019, Document N0013730396.

acquiring benefits for another person, which has resulted in the violation of the physical person's rights and considerable violation of the lawful interests of the agency and considerable offending of the victim's dignity (edition of the CCG acting before May 30, 2006).

In accordance with the indictment, late at night on November 24, 2004, at about 2:00 am, on the Akaki Tsereteli Avenue in Tbilisi, close to the Didube Pantheon, patrol police officers stopped a BMW, where a driver and five more passengers were sitting. During their personal search, patrol inspector Grigol Basheleishvili accidentally fired from his service gun and gravely wounded Amiran (Buta) Robakidze, one of the passengers in the left armpit, who died on the site. The Minister of Internal Affairs Irakli Okruashvili was reported about the accident on the same night; he ordered the senior officials of the MIA, who had arrived at the site, "to protect the reputation of the patrol police" and stage the scene as if armed group members had assaulted the police officers. In accordance with this instruction, the senior officials of the MIA planted firearms and ammunition on the deceased Buta Robakidze and others sitting in the car.

In accordance with the indictment, afterwards, based on the order of that time Prosecutor General of Georgia Zurab Adeishvili, the investigation was conducted with wrong qualification by enclosing fabricated evidence to the case files and wrong reports of the MIA officials. As a result of the fabricated evidence, the people sitting in the car – Giorgi Kurdadze, Irakli Mikaberidze, Kakhaber Azariashvili, Levan Dangadze and Akaki Bartaia were arbitrarily convicted under the Article 353 Part 2, Article 236 Parts I and II of the Criminal Code of Georgia. Deceased Amiran (Buta) Robakidze was regarded as a member of the criminal formation. These activities resulted into a considerable violation of the physical person's rights and lawful interests of the state, as well as the offending of the victim's dignity.

According to the November 20, 2019 indictment on the separation of the criminal case, pursuant to the Article 110 Part I of the CPCG, for the prompt and

effective justice, Irakli Okruashvili's case was separated from the abovementioned case²⁹¹.

Irakli Okruashvili was charged of the crime punishable under the Article 332 Part 3 – “c” of the CCG – abuse of official powers by an official.

Findings from the trial monitoring

When the prosecutor's office of Georgia brought charges against Irakli Okruashvili over the so-called Amiran (Buta) Robakidze's case, Okruashvili was already defendant in the criminal case related with the June 20-21, 2019 events, where he was charged under the Article 225 Parts 1 and 2 of the CCG and was in pre-trial imprisonment based on the court ruling.

The prosecutor's office resumed investigation over Amiran (Buta) Robakidze's case on November 12, 2012 and lifted all charges from the previously convicted people claiming that the accusation against them was fabricated²⁹². After the investigation was resumed, Irakli Okruashvili was first interrogated on February 26, 2018. According to the defendant's testimony, he saw the video of November 24, 2004 years later on TV for the first time. Later, the convicts - former head of the Public Relations Service at the MIA Guram Donadze and the former head of the Tbilisi main department of the Patrol Police Zurab Mikadze gave testimonies with regard to Buta Robakidze's case; they were found guilty after five-year long court proceedings. In November 2019, Guram Donadze and Zurab Mikadze wrote confession testimonies to the representatives of the investigative body. On April 8, 2020, the convicts, under the status of witness, made testimonies against Irakli Okruashvili at the trial and stated that the defendant Okruashvili had ordered them to fabricate the criminal case in order not to “harm the reputation of the patrol police” and added that the former minister was informed about everything. It is noteworthy that after these testimonies, Guram Donadze and Zurab Mikadze were released from prison based on the plea-agreement. The defense side claimed

²⁹¹ See the indictment on the separation of the criminal case, 20.11.2019, Tbilisi Document N0013737417.

²⁹² See full information at <https://bit.ly/3et97hj>.

that their freedom was result of the agreement between the prosecutor's office and the convicts in exchange of their testimonies against Irakli Okruashvili²⁹³.

On April 15, 2020, the Tbilisi City Court examined the annulment of the measure of constraint against Irakli Okruashvili over Buta Robakidze's case after the prosecutor solicited not to cancel the pre-trial imprisonment for the defendant. By that time, the Tbilisi City Court had already convicted Irakli Okruashvili in the case related with June 20-21 events. Therefore, he was already in prison. Nevertheless, according to the prosecutor's clarification, although Irakli Okruashvili was already convicted and he was serving his term in prison, there was ground to annul the judgment and in this case, in order not to hinder the execution of justice, the prosecutor solicited not to change the measure of constraint – imprisonment.

Irakli Okruashvili's defense lawyers did not agree with the position of the prosecutor's office. They said, there were no threats against the execution of justice as the defendant was already in prison. As for the annulment of the verdict, which means the possibility to appeal the judgment of the first instance court, the lawyers stated that the prosecutor's solicitation was not well-reasoned. At the same time, on April 25, 2020, a nine-month term of the pre-trial imprisonment was due to expire.

With regard to the revision of the measure of constraint, the court clarified that based on the Article 230¹ of the Criminal Procedure Code of Georgia, if imprisonment is used against the defendant as a measure of constraint, periodically, at least once in two months, the presiding judge shall, on his/her own initiative, review the necessity of leaving the accused in custody²⁹⁴. Also, the judge stated that before reviewing this issue, there are several circumstances: 1) context of the nine-month pre-trial imprisonment and constitutional provision is applied in all stages of the case examination regardless the fact the defendant is sentenced to the nine-month pre-trial imprisonment for several cases simultaneously or not; 2) if the judgment of the first instance court is appealed, the Appellate Court was not able to deliver the judgment before April 25, 2020; 3) as for changing the

²⁹³ See the statement of the defense side at <https://bit.ly/2ZP7SLv>.

²⁹⁴ See the Article 230¹ of the CPCG <https://bit.ly/2NX6WNT>

measure of constraint into a bail, it would have a formal character because the defendant was already convicted in another criminal case (June 20-21); 4) there is no threat to influence the witnesses because two most important witnesses²⁹⁵ were already questioned.

As a conclusion, the judge clarified that there are several new considerable circumstances with regard to the review of this issue and because of the constitutional requirement with regard to nine-month pre-trial imprisonment²⁹⁶, he had to examine the issue in ten days. The judge clarified that he fully shared the solicitation of the defense side to fully annul the imprisonment. Consequently, on April 15, 2020, the Court, based on the Articles 192, 205 and 230¹ of the CPCG, decided to cancel the imprisonment imposed on Irakli Okruashvili as a measure of constraint.

When Guram Donadze and Zurab Mikadze were interrogated in the court, Judge Lasha Chkhikvadze did not allow the HRC court monitor to attend the hearing and monitor the process though the hearing was held in the large courtroom²⁹⁷. The hearing was closed for the journalists, too and the journalist of the TV-Company Main Channel, who was permanently covering the proceedings over Irakli Okruashvili's case, protested the decision of the judge²⁹⁸. It is interesting that on the previous day, when the other judge was leading the hearing of another criminal case against Irakli Okruashvili, which is related with the June 20-21 events, the judge allowed the HRC monitors to attend the hearing without any obstacles. HRC protested the unjustified practice of the Tbilisi City Court when judges selfishly and unlawfully closed court hearings claiming on the COVID-19 related emergency situation. Also, according to the HRC assessment, such a contradictory and unjustified approach of the judges to different cases raise doubts that ongoing examination of the criminal cases against Irakli Okruashvili is tendentious and partial²⁹⁹. According to the assumption of the defense lawyer, the

²⁹⁵ Meaning Guram Donadze and Zurab Mikadze, who were already questioned

²⁹⁶ See the judgment №3/2/646 of the plenum of the Constitutional Court of Georgia on the case Giorgi Ugulava v. The Parliament of Georgia, September 15, 2015, at <https://bit.ly/3dsqob1>.

²⁹⁷ See the HRC statement <https://bit.ly/3eyj34d>

²⁹⁸ See the comment of the HRC executive director from 2:29 minute <https://cutt.ly/lumhjn>.

²⁹⁹ See the HRC statement <https://bit.ly/31g3vcr>

HRC monitors and journalists were not allowed into the courtroom because Guram Donadze and Zurab Mikadze were being interrogated in the court³⁰⁰, who were so-called golden witnesses for the prosecution. The Tbilisi City Court was informed in written and verbal forms that HRC was monitoring the trials. It is also noteworthy that unlike the June 20-21 events, the court refused the HRC monitors to attend the hearings of the so-called Amiran (Buta) Robakidze's case on March 26 and April 2, 2020. In the course of the trial monitoring, HRC monitors observed two facts when the scheduled court hearings were postponed or, just the opposite, the hearing was held a day earlier than it was scheduled but the respective updated information was not published on the website of the Tbilisi City Court.

On April 13, 2020, the Coalition for Independent and Transparent Judiciary published a statement with regard to the closure of the court proceedings in the common courts of Georgia and other related problems under a state of emergency³⁰¹. In accordance with the statement, the practice has been inconsistent with this regard. Some criminal trial judges allow representatives of monitoring organizations to attend trials, while the majority of judges restrict their attendance by wrongfully citing the regulations. Thus, they disregard the existing regulations³⁰² and establish a faulty practice.

On May 15, 2020, Human Rights Center, to respond the closure of the court hearings under a state of emergency and other related miscarriages, addressed the Secretary of the High Council of Justice. HRC called on the HCoJ and the chairpersons of the common courts to promptly respond to the abovementioned problems and requested to allow impartial observers to monitor the proceedings into the criminal cases remotely that requires official confirmation of the court to have access to the respective URL. The HRC also requested reaction to the miscarriages identified in the court proceedings in the Tbilisi City Court not to violate one of the key elements of the fair trial – principle of openness and allow

³⁰⁰ See the comment of Irakli Okruashvili's lawyer Mamuka Tchabashvili to the HRC <https://cutt.ly/jumhise>.

³⁰¹ See the statement of the Coalition at <https://bit.ly/3dzke6x>

³⁰² See the recommendation of the High Council of Justice with regard to the measures to be taken in the common courts for the prevention of the spread of the COVID-19, March 13, 2020 <https://cutt.ly/Yu0UjiC>.

the monitors to personally or remotely attend the hearings of high profile criminal cases³⁰³.

According to the evaluation of Human Rights Center, by prohibiting the HRC monitors to attend the court hearings the publicity of the trials is blatantly violated. Full or partial closure of the court hearings contradicts the principle of just state and rule of law and undermines the right of an individual to have access to the fair trial.

Problems related with the pre-trial imprisonment and remoteness of the crime

It is important to note that after the new charge was brought against Irakli Okruashvili with regard to the so-called Buta Robakidze's case, the term of the nine-month pre-trial imprisonment started independently from the one, which had started with regard to the June 20-21 related criminal case. It shall be evaluated as problematic because in accordance with the September 15, 2015 ruling № 3/2 646 of the Constitutional Court of Georgia³⁰⁴, the norm in the Criminal Procedure Code of Georgia, based on which it was allowed to start a new nine-month pre-trial imprisonment term while the second pre-trial imprisonment term is in progress, was declared as unconstitutional³⁰⁵.

As clarified by the Constitutional Court of Georgia, remand detention may be repeated in two instances: (1) when an offence is committed after the first detention or (2) when the information about the previously committed offence became known after the first remand detention. However, in both instances, imposing two simultaneous remand detentions on a defendant contradicts the requirements of the Constitution of Georgia unless the charges are brought or/and request on imprisonment are artificially dragged out and they are used to artificially expand the remand detention³⁰⁶.

The Prosecutor's Office of Georgia brought charges against Irakli Okruashvili for the criminal case reviewed in this chapter several days before the 15 years

³⁰³ See the HRC statement at <https://bit.ly/2dchvtv3>

³⁰⁴ See the ruling № 3/2 646 of the Constitutional Court of Georgia, September 15, 2015, § 34.

³⁰⁵ See the Article 205 Part 2 of the CPCG <https://bit.ly/3guwgsb>

³⁰⁶ See the Ruling №3/1/574 of the Constitutional Court of Georgia, May 23, 2014 on the case Giorgi Ugulava v. The Parliament of Georgia, <https://bit.ly/3gndi73>.

limitation term of the criminal case, regulated by the Article 71 Part 1 – “c”¹ of the CCG³⁰⁷, was due to expire. This fact, within the frames of reasoned assumption, creates doubts that the Prosecutor’s Office of Georgia aimed to overlap the terms of the remand detention for both criminal cases with as shortest time as possible and to keep the defendant in pre-trial detention as long as possible. These facts indicate at the interests of the government in the criminal prosecution against the defendant.

Formally, the Tbilisi Appellate Court verified in its judgment, that the prosecutor’s office had learned about the 2004 crime later that hindered them to bring charges against Irakli Okruashvili before November 19, 2019 because the existing evidence with regard to the alleged abuse of official powers failed to create the standard of reasoned assumption, based on which, the prosecutor’s office could bring charges against Irakli Okruashvili over Buta Robakidze’s case³⁰⁸. Having that, it is a reasonable doubt that before the 15-year term of the remoteness of the criminal case was due to expire, in fact in the last few days, the prosecutor’s office already had information about the committed crime and delayed the commencement of the criminal prosecution until the most appropriate date for them came. Similar approach of the prosecutor’s office, pursuant to the abovementioned clarification of the Constitutional Court of Georgia, contradicts the Constitution of Georgia and other international human rights documents.

The institute of remoteness, together with other human rights components and guarantees of the fair trial, aims to achieve various legitimate objectives. Simultaneously, it is very important that each legislative regulation relied on the reasoned and fair balance of interests so that it served the public objectives and did not cause unjustified, unlawful infringement of the rights of concrete individuals. For that, the regulation adopted by a law-maker shall be admissible, necessary and proportionate.

The Article 103 of the CPCG determines that “an investigation shall be carried out within a reasonable period, which shall not exceed the limitation period prescribed by the Criminal Code of Georgia for criminal prosecution of the given

³⁰⁷ See the Article 71 of the CCG at <https://bit.ly/2nwpyc8>

³⁰⁸ See the ruling of the Tbilisi Appellate Court on the rejection of the appeal of the defense side, №13/1959-19, p. 8

crime. " Article 100 of the CPCG obliges an investigator, prosecutor to initiate an investigation when notified of the commission of an offence, and this obligation is not related with any time-frame . Only Article 105 of the CPCG determines the grounds for terminating the investigation – if a period of limitation for criminal liability determined by the Criminal Code of Georgia has expired (Article 105 Part 1 – e of the CPCG) . Pursuant to the Article 71 Part 1 – "c"¹ of the CCG, a person shall be released from criminal liability, if: 15 years have passed after the crimes provided for by Articles 332-3421 of this Code, unless they constitute particularly serious crimes³⁰⁹. As it was already noted, in the criminal case reviewed in this chapter, the Prosecutor's Office of Georgia brought charges against Irakli Okruashvili for the crimes punishable under the Article 332 Part 3 – "c" of the CCG that refers to the abuse of official powers by an official³¹⁰. It is noteworthy that the term of remoteness for the mentioned crime was 10 years (Article 71 Part 1 – "c" of the CCG, edition in force before November 24, 2004), while pursuant to the amendments introduced to the Criminal Code of Georgia on July 25, 2006, the limitation term for this crime became 15 years (Article 71 Part 1 – "c"¹ of the CCG). The criminal charges were brought against Irakli Okruashvili in the period of increased limitation period – on November 19, 2019.

This fact is worth to be taken into account because, if the prosecutor's office acted pursuant to the edition of the Criminal Code of Georgia, which was in force in the moment of the commission of the offence, it should have been impossible to bring charges against Okruashvili on November 19, 2019 as the limitation term was already expired. The position of the opponents of this position may rely on the fact that the law first of all underlines the "reasonable" time-frame of the investigation and mentions the limitation term for the criminal prosecution only afterwards. Unfortunately, the Code itself does not clarify the "reasonable term", and its definition and determination of the investigation time-frame depends only on the views of the prosecution. Therefore, other persons participating or interested in the criminal case do not have any leverage to determine the time-frame for the investigation as the right and rules of the appeal are not determined. Nowadays, there is no

³⁰⁹ See Article 71 of the CCG at <https://bit.ly/2nwpyc8>

³¹⁰ See the Article 332 of the CCG at <https://bit.ly/2nwpyc8>

leverage to prevent the state from using this legislative shortcoming for its benefit. Thus, a citizen is not protected “[...] naturally, the government has wide margin of appreciation in determining criminal policy. The state based on the Rule of Law serves ensuring free and safe human, therefore in order to achieve this aim it should be armed with suitable and sufficient effective mechanisms. On this matter fight against crime constitutes strong and important instrument in state’s disposal. By this instrument state ensures protection of order is society, state security and other legitimate constitutional aims, which results in avoidance, prevention of violation of rights and freedom of an individual. However responsibility of state is very high on correct use of the mentioned instrument. The instrument should not become the source of violation of values for protection of which state authority is constitutionally obliged to use it. In this process a state is obliged to correctly assess the risks threatening the state and the society, objectively evaluate real dangers and use reasonable, extremely necessary and at the same time sufficient mechanisms for neutralizing them. Therefore, regulating certain activities by the law, setting restriction and use of suitable measures of responsibility for violating such general rules falls within the scope of the state authority. Obviously, in this process, the state needs to be very careful in order to prevent groundless restriction of human liberty via setting restriction on certain acts and at the same time state response on commission of restricted act should not be excessive, disproportionate. Such response by itself implies limitation of scope of human liberty by the state. The state should not interfere in human liberty (human rights) more intensively than it is objectively necessary, because an aim of such approach would turn into the restriction of individual and not protection of him/her.³¹¹”

As for the July 25, 2006 edition of the Criminal Code of Georgia, it determines the 15-year limitation term for the crimes provided by the Article 332 Part 3 –“c” of the CCG as an exception from other grave crimes. Article 71 of the CCG in the same edition of the law stipulates³¹² that *“an individual is discharged of the criminal liability if fifteen years limitation term determined for the crimes provided in the Articles 332-342¹ of this code has expired.”* It should be taken into account that on July 25,

³¹¹ See the Judgment N1/4/592 of the Constitutional Court of Georgia, 24.10.2015, Beka Tsikarishvili v. The Parliament of Georgia <https://bit.ly/3f0mn5t>

³¹² See Article 71 of the CCG, edition of the July 25, 2006

2006 three amendments were introduced to the Criminal Code³¹³ and as the analysis of the criminal case files revealed, the Prosecutor's Office of Georgia decided to act pursuant to the edition of the Criminal Code of Georgia which worsens the states of the defendant worst of all since November 11, 2004³¹⁴. This fact creates strong legal ground to start dispute over the violation of the constitutional principle on the prohibition of the retroactive power of the law. Moreover, use of this edition of the Criminal Code of Georgia, with high probability, was purposefully chosen by the state prosecution, which aimed to start criminal proceedings against the active opposition politician. In this view, normative content of the second sentence in the Article 3 Part 1 of the CCG, according to which, a criminal law that criminalizes an act or increases punishment for it shall not have retroactive force. If it happens, it may be regarded as unconstitutional in relation with the Article 31 Paragraph 9 of the Constitution of Georgia³¹⁵.

It must be noted that with regard to the abovementioned issue, **the Constitutional Court of Georgia has already released judgment on May 13, 2009**³¹⁶, in which the Court clarified the content of the constitutional provision (second sentence of the Article 31 Paragraph 9 of the Constitution of Georgia). The Court also determined whether the institute of limitation is regulated under the constitutional notion of "responsibility" and offered categorical difference between the true and wrong retroactive force and imposed different constitutional defense standard on those cases, where the use of retroactive power of the law for the increase of the term of limitation, may become the ground to establish faulty practice by the criminal prosecution bodies, which we observed in the case of Irakli Okruashvili. It is necessary to note that if the term of limitation is increased, granting a retroactive power to the law causes reanimation of the reality, which was rejected with the expired limitation term and which was removed from the

³¹³ See the CCG, edition of the July 25, 2006

³¹⁴ See the CCG, edition of the November 11, 2004

³¹⁵ See the Article 31 Paragraph 9 of the Constitution of Georgia <https://bit.ly/2ZA7G0d>

³¹⁶ See the May 13, 2009 judgment N1/1/428,447,459 of the Constitutional Court of Georgia on the case "Public Defender of Georgia, citizen of Georgia Elguja Sabauri and the Citizen of the Russian Federation Zviad Mania vs. The Parliament of Georgia"

law by a law-maker. In a similar situation, an individual has a lawful expectation that repressive measures will no longer be applied against him/her. Above that, Article 3 of the CCG prohibits retroactive effect to a legal norm, which determines criminalization of the action or makes the punishment more severe³¹⁷.

When the code does not allow the defense side or any other interested party to determine or clarify the “reasonable” limitation term and it depends only on the views and will of the investigator, no mechanisms to prevent prolongation or acceleration of the investigation process are available. Therefore, the criminal case may become a political instrument for the state against its opponents to make them silent or change their conduct that many times happened in the past and is expected in future, too³¹⁸. Pursuant to the present national legislation, determination of the criminal offence of an individual depends only on the will of the investigation, as well as determination of his/her guiltiness and finally restoration of justice in relation with him/her. When a person expects prompt and effective investigation to restore his breached rights, but the legislative acts include obscure terminology and unclear notations, realization of these expectations are always related with the views of the investigator, political or other peculiarities, which are impossible to foresee and there is a high probability of the blatant violation of basic human rights and freedoms³¹⁹.

PRESIDENT’S PARDON

In Georgia, pardon power is the exclusive constitutional authority of the President, who is the head of the State. The Article 53 Paragraph 2 –“g” of the Constitution of Georgia determines that: *“a countersignature shall not be required for legal acts of the President of Georgia related to pardoning convicts.”*³²⁰ The pardon mechanism aims to effectively implement the criminal law policy of the country.

³¹⁷ See the Article 3 of the CCG

³¹⁸ See the judgment of the Constitutional Court of Georgia on the case “citizen of Georgia Gevorg Babayan v. The Parliament of Georgia” <https://bit.ly/2Zmw9GL>.

³¹⁹ Ibid

³²⁰ See the Article 53 Paragraph 2 –“g” of the Constitution of Georgia at <https://bit.ly/3gt9gp4>

In accordance with the Article 78 of the Criminal Code of Georgia, “Pardon shall be granted by the President of Georgia to individually a specific person.”³²¹

Human Rights Center already reviewed two documents signed between the Government of Georgia and the opposition political parties on March 8, 2020 in the report - *Legal Assessment of the Two Criminal Cases Launched against Giorgi Ugulava*³²². According to the opposition members, the second document stressed out the shortcomings in the judicial system³²³. The document acknowledges that the “highest standards” shall be strived in the judicial system. The document mentions that according to the reached agreement, now and in the future, it is necessary to address inappropriate politicization of Georgia’s judicial and electoral processes. The document underlines the scopes of authority of the President of Georgia and in this regard, within her constitutional powers, to use the Pardon Power as one of the instruments to free the people imprisoned based on alleged political motives and selective justice. On March 9, 2020, the President of Georgia Salome Zurbishvili stated that she will grant a pardon based on her own judgment³²⁴.

On March 10, 2020, Chairman of the US Senate Foreign Relations Committee Jim Risch and Senator Jeanne Shaheen echoed the agreement between the Government of Georgia and majority of opposition political parties in Georgia. Jim Risch stated that he expected to see the release of politically-motivated detainees imminently. Senator Jeanne Shaheen stated that the reached agreement is crucial for their nation’s democracy³²⁵. The second document is regarded as an agreement on the release of the people imprisonment based on alleged political motives to ensure conduct of the fair parliamentary elections in the country (use of the Pardon Power by the President of Georgia). Besides that, the members of the opposition political parties stated that they will support the implementation of the

³²¹ See the Decree of the President of Georgia <https://bit.ly/2M2PVB1>.

³²² See the Legal Assessment of the Two Criminal Cases Launched against Giorgi Ugulava, Human Rights Center, 2020 <https://bit.ly/3gptxqx>

³²³ See the joint statement at <https://cutt.ly/vumzcjz>.

³²⁴ See Salome Zurbishvili’s comment about pardoning the so-called political prisoners at <https://bit.ly/3ckbcfz>.

³²⁵ See the statements of the chairman of the US Senate Foreign Relations Committee Jim Risch and Senator Jeanne Shaheen at <https://bit.ly/35zzxxk>

issues agreed in the Memorandum of Understanding signed by the opposition and the ruling power³²⁶, after the requirements of the second document signed on March 8, 2020 – Joint Agreement³²⁷ are fully satisfied, which refers to the immediate release of the alleged political prisoners. The Members of the European Parliament also made clear messages to the Government of Georgia. Particularly important was the critical letter of 26 MEPs to the Prime Minister of Georgia Giorgi Gakharia, where the renewed criminal prosecution against the members of the opposition political parties was also mentioned³²⁸.

As a result of huge international pressure, on May 15, 2020, the President of Georgia pardoned the leader of the political party Victorious Georgia Irakli Okruashvili and the former Tbilisi Mayor and a leader of the political party European Georgia Gigi Ugulava. Both convicts left prison on the same day – on May 15, 2020. Some politicians and representatives of the nongovernmental organizations were suspicious over the independence of the president's decision though the members of the ruling party categorically denied the information. However, as it was revealed later, before issuing the Pardon Act, the President of Georgia had informed the Chairman of the Georgian Dream Bidzina Ivanishvili about her decision³²⁹.

All in all, the members of the opposition political parties and the diplomats or other international partners who facilitated the dialogue between the GoG and the opposition political parties, positively evaluated the pardon act issued by the President of Georgia. The US Embassy in Georgia also released a statement to echo the decision³³⁰. The Member of the European Parliament Andrius Kubilius positively evaluated the pardoning by the President and said it was “significant step taken forward in Georgia.”³³¹ Besides that, the Chairman of the US Senate Foreign Relations Committee Jim Risch and Senator Jeanne Shaheen also echoed the pardoning of the opposition political leaders in Georgia. They said it was an

³²⁶See the Memorandum of Understanding <https://bit.ly/2z1hl7g>

³²⁷ See joint statement: <https://ge.usembassy.gov/wp-content/uploads/sites/165/jointstatement.pdf>

³²⁸ See the joint statement at <https://civil.ge/archives/341052>

³²⁹ See the President's statement at <https://cutt.ly/iumlu2s>.

³³⁰ See the joint statement of the facilitators of the dialogue at <https://bit.ly/3f1tgbr>

³³¹ See the statement of the MEP <https://bit.ly/2tjpmey>.

important step in the implementation of the March 8 agreement that will modify Georgia's electoral system and bring an end to political interference in the judiciary³³².

ALLEGED POLITICAL MOTIVE

This chapter, based on the international practice and in the view of the Georgian context, analyzes the criteria necessary to grant the status of a political prisoner to an individual and the details of the former Minister of Internal Affairs of Georgia and the leader of the political party Victorious Georgia Irakli Okruashvili.

On June 26, 2012, the Parliamentary Assembly of the Council of Europe adopted the resolution which established the criteria about the status of a political prisoner. Pursuant to the established criteria³³³, *"A person deprived of his or her personal liberty is to be regarded as a "political prisoner" if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."*³³⁴ Besides that, this criterion coincides with the criteria established by the Amnesty International. Namely, the case contains "obvious political element;" "the government did not ensure the fair trial over the case in compliance with the international standards."³³⁵

Political assessment promptly followed Irakli Okruashvili's detention. Various opposition political parties and international partners evaluated his arrest as a political decision, the US Senators and Congressmen were particularly critical. Furthermore, on April 14, 2020, the US Embassy in Georgia also released a statement, which read: *"The timing and circumstances of Irakli Okruashvili's arrest raised concerns about political interference and the selective use of justice."*³³⁶ Above that, the US Embassy noted that the case casts a shadow over the impartial application

³³² See the joint statement of the US Senators at <https://bit.ly/3d1nqg7>

³³³ See the criteria of the political prisoner elaborated by the June 26, 2012 Resolution of the PACE <https://assembly.coe.int/nw/xml/xref/Xref-XML2HTML-en.asp?Fileid=18995&lang=en>

³³⁴ Ibid

³³⁵ See the manual about the political prisoners in Georgia, Tbilisi 2012 <https://cutt.ly/sumznd6>.

³³⁶ See the statement of the US Embassy at <https://bit.ly/2d2aind>

of justice – a concern the March 8 Joint Statement³³⁷ was intended to dispel. At the same time, **after the April 13, 2020 conviction judgment passed against Irakli Okruashvili over June 20-21 event related criminal case, he, together with Gigi Ugulava, was regarded as a political prisoner by the international partners³³⁸ and the members of the opposition political parties³³⁹.**

In accordance with the case files, 18 individuals were charged for the alleged violations during June 20-21, 2019 events. *Each of them was standing on the frontline of the protest demonstration and had active contact with the police.* Except for the small group of the people, whom the prosecutor's office regarded as allies of Irakli Okruashvili, in order to prove his leadership or/and participation in the group violence in the court, hundreds more people were around Irakli Okruashvili in front of the parliament, who could be identified in the video files.

As the case files revealed, *the Prosecutor's Office of Georgia selected only Irakli Okruashvili to start criminal prosecution against, among those several hundreds of demonstrators standing in front of the Parliament of Georgia, who may not were pushing the police cordon and did not directly use physical force against them, but allegedly pushed the crowd forward to resist the police cordon or simply shared the vision and goal of the public protest.* The judge examining the case did not pay attention to this important detail. With this reality, the court created a practice, which has no legal connection with the objective of the norm and which may turn the Article 225 of the CCG into a weapon of the political repression.

On November 19, 2019, a new criminal charge was brought against Irakli Okruashvili in the penitentiary establishment. The Prosecutor's Office accused him of the abuse of official powers in relation with the 2004 accident, when he was the Minister of Internal Affairs³⁴⁰. The charges were brought against him few days before the 15-year limitation term of the crime was due to expire. The state prosecution relied on the edition of the Criminal Code of Georgia which

³³⁷ See the joint statement at <https://bit.ly/2d2aind>

³³⁸ See at <https://bit.ly/2d2aind>; also at <https://bit.ly/2zve2pr>.

³³⁹ See the statements of the opposition political parties at <https://netgazeti.ge/news/442658/>; also <https://bit.ly/2ywbhpy>.

³⁴⁰ See the HRC statement at <https://bit.ly/3iymsxx>

worsened the state of the defendant most of all editions, which were in force since November 11, 2004³⁴¹.

CONCLUSION

The analysis of the cases in the above document revealed several fundamentally crucial material and procedural-legal violations as a result of the selective justice and alleged political motives of the state in relation with the cases with political context. In order to identify possible political motives, the criteria necessary to grant political status to an individual elaborated by the Council of Europe and the international organization Amnesty International, were analyzed.

Based on these criteria, as well as the findings from the trial monitoring carried out by Human Rights Center, based on the information obtained during the interviews with Irakli Okruashvili's lawyers and the documents provided by them, based on the analysis of the international practice, the respective Case Law of the ECtHR, judgments of the domestic common courts and the Constitutional Court of Georgia, we concluded that: *ongoing criminal prosecution and verdict passed against Irakli Okruashvili with regard to the accusation under the Article 225 Part 1 of the CCG (leadership of the group violence) contained significant shortcomings:*

- ✓ *Interpretation of the term "violence" as presented by the court for the objectives of the Article 225 of the CCG is problematic;*
- ✓ *The norm, as it is offered by the court in terms of its meaning and form, does not only present a wrong interpretation of the provision but it extremely worsens the rights of the defendant;*
- ✓ *the clarification of the norm by the court, creates a possibility for the prosecutor's office to use it as a political weapon against opponents and Irakli Okruashvili's case serves a good example of it;*
- ✓ *the Prosecutor's Office of Georgia **discriminatively** selected only Irakli Okruashvili to start criminal prosecution against, among those several hundreds of*

³⁴¹ See the Criminal Code of Georgia, edition of November 11, 2004

demonstrators standing in front of the Parliament of Georgia, who may not were pushing the police cordon and did not directly use physical force against them, but allegedly pushed the crowd forward to resist the police cordon or simply shared the vision and goal of the public protest;

- ✓ *regardless several lawfully correct and fair clarifications of the court with regard to the accusations against Irakli Okruashvili under the Article 225 of the CCG, based on which Irakli Okruashvili was acquitted in one part of the imposed charge, the content of the evidence included in the conviction judgment is to be questioned;*
- ✓ *the guilty verdict relied only on the testimonies of four police officers;*
- ✓ *several days before Irakli Okruashvili's detention, his driver and relative Koba Koshadze was arrested based on the alleged political motive and it was a warning message to Okruashvili;*
- ✓ *several days before the 15-year limitation term was due to expire over so-called Amiran (Buta) Robakidze's case, the criminal charges were brought against the defendant, who was already in the nine-month pre-trial detention and the court sentenced him to a new nine-months pre-trial detention independently from the previous nine-month pre-trial imprisonment imposed for the June 20-21 case;*
- ✓ *The state prosecution used the edition of the Criminal Code of Georgia which worsened the state of the defendant the most of all previous editions of the Code, which were in force since November 11, 2004³⁴².*

The Tbilisi City Court continues examination of the so-called Amiran (Buta) Robakidze's case. By now, Irakli Okruashvili's case is under the particular focus of the international organizations. On March 9, 2020 the representatives of the International Federation for Human Rights (FIDH) observed the hearing of his case³⁴³⁻³⁴⁴. HRC monitor observes the court hearings of Irakli Okruashvili's case³⁴⁵ and the organization will assess the process after the court proceedings are over and judgment is announced on the case.

³⁴² See the Criminal Code of Georgia, edition of November 11, 2004

³⁴³ See the HRC information <https://bit.ly/2nvn1xp>

³⁴⁴ See the statement of the FIDH representative <https://bit.ly/3cqabsu>.

³⁴⁵ See the statement <https://bit.ly/2O99k4l>

CHAPTER

4

CRIMINAL CASE OF **GIORGI**
RURUA LEGAL ANALYSIS

INTRODUCTION

Equality before the law is one of the hallmarks of the state under the rule of law. Irrespective of social status and political affiliations, each individual shall be liable for his or her criminal actions in an equal manner. However, because of the lack of independent, impartial and efficient investigation bodies in Georgia, governments of various times try to use the law for attaining own political objectives. Persecution on political grounds by means of criminal proceedings more than once has become a weapon in Georgian history for influencing political opponents and critical media at the hands of various governments. In this regard, the initiation of criminal prosecution against Giorgi Rurua suspiciously coincides with him appearing on public and political arena and acquiring a share in the oppositional TV company³⁴⁶.

The criminal case ongoing against Giorgi Rurua, one of the owners of *Mtavari Arkhi* (the Main Channel), came to the attention of the media, the public and the political spectrum from the day of the arrest of Rurua. In parallel to the court proceedings, and especially recently, the critical statements from the partner states of Georgia became frequent directly or indirectly connecting the investigation against Giorgi Rurua with the political motives of the government.

METHODOLOGY

The current document is based on the reports of the court proceedings prepared by the court monitor of the Human Rights Center, further it is based on the identified problematic issues of the substantive criminal law and of the procedural criminal law. In the research, the comparative and legal analysis is made based on the comparison of the national law and national court decisions with the relevant judgments of the European Court of Human Rights (ECtHR) making even more evident the various legal problems.

³⁴⁶ See: Information: <https://bit.ly/3gy6lhl>

Substance of the allegations

Giorgi Rurua, one of the founders and shareholders of *Mtavari Arkhi* was arrested on November 18, 2019³⁴⁷. According to the indictment, Rurua is charged with committing an offense under paragraphs 3 and 4 of Article 236 of the Criminal Code of Georgia envisaging the illegal purchase, storage and carriage of firearms and ammunitions³⁴⁸. Further, according to the decree to prosecute, based on the information obtained through a criminal intelligence operation, on November 18, 2019, Giorgi Rurua was driving his own car within Tbilisi towards Tskneti settlement and at that moment he should have been carrying with an illegal firearm. Based on the decision to act on urgent necessity, in order to personally search him and seize the illegal weapon, Rurua was stopped by the patrol police.

On November 20, 2019, Tbilisi City Court granted the motion by the prosecution and remanded Rurua in custody for two months on the charges of illegal purchase, storage and carriage of firearms stemming from Article 205³⁴⁹ of the Criminal Procedure Code³⁵⁰. As the prosecution stated, based on the facts and information in the case files, remanding in custody was the sole measure of restraint in order to avoid the accused absconding the justice, hindering the justice and collection of evidence, and committing a new offense³⁵¹.

On December 25, 2019, accused Giorgi Rurua was additionally charged with an offense under paragraph 1 of the Article 381 of the Criminal Code of Georgia envisaging the failure to execute the court decision t, or the interference with the execution of the court decision³⁵². The issue concerns the refusal of Giorgi Rurua in a penitentiary facility to allow investigative actions namely acquisition of DNM sample and palm prints as ruled by the court³⁵³.

³⁴⁷See the information if full: <https://bit.ly/2Bl6XIV>. Last seen: 6/26/2020.

³⁴⁸See Paragraphs 3 and 4 of Article 236 of the Criminal Code of Georgia: <https://bit.ly/3ilabi3>.

³⁴⁹See Paragraph 3¹ of Article 205 of the Criminal Procedures Code of Georgia: <https://bit.ly/3dn6u6r>.

³⁵⁰The Report prepared by the court monitor of the Human Rights Center on the case of Giorgi Rurua. Further see the information if full: <https://bit.ly/2Ap4DzP>. Last seen: 6/1/2020.

³⁵¹See Subparagraphs (a), (b) and (c) of paragraph 1 of Article 205 of the Criminal Procedure Code of Georgia: <https://bit.ly/3dn6u6r>.

³⁵²See Paragraph 1 of Article 381 of the Criminal Code of Georgia: <https://bit.ly/3ilabi3>.

³⁵³See the information if full: <https://bit.ly/2bys1ei>.

I - COURT MONITORING AND LEGAL ASSESSMENT OF THE PROBLEMATIC ISSUES IDENTIFIED ON THE CRIMINAL CASE OF GIORGI RURUA

The court monitor of the Human Rights Center was observing the court proceedings against Giorgi Rurua from the very first day of hearing the case on merits. The substantial hearings of the case began on February 10, 2020 and are still going on.

No procedural violations were identified immediately in monitoring the court proceedings. The publicity of the proceedings was impeded by the emergency situation declared at the time of spreading the coronavirus when the court hearings were held remotely and not every interested person had access to the hearings. After lifting the state of emergency, the court hearings are held in the City Court but mostly Rurua's family members, the monitors and reporters are allowed to be present at the hearings. Beyond that, other public is also able to attend the hearings but in limited numbers to be seated on the chairs with special stickers by two-meter distance and equipped with masks. Overall, there were 20 persons allowed in the court room of 45 persons and almost 20 other upset people were left outside the room - mostly the companions of Giorgi Rurua, and the activists of civil movements active since June 20-21, 2019³⁵⁴.

In the result of monitoring the court sessions, the court monitor of the Human Rights Center identified possible investigative/procedural violations on the stage of investigation of the criminal case³⁵⁵.

According to the statement of the accused, his constitutional rights were severely violated at the moment of his arrest, in particular:

³⁵⁴The reports prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearings on merits: 15.07.2020; 16.07.2020 etc.

³⁵⁵The reports prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearings on merits: 10.02.2020; 25.05.2020; 30.05.2020.

- **RIGHT TO ACCESS A LAWYER**

According to the statement of the defence, during the arrest and on the initial stage of the investigation Rurua was denied the possibility to contact his lawyer and family members.

In accordance with Article 13 of the Constitution of Georgia, the person shall be explained his/her rights and the grounds for the arrest at the moment of arrest. A person may request the assistance of a lawyer immediately upon being arrested, and the request must be satisfied³⁵⁶. Moreover, according to the interpretation of the European Court of Human Rights, in the case of deprivation of liberty or in the case of any other restriction of liberty, the person shall have the right to receive the information about the grounds of his/her arrest and in the case he/she is recognized as accused, the accused shall receive the information about the charges brought against him³⁵⁷. In accordance with the court practice of the Constitutional Court of Georgia “the essence of the right to defence lays in the possibility of the person against whom the procedural measures take place to efficiently influence the respective procedures and the outcomes of the procedures³⁵⁸. Moreover, the Constitutional Court of Georgia has held on a certain case that “the detainee or accused shall be guaranteed the assistance of the defender”³⁵⁹.

The right to defence is the essential element of a fair trial and generally means the possibility “to submit the evidence, express opinions, defend themselves in person or through a defence council”³⁶⁰. The right concerns those against whom procedural measures take place and who have legal interests to

³⁵⁶See Paragraph 4 of Article 13 of the Constitution of Georgia: <https://bit.ly/38kdcnf>.

³⁵⁷ See The Judgment of the European Court of Human Rights from February 21, 1990 on the case *van der Leer v NLD*, application 11509/85, paragraph 27. See further: Grabenwarter/ Pabel, 2012, p. 205.

³⁵⁸See The Judgment of the Constitutional Court of Georgia from April 11, 2013 N1/2/503,513 on the case *Georgian citizens - Levan Izoria and Davit-Mikheil Shubladze v. The Parliament of Georgia*, II-55. <https://bit.ly/3hhsqis>.

³⁵⁹See The Judgment of the Constitutional Court of Georgia from January 29, 2003 N2/3/182,185,191 on the case *Georgian Citizens - Piruz Beriashvili, Revaz Jimshelishvili and the Public Defender of Georgia v. The Parliament of Georgia*, paragraph 2.

³⁶⁰See Judgment of the Constitutional Court of Georgia N3/1/574 from May 23, 2014 on the case *Giorgi Ugulava v Parliament of Georgia*, II-61. <https://bit.ly/2uxenyv>.

influence the measures and/or defend themselves from the negative outcomes of the measures.

On the given criminal case, the defence stated that Giorgi Rurua was unlawfully restricted in his right to defence.

- **THE OBLIGATION TO READ THE RIGHTS AND DUTIES TO A DETAINEE**

According to the statement of the defence, Giorgi Rurua was detained for 6-7 hours in a manner that he was not explained the rights granted by the law³⁶¹. This was denied by the police officers having appeared to the court proceedings as witnesses. The defence questioned a witness what rights were explained to the detainee, but the witness could not answer what rights and duties were explained to the detained Giorgi Rurua³⁶². According to the testimony of the witness, he has provided to the detainee the information about the right to defence.

In accordance with Article 38 of the Criminal Procedures Code of Georgia, upon arrest, or if a person is not arrested, immediately upon his/her recognition as the accused, also before any interrogation, the accused shall be notified, in the language that he/she understands, of the crime provided for by the Criminal Code of Georgia in the commission of which he/she is reasonably suspected. Further, the accused shall be handed over a copy of a record of his/her arrest, or if he/she is not arrested, a copy of a decree to prosecute as the accused³⁶³. Moreover, we have to admit that the right to receive the information about the procedural rights is not directly envisaged in the European Convention of Human Rights, however there is a practice of the European Court of Human Rights requiring from the judicial authorities to undertake positive measures in order to ensure the compliance with article 6³⁶⁴.

³⁶¹ The reports prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 10.02.2020.

³⁶² The reports prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 25.05.2020.

³⁶³ See paragraph 1 of Article 118 of the Criminal Procedure Code of Georgia: subparagraph: <https://bit.ly/3dn6u6r>. Last seen: 01.06.2020.

³⁶⁴ See ecthr 13 May 1980, Artico v. Italy, No. 6694/74, paragraph 36 and ecthr 30 January 2001, Vaudelle v. France, No. 35683/97, paragraphs 52, 59 and 60. (1) <https://bit.ly/3hdvpxf>. (2) <https://bit.ly/2usafbj>.

Of interests would be the Judgment of the European Court of Human Rights on the case Padalov v. Bulgaria and Talat Tunc v. Turkey, where the Court demanded from the authorities to choose a proactive approach in order to inform the detainees/accused their rights to legal aid³⁶⁵.

In the given case, the requirements were ignored on the part of investigation authorities as it became evident from the examination of the evidence at the hearings on merits.

- **REFUSAL TO ALLOW TAKING SAMPLES - “FAILURE TO EXECUTE THE COURT DECISION”**

According to the explanation of the defence, at the moment of the arrest, Giorgi Rurua was coerced to provide DNM samples in the main premises of the Tbilisi Police Department in the office of G.M. and no document was drawn up on the procedure³⁶⁶. The purpose of the coercion was to attach onto the “seized” weapon the illegally taken DNM and proof in this way to the detainee the fact of illegal purchase, storage and carriage of the weapon.

On the court hearing of May 4, 2020, a witness of the persecution, the police officer, explained that he participated in the attempt of taking samples based on the court ruling and he recalled that he was there with two investigators and an expert³⁶⁷. The witness stated that he introduced the ruling to the accused, explained his rights and duties including the warning that in the case of refusal to provide DNM samples he would be liable under the law, meaning in the case of failure to allow the execution of the court ruling, the charges would be brought against him.³⁶⁸

According to the explanations of the witness of the prosecution, Giorgi Rurua resisted to provide DNM samples at the presence of the lawyers who were

³⁶⁵See ecthr 10 August 2006, Padalov v. Bulgaria, No. 54784/00, and ecthr 27 March 2007, Talat Tunc v. Turkey, No. 32432/96. (1) <https://bit.ly/2Am7pWF>. (2) <https://bit.ly/3f8dhdg>.

³⁶⁶ The reports prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 06.05.2020.

³⁶⁷ The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 04.05.2020.

³⁶⁸ The reports of the court monitor of the Human Rights Center. Hearing on merits of the case of Giorgi Rurua: 04.05.2020

encouraging him to refuse the procedure. Moreover, according to the statement of the witness, it was explained to the accused that in the case of resistance they would be obliged to use proportional force. What is most important, the witness confirmed that they were trying to take DNM samples from the accused by using force, but he *“was pushing them back and he was resisting them and they were afraid not to damage him, not to break his arm for instance as they were taking prints from the palm and samples of saliva”*³⁶⁹. On the questions from the defence in what particular the resistance was expressed, the witness responded that: *“The accused Giorgi Rurua stood in an angle, he was clenching fists, and was squeezing his lips and they could not open his mouth”* (formulation of the speaker maintained). On the question of the defence, whether they were trying to unclench his fingers from the fist, the answers of the witness was based on the assumptions and for this reason the defence had to put the same question several times in order to have the witness answer the question in exact terms. In response to this, the prosecution put several times a motion to remove the question. The judge did not grant the motions and the judge himself also addressed the witness to give the specified answers, or in the case the witness did not remember to say so and the like³⁷⁰.

● PROPORTIONALITY OF THE INTERFERENCE

Paragraph 5 of Article 147 of the Criminal Procedure Code of Georgia provides for that *“[t]aking a sample that causes severe pain shall be allowed only in exceptional cases and with the consent of the person from whom the sample is to be taken”*³⁷¹. Moreover, according to the interpretations of the European Court of Human Rights, the interference by the state authorities in excising the right shall not be allowed, except for the cases when such interference is necessary due to the national security reasons, public safety or economic wellbeing of the country, further for the reasons of preventing disorders and crime, for the reasons of safeguarding health and morals and the rights and freedoms of other persons. Further, the Court notes that the respect for the right to private life protected

³⁶⁹ The assessment by the witness (the formulations of the witness are maintained).

³⁷⁰The Report of the court monitor of the Human Rights Center. Hearings on merits of the case of Giorgi Rurua: 06.03.2020; 04.05.2020; 11.05.2020.

³⁷¹See Article 147 of the Criminal Procedures Code of Georgia: <https://bit.ly/2mlkcjh>.

under Article 8 of the Convention includes the respect for the physical integrity of the person. The European Court of Human Rights provided on the case *Detlef-Harro Schmidt against Germany*³⁷² that, taking of a blood and saliva sample from the applicant constitutes a compulsory medical intervention which, even if it is of minor importance, must consequently be considered as an interference with his right to privacy. Such an interference gives rise to a breach of Article 8 unless it can be shown 1) that it was “prescribed by law”, 2) pursued one or more legitimate aim or aims and 3) was “necessary in a democratic society” [...].

In the case of Giorgi Rurua the issue is still vague and raises some questions, even more then when the accused refers on illegally taking the DNM samples from his neck with cotton sticks³⁷³. Further, exactly the refusal to give samples was made as grounds for the new charges against him (Article 381 of the Criminal Code, failure to execute the court decision)³⁷⁴.

Taking samples constitutes the *other* procedural actions under the Articles 147 and 148 of the Criminal Procedures Code of Georgia³⁷⁵. *According to the assessment of the Human Rights Center, the above norms are problematic.* In particular, in accordance with Article 31 of the Constitution of Georgia, no one shall be obliged to testify against him/herself or against the related persons as enlisted by the law. Therefore, the accused is empowered with a privilege to be protected against self-incrimination. The European Court of Human Rights considers the protection of persons/accused against self-incrimination as the cornerstone of a fair trial³⁷⁶. With the protection against self-incrimination the European Court thinks of various forms of such a protection like: The right of the accused not to testify against him/herself (*the right to remain silent*). Also, the right not to provide the prosecution with any evidence that would proof his/her guilt.

³⁷² see. The Judgment of the European Court of Human Rights on the case, *Detlef-Harro Schmidt against Germany*”, 2006. <https://bit.ly/3cpvito>.

³⁷³ The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearings on merits: 06.03.2020; 06.05.2020; 08.05.2020.

³⁷⁴ See Article 381 of the Criminal Procedures Code of Georgia. <https://bit.ly/2Yi7Uce>.

³⁷⁵ See Articles 147 and 148 of the Criminal Procedure Code of Georgia: <https://bit.ly/2mlkcjh>. Last seen: 04.06.2020.

³⁷⁶ See the Judgment of the European Court of Human Rights on the case: *John Murray v. The United Kingdom* §44.

On the case *Funke v. France*, ECtHR ruled that the attempt to compel the applicant himself to provide the evidence of offenses he had allegedly committed, constituted the breach of Article 6, in particular the right to remain silent and not to contribute to incriminating himself³⁷⁷.

On its turn, the privilege against self-incrimination is a part of fair trial as conditioned by the significance of the right. The purpose of the legislator is to place the right to be protected against self-incrimination under a special field of norm protection. The threat of infringement of the right is equally possible by testifying against oneself, and by revealing other evidence against oneself.

According to the assessment of the Human Rights Center, the refusal to provide samples as the refusal against the investigative action or a passive resistance against the action should not result in criminal liability of the person. Therefore, one has to take into account number of facts and the implementation of the investigative action should be derived from an urgent necessity and for that reason, the high standard of substantiation must exist in each individual case.

Further, Giorgi Rurua had a right to refuse providing the samples because he as an accused was protected with a privilege against coercive self-incrimination. However, the investigator was authorized to take the samples envisaged in the court ruling through the use of proportional force and thus the investigative actions would not have been hindered. In accordance with paragraph 7 of Article 111 of the Criminal Procedure Code, when a person resists the carrying out of an investigative action, a proportional coercive measure may be applied³⁷⁸. Moreover, taking into account the given facts, the issue of bringing charges against Giorgi Rurua under paragraph 1 of Article 381 of the Criminal Code (failure to execute the court decision) is quite problematic.

By the ruling of Tbilisi City Court from December 28, 2019, the motion of the prosecution was granted to seize personal items of Giorgi Rurua i.e. sheets, shoes, a toothbrush, clothes, a hair brush and a tower³⁷⁹. On January 3, 2020, the investigator decided to carry out the investigative action. As the witness said at

³⁷⁷ See the Judgment of the European Court of Human Rights on the case: On the case *Funke v. France* §44. <https://bit.ly/2uxxdhi>.

³⁷⁸ see: Paragraph 7 of Article 111 of the Criminal Procedure Code of Georgia: <https://bit.ly/2mlkcjh>.

³⁷⁹ The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 24.06.2020.

the court hearing, he could not reach Dimitri Sadzaglishvili, the defence council of the accused, while the second defence council, Shota Kakhidze refused to participate in the investigative action³⁸⁰. Later on, during the examination of the evidence of the defence, the defence council stated that he told the investigator that because he was not able to attend the investigative action on the same day (on Friday), the investigator should have contacted the other defence council, and further he suggested to the investigator to carry out the investigative action on January 6, 2020 (on Monday). The investigator did not decline the suggestion by the defence council, however later, on the same day, after several hours from the conversation with the defence council he nevertheless decided to seize the personal items of Giorgi Rurua from the cell without participation of defence councils³⁸¹. During the interrogation, the witness stated, that he decided to carry out the investigative action because there was a risk of the items to be seized might be hidden away or destroyed.

In accordance with the criminal procedural law, the accused may demand the defence council to be presented at the investigative action carried out with the participation of the accused. "Where the defence council does not participate in the scheduled investigative action, the prosecutor shall be obliged to reschedule the investigate action one-time-only for a reasonable period for no more than 5 days. [...] absence of the defence council shall not result in the delay of performing the urgent investigative action³⁸².

Moreover, it is not clear, how could Giorgi Rurua destroy the above items when he was in the isolated cell and was under 24 hours visual and electronic surveillance.

- **CAR SEARCH COMPLIANCE WITH THE PROCEDURAL LAW**

According to the statement of the defence, the search of the car of Giorgi Rurua began at 16:40 after 3 hours and 40 minutes of his first exposure to the police officers (which took place at 13:00). We further find problematic the fact,

³⁸⁰The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 01.06.2020

³⁸¹The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 25/06/2020. 10:30-10:47.

³⁸²See Paragraph 7 of Article 38 of the Criminal Procedure Code: <https://bit.ly/2mlkcjh>.

that the search of the car was conducted not at the scene but in the yard of administrative premises of Tbilisi Police Department³⁸³. According to the statements of the witnesses of the prosecution, the search of the car was not possible at the scene due to the narrowness of the road, created traffic jam and exaggerated interests of the people passing by. Notable also is the fact that the car was not searched immediately after bringing it to the yard of the premises of the investigation body. The search was preceded by personal search of the detainee³⁸⁴.

By assessment of the Human Rights Center, at the moment of drawing up the report of personal search of Giorgi Rurua and at the moment of sealing the weapon, the requirements of the Criminal Procedure Code were violated. In particular, the investigator ignored the requirements of the procedural law when he limited himself with just a general description of the weapon. According to the defence, the search report indicates only that "metallic dark firearm was seized" when searching Giorgi Rurua in person³⁸⁵. Under the criminal procedural law, reports of investigative actions which are drawn up during the process of the investigative action or upon the finalization of the investigative action, must contain the details in terms of form and content as provided for by Chapter XV of the Criminal Procedure Code. Under paragraph 6 of Article 120 of the Criminal Procedure Code, an item, a document, substance or any other object containing information that has been detected during a search or seizure, shall, if possible, be presented, before its seizure, to persons participating in that investigative action. Then, it shall be seized, described in detail, sealed and, if possible, packaged. On the packaged item, in addition to a seal, the date and signatures of the persons who participated in the investigative action shall be indicated. A document that is seized due to its contents, shall not be sealed.

³⁸³The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearings on merits: 06.05.2020; 11.05.2020

³⁸⁴The Report prepared by the court monitor of the Human Rights Center on the case of Giorgi Rurua. Hearing on merits: 10/03/2020.

³⁸⁵The Report prepared by the court monitor of the Human Rights Center on the case of Giorgi Rurua. Hearings on merits: 25.02.2020; 25.05.2020; 30.05.2020.

In the report of personal search of Giorgi Rurua, as noted by the defence, it is indicated that the seized weapon was put in the package on which signatures, the number of the criminal case and the date of the investigative action were placed. However, the defence states that on the photoboard of the ballistic expert examination it is clearly seen that on the seal of the package only the signatures of the persons conducting the investigative action, number of the case and date are placed. On the seal, there is no signature of Giorgi Rurua and neither a special comment saying Giorgi Rurua refused to sign the seal³⁸⁶. Further, interesting is the issue that on the part of investigators no video and/or photo was taken of the actions described in the personal search report³⁸⁷. Indeed, the above does not provided for by the procedural law as a mandatory measure, but still when the investigators had free access to all technical means, it is not clear why have not they took the opportunity that would assist them in proving the guilt to the accused.

Moreover, number of facts in the case files indicate on the doubtful origin of the silencer of the weapon identified during the car research.

The investigative actions conducted without prior court authorisation, create a risk that the subjects carrying out the investigation may act *ultra vires* and infringe unjustifiably the rights of the private person as guaranteed by the Constitution. Therefore, it is necessary the consequent control by the court be efficient in order to minimize the risks of “unfair” investigations.

The general courts note that “the efficiency of the consequent (inspective) court control over the proceedings of search and/or seizure is of particular significance because as practice shows the absolute majority of search and seizures are carried out based on the urgent necessity without court rulings”³⁸⁸ creating even more risks on the parts of investigation bodies to abuse the powers.

³⁸⁶The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearings on merits: 25.05.2020; 30.05.2020.

³⁸⁷The Report prepared by the court monitor of the Human Rights Center on the monitoring of the case of Giorgi Rurua. Hearing on merits: 30.05.2020.

³⁸⁸Ruling 18/1197 of the Court of Appeals from July 14, 2016, page: 5; The ruling may be accessed at: <https://bit.ly/3dm9xo9>.

The risks are especially high when such investigative actions are carried out based only on operative information (*provided by so called confidants*) that is not confirmed by other evidence and in its turn the prosecutorial supervision on such information is limited under the paragraph 3 of Article 13 of the Law of Georgia on *Operative and Search Activities*. Moreover, the court completely lacks the possibility to verify the information.

The criminal procedural law provides for the possibility as an exception that search and seizure be conducted without prior authorisation, the relevant ruling of the court, in particular in the cases of urgent necessity³⁸⁹. Paragraph 5 of Article 112 of the Criminal Procedure Code directly stipulates what shall be considered as the cases of urgent necessity. According to the interpretation of the norm, the urgent necessity is the case when a delay may cause destruction of the factual data essential to the investigation, or when a delay makes it impossible to obtain the above data, or when an item, a document, substance or any other object containing information that is necessary for the case has been found during the carrying out any other investigative action (*if found as a result of single superficial examination*), or when an actual risk of death or injury exists. Accordingly, the urgent necessity means the cases when “based on the principle of proportionality, attaining the public interest under the Constitution, because of the actual objective reasons could not be possible without immediate and prompt limitations of the private interests”³⁹⁰, for the delay in carrying out the investigative action may cause the destruction of the evidence proving the guilt of certain person(s), the deletion of the trace of the crime, disappearance of the offender and other irrevocable consequences.

The court shall check the lawfulness of the search and seizure carried out under urgent necessity within 24 hours from the moment the prosecutor files the motion and respective case files³⁹¹. In order the court to find the

³⁸⁹see: paragraph 1 of Article 120 of the Criminal Procedure Code of Georgia: <https://bit.ly/2YT1stT>.

³⁹⁰see: Judgment N 1/3/407 of the Constitutional Court of Georgia from December 26, 2007, II point.26, para 3. The ruling may be accessed at: <https://bit.ly/31vm08g>.

³⁹¹See paragraph 5 of Article 112 of the Criminal Procedure Code of Georgia: <https://bit.ly/2YT1stT>.

performed search and seizure lawful, the prosecutor must provide substantiations of why the urgent necessity was there. For this reason, only the hypothetical opinions, and assumptions not related to the case would not suffice. For the purpose of search and seizure under urgent necessity, it is required that the urgent necessity exists not only at the beginning of the action but also during the process of the action. Therefore, as soon as the urgent necessity disappears, the investigation body may not further carry on the investigative action³⁹².

ECtHR notes that the presence of the applicant and other witnesses during a house search as a factor enabling the applicant effectively to control the extent of the search carried out. However, in such cases, in the absence of prior authorisation by a court and of effective subsequent scrutiny is insufficient to prevent the risk of abuse of authority by the investigators³⁹³.

Stemming from the above, stopping Giorgi Rurua with a purpose to search under urgent necessity and conducting the action 3 hours and 40 minutes in late seems problematic. It has not been justified why the search did not take place immediately or soon after the car was moved to the site.

When testifying at the court proceedings, the accused stated that no personal search took place on him on the scene meaning the territory adjacent to *Vake Cometary*. As the accused says, the police officers moved him from his personal car directly to black car of Skoda brand and brought him to the administrative premises of Tbilisi Main Police Department. According to the statement of Rurua, the fact that he was not searched at the moment of arrest is proved by the foam pad³⁹⁴. In accordance with search report in the case files, the foam pad was seized and sealed on the place of arrest, but in fact Rurua has the foam pad at the time when he was brought to the premises of the Department. The defence requested to seize and decipher the video records of

³⁹²See Criminal Procedure Law of Georgia, Private Part. Collective of authors, editor L. Papiashvili (2017) p. 452.

³⁹³See Guide on Article 8 of the European Convention on Human Rights (Right to respect for private and family life, home and correspondence), European Court of Human Rights, 2019. P. 88. Can be accessed at: <https://bit.ly/2yrhdwk>.

³⁹⁴The item produced from special material used by mountain-climbers and hikers to seat or lay on it. Giorgi Rurua carried the foam pad with him on protest demonstrations.

the administrative premises of Tbilisi Main Department proving that when Rurua entered the premises the foam pad was in his pocket³⁹⁵. The video records of bringing Giorgi Rurua to the Department are not attached to the case files.

- **EXPERT EXAMINATION OF THE FIREARM**

On June 3, 2020, three witnesses of the prosecution were questioned at the court hearing, these were: two experts of *Levan Samkharauli Expert Examination Bureau* and an investigator. The experts conducted fingerprints study to compare the palm prints. For the expert examination, a thing similar to the firearm seized from Giorgi Rurua was submitted, further, a clip, bullets, box in which 25 bullets were placed. In reference to the above bullets, a member of the guard of Giorgi Rurua stated at the stage of car search that they belonged to the member of the guard. The expert said that no prints were detected on the firearm, clip and bullets.

The second witness was the expert who conducted biologic and genetic expert examination based on the submission from the investigator of the Investigative Office of the Police Department of the Ministry of Internal Affairs. For the study sealed bags with materials cleaned up from the pistol firearm, trigger, clip, metal thing (probably the silencer, for the person involved in the measures referred to the silencer as a metal thing) and bullets. Specifically, for the expert examination the sealed cleaned-up materials and not the seized firearm itself and other items were submitted. On the 14 packages sent for the forensic examination, there were indicated from which item the materials were cleaned up from (sorted by the properties of the items) and submitted for the examination.

The task of the expert was to ascertain whether biological profile was identical to the sample of saliva taken from Giorgi Rurua. In the result of the expert examination, it was confirmed that from the trigger of the weapon on the sample appeared mixed profile belonging to the male gender. From the mixed

³⁹⁵The Report prepared by the court monitor of the Human Rights Center on the case of Giorgi Rurua. Hearing on merits: 16/07/2020.

profile, on the biological profile of Giorgi Rurua came a major share - main share.

*The defence put a question on the court hearing: In the case the cleaned-up materials were placed on the item on purpose could the study identify this fact? With regard to the question the witness stated that it was not possible*³⁹⁶.

II - POLITICAL MOTIVES AND SELECTIVE JUSTICE

In accordance with the criteria established by the *Resolution of the Parliamentary Assembly of the Council of Europe* from June 26, 2012³⁹⁷, “the detained shall be referred as a “political prisoner” provided the imprisonment took place on the background of evident violations of procedural guarantees and there are grounds to believe that this is linked with a political motives of the government”³⁹⁸. This criterion matches the criteria of *Amnesty International*. In particular: The case contains “noticeable political elements”; “the government does not ensure a fair trial under the international standards”. Furthermore, no one is granted a right to be freed immediately by being recognized as a political prisoner but instead it is necessary that the person is guaranteed the right to fair trial.

The arrest of Giorgi Rurua was preceded by the events of June 20-21, 2019 and by the large scale anti-occupation demonstrations. According to the disseminated information³⁹⁹, Giorgi Rurua was arrested exactly because of funding the demonstrations and the opposition TV Company - *Mtavari Arkhi*. The arrest of Giorgi Rurua and the criminal proceedings against him along the cases of Irakli Okruashvili and Giorgi Ugulava was followed by the political

³⁹⁶The Report prepared by the court monitor of the Human Rights Center on the case of Giorgi Rurua. Hearing on merits: 03/06/2020.

³⁹⁷See the Criteria of Political Prisoners under the Resolution of the Parliamentary Assembly of the Council of Europe from June 26, 2012: <https://bit.ly/2N8X43>.

³⁹⁸See the Legal Analysis of the criminal cases connected to the events of June 20-21, 2019, Human Rights Center. 2020: <https://bit.ly/3drykmj>. Last seen: 27.06.2020.

³⁹⁹See the information if full: <https://bit.ly/31e2ues>. Last seen: 27.06.2020.

assessments⁴⁰⁰ from the side of various oppositional parties and international partners especially from the side of the US senators and congressmen.

Regarding his political activities, the accused also spoke at the court proceedings. According to the statement of Giorgi Rurua, after the events of June 20-21, 2019, he was one of the organizers of the peaceful demonstrations against occupation and the government, financially supporting them and being an active participant. The demonstrations that began in June 2019 were temporarily stopped after the government promised to the public that the Parliamentary Elections of 2020 would be held under the proportional system. The demonstrations resumed in November, when the group of MPs allied with the government voted down the initiated constitutional amendments and it came out that the Parliamentary Elections would be held again under the mixed majoritarian and proportional system. Giorgi Rurua said that in November he carried on to organize the protest demonstration and was supporting them financially, he was also physically assisting the participants of the demonstrations in various works. On November 17, 2019, for instance, he organized and personally brought to the Parliament firewood so the demonstrations could be warmed. On the demonstrations he was there for the whole night and on November 18, he was returning back home when he was arrested.

The arrest of Giorgi Rurua in most instances is assessed as a political decision of the government and recently his continuous custody is regarded as a violation of joint declaration from March 8, 2020⁴⁰¹.

On May 15, 2020, the President of Georgia based on the Act of Pardon released from prison Gigi Ugulava, the former Mayor of Tbilisi, one of the leaders of *European Georgia* and Irakli Okruashvili, the leader of the party *Victorious Georgia*. The both prisoners left the penitentiary facility on May 15, the day the Act of Pardon was issued. Both the oppositional parties and international partners were expecting Giorgi Rurua to be released with these two prisoners, but we have to take into account that no judgment of conviction

⁴⁰⁰ see: Information in full: <https://bit.ly/37seotf>; further see <https://bit.ly/3hrbikf>.

⁴⁰¹see: Joint Declaration: <https://bit.ly/3fzfw7n>. Last seen: 27.06.2020.

was yet rendered against Giorgi Rurua which is required for pardoning. In accordance with Article 78 of the Criminal Code of Georgia, “[P]ardon shall be granted by the President of Georgia individually to a specific group of persons⁴⁰². Pardon may be applied to persons convicted by Georgian courts and serving sentences on the territory of Georgia”.

Moreover, the *United National Movement* party and the *European Georgia* party were referring to the release of Giorgi Rurua as a condition to support the draft Constitutional Law amending the system of Parliamentary Elections in Georgia⁴⁰³. According to the statement of the named parties, the release of Giorgi Rurua is a part of the agreement reached with the government on March 8 that the representatives of the ruling party do not agree to and categorically deny.

Before the voting procedure under the third hearing of the constitutional amendments, civil activists gathered in front of the Parliament and demanded the release of Giorgi Rurua⁴⁰⁴. On June 29, 2020, the Parliament of Georgia passed the constitutional amendments⁴⁰⁵ on the irregular session by the third hearing with 117 votes against 3 votes. Before the voting, Giorgi Rurua released his statement asking MPs to participate in voting⁴⁰⁶. However, the factions of *European Georgia* and *United National Movement*⁴⁰⁷ did not take part in the voting process, because according to them the agreement from March 8, 2020 was not fulfilled as Giorgi Rurua remained in custody.

After the issuance of the Act of Pardon by the President of Georgia, the defence raised an issue at the court proceedings to change the measure of restraint to Giorgi Rurua. The defence requested GEL 10 000 in bail as a measure of restraint which was not granted. According to the assessment of the

⁴⁰²see: Edict of the President of Georgia: <https://bit.ly/2M2PVB1>..

⁴⁰³see: the information if full: <https://bit.ly/2cueiks>. Last seen: 27.06.2020.

⁴⁰⁴see: the information if full: <https://bit.ly/2busmdk>, 29.06.2020.

⁴⁰⁵See The Constitutional Law of Georgia on making amendments to the Constitution Law of Georgia regarding *making Amendments to the Constitution of Georgia*: <https://bit.ly/2akwmdp>.

⁴⁰⁶see: “It is necessary to participate in voting, we have to bring the matter to the end - Rurua”: <https://netgazeti.ge/news/463123/>

⁴⁰⁷see: the information if full: <https://bit.ly/38kmqvq>. Last seen: 29.06.2020.

court, the remand on bail would not ensure the avoidance of the risks because of which the custody as a measure of restraint was initially used.

CONCLUSION

By monitoring the court proceedings and by studying the documents it was made clear that rights and freedoms of Giorgi Rurua as guaranteed by the Constitution of Georgia and international instruments were presumably violated during the personal search of Giorgi Rurua and during the various investigative and procedural actions. **Specifically:**

- ✓ *The accused was denied at the moment of arrest to contact a lawyer and family members.*
 - ✓ *No rights and duties were explained to the detainee.*
 - ✓ *The personal search of Giorgi Rurua right as well the search of his car were carried out with significant violations of the criminal procedural law.*
 - ✓ *In drawing up the report of personal search and in sealing the firearm the requirements of the Criminal Procedure Code were violated.*
 - ✓ *The procedural violations existing on the case together with opinions of various experts puts under doubts the relatedness of Giorgi Rurua with the firearm and the authenticity of the evidence.*
 - ✓ *Number of facts indicate to the doubtful origin of the silencer of the firearm.*
 - ✓ *The investigator carried out number of investigative actions without the participation of the defence council.*
 - ✓ *The aggravation of charges against Giorgi Rurua lacks constitutional grounds. Further, the aggravation is not justified by the purposes of the criminal law. The reason for aggravating the charges against the accused became the fact that the accused refused to participate in taking the sample, the right he had under the Constitution of Georgia and under the international documents of human rights. The criminal prosecution launched under the subsumption ignores the privilege to be protected against self-incrimination constituting the violation of fair trial.*
- the use of proportional measures for taking the sample is also a problematic issue.*

CHAPTER

5

LEGAL ASSESSMENT OF THE
CURRENT CRIMINAL CASE
AGAINST **NIKA GVARAMIA**

INTRODUCTION

The independent, pluralistic media environment plays an indispensable role in forming a democratic society and protecting human rights. Therefore, HRC is particularly interested in the situation and challenges that exist in the country with this regard posing threats to democratic processes. In this term, initiation of criminal proceedings and/or enforcement of investigative actions against the representatives of critical media outlets shall be deemed problematic especially when such prosecution coincides in time with the intensified resistance to the government⁴⁰⁸. Thus, HRC shifted focus on the ongoing criminal case against Nika Gvaramia, the founder and Director-General of TV company Mtavari Arkhi (Main Channel), which critical of the government, and the former Director-General of the Rustavi 2 Broadcasting Company. On 18 July 2019, the European Court of Human Rights delivered a judgment⁴⁰⁹ on the Rustavi 2 case, according to which in relation to the Rustavi 2 case, there has been no violation of any article of the European Convention. Consequently, Rustavi 2 was returned to its former owner, who dismissed Nika Gvaramia, the director-general of the channel, the same day⁴¹⁰. In the aftermath, bringing a conflict of interests as the cause, the head of the news service and the journalists of the leading talk shows were fired from the TV company. A large number of employees who were dissatisfied with the changes in the staff left the broadcaster⁴¹¹.

Mtavari Arkhi where lots of former employees of Rustavi 2 were hired⁴¹², started broadcasting in September of 2019⁴¹³.

On July 20, 2019, after the adoption of judgment by the European Court of Human Rights (ECtHR), the Office of the Prosecutor General of Georgia launched an investigation into the facts of abuse of official power harming the legitimate interests of Rustavi 2 Broadcasting Company, further, of misappropriation of large

⁴⁰⁸see Reports of HRC court monitoring on the cases with alleged political motivates. [Shorturl.at/tbiw5](https://shorturl.at/tbiw5).

⁴⁰⁹see CASE OF RUSTAVI 2 BROADCASTING COMPANY LTD AND OTHERS v. GEORGIA. [Shorturl.at/kjlp1](https://shorturl.at/kjlp1).

⁴¹⁰see the Statement: shorturl.at/vnvz9.

⁴¹¹see more information at: shorturl.at/sb024; shorturl.at/ndmpx; shorturl.at/guwu4; shorturl.at/aijgh.

⁴¹²see more information at: shorturl.at/cqjlo.

⁴¹³ see more information at: shorturl.at/bvgm5.

amounts of the funds belonging to Rustavi 2 through official capacity, and concealing assets through fraudulent and/or sham transactions. In the course of the investigation, charges were brought against Nika Gvaramia, the former Director-General of Rustavi 2, and the founder of the newly established *Mtavari Arkhi*⁴¹⁴. The excuse for the prosecution was the unprofitableness of the business decisions made by Nika Gvaramia while in the capacity of the Director of Rustavi 2.

The purpose of this document is to assess to what extent the charges brought by the prosecution against Nika Gvaramia - meaning the embezzlement of assets under aggravating circumstances - actually contain the signs of a crime sufficient for holding a person criminally liable.⁴¹⁵ Moreover, to what extent the commencement of criminal prosecution following a decision made by the CEO (Chief Executive Officer) of a company is in line with norms and practice of the national and international laws; Furthermore, whether there are some alleged political motives and signs of selective justice on the case.

Beyond the above-mentioned issues, the current Report shall assess the actions on the part of Nika Gvaramia in terms of corporate law and juxtapose the acts with any possible criminal liabilities.

RESEARCH METHODOLOGY

The research is based on various documents of criminal cases, further, on the reports of court hearings prepared by the HRC court monitor, and on the identified problem issues of the substantive criminal law and the procedural criminal law. During the course of the research, we have carried out a comparative legal analysis revealing the various legal issues existing in the Case. The comparative analysis is based on the juxtaposition of the national legislation and of the decisions of national courts with some of the judicial decisions by the US and German courts, further with various international standards having the origin

⁴¹⁴ see Statement by the Office of the Prosecutor General of Georgia at: shorturl.at/clzc4.

⁴¹⁵ See the criminal offense provided for in subparagraphs (a) and (d) of paragraph 2, and subparagraph (b) of paragraph 3 of Article 182 of the Criminal Code of Georgia. Shorturl.at/gbfir.

in corporate legal relations, and finally with relevant judgments rendered by ECtHR.

THE SUBSTANCE OF THE ALLEGATIONS

Nika Gvaramia has been charged with the criminal offenses provided for in subparagraphs (a) and (d) of paragraph 2, and subparagraph (b) of paragraph 3 of Article 182, subparagraph (c) of paragraph 3 of Article 194⁴¹⁶, paragraph 3 of Article 221⁴¹⁷ subparagraph (b) of paragraph 2 of Article 362⁴¹⁸ of the Criminal Code of Georgia⁴¹⁹. Within the scope of the criminal case, the main charges relate to fewer revenues from advertisements earned by Rustavi 2 at the end of 2015 as compared to the revenues from the previous year which, according to the prosecution, was caused by the business decisions of Nika Gvaramia allowing the prosecution to subsume the acts of Gvaramia under "unlawful embezzlement of property rights" committed in aggravating circumstances.⁴²⁰

As we learn from the files on the criminal case, under the agreement concluded in 2013-2015, *InterMedia LLC* was eligible in addition to the set fee to receive as a bonus around 5% of the total revenues from selling the commercial airtime, while the TV company was allowed to keep the rest of the revenue.

On 16 January 2015, on behalf of the Rustavi 2 Broadcasting Company LLC, Nika Gvaramia signed an agreement with InterMedia Plus LLC, according to which Rustavi 2 Broadcasting Company LLC assigned the rights to run commercials on its channels to Inter Media Plus LLC. Under the agreement

⁴¹⁶See The criminal offense provided for in subparagraph (c) of paragraph 3 of Article 194 of the Criminal Code of Georgia (*legalization of illegal income (money laundering) accompanied with receipt of particularly large amounts*). Shorturl.at/gbfir

⁴¹⁷See Criminal offense provided for in paragraph 3 of Article 221 of the Criminal Code of Georgia (*Commercial bribery by a person who exercises the power to manage and represent an enterprise or organization, as well as other special powers, or who works in that organization*). Shorturl.at/gbfir.

⁴¹⁸See: The criminal offense provided for in subparagraph (b) of paragraph 2 of Article 362 of the Criminal Code of Georgia (*making forged document, seals, stamps, or letterheads causing significant damage*). Shorturl.at/gbfir.

⁴¹⁹see: Decree to prosecute a person (01.11.2019).

⁴²⁰see: The crime provided for in subparagraphs (a) and (d) of paragraph 2, and subparagraph (b) of paragraph 3 of Article 182 of the Criminal Code of Georgia. Shorturl.at/gbfir.

between the parties, the fee for assigning the right to run commercials was to be paid in the amount agreed on a monthly basis, irrespective of the amount of commercial airtime actually consumed by Inter Media Plus LLC in the corresponding month.

From January to August 2015, Nika Gvaramia, in accordance with the established practice on the market, demanded 90-95% of the total revenue from the alienation of the TV company's advertising time from Inter Media Plus LLC while leaving the rest of the amount to Media Plus LLC in consideration for the services rendered.

According to the prosecution, the purpose of concluding the different agreement was to embezzle the property rights of Rustavi 2. The difference between the advertising revenues in 2014 in the amount of GEL 43,230,509 and the advertising revenues in 2015 in the amount of GEL 36,467,000 was determined as the financial loss inflicted upon the broadcasting company. Further, according to the prosecution, since the advertising market had not shrunk, the company should have received the revenue in the same amount as that of the previous year.

According to the defense, the agreement of 2015 served the best interests of the company, aiming to provide insurance for short or long-term risks, and to tackle expected financial difficulties leading the Company to decide to claim less but guaranteed revenues.

Moreover, it is significant to note the fact that since these risks had not been materialized, the old manner of settlement was restored under the 2016 agreement, and Inter Media Plus returned a part of its profits earned in 2015⁴²¹.

INTERNATIONAL STANDARDS

- **LEGAL BASIS FOR PERSONAL RESPONSIBILITY OF COMPANY DIRECTORS**

Corporate governance is a system formed through the multilateral relationships between lots of participants of the system⁴²². In general, legal

⁴²¹ see Interrogation Report of Nika Gvaramia of 1 August 1, 2019.

relations constitute one of the most important problems in legal science. However, in this regard, the issue of responsibility in the field of corporate governance is a particularly topical issue⁴²³, which is referred as one of the tools of corporate governance⁴²⁴. Under the issue of responsibility also comes the issues of mutual responsibility of both the management and the partners/shareholders of the corporation. Accordingly, we can differentiate between internal and external corporate responsibilities. Internal responsibility arises in relationships between members of the corporation (*managers, shareholders, and dominants*), while external responsibility involves the responsibility of the managers of the company before third parties⁴²⁵.

The Organization for Economic Cooperation and Development (OECD) has adopted the Principles of Corporate Governance, recognizing that there is no universal model of good corporate governance⁴²⁶. Consequently, for an entrepreneurial company to be profitable, the director of the enterprise and its shareholders, including creditors, may consider different ways to be optimal; some of them may care for their public image, while others may deem even criminal activities acceptable⁴²⁷.

Further, we should take into account that in Georgia there are mainly the entities established in the form of limited liability company, while other legal forms of companies are quite rare. Even when companies are not required in principle to exist in the form of LLC, they still are established as LLCs. One of the reasons for this is a lack of legislative regulation and the absence of tax benefits⁴²⁸.

⁴²²see: Humera K., A Literature Review of Corporate Governance, International Conference on E-business, Management and Economics IPEDR Vol.25, IACSIT Press, Singapore, 2011, 3. Shorturl.at/eqyc2.

⁴²³see Emmerich V., Habersack M., Konzernrecht, "Verlag CH Beck ", 2005, Munich, 274-277.

⁴²⁴see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law (2006), p.29.

⁴²⁵see Machavariani, S., Management of Corporate Groups in Germany and the United States and Integration of Management Principles into Georgian Private Law (2015) Tbilisi, p.121.

⁴²⁶see OECD Principles of Corporate Governance, OECD, Paris, 2004, 13. Shorturl.at/asjnr.

⁴²⁷see Brodowski, D., Espinoza de Los Monteros de La Parra, M., Vogel, J. 2014 Regulating Corporate Criminal Liability. Cham: Springer International Publishing, 47.

⁴²⁸ see Research into Regulation Law and Practice of Business Sector, *Article 42 of the Constitution*, 2012, 10. Shorturl.at/iont8.

Therefore, the legal form of LLC is a profit-oriented organizational and legal corporate structure, which proved to be the most frequently used and, consequently, the most acceptable for the Georgian reality. Moreover, limited liability companies exist for two main reasons: (a) *this is beneficial for both the enterprise and (b) the economy*. Furthermore, partners of LLC are not liable for the company's liabilities⁴²⁹ and directors are tasked with managing and representing such company in accordance with paragraph 1 of Article 9 of the Law of Georgia on Entrepreneurs unless otherwise provided for in the charter of the company⁴³⁰.

The competence and scope of liability of the director are determined by the same law and/or the articles of incorporation⁴³¹. However, the managerial decision made by the director of the company in managing the entrepreneurial company may not be assessed by ignoring the particularities of the legal status of the director. Namely, directors' liability should not be perceived as if the said liability aims at nothing else but to punish directors. Determining the grounds for liability is in the interests of both the enterprise and the director, because the absence of predetermined grounds as to when and after which action the director may be held liable will cause complete chaos and uncertainty that will hamper and prevent directors from making innovative and risky decisions that may prove beneficial for the entrepreneurial company⁴³².

The corporate law carries a principle of *piercing the corporate veil*⁴³³ according to which the liability of directors and shareholders is permissible only in exceptional cases⁴³⁴. The said principle originates in the law of the courts of the USA⁴³⁵, which

⁴²⁹ see Paragraph 4 of Article 3 of the Law of Georgia on Entrepreneurs. Shorturl.at/egmmv.

⁴³⁰ see paragraph 1 of Article 9 of the Law of Georgia on Entrepreneurs. Shorturl.at/egmmv.

⁴³¹ see paragraph 3 of Article 47 of the Law of Georgia on Entrepreneurs. Shorturl.at/egmmv.

⁴³² see Posner, R. 1975 THE RIGHTS OF CREDITORS OF AFFILIATED CORPORATIONS. The University of Chicago Law Review, 43, 501-502.

⁴³³ see *Prest v Petrodel Resources Ltd* [2013] UKSC 34; *Dadourian Group International v Simms* [2006] EWHC 2973, at [686]. Further: see.: Bakhutashvili, G., Protection of the rights of shareholders holding a small parcels of shares according to the legislation on joint stock companies in the book: Chanturia, L., Knipper, R., Zemler, I., Issues of Development of Corporate Law in Georgia, the German-Georgian Symposium, Tbilisi, 7-8 March 2000, gtz, 117.

⁴³⁴ see Tan Cheng-Han, Jiangyu Wang, Christian Hofmann, *PIERCING THE CORPORATE VEIL: HISTORICAL, THEORETICAL AND COMPARATIVE PERSPECTIVES*, EW Barker Center for Law and Business, National University of Singapore, 2019.

is mainly used in LLCs⁴³⁶. The principle implies direct liability when partners, despite their limited liability, may be held individually liable for harm inflicted on creditors.⁴³⁷ In the case of a director of an entrepreneurial entity, this is possible only when he or she fails to perform fiduciary duties or commits a crime⁴³⁸.

The principle of piercing the corporate veil is also found in German case law. This principle, at first glance, contravenes with the principle of corporate law on limited liability of a legal entity, but according to case law, it is considered a lawful action that the court may use to avoid injustice⁴³⁹. On their part, managers of the company and members of the supervisory board shall conduct company affairs in good faith and with a belief that their actions are in the best interests of the company⁴⁴⁰.

According to paragraph 1 of Article 9 of the Law of Georgia on Entrepreneurs, the entrepreneurial leadership and the members of the Supervisory Board must conduct company affairs in good faith, namely, perform the duty of care like an ordinary, prudent person holding a similar position under similar circumstances, and acting in the belief that their actions are most beneficial to the company. If they do not fulfill this duty, they will be held jointly and severally liable to the company for the harm caused. These persons must prove that they have not breached their duty⁴⁴¹.

⁴³⁵ see Cases: *Consumer's Co-op v. Olsen*, Wisconsin Supreme Court, 1988 142 Wis. 2d 465, 419 NW 2d 211; *KC Roofing Center v. On Top Roofing, Inc.*, Missouri Court of Appeals, 1991, 807 SW 2d 545; *United States v. Bestfoods*, Supreme court of the United States, 1998 118 S. Ct. 1876.

⁴³⁶see Burduli L., authorized capital and its functions in the book: *Theoretical and practical issues of contemporary corporation law*, Publishing House Meridiani, 2009, 241

⁴³⁷see Pfeiffer G., Timmerbeil S., *US-American Company Law-An Overview*, 598.

⁴³⁸ see L. Tsertsvadze calls fiduciary duties the *Duties of Care*. *Duties of Directors in Managing Company [Comparative Legal Analysis on the Example of US, Predominantly Delaware, and Georgian Law]*, Law Journal, N1, 2013, 258.

⁴³⁹see *dewitt Truck Brokers v. W., Flumming fruit company*, 540 F. 2d 681 (Cir 1976); also: *Emmerich V., Habersack M., Konzernrecht*, "Verlag CH Beck ", 2005, Munich, 144-147; 419.

⁴⁴⁰see Chanturia, L., *Corporate Governance and Responsibilities of Managers in Corporate Law*, 2006, 199

⁴⁴¹see Ruling №as-471-450-08 of the Supreme Court of Georgia of 31 March 2009.

● CORPORATE LEGAL RESPONSIBILITY OF DIRECTORS

According to the principles of corporate governance at the American Law Institute⁴⁴², the director or manager has a duty to the corporation to perform the functions of a director or manager *in good faith* - thus *in a manner* that he *reasonably believes* he acts *in the best interests of the corporation* and with such diligence as is reasonably expected of *an ordinarily prudent person*⁴⁴³ holding a similar position and under similar circumstances.

In general, opinions over the principle of good faith vary. For example, the Delaware District Court does not recognize this principle and divides the duties of management into *the duty of care*⁴⁴⁴ (*Sorgfaltspflichten*) and *the duty of loyalty*⁴⁴⁵ (*Treuepflicht*) and places the duty of good faith under the duty of loyalty⁴⁴⁶. Consequently, in corporate governance, the director bears these two primary corporate legal (fiduciary) duties.⁴⁴⁷

Fulfillment of the duty of loyalty would be the strive towards the achievement of common goal of the enterprise, while the breach of the duty of loyalty would be the ignorance of the actions to achieve the common goals. This also applies to shareholders. The corresponding legal norm is Article 3.8. of the Law of Georgia on Entrepreneurs, according to which, if a dominant partner in the enterprise has intentionally abused his or her dominant position to the detriment of the company, he or she shall pay the corresponding compensation to the rest of the partners. Dominant shall be considered a partner or a group of partners acting together, who has a practical opportunity to make a decisive influence on the voting results at the meetings of partners⁴⁴⁸.

⁴⁴² see ALI Principles of Corporate Governance.

⁴⁴³see .: Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, 199

⁴⁴⁴see Emanuel S., Emanuel L., Corporations, Aspen Publishers Online, 2009, 25-31.

⁴⁴⁵see Carney WJ, Mergers and Acquisitions / Cases and Materials, New York, Foundation Press, 2000, 66-229.

⁴⁴⁶see Rossi F., Making Sense of the Delaware Supreme Court's Triad of Fiduciary Duties, 2005, 17. https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=755784.

⁴⁴⁷see Jugheli G., 2010. Capital Protection in the Joint Stock Company, Tbilisi, 249.

⁴⁴⁸ see paragraph 8 of Article 3 of the Law of Georgia on Entrepreneurs. Shorturl.at/egmmv.

A breach of duty of loyalty in most cases is referred to *self-dealing*⁴⁴⁹, to a breach of duty of disclosure of information, to abuse of powers for attaining personal gains etc.⁴⁵⁰.

Beyond the above mentioned, a number of decisions were made in the USA on the issue of loyalty induces us to conclude that in order to prove the fact of a breach of the fiduciary duty, it shall be established whether the manager was acting more in his/her interests rather than in the interests of the corporation⁴⁵¹.

An independent form of duties of managers in corporate governance shall be a *Duty of Care or Duty of Diligence* (Sorgfaltspflicht)⁴⁵². In legal science, it is generally believed that the *duty of care or diligence* lays down the standard of conduct of directors and shall be interpreted in such a manner that the director must pay proper attention to corporate affairs. The Duty of Diligence imposes the responsibility upon directors or managers before the company to perform their functions in good faith so that they reasonably believe they act in the best interests of the corporation and with such diligence⁴⁵³ as reasonably expected from an ordinary, prudent person holding a similar position and under similar conditions⁴⁵⁴.

Noteworthy, the best interests of shareholders and corporations are impossible to be defined in a direct manner. However, we shall be able to determine in each

⁴⁴⁹ see Corporate Governance in the United States and Germany, European Corporate Governance Institute (ecgi), Law Working Paper # 17/2003, 5; Baums T., Scott KE, Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany, European Corporate Governance Institute (ecgi), Law Working Paper # 17/2003, 4-5.

⁴⁵⁰see Balotti RF, Finkelstein JA, The Delaware Law of Corporations & Business Organizations Statutory Deskbook, New York, "Aspen Publishers", 2010, 8- 3-98; Baums T., Scott KE, Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany, European Corporate Governance Institute (ecgi), Law Working Paper # 17/2003, 5; See also: Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, pp 320-359.

⁴⁵¹: see Cases: Lewis v. SL & E., Inc., United States Court of Appeals, second Circuit 629 F. 2d 764 (1980); In re The Walt Disney Co., Delaware Court of Chancery, 825 A. 2d 275 (2003).

⁴⁵² see Emanuel S., Emanuel L., Corporations, Aspen Publishers Online, 2009, 25-31.

⁴⁵³**Seminar:** Another duty characteristic of the USA. Law is the duty to act lawfully, which is *the Duty of Obedience*, however, it is, in principle, incorporated into the Duty of Diligence.

⁴⁵⁴ see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, 319; further see: Machavariani S., Management of Corporate Groups in Germany and the United States and the Integration of Management Principles into Georgian Private Law, Tbilisi, 2015, 134.

particular case, and based on various facts existing on the case, which decision by the director is "most beneficial" for the company and shareholders⁴⁵⁵. Moreover, in making a decision, it is important to thoroughly study the existing facts on which the decision will be based, to undergo consultations, to listen to different opinions, to be aware of the current situation in the market, to share the information available to the director with each other, and so on.⁴⁵⁶

In the duty of diligence of managers, some scholars include *Business Due Diligence* and *Legal Due Diligence*. The former involves the observance of the procedures of *due diligence* in making economic and financial decisions, while the latter involves the necessity for legal regulations of the decisions. Both of them make a term of *due diligence* which is used when two enterprises merge and which certifies that the enterprise is thoroughly studied in making the decision⁴⁵⁷. In piercing the corporate veil, the attention is paid to a number of aspects, such as: *improper capitalization, non-observance of the rules of corporate governance, acts of omission by directors, the lack of reporting records etc.* ⁴⁵⁸.

Notwithstanding the extensive case law and important interpretations in the USA and Germany, there are no uniform precedents for the liability of managers against the company when they breach the duty of diligence, hence it is difficult to argue on the issue⁴⁵⁹. The main ground for the lack of uniformity is the principle of *business judgment rule* that is well introduced throughout the world protecting the rights of directors.

⁴⁵⁵see Maisuradze D., Measures Corporate and Legal Safeguards when conducting Reorganization of Companies (Comparative Legal Research, Predominantly on the Example of Delaware and Georgian corporate laws), Tbilisi, 2014, 26.

⁴⁵⁶ see Case Smith v. Van Gorkom , 488 A.2d 872 (Del. P. 1985).

⁴⁵⁷see Kubota D., Due diligence and commercial transaction - Advanced Corporate Business Transactions, 2009, Ontario, 28.

⁴⁵⁸see Emanuel S., Emanuel L., Corporations, Aspen Publishers Online, New York, 2009, 25-31; Further: Opinion of Friends of the Court, Public Defender of Georgia, 04/11/2019, 4. Shorturl.at/bcjmu; Further see: Pepsi-Cola Metro. Bottling Co. V. Checkers, Inc., 754 F.2d 10 (1st Cir. 1985).

⁴⁵⁹see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, p. 199.

● PRINCIPLE OF BUSINESS JUDGMENT RULE

(Business Judgment Rule)

The business judgment rule is an institute that has been created by the case law and incorporated into the corporate law of many countries throughout the world⁴⁶⁰.

The business judgment rule is the presumption that directors were informed in making business decisions, acted in good faith and reasonably believed that their actions were in the best interests of the corporation"⁴⁶¹. The rule is considered to be a strong guarantee for the protection of decisions made by directors. Where a party appeals against the actions of directors regarding a possible breach of duty of diligence, the party at the court shall overcome the presumption of the business judgment rule which protects formal decisions made by directors⁴⁶². The Delaware *Court of Chancery* made the same interpretation on Robinson's case stating that *directors enjoy a presumption of sound business judgment, and in making decisions, they act in good faith and the honest belief that their actions are in the best interests of the corporation*⁴⁶³. The court made a similar interpretation in Davis's case⁴⁶⁴. Defined as the basis for the exemption from liabilities for the breach of fiduciary duties, the principle of *the business judgment rule* is deemed to be the protection tool of directors from fiduciary liability⁴⁶⁵.

The business judgment rule has a direct impact on the standard of liabilities of directors towards the company and, therefore, on the decisions they make. Thus, the correct application of this rule by courts positively correlates with business

⁴⁶⁰See Gurrea-Martinez, Re-Examining the Law and Economics of the Business Judgment Rule: Notes for its Implementation in Non-US jurisdictions, Working Paper Series, 2017, 5.

⁴⁶¹See *Aronson v. Philip* 473 A.2d 805 (Del. 1984): "It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company". See further: Maisuradze D., *The Rule of Entrepreneurial Judgment in Corporate Law (on the Example of the United States and Georgia)*, Collection of Corporate Law, Tbilisi, 2011, p. 109.

⁴⁶²See: Chanturia, L., *Corporate Governance and Responsibilities of Managers in Corporate Law*, 2006, p. 219.

⁴⁶³See: *Robinson v. Pittsburgh Oil Refinery Corp.*, Del. Ch., 126 A. 46 (1924).

⁴⁶⁴See: *Davis v. Louisville Gas Electric Co.*, 16 Del. Ch. 142 A. 654. (1928).

⁴⁶⁵See: *The Delaware Law of Corporations & Business Organizations Statutory Deskbook*, New York, "Aspen Publishers", 2010, 135; O'Kelley RT, Thompson B., *Corporations and other business associations / Cases and Materials*, third edition - Aspen Law & Business, New York, 1999, p. 261.

developments⁴⁶⁶. According to the principle, a director may not be held liable for any harm resulting from a mistake that could have been made by any diligent director. The basis of liability shall be only a wrong decision made in culpable breach⁴⁶⁷. Consequently, the business judgment rule does not allow for the personal liability of directors where the damages to the company are caused though by a wrong and unprofitable decisions, but the decisions were not made with *gross negligence* or wrongful intentions⁴⁶⁸.

The Public Defender of Georgia in an *amicus curiae* brief, refers to the standard approach dominating legal studies that is as follows: "*An entrepreneurial decision is a managerial decision related to the assumption about the future, with regard to which directors enjoy wide discretionary powers. Where in making an entrepreneurial decision, the director could reasonably have assumed that, on the basis of the relevant information and for the benefit of the enterprise, he/she took action stemming from the necessity to take a reasonable risk, the director would not be held liable for the damage caused to the company*"⁴⁶⁹.

This principle of exemption from liabilities applies only to the decision of the directors; it does not apply to the decisions related to the supervision and control⁴⁷⁰. The reason for this could be the fact that so-called *business decisions* depend on certain commercial risks, and the decisions that are protected by the principle shall be made only by managers.

● CRIMINAL LIABILITY OF DIRECTORS

Liabilities arising from corporate governance in the U.S. law, except for the case-law, are regulated by *the Sarbanes-Oxley Act*, while the new regulation of the

⁴⁶⁶see Zurabiani L., *The Essence, Functions and Reception of Business Judgment Rule in Georgian Corporate Law*, 2020, 23.

⁴⁶⁷see Andenas M., Wooldridge F., *European Comparative Company Law*, Cambridge University Press, Cambridge, 2009, 486- 487.

⁴⁶⁸see Andenas, M., & Wooldridge, F. (2009). *European comparative company law*. Cambridge, UK; New York: Cambridge University Press. 486- 487. See further: *Amicus Curiae Brief*, Public Defender of Georgia, 04/11/2019, 7.

⁴⁶⁹See: *Amicus Curiae Brief*, Public Defender of Georgia, 04/11/2019, 7. See further: Jugheli G., 2010. *Capital Protection in Joint Stock Companies*, Tbilisi, 112.

⁴⁷⁰ See: Andenas M., Wooldridge F., *European Comparative Company Law*, Cambridge University Press, Cambridge, 2009, 312-314.

same field further are laid down in *the Dodd-Frank Act*⁴⁷¹. In Germany, the mentioned issues are mainly determined by the Stock Corporation Act⁴⁷². Regardless of whether or not a person has acted negligently in the context of the fiduciary duty of care, the court may not control the contents of the director's decision. The court may not discuss what kind of decision an ordinary, prudent person would have made⁴⁷³. An example of the principle of non-interference is the decision by the U.S. Federal Court of Appeals in the case of *Shlensky v. Wrigley*. On the case, the court held that the court could not interfere in the management's activities unless it was clearly established that the director had been involved in fraud, misappropriation of property, or other similar acts. However, the court noted that the determination of the court did not confirm that the director's decision was right since the issue was beyond the jurisdiction of the court⁴⁷⁴. However, control over the corporate field is also exercised under the criminal justice, and some illegal actions committed in the entrepreneurial field are considered crimes under the legislation of Georgia. Inter alias, noteworthy shall be the article of misappropriation and embezzlement,⁴⁷⁵ which is considered an offense against property and constitutes unlawful misappropriation or misuse of another's property or property right if that property or property right was in the lawful possession of the embezzler or the person who misappropriated the property. The assets of the company, which are considered to be the property of the company and, more broadly, its partners, are considered to be the lawful possession of the company directors and misappropriation or embezzlement of this property may be classified as a crime. If directors believe that they act in the interests of the corporation, they are subject to criminal liability only if the act committed by them is an offense⁴⁷⁶.

⁴⁷¹ see: The Sarbanes-Oxley Act (SOX), Congress of USA, 2002.

⁴⁷² see: Dodd-Frank Act, Congress of USA, 5/01/2010.

⁴⁷³ see: ohnson, The Modest Business Judgment Rule, the Business Lawyer, Vol. 55, 2000, 636.

⁴⁷⁴ see: *Shlensky v. Wrigley*, 237 NE2d 776 (Ill. App. Ct. 1968); Bainbridge, The Business Judgment Rule as Abstention Doctrine, Vanderbilt Law Review, Vo. 57, 2002, 87.

⁴⁷⁵ see: Article 182 of the Criminal Procedures Code of Georgia. Shorturl.at/gbfir.

⁴⁷⁶ see: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 7. Further see *R v Seager and Blatch* [2009] EWCA Crim 1303.

From the research findings of the corporate legal system of the United States, it may be concluded that it provides high-standard protection of the activities by the chief executive officers of business companies. This opinion is also supported by the fact that the US Department of Justice is actively working on and publishing guidelines, according to which, in addition to other circumstances, the prosecutor shall consider whether there is an adequate alternative to criminal prosecution (legal proceedings)⁴⁷⁷. Civil proceedings may be deemed as such an alternative and, consequently, as the imposition of civil liability, which is also known in the court practice of the Supreme Court of Georgia⁴⁷⁸. However, if the director has breached fiduciary duties, overstepped authority, or improperly performed his or her duties, to protect themselves from dishonest actions, the shareholders and creditors of the enterprise, through a mechanism of *piercing the corporate veil*, already have the right to claim damages directly from the director, which is a well-established practice in the national law.

NATIONAL LEGISLATION AND COURT PRACTICE

Some issues of the elements of corporate governance on the liability of managers are defined in Article 9.6 of the Law of Georgia on Entrepreneurs, according to which entrepreneurial leadership and the members of the supervisory board shall conduct company affairs in good faith; in particular, they shall care in the same manner as an ordinary, prudent person holding a similar position and under similar circumstances and act in the belief that their actions are most beneficial to the company. If they do not fulfill this duty, they will be jointly and severally liable to the company for the damage caused⁴⁷⁹.

According to the court practice of the Supreme Court of Georgia, the legal basis for the responsibility of managers is regulated by a special law. The director's culpability in relation to the damage caused to the company shall not be examined by the norms regulating the liability arising from the tort; it shall be examined by

⁴⁷⁷ see: US Attorney's Manual. Principles of Federal Prosecution, §9-27.220.

⁴⁷⁸ see: The ruling №33-306-291-2016 of the Supreme Court of Georgia of 18 March 2016.

⁴⁷⁹ see paragraph 6 of Article 9 of the Law of Georgia on Entrepreneurs. Shorturl.at/egmmv

the special norms determining the responsibility of the management of the company - the Law of Georgia on Entrepreneurs⁴⁸⁰.

The case-law of the Supreme Court of Georgia is in line with international standards; in particular, in relation to one of the cases the court notes that: *"The duty of care requires the director to make decisions that will increase the profits of the company. These decisions may be both high-risk and wrong, but in view of the presumption that corporate decisions are rational if the manager exercises common sense and acts in the belief that his or her decision has been made in the best interests of the company and, in making the decision, he or she was provided with information which he or she deemed sufficient under the given circumstances, the company director is protected from personal liability for the consequences of this decision"*⁴⁸¹. In addition, as for the criminal liability of the director, following the public defender's amicus curiae brief, *"the case-law of the Supreme Court of Georgia is familiar with cases where the director of the enterprise, in the literal sense, took home the assets of an enterprise". In this case, he was charged with civil and legal liability, which is logical because in similar cases, the optimal process to meet the requirements of creditors or shareholders is civil proceedings.*"⁴⁸².

Thus, despite the fact that the case-law of Georgia on issues with respect to legal relations in corporate governance is scarce and, mainly, the existing case law does not fully comply with the internationally established rules, the Georgian legislation, in an unsystematic form, still includes the provisions reflecting some of the principles. Further, the Supreme Court of Georgia has made important interpretations concerning several cases, and there is an established practice, which is in line with international standards, with respect to the same cases.

⁴⁸⁰ see the Law of Georgia on Entrepreneurs. Shorturl.at/egmmv.

⁴⁸¹ see: The ruling №სს-1158-1104-2014 of the Supreme Court of Georgia of 6 March 2015. Also recommended: Judgment of the Supreme Court of Georgia №სს 6-687-658-2016 Ruling of November 6, 2018; Ruling №2 / 27045-18 of the Civil Cases Panel of the Tbilisi City Court of October 15, 2018.

⁴⁸² see The ruling №სს-306-291-2016 of the Supreme Court of Georgia of 18 March 2016.

COURT MONITORING FINDINGS

The HRC court monitor observes all court hearings in connection to the ongoing criminal proceedings against Nika Gvaramia⁴⁸³. So far, the principle of equality of arms and adversarial proceedings have been formally observed in the court proceedings. The parties have the opportunity to freely submit motions and express their opinion on the motions of the opposing party.

The monitoring of the court hearings leads to the conclusion that the specificity of the given case is known - the case concerns the imposition of criminal liability on the director of a private enterprise for concluding an unprofitable agreement and receiving less revenue. Additionally, the court hearings mainly focus on the issues related to the peculiarities of running the TV company and those of the advertising market, as well as the procedure for calculating the revenue in a private company. Furthermore, the sale and purchase agreement of 27 February 2019, between Tegeta Premium Vehicles LLC and Proesco Media LLC, following which, as the prosecution alleges, the Porsche Macan S Model car (worth of EUR 76,700) was transferred into the actual ownership of Nika Gvaramia and his family, while Proesco Media LLC, was declared to be a formal owner, is being discussed at the hearings, and witnesses are also questioned. The next day, Tegeta Premium Vehicles LLC and Proesco Media LLC signed the advertising services agreement worth of EUR 76,700, within the framework of which Rustavi 2 TV Company aired commercials, as it had been agreed, at a reduced/low price. In addition to the above mentioned, according to the Office of the Prosecutor General, on March 28, 2019, another agreement was signed between Tegeta Motors LLC and Proesco Media LLC, within the framework of which Rustavi 2 TV Company aired commercials, as it had been agreed, at a reduced/low price, thus causing significant damage to the TV company⁴⁸⁴. Issues related to other charges (real estate) are also being discussed at the court hearings.

⁴⁸³ The court session reports of the HRC court monitor: (1) *Hearings on the merits*: 1.02.2020; 13: 14-17: 25 p.m.; (2) *hearings on the merits*: 21.02.2020; 12: 04-13: 06 p.m.; (3) *hearings on the merits*: 05.03.2020; 14: 13-17: 20 hours; (4) 09.03.2020; 14: 11-15: 45; (5) 11.03.2020; 15: 14-17: 30 p.m.

⁴⁸⁴ The report of monitoring the court hearings by the HRC court monitor: *Hearings on the merits*: 3/5/2020; 14:13-17:20

The contents of the charges brought against Nika Gvaramia by the Prosecutor's Office of Georgia is based on his unprofitable entrepreneurial decision when holding office as director in the Rustavi 2 Broadcasting Company LLC. Conclusion of an unprofitable agreement for an enterprise and a failure to receive the maximum amount, following the position of the Prosecutor's Office, is an "unlawful appropriation of property and misuse of property rights" under aggravating circumstances (Article 182 of the Criminal Code)⁴⁸⁵.

In this criminal case, the act under consideration (changing the terms of the agreement, and determining the revenue to be accrued) is considered a crime by the prosecution. Following the position of the prosecution, the said act constitutes a crime because the director could have earned more revenue to the company and failed to accrue that revenue⁴⁸⁶. It is also noteworthy that according to the prosecution, the exercise of power by the director was not a precondition for committing another crime, which raises more questions regarding the criminalization of the action in question and possible imposition of criminal liability. Also, as mentioned above, the business judgment rule prohibits the imposition of personal liability on directors, even if the loss to the company is incurred due to a wrong, unprofitable decision but not followed by *gross negligence* or malicious intent⁴⁸⁷. Additionally, according to the international standards, a court cannot interfere in management activities unless it has been clearly established that fraud, misappropriation of property, or other similar act had been committed by the director, which has not been detected in this case. However, the U.S. Federal Court of Appeals noted that the determination did not confirm that the director's decision was right as the issue is beyond its jurisdiction⁴⁸⁸. Furthermore, it should also be considered if the Office of the Prosecutor General of Georgia has given due consideration to the critical circumstances in the criminal case against the defendant and whether these aspects could have proven of

⁴⁸⁵ see Statement by the Office of the Prosecutor General of Georgia at: shorturl.at/clzc4.

⁴⁸⁶ see: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 9.

⁴⁸⁷ see: Andenæs, M., & Wooldridge, F. 2009 European comparative company law. Cambridge, UK; New York: Cambridge University Press () 486 - 487

⁴⁸⁸ see: Shlensky v. Wrigley, 237 NE2d 776 (Ill. App. Ct. 1968); Bainbridge, The Business Judgment Rule as Abstention Doctrine, Vanderbilt Law Review, Vol. 57, 2002, 87.

decisive importance in defining the act in question as a criminal offense and determining possible culpability of the person.

According to the case-law of the European Court of Human Rights, different aspects shall be considered in assessing the concept of crime. The most critical is legally protected interests to which the provision determining a punishment for a particular action refers. Provisions directly targeting the company (at least potentially) indicate to the criminal nature of the action⁴⁸⁹. The main focus of this case is a private company whose business aims at making more profit. Additionally, it should be emphasized that according to the defense, the decisions by the director were discussed with and approved by the shareholders. In the US, for example, the grounds for exemption from liability may prove to be both the *shareholder approval* of the director's actions and the approval of other members of the board⁴⁹⁰.

In the *Amicus Curiae* brief, the Public Defender of Georgia indicates that to be found guilty, the director must be necessarily aware that he is committing a crime, the committed act must be criminal, and it must be motivated by the desire to gain wealth⁴⁹¹. However, even in similar cases, given the peculiarities of corporate legal relations, in accordance with the practice established by U.S. and German courts and international standards, criminal prosecution usually is not launched if there is an optimal alternative to satisfy the creditors, which is a civil dispute⁴⁹². According to the *business judgment rule*, the director is held responsible for a gross mistake that should not have made by a reasonable and ordinary, prudent person. The basis of responsibility is only a culpable decision⁴⁹³. Consequently, if the director of an entrepreneurial company has not committed a criminal act, which may also lead to the corresponding criminal liability, the judicial bodies shall, in similar cases, pay attention to the corporate legal significance of the disputed act. Additionally, as mentioned above, within the principle of Business judgment rule,

⁴⁸⁹ see: ecthr, 1/5/2005, Ziliberg v MDA, p. Number: 61821/00, § 34.

⁴⁹⁰ see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, 29

⁴⁹¹ see: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 10.

⁴⁹² further 10.

⁴⁹³ see: Andenas M., Wooldridge F., European Comparative Company Law, Cambridge University Press, Cambridge, 2009, 486- 487.

the shareholders and creditors of the enterprise, through the mechanism of piercing the corporate veil, already have the right to claim the damages immediately from the director, which constitutes an established practice by the determinations made by the Supreme Court of Georgia.

SELECTIVE JUSTICE

(Case-law of the European Court of Human Rights (ECtHR))

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*hereinafter referred to as "the Convention"*) applies to both "civil rights and obligations" and "criminal charges". The safeguards enshrined in paragraph 1 of Article 6 of the Convention apply to both types of legal proceedings, while paragraph 2 of Article 6, which ensures the presumption of innocence, and the various safeguards in paragraph 3 of Article 6 are applied in criminal proceedings only. This especially refers to criminal cases in which the risk of violations of human rights is the highest. Article 7 is an effective guarantee against arbitrary criminal prosecution, the imposition of charges, and conviction⁴⁹⁴.

Under Article 6 of the Convention, domestic courts are required to substantiate their decisions. Courts are not required to respond to all possible arguments. Paragraph 1 of Article 6 of the Convention may be construed as the obligation to provide detailed responses to any argument by the parties. However, the national court has definite scope of assessment in a particular case, in selecting the arguments and accepting the corresponding evidence from the parties' statements, and the aggrieved party expects to receive a specific and clear response from the court to the submissions that are decisive for the outcome of the legal proceedings⁴⁹⁵.

This criminal case concerns Nika Gvaramia's tenure as director at Rustavi 2 Broadcasting Company LLC (*hereinafter referred to as "Rustavi 2"*), where he was

⁴⁹⁴ see: *Liivik v. Estonia* 12157/05, §§ 92-94, 25 June 2009, *SW v. The United Kingdom*, 22 November 1995, § 35, Series A no. 335-B, and *CR v. The United Kingdom*, 22 November 1995, § 33, Series A no. 335-C.

⁴⁹⁵ see *Hiro Balani v. Spain*, 9 December 1994, §§ 27-28, Series A no. 303-B; *Grădinar v. Moldova*, no.7170 / 02, §§ 107-108, 8 April 2008; And *Gheorghe v. Romania*, no. 19215/04, §43, 15 March 2007.

appointed to the post of director in November of 2012 and director-general in September of 2014 (until 18 July 2019). During this time, Rustavi 2 was known for its critical editorial policy towards the Georgian government. Nika Gvaramia, who is currently the founder and director of *Mtavari Arkhi* and the host of its weekly political show, is known for his strong anti-government stance. Further, noteworthy is the fact that on 18 November 2019, Giorgi Rurua, a shareholder of *Mtavari Arkhi* was arrested for the offense provided for in paragraphs 3 and 4 of Article 236 of the Criminal Code of Georgia, which envisages illegal purchase, storage and carrying of firearms⁴⁹⁶. Rurua was also charged under paragraph 1 of Article 381 of the Criminal Code, which envisages non-compliance with the court ruling or interference with the enforcement of the court ruling. Giorgi Rurua linked the initiation of the criminal prosecution to his own political position. Giorgi Rurua is one of the organizers and participants of the protest rallies of 20-21 June and November of 2019. On 30 July 2020, the judge of the criminal panel of Tbilisi City Court, Valerian Bugianishvili, rendered a judgment of conviction against Giorgi Rurua, sentencing him to four years in prison. The criminal case was considered politically motivated by Georgia's international partners⁴⁹⁷.

The HRC monitored the court hearings in connection to ongoing criminal proceedings against Giorgi Rurua and identified a number of violations, which, adversely affecting the defendant, could have negatively impacted on the final judgment of the court⁴⁹⁸.

There are a number of cases in the case-law of the European Court of Human Rights, including against Georgia, where the Court has defined convictions of different persons as inconsistent with Article 6 of the Convention for various reasons⁴⁹⁹. The case of *Tchankotadze v. Georgia*⁵⁰⁰ is especially important. In this case, the applicant argued that his pre-trial detention was unlawful and the criminal proceedings against him were unjust in violation of paragraph 1 of Article 5 and

⁴⁹⁶ see: Paragraphs 3 and 4 of Article 236 of the Criminal Code of Georgia and paragraph 1 of Article 381. <https://bit.ly/2gkixpj>.

⁴⁹⁷ see: the information if full: <https://bit.ly/37seotfj>; further see <https://bit.ly/3hrbikf>.

⁴⁹⁸ see *Criminal Case of Giorgi Rurua: - Legal Analysis*. The HRC, 2020.

⁴⁹⁹ For example: Rostomashvili v. Georgia, no. 13185/07, 8 November 2018; Kartvelishvili v. Georgia) 17716/08, 7 June 2018 and Bregvadze v. Georgia) 49284/09, 17 January 2019.

⁵⁰⁰ see Case *Tchankotadze v. Georgia*, no. 15256/05, § 103, 21 2016.

paragraph 1 of Article 6 of the Convention. He also argued that the criminal proceedings against him and his pretrial detention, in violation of Article 18 of the Convention, were based on improper, covert motives. The court concluded that *"the national courts did not give due consideration to the decisive circumstances in the criminal case against the applicant. Those aspects could have had decisive implications for the determination of the applicant's guilt"*⁵⁰¹. The ECtHR further noted that: *"The situation, prompted by the absence of sufficient reasons in the decisions of the domestic courts, is that of incomprehension for the Court as to why the applicant's acts - the collection of the fee on the basis of service agreements and the sub-legislative legal act - were described as criminal at all. [...] notably, the scope of the offence of abuse of official authority was inexplicably and thus arbitrarily construed to the detriment of the applicant by the domestic courts."*⁵⁰².

The case *Navalny and Ofitserov v. Russia*⁵⁰³ is also noteworthy. Navalny is a prominent political activist, opposition leader, anti-corruption campaigner and a popular blogger in the Russian Federation. The ECtHR has ruled that there was no evidence that the intermediary company was driven by any unlawful motive. Neither the deal between Kirovles and the intermediary company was challenged, nor had the fictitious transaction made between the parties, money laundering, tax evasion, *kick-back scheme*, or the attempt to attain an illegal or suspicious goal had become subjects of debates. Both sides pursued independent commercial interests. Also, it was not determined that the parties acted in (*bad faith*), or in violation of competition rules. Moreover, the ECtHR criticized Russian courts for failing to investigate the political motives for the criminal prosecution on this case, which was disputable at least. Therefore, the criminal law was arbitrarily interpreted to the detriment of the applicants in a manner that foreseeing this was impossible, which led the proceedings to a clearly unjustified outcome.

⁵⁰¹ Ibid: § 103.

⁵⁰² Ibid: § 108. „The situation, prompted by the absence of sufficient reasons in the decisions of the domestic courts, is that of incomprehension for the Court as to why the applicant's acts - the collection of the fee on the basis of service agreements and the sub-legislative legal act - were described as criminal at all. "+

⁵⁰³ see Case *Navalny and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016.

Georgian case-law is also noteworthy. The case-law of the Supreme Court of Georgia is also familiar with cases where the director of the enterprise literally took home the property of the enterprise, but he was made liable under the civil law ⁵⁰⁴. According to the Public Defender's opinion, a precedent of imposing criminal liability on the director of a private enterprise in the Georgian case-law does not exist, which calls into question the lawfulness of the charges against Nika Gvaramia.

Article 182 of the Criminal Code of Georgia, which is the basis for the charges against Nika Gvaramia, may prove problematic in several terms under the ECHR. As the research into the case-law of the Supreme Court of Georgia, and the decisions made by the courts of different states, as well as the international standards clearly show, it has never been used against a director of a private company for making commercial decisions.

DURATION OF LEGAL PROCEEDINGS

It is noteworthy that, initially, the court hearings in connection to the ongoing criminal case against Nika Gvaramia were frequently held. However, eventually, the court hearing scheduled for 18 March 2020 was postponed with an indefinite period⁵⁰⁵. This fact raises questions about selective justice and alleged political motives over the case.

The right to making decisions within a reasonable time is not the right of individuals only; it also includes the obligations of public authorities to maintain a judicial system that meets the requirements of Article 6 of the Convention.

According to Paragraph 1 of Article 6 of the European Convention, the courts must make decision *within a reasonable time*". This guarantee stands, on the one hand, as a component of effective legal remedy. However, a problem with individual court guarantees may be caused, as procedural rights constantly lead to protracted legal proceedings⁵⁰⁶. Especially with regard to criminal proceedings, uncertainty around the case outcome shall be reduced as much as possible. In

⁵⁰⁴ see Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 9. Further see The ruling №36-306-291-2016 of the Supreme Court of Georgia of 18 May 2016.

⁵⁰⁵ see The court monitoring report by the HRC court monitor: 1.03.2020; 15:14-17:30

⁵⁰⁶ see ecthr, 28/6/1978, Konig v GER, 6232/73, § 100.

criminal proceedings, the corresponding period commences before the hearing on the merits of the case, in particular, from the very first stage of the criminal investigative actions⁵⁰⁷.

The Criminal Procedure Code of Georgia provides for the right of the defendant to prompt justice. However, this right may be waived to prepare the defense appropriately⁵⁰⁸. The ECtHR requires the corresponding period to start before taking formal procedural steps to avoid delays in legal proceedings (e.g., due to unavailability of witnesses or documents)⁵⁰⁹.

However, there is no standard rule for determining a reasonable time. The ECtHR considers failures to meet the reasonable time requirement the cases where the length of proceedings in one instance has exceeded three years, in two instances five years and in all three instances six years⁵¹⁰.

CONCLUSION

In deciding whether there are grounds that make the disputed act criminal, it is unknown if the Office of the Prosecutor General of Georgia has given due consideration to the decisive circumstances in the criminal case against the defendant. These aspects could have proven of critical importance in considering the disputed actions non-criminal and finding the defendant innocent; Further, the criminal relevance of the issue arising in the given corporate legal relationship also comes into question. In this case, the scope of the abuse of power is completely unclear - it is defined by the prosecuting authority to the defendant's detriment, and arbitrarily.

It has so far been unknown whether the prosecution has discussed the use of legal alternatives to criminal prosecution; it disregarded the fact that the director's decisions were discussed with and approved by the partners and shareholders

⁵⁰⁷ see ecthr, 2/10/2003, Henning v AUT, 41444/98, § 32.

⁵⁰⁸ see paragraph 2 of Article 8 of the Criminal Procedure Code of Georgia (*Fair Trial and Prompt Justice*). <https://bit.ly/2GHUH7G>.

⁵⁰⁹ see Leigh, *The Right to a Fair Trial and the European Convention on Human Rights*, Weissbrodt / Wolfrum, (ed.), *The Right to a Fair Trial*, 1997, p. 653.

⁵¹⁰ see: Davidas Vitkauskas and Grigory Dikov, Council of Europe, "Protection of the Right to a Fair Trial under the European Convention on Human Rights", February 2012, p. 74.

and, in the director's opinion, for which he had reasonable grounds, after analyzing short and long-term risks, he served the best interests of the corporation, which was also agreed with the above persons concerned.

Due to the specificity of the case, the Office of the Prosecutor General of Georgia should have strictly adhered to the principles of legal certainty and protection against arbitrariness, which are considered to be a common threat to the Convention and the rule of law. The arbitrary application of criminal law is an instance that will be subject to a thorough investigation by the ECtHR, especially with regard to cases of politically active persons with opposing views, and will result in the breach of Articles 6 (*the Right to a fair trial*) and 7 (*No punishment without law*) of the European Convention⁵¹¹.

Given all the above mentioned, it can be said that the contents of the charges, the prosecution in time and space, the actions taken by different authorities (*including arbitrary interpretation of a criminal norm*) and other factual circumstances unequivocally point to the possible use of selective justice against a person with different political views and an activist.

⁵¹¹ see Universal Declaration of Human Rights, Article 6- 7. <https://bit.ly/3ionfjs>.

CHAPTER

6

PROBLEMS RELATED TO REMOTE LEGAL PROCEEDINGS ON THE BACKGROUND OF CORONAVIRUS PANDEMIC AND THE STATE OF EMERGENCY

INTRODUCTION

The new coronavirus pandemic (COVID-19)⁵¹² exposed the world community to a number of legal, economic or social challenges. In the current situation, the priority goal for the State under the rule of law is to protect human life and health. Therefore, the measures taken are mainly aimed at preventing the spread of the pandemic and minimizing the expected threats, and such measures are associated with certain restrictions.

In order to properly respond to the pandemic, on March 21, 2020, a State of Emergency was declared throughout Georgia. By the Decree of the President of Georgia⁵¹³ the measures to be taken were laid down, including the list of the fundamental rights and freedoms guaranteed by the Constitution of Georgia that would be subject to restrictions during the State of Emergency. Furthermore, the Decree provided for the possibility of holding the court sessions remotely including the hearings under the criminal procedural law.

Despite the fact that the remote litigations were not a novelty to the Georgian criminal procedure law, the expansion of the scope of such proceedings has posed a significant problem for the right to a fair trial and the principle of publicity of court hearings. Moreover, a number of technical or other problems have arisen.

Following the legislative changes, trials are held both remotely and immediately in the courtrooms within the administrative premises of the courts posing a challenge for the Human Rights Center (HRC) monitors when attending the hearings of the criminal and administrative cases with alleged political motives. The court restricted access to monitors, like to other stakeholders wishing to attend the criminal proceedings. Conducting the trials without stakeholders attending them, especially without the qualified monitors shall be a significant problem, particularly when monitoring the hearings of the cases with alleged political motives. In hearing such cases, there is a higher probability the justice is rendered covertly on the background of the restrictions on the

⁵¹² On March 11, 2020, the World Health Organization (WHO) declared the spread of the new coronavirus as a pandemic. See.: World Health Organization Declares COVID-19 a Pandemic: <https://bit.ly/374ida8>.

⁵¹³ See Decree N1 of the President of Georgia from March 21, 2020. <https://bit.ly/3maomrr>.

transparency and publicity of the hearings, without public control ultimately reducing the public confidence in the courts and in the judgments of the courts.

METHODOLOGY

HRC has been monitoring the proceedings of criminal and administrative offenses with alleged political motives since February 1, 2020, preparing the reports based on the information obtained immediately from attending and observing the hearings.

The monitoring of the court proceedings is carried out by three court monitors who received special training on court monitoring. On the initial stage, a questionnaire was designed for the court monitors. After each court session, the court monitors lay down the information which is summed up and used for the analysis and reports by the legal analyst.

Up to date, the monitoring includes trials in 24 cases of criminal and administrative offenses. The HRC monitors use the questionnaires designed specifically for these purposes when observing the hearings both conducted remotely or immediately in the courtrooms.

The purpose of the current paper is to analyze the information obtained by the court monitors in terms of assessing the impact of the COVID19 pandemic on the functioning of the judiciary against the international standards, the Constitution of Georgia and applicable domestic laws.

LEGISLATION REVIEW

The special need to ensure the protection of public health against the COVID-19 viral infections has led to massive restrictions on human rights by the State through instant decision-making following the legislative changes.

Neither the Constitution of Georgia⁵¹⁴ nor the Organic Law of Georgia on Normative Acts⁵¹⁵, nor the Laws of Georgia on the State of Emergency⁵¹⁶ and on

⁵¹⁴see: The Constitution of Georgia <https://bit.ly/36bg63h>.

⁵¹⁵see: Organic Law of Georgia on Normative Acts: <https://bit.ly/33kzfec>.

⁵¹⁶see: On the State of Emergency: <https://bit.ly/39slfy6>.

the State of War⁵¹⁷ provides for the exhaustive list of the issues that may be regulated by a decree of the President of Georgia. The only exception is provided when it comes to the content of the decree and the definition of the powers of the President, namely these are the restrictions of the rights defined in Chapter 2 of the Constitution of Georgia, in particular, Article 71.4 of the Constitution of Georgia enlists specific articles that the President has the power to limit.

Paragraph 3 of Article 71 of the Constitution of Georgia allows the President of Georgia to issue the decrees having the force of law in times of a state of emergency or state of war upon the submission of the Prime Minister⁵¹⁸. In times of a state of emergency, a presidential decree may govern any field of public life like laws do including by introducing some norms other than those provided for by the legislation in force.

According to the Decree of the President of Georgia from March 21, 2020, due to the threats stemming from the coronavirus pandemic, the emergency situation was declared and number of civil rights were restricted⁵¹⁹. The decree restricted the human rights laid down in the following articles of the Constitution of Georgia: Article 13 (human liberties), Article 14 (freedom of movement), Article 15 (rights to personal and family privacy, personal space and privacy of communication), Article 18 (rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for the damage inflicted by public authorities), Article 19 (right to property), Article 21 (freedom of assembly) and Article 26 (freedom of labor, freedom of trade unions, right to strike and freedom of enterprise).

Moreover, the Decree of the President of Georgia stipulated that court hearings provided for by the criminal procedure laws to be held remotely using electronic means of communication, for the implementation of which relevant amendments were made to the Criminal Procedure Code of Georgia⁵²⁰. Further, the High

⁵¹⁷see: On Law of Georgia on the State of War: <https://bit.ly/3oeaahr>.

⁵¹⁸See Paragraph 4 of Article 13 of the Constitution of Georgia: <https://bit.ly/36bg63h>.

⁵¹⁹see: Decree N1 of the President of Georgia from March 21, 2020, article 7. <https://bit.ly/39mz0ba>.

⁵²⁰See The Code of Criminal Procedures: <https://bit.ly/3l9qnfg>.

Council of Justice adopted the package of recommendations⁵²¹ aiming at the safe implementation of justice in times of pandemic.

After the expiration of the temporary rules under the Presidential Decree (i.e. from April 21, 2020), there was no legislative basis in the criminal procedural law for holding the proceedings remotely in whole. Precisely with this purpose, on May 22, 2020, the legislative amendments were made and the general courts of Georgia were granted the right until July 15, 2020 to hold the proceedings remotely via electronic means of communication⁵²². After the above-mentioned, the court proceedings are held both remotely and immediately in the courtrooms within the administrative premises of the courts. In the given case, the problem stems from the fact that after the state of emergency was declared on March 21, 2020, the Parliament of Georgia, in fact, has not exercised parliamentary control and has not discussed the proportionality of human rights restrictions at all⁵²³. According to the amendments introduced to the Criminal Procedure Code, holding of remote court hearings is limited in time and under article 332⁵ of the Code, the temporary rule for holding the remote court hearings is valid until January 1, 2021. It is noteworthy that the Rules of Procedure of the Parliament oblige parliamentary committees to hold a sitting at least twice a month during the ordinary sessions⁵²⁴. The Rules of Procedure do not provide for any different arrangements during the extraordinary session.

On June 10, 2020, the European Commission for the Efficiency of Justice (CEPEJ) elaborated a declaration titled "Lessons Learned and Challenges Faced by the Judiciary during and after Covid Pandemic."⁵²⁵ According to the assessment of the Commission, the existence of the pandemic crisis cannot justify the interruption in the court systems or violating the right to a fair trial. Moreover,

⁵²¹See Recommendation N1 of the High Council of Justice from March 13, 2020: <https://bit.ly/2e0tli9>.

⁵²²See Law of Georgia N5973 from May 22, 2020: <https://bit.ly/33kk9ua>.

⁵²³see: "Implementing restrictive measures without declaring a state of emergency is unconstitutional": <https://bit.ly/39mruge>.

⁵²⁴see: Paragraph 1 of Article 34 of the Rules of Procedure of the Parliament of Georgia. <https://bit.ly/36ab7uk>.

⁵²⁵see: The European Commission for the Efficiency of Justice (CEPEJ), Declaration of Lessons Learned and Challenges Faced by the Judiciary During and After Covid Pandemic: <https://bit.ly/39kendv>.

after the crisis ends, the court systems must get ready for new waves of the pandemic.

On September 15, 2020, the High Council of Justice of Georgia reaffirmed the recommendations to the general courts to prevent the spread of COVID-19 providing for the possibility the parties to the proceedings participate remotely, using technical means in accordance with the procedural law. This recommendation is valid until it is repealed⁵²⁶.

RIGHT TO FAIR TRIAL

(Publicity of court hearings)

In a democratic state, the importance of public oversight of the administration of justice, especially in court hearings and acts, is immeasurably great⁵²⁷. The latter provides the opportunity for each member of society to exercise public control over the judiciary. People must be provided with a possibility to put under public discussion and assess every judgment of the courts, the interpretations and findings made in the judgment. Public control over the branch of government that operates independently of other branches is particularly important. By informing the public, it is possible to avoid biased decisions behind closed doors and to hold the court accountable to the public as a judicial branch of government, taking into account the relevant constitutional framework⁵²⁸.

The Constitution of Georgia does not provide for the restriction of the right to a fair trial by a presidential decree during a state of emergency. Accordingly, it is formally unjustified to impose the above measure by the decree. That is why, unlike other constitutional rights, the right to a fair trial was not restricted by the Decree of the President of Georgia. However, as mentioned above, Article 7 of the

⁵²⁶see: The Recommendations by the High Council of Justice from September 15, 2020:

<https://bit.ly/3mgsfjh>.

⁵²⁷see: General Comment N32, article 14: Article 14: Right to equality before courts and tribunals and to a fair trial, Human Rights Committee, UN. Doc. CCPR/C/GC/32, July 9 - 27, 2007, para. 28.

<https://bit.ly/3o2qyvj>.

⁵²⁸see: Decision of the First Panel of the Constitutional Court of Georgia №1 / 4 / 693,857, June 7, 2019.

<https://bit.ly/39nzadi>.

Decree stipulates that court hearings under the criminal procedure law of Georgia could be held remotely using electronic means of communication⁵²⁹. The High Council of Justice, with its recommendations of September 15, 2020, appeals to the general courts to ensure that the cases are heard without an oral hearing where this is allowed by the procedural law, and that participants in the proceedings participate in the trial remotely. With these legislative changes and recommendations, the publicity of the hearings was significantly hampered and the right to a fair trial of the parties was put at risk. Further problems stemmed from the fact that the attendance to the court sessions was possible only after the court monitor applied with a written formal request to the judge hearing the case and asked him/her permission to attend the session⁵³⁰.

Some judges unjustifiably refused to allow the court monitors of HRC to attend the court proceedings immediately in the courtroom or remotely hearing the criminal cases with alleged political motives or the cases of administrative offenses against the persons arrested at protest demonstrations.

For instance, on March 23, 2020, it was the first time that the HRC monitor was not allowed to attend court hearings while the parties and media representatives were allowed to the courtroom⁵³¹. Moreover, on the court session of April 2, 2020, judge of Tbilisi City Court, Lasha Chkhikvadze did not allow the HRC court monitor to the hearing of the criminal case initiated against Irakli Okruashvili, the leader of *Victorious Georgia*. About the fact, HRC⁵³² and later *the Coalition for Independent and Transparent Justice* disseminated statements regarding the closure of court sessions under the state of emergency and regarding other types of deficiencies and called the High Council of Justice and the Chairperson of the Supreme Court to react promptly to the deficiencies identified in the court

⁵²⁹see: Decree N1 of the President of Georgia from March 21, 2020, article 7. <https://bit.ly/39mz0ba>.

⁵³⁰ Monitoring Reports on criminal cases of Irakli Okruashvili and Zurab Adeishvili prepared by HRC; *Hearings on the merits*: 19.05.2020; Further, Monitoring Report on Lasha Chkhartishvili case of administrative offense; *Hearings on the merits*: 10.06.2020 and also the Monitoring Report on the criminal case of Giorgi Rurua; *Hearings on the merits*: 25-Jun-20.

⁵³¹see: Monitoring reports prepared by the HRC monitor on the criminal case ongoing against Besik Tamliani; *Hearings on the merits*: 31-Mar-20.

⁵³²see: the Statement: HRC objects the closure of court proceedings on the cases with alleged political motives. <https://bit.ly/36bzdjs>.

hearings in order not to violate one of the main elements of the principle of a fair trial - the principle of publicity and not to allow that the publicity of the proceedings be restricted in full⁵³³.

On April 16, 2020, HRC appealed in writing the High Council of Justice on the same issue.

From the response of the High Council of Justice, it is evident that the court practice and the attitude of the Council do not comply with each other. In particular, the Council explained to HRC that the court system lacked the possibility to involve court monitors in the remote proceedings. Meanwhile, in some of the cases, the monitors following the consent of the court attended the proceedings remotely. This indicates to the fact that the High Council of Justice had not acquired in full the information about the problem and the needs⁵³⁴.

Bringing the prevention of the spread of coronavirus infection as a reason and following the recommendations of the High Council of Justice of September 15, 2020, on September 16 the judge of Tbilisi City Court did not allow the HRC monitor to monitor the court proceedings against Irakli Okruashvili on the so called case of Amiran (Buta) Robakidze, despite a prior written request by the monitor to attend the hearings. However, on October 2 and 13, 2020, the HRC monitor on the same criminal case was given the opportunity to monitor the trial following a phone conversation with a personal assistant to the judge. It is also noteworthy that the assistant to the judge told the HRC monitor at the trial of October 13 that they would let the monitor attend the hearing just once at this stage, and that they may not be able to let the monitor to next hearings without giving the reasons for such denial.

On November 5, 6, 9 and 10, 2020, the HRC court monitor observed the trial of 7 people detained during the protest rally organized by the representatives of political parties and members of the public dissatisfied with the results of the Parliamentary Elections. In order to attend the hearings, the monitor approached the assistant to the judge hearing the case, who initially stated that due to COVID-

⁵³³see: the Statement regarding closure of the proceedings in general courts under the state of emergency and regarding other kinds of deficiencies: <https://bit.ly/2KDEH8m>.

⁵³⁴ Response N323/1072-03 of the High Council of Justice from April 22, 2020 to the Statement of HRC from April 16, 2020.

19 prevention, the judge did not agree to have the monitor present at the hearing, but when approaching the assistance repeatedly, the judge agreed to let the monitor attend the hearings and also other court hearings were monitored without obstacles.

It is obvious, the reference to the prevention of COVID-19 cannot be used as an argument, since the HRC monitors have attended a number of hearings at Tbilisi City Court during the pandemic. However, it should be noted that there is a heterogeneous practice on the part of individual judges. Moreover, in some instances judges unreasonably refuse monitors to attend the hearings, making it impossible to determine in advance whether the court monitors will be able to monitor the trials. Consequently, in order to solve this problem, multiple and long-term communication with various competent persons of the court administration is needed which causes additional problems with deadlines. This is a violation of the right to a fair trial and most importantly, this is a breach of the principle of publicity of hearings.

The State has a direct obligation to ensure that any interested person attends court hearings in the courtroom (where such opportunity reasonably exists) and, at the same time, to ensure the inclusion of the person in the hearings conducted remotely. In contrast to this, the attendance of HRC monitors at the court hearings still poses significant problems.

The publicity of the court proceedings protects the parties to the trial from the covert administration ensuring public control over the proceedings. Further, this is one of the most significant means for promoting trust in the courts. Ensuring the publicity of justice promotes the realization of the right to a fair trial, which is one of the founding principles of any democratic society⁵³⁵.

In addition, the publicity of court hearings does not serve only the interests of public awareness and public scrutiny. Holding court hearings in public, maximum transparency of the court's activities, including public access to the acts of the courts is the most important legal component of a fair trial guaranteed by the Constitution of Georgia. The first paragraph of Article 31 of the Constitution of

⁵³⁵see: the cases: 1) Sutter v. Switzerland, § 26; <https://bit.ly/3o5rjka>; 2) Riepan v. Austria, § 27; <https://bit.ly/2jpnrcr>; 3) Krestovskiy v. Russia, § 24; <https://bit.ly/36dzsqb>.

Georgia strengthens the right to a fair hearing⁵³⁶. The latter, in addition to controlling the judiciary, ensures public confidence in the judiciary. According to the Constitutional Court of Georgia, "the guarantees provided by the legislation on the right to a fair trial [...] must lead to the perception of judicial fairness by the public. Transparent, thorough, adequate, and sufficient procedures ensure the legitimacy of court decisions, their public recognition, which is very important for increasing and strengthening public confidence in the courts and, ultimately, in the government as a whole"⁵³⁷.

PROBLEM OF CONFIDENTIAL COMMUNICATION WITH DEFENCE COUNSELS

The right to have a lawyer is the foundation of the administration of due justice, as the defence counsel is responsible for diligently protecting the right of the accused to a fair trial. Furthermore, the aim of the right to a lawyer is to counteract the natural disparity of the resources between the prosecuting State and the individual accused, to enable the accused to choose a competent and independent legal representation of his or her own choosing, and to guarantee complete and confidential communication with the representative⁵³⁸. In the context of criminal proceedings, the right to a lawyer includes the right to be represented by a defence counsel chosen by the person concerned and the guarantee to receive information about the right to a lawyer, as well as the right to assign some rights to and to receive information from a lawyer confidentially and to enjoy the right to free legal aid⁵³⁹.

The right to confidential and privileged communication with a defence counsel, as such, is not enshrined verbatim in the International Covenant on Civil and Political Rights or in the European Convention on Human Rights. However, the UN Human Rights Council recognizes that the special nature of the lawyer-

⁵³⁶ see.: Article 31 of the Constitution of Georgia: <https://bit.ly/36bg63h>.

⁵³⁷ See Judgment N3/2/574 of the Constitutional Court of Georgia from May 23, 2014 on the case *Giorgi Ugulava v Parliament of Georgia*, II-59. <https://bit.ly/37fy57l>.

⁵³⁸ see: ICCPR, Article 14 (3) (d) and ECHR, Article 6 (3) (c). <https://bit.ly/2vazqhr>.

⁵³⁹ see: Legal Digest of International Fair Trial Rights, 7, pp. 138. <https://bit.ly/2hpxgp2>.

client relationship envisages the following: "the Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications."⁵⁴⁰

In addition, the European Court of Human Rights has repeatedly affirmed that the right to confidential and privileged communication with a lawyer is an important component of the right to a fair trial⁵⁴¹. Where the right to a fair trial is to be "practical and effective", then the conditions for confidential and privileged communication with a lawyer must really be ensured, without which the assistance of a defence lawyer would be meaningless⁵⁴².

Although all monitored proceedings must be evaluated in the specific context of each case, it is possible to talk about general trends, such as the lack of effectiveness in terms of presentation of the evidence on the case, arguments, cross-examination of witnesses, advice to clients and protection of client interests indicating to possible violations of the right to a fair trial.

During the monitoring, some interruptions were noticeable in confidential and privileged communication between the defence counsel and the client. In the remote proceedings, the fact that the accused and the defence counsels were separated from each other hampering the confidential and privileged communication among them. There was a case when in the remote session the defence counsel⁵⁴³ requested to suspend the session because he was not provided with confidential communication with the client⁵⁴⁴. Mostly, the advice on particular issues given by the defence counsel to the accused was heard by every participant of the hearing. Therefore, the accused lacked the possibilities to adjust

⁵⁴⁰see: General Comment N.32, citing from the paper Comment. 113, 34. <https://bit.ly/2j7avj3>.

⁵⁴¹see: The practice of ecthr in this regard: 1) S v. Switzerland , ecthr, November 28, 1991, Para. 48, <https://bit.ly/2knim3g>; 2) Campbell v. The United Kingdom , ecthr, March 25, 1992, Para. 46. <https://bit.ly/2kecjcc>.

⁵⁴²see: 1) Ocalan v. Turkey , ecthr, May 12, 2005, Para. 133, <https://bit.ly/39lsdmx>; 2) Khodorkovsky and Lebedev v. Russia , ecthr, October 25, 2013, Para. 627, <https://bit.ly/33rgfoi>; 3) Sakhnovsky v. Russia , ecthr, November 2, 2010, Para. 97, <https://bit.ly/3mfbui7>.

⁵⁴³E.g.during the court hearings of the criminal case against Irakli Okruashvili, Monitoring Report: 19.05.2020.

⁵⁴⁴The Report prepared by the HRC court monitor Center on the monitoring of the case of Giorgi Rurua. Last seen: 04.05.2020.

the positions during the hearing with the defence counsels that could be considered as a violation of the right to a fair trial.

PROBLEMS LINKED TO QUESTIONING THE WITNESSES

Following the international standards, the Constitution of Georgia provides for the right of the accused to call witnesses: “The accused in criminal offense has a right to call and examine his witnesses under the same conditions as the witnesses of the prosecution.”⁵⁴⁵ To summon witnesses is foremost the function of the parties to the proceedings as they have to ensure the witnesses appear to the court. Following the motion by the party, the judge may issue a summon in order the witnesses to appear to the court provided the witness fails to appear at his will⁵⁴⁶.

The right to summon the witness is a fundamental guarantee of a fair trial as it balances the powers of the prosecutor⁵⁴⁷ “through an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence⁵⁴⁸. This guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”⁵⁴⁹

The exercise of the rights of the defence - an essential part of the right to a fair trial - required in principle that the applicants should have an opportunity to challenge any aspect of the complainants’ account during a confrontation or an examination.⁵⁵⁰

During the monitoring of the remote court sessions, the problem was to establish that the witness was alone and was being testified freely without any influence. The Public Defender also emphasized the problem⁵⁵¹. When questioning the witnesses remotely as a rule no items could be seen before them (laying on the

⁵⁴⁵see: Constitution of Georgia, Article 31 (4), <https://bit.ly/2vcshrh> ; See: also Article 14(2) of the Criminal Procedure Code. <https://bit.ly/3lanz8f>.

⁵⁴⁶see: Article 149 (1) - (3) of the Criminal Procedure Code of Georgia. <https://bit.ly/3lanz8f>.

⁵⁴⁷see: Legal Digest of International Fair Trial Rights, Comment 7, pp. 150. <https://bit.ly/2jiobwh>.

⁵⁴⁸see: General Comment N.32, citing from the paper p 113 Comment. 39. <https://bit.ly/37idcit>.

⁵⁴⁹ Ibid.

⁵⁵⁰see: case of Bricmont v Belgium (ecthr, 7 July 1989, para. 81. <https://bit.ly/3lc1emx>.

⁵⁵¹see: Special Report of the Public Defender: *Report of Monitoring of the Court Sessions of the Criminal Cases held Remotely*. 2020. <https://bit.ly/2v86wyd>.

table for instance). Problematic is also establishing the identity of the witness. Usually, the identity of the witness joined remotely is confirmed by the party in the courtroom. Moreover, a witness who is not questioned yet may listen to another witness⁵⁵². Furthermore, there is no possibility to state or exclude that other persons are present with a witness and dictate to the witness the information.

The Criminal Procedure Code allows the parties to the proceedings where there is a substantial discrepancy between the information provided by a person during the interview and his/her testimony to file a motion with the judge requesting the recognition of the testimony as inadmissible evidence.⁵⁵³ Stemming from the general rule that a witness shall testify at the court in person,⁵⁵⁴ the Code allows the parties as an exception to file a motion to use the testimony of the witness obtained through the audio or video recording provided “there is a discrepancy between the testimonies and there is a reasonable assumption the witness was forced, threatened, intimidated or bribed.”⁵⁵⁵

Apart from the above mentioned, the principal of oral hearings requiring that the court is in immediate contact with the persons providing testimonies also lays down that: “The accused must confront the witness in the presence of the court rendering the final decision in order to have a possibility carefully observe the credibility and the manner of behavior of the witness.”⁵⁵⁶

MAIN PROBLEMS RELATED TO REMOTE LEGAL PROCEEDINGS

Following the legislative amendments adopted on May 22, 2020, a temporary rule was added to the Criminal Procedure Code of Georgia, according to which, in case of a threat of a pandemic and/or an epidemic particularly dangerous to public health, a court hearing can be held remotely through means of electronic

⁵⁵²This problem is also emphasized by the organisation *Rights Georgia* in the Report *Efficiency and Accessibility of the Electronic Justice*: <https://bit.ly/2Vbc98w>.

⁵⁵³see: Article 75(2) of the Criminal Procedure Code of Georgi. <https://bit.ly/3lanz8f>

⁵⁵⁴see: Article 49 (2) (a)(b) of the Criminal Procedure Code of Georgia. <https://bit.ly/3lanz8f>.
<https://bit.ly/3lanz8f>.

⁵⁵⁵see: Article 243(1)(2) of the Criminal Procedure Code of Georgia. <https://bit.ly/3lanz8f>.

⁵⁵⁶see: Case P.K. v. Finland ecthr (Decision on admissibility) 9 July 2002.

communication. The remote nature of court hearings has given rise to a number of recurring problems of a technical nature. The court and the penitentiary system were not ready for such a challenge.

Because of the technical problems the proceedings sometimes started in delay by hours⁵⁵⁷, that substantially hindered the conduct of the court proceedings and in some cases served for suspensions of the proceedings. Suspension of or delay in the court hearings is caused by visual and audio problems that arise during the hearing, which may appear throughout the entire hearings⁵⁵⁸.

The problem of remote communication between the parties through Webex software appeared to be a significant problem during the monitoring of some trials. Where more than two or more persons were speaking simultaneously the voice could not be heard and the participants of the process, including the judges had to repeat the questions which kept delaying the hearing and made it impossible to continue the sessions. Several times, the cases were reported when the voice of the participants was doubled and/or were unclear. After the launch of the court session, some other technical defects appeared. This problem remains unresolved to this day.

The Report of the Public Defender refers to the similar problems. According to the report, the remote court sessions have become a challenge in terms of the right to a fair trial. On the court hearings, for the absolute majority of the accused, there was no possibility for confidential communication with the defence counsel. When questioning the witnesses, the court could not verify the truthfulness of the victim. Because of technical defects the problems remain with visual clarity of the witness and understanding what they were saying. On some of the sessions, the problems related to the translation were identified⁵⁵⁹.

⁵⁵⁷ For example, the Monitoring Report on the hearings of the criminal case against Giorgi Esiashvili: 16.11.2020.

⁵⁵⁸ see: also the Special Report of Georgian Young Lawyers Association: *Justice in Times of Pandemics*. 2020. <https://bit.ly/2dlrsq0>.

⁵⁵⁹ see: Special Report of the Public Defender: *Report of Monitoring of the Court Sessions of the Criminal Cases held Remotely*. 2020. <https://bit.ly/3lfd4ur>.

The practice of the judges asking the parties if they could hear the other participants of the proceedings, etc should be assessed positively.

CONCLUSION

The mechanism of the State of Emergency is a rather sophisticated institution impacting a number of factors important to the State. Therefore, it is of utmost importance the legislature to fully analyze its own responsibilities in this process. Parliamentary oversight is not a burden. It is a prerequisite for legitimizing the proceedings and for effective governance. Accordingly, the legislation, in turn, should enable the proceedings to be held in a healthy manner.

Moreover, based on the relevant legislative changes, the transition to electronic litigation should be positively assessed, as it has a logical connection with a legitimate goal - the protection of public health. However, on the other hand, ongoing trials using electronic means of communication became a significant challenge for the judiciary as both before and during the State of Emergency the hearings are held remotely or in the courtrooms but unreasonably denying the public to attend the hearings hampering the publicity of the hearings, breaching the confidential and privileged communication with counsels, arising the problems of questioning the witnesses and in sum jeopardizing the exercise of the right to a fair trial by the parties.

Furthermore, concerns remain with regard to the practice of individual judges in violating the rights of the public to attend public hearings because the public cannot often attend public hearings in courtrooms due to insufficient space and due to the prevention of the coronavirus infection and neither remotely due to the technical problems. Moreover, inaccurate or non-existent information about the trial schedule poses a problem.

Furthermore, as the response of the High Council of Justice to the appeal of HRC revealed, the practice of the courts and the approach of the Council did not match. This indicates to the fact that the High Council of Justice had not acquired in full the information about the problem and the needs.

Finally, despite the fact that the deficiencies identified during the court hearings do not expressly violate the right to a fair trial *per se*, the combination of

some individual cases, particular legislative defects and generally problematic court practice, significantly threatens the protection of the right to a fair trial in accordance with international standards and human right laws.

RECOMMENDATIONS

- ✓ *Courts must ensure the smooth access of monitors and stakeholders to remote proceedings;*
- ✓ *During the State of Emergency and the pandemic, the publicity of trials must be ensured, so as not to violate the constitutional right of a person to enjoy the right to a fair trial;*
- ✓ *The High Council of Justice should issue recommendations to regulate the participation of monitors and stakeholders in court proceedings, while simultaneously protecting the interests of those involved in the proceedings;*
- ✓ *The confidentiality of lawyer-client communication during the remote court proceedings must be ensured;*
- ✓ *The courts must be provided with technical means and effective software for electronic proceedings;*
- ✓ *For the effective exercise of the right to confidential and privileged communication with defence counsels, and for the possibility of a party to make a statement, all efforts must be made to balance the inequality between pre-trial detainees and those released on bail. Therefore, the judges need to show a proactive approach for ensuring the appropriate conditions for consultations between defence counsels and defendants;*
- ✓ *The defence counsels must immediately notify the court of the existence of circumstances impeding the exercise of the right to confidential and privileged communication;*
- ✓ *The courts and the parties must do their best to hold the hearing on the merits in the courtrooms.*