

The background of the page is a solid light blue color. It features several faint, stylized icons of a coronavirus, each with a circular head and radiating spike-like protrusions. These icons are scattered across the page, with some appearing larger and more prominent than others. The text is centered and reads:

**PROBLEMS** RELATED TO  
**REMOTE** LEGAL PROCEEDINGS  
ON THE BACKGROUND OF  
CORONAVIRUS **PANDEMIC** AND  
THE STATE OF EMERGENCY

---

**2020**



## HUMAN RIGHTS CENTER

**AUTHOR:** Giorgi Tkebuchava

**EDITED BY:** Aleko Tskitishvili  
Giorgi Kakubava

**TRANSLATED BY:** Nikoloz Jashi

**MONITORS:** Ani Porchkhidze, Tamar Kurtauli,  
Nino Chikhladze

Non-governmental organization the **HUMAN RIGHTS CENTER**, formerly the Human Rights Information and Documentation Center (HRC) was founded on December 10, 1996 in Tbilisi, Georgia. The HRIDC aims to increase respect for human rights, fundamental freedoms and facilitate the peace-building process in Georgia. To achieve this goal, it is essential to ensure that authorities respect the rule of law and principles of transparency and separation of powers, to eliminate discrimination at all levels, and increase awareness and respect for human rights among the people in Georgia.

### THE HUMAN RIGHTS CENTER IS A MEMBER OF THE FOLLOWING INTERNATIONAL NETWORKS:

- International Federation of Human Rights (FIDH); [www.fidh.org](http://www.fidh.org)
- World Organization against Torture (SOS-Torture – OMCT Network); [www.omct.org](http://www.omct.org)
- Human Rights House Network; [www.humanrightshouse.org](http://www.humanrightshouse.org)
- Coalition for International Criminal Court; [www.coalitionfortheicc.org](http://www.coalitionfortheicc.org)

#### Address:

Akaki Gakhokidze Str. 11a, 3rd Floor, 0160 Tbilisi

Tel: (+995 32) 237 69 50, (+995 32) 238 46 48

Fax: (+995 32) 238 46 48 Email: [hridc@hridc.org](mailto:hridc@hridc.org)

Website: <http://www.humanrights.ge>; <http://www.hridc.org>



**National Endowment  
for Democracy**

*Supporting freedom around the world*

*The Analytic document was prepared with the financial support of the National Endowment for Democracy (NED). The document does not necessarily reflect the views of the donor. Human Rights Center bears sole responsibility for the content of the analytic document.*

## CONTENTS

INTRODUCTION	5
METHODOLOGY	6
Legislation Review	6
Right To Fair Trial	9
Problem Of Confidential Communication With Defence Counsels	13
Problems Linked To Questioning The Witnesses	15
Main Problems Related To Remote Legal Proceedings	17
CONCLUSION	19
RECOMMENDATIONS	20

## INTRODUCTION

The new coronavirus pandemic (COVID-19)<sup>1</sup> 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 Georgia<sup>2</sup> 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

---

<sup>1</sup> 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/374ldA8>.

<sup>2</sup>See Decree N1 of the President of Georgia from March 21, 2020. <https://bit.ly/3maOmRR>.

justice is rendered covertly on the background of the restrictions on the 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 Georgia<sup>3</sup> nor the Organic Law of Georgia on Normative Acts<sup>4</sup>, nor the Laws of Georgia on the State of Emergency<sup>5</sup> and on the State of War<sup>6</sup> 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 Minister<sup>7</sup>. 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 restricted<sup>8</sup>. 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).

---

<sup>3</sup>see: The Constitution of Georgia <https://bit.ly/36bg63h>.

<sup>4</sup>see: Organic Law of Georgia on Normative Acts: <https://bit.ly/33kzFEc>.

<sup>5</sup>see: On the State of Emergency: <https://bit.ly/39sLFY6>.

<sup>6</sup>see: On Law of Georgia on the State of War: <https://bit.ly/3oeAAhR>.

<sup>7</sup>See Paragraph 4 of Article 13 of the Constitution of Georgia: <https://bit.ly/36bg63h>.

<sup>8</sup>see: Decree N1 of the President of Georgia from March 21, 2020, article 7.  
<https://bit.ly/39mZ0BA>.

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 Georgia<sup>9</sup>. Further, the High Council of Justice adopted the package of recommendations<sup>10</sup> 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 communication<sup>11</sup>. 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 all<sup>12</sup>. According to the amendments introduced to the Criminal Procedure Code, holding of remote court hearings is limited in time and under article 332<sup>5</sup> 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 sessions<sup>13</sup>. The Rules of Procedure do not provide for any different arrangements during the extraordinary session.

---

<sup>9</sup>See The Code of Criminal Procedures: <https://bit.ly/3l9OnfG>.

<sup>10</sup>See Recommendation N1 of the High Council of Justice from March 13, 2020: <https://bit.ly/2E0tHl9>.

<sup>11</sup>See Law of Georgia N5973 from May 22, 2020: <https://bit.ly/33kK9Ua>.

<sup>12</sup>see: "Implementing restrictive measures without declaring a state of emergency is unconstitutional": <https://bit.ly/39mRUge>.

<sup>13</sup>see: Paragraph 1 of Article 34 of the Rules of Procedure of the Parliament of Georgia. <https://bit.ly/36aB7uK>.

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.”<sup>14</sup> 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, 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 repealed<sup>15</sup>.

➤ *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 great<sup>16</sup>. 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

---

<sup>14</sup>see: 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>.

<sup>15</sup>see: The Recommendations by the High Council of Justice from September 15, 2020: <https://bit.ly/3mgsfjH>.

<sup>16</sup>see: 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>.

the court accountable to the public as a judicial branch of government, taking into account the relevant constitutional framework<sup>17</sup>.

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 Decree stipulates that court hearings under the criminal procedure law of Georgia could be held remotely using electronic means of communication<sup>18</sup>. 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 session<sup>19</sup>.

**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

---

<sup>17</sup>see: Decision of the First Panel of the Constitutional Court of Georgia №1 / 4 / 693,857, June 7, 2019. <https://bit.ly/39nzADI>.

<sup>18</sup>see: Decree N1 of the President of Georgia from March 21, 2020, article 7. <https://bit.ly/39mZ0BA>.

<sup>19</sup> 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.

were allowed to the courtroom<sup>20</sup>. 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, HRC<sup>21</sup> 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 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 full<sup>22</sup>.

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 needs<sup>23</sup>.**

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

---

<sup>20</sup>see: Monitoring reports prepared by the HRC monitor on the criminal case ongoing against Besik Tamliani; Hearings on the merits: 31-Mar-20.

<sup>21</sup>see: the Statement: HRC objects the closure of court proceedings on the cases with alleged political motives. <https://bit.ly/36bzDjS>.

<sup>22</sup>see: 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>.

<sup>23</sup> Response N323/1072-03 of the High Council of Justice from April 22, 2020 to the Statement of HRC from April 16, 2020.

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-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 society<sup>24</sup>.

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 Georgia strengthens the right to a fair hearing<sup>25</sup>. 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"<sup>26</sup>.

### ➤ *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

---

<sup>24</sup>see: the cases: 1) Sutter v. Switzerland, § 26; <https://bit.ly/3o5RIKa>; 2) Riepan v. Austria, § 27; <https://bit.ly/2IpnRcE>; 3) Krestovskiy v. Russia, § 24; <https://bit.ly/36dZSqB>.

<sup>25</sup> see.: Article 31 of the Constitution of Georgia: <https://bit.ly/36bg63h>.

<sup>26</sup>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>.

independent legal representation of his or her own choosing, and to guarantee complete and confidential communication with the representative<sup>27</sup>. 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 aid<sup>28</sup>.

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-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."<sup>29</sup>

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 trial<sup>30</sup>. 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 meaningless<sup>31</sup>.

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,

---

<sup>27</sup>see: ICCPR, Article 14 (3) (d) and ECHR, Article 6 (3) (c). <https://bit.ly/2VazqHr>.

<sup>28</sup>see: Legal Digest of International Fair Trial Rights, 7, pp. 138. <https://bit.ly/2HPXgp2>.

<sup>29</sup>see: General Comment N.32, citing from the paper Comment. 113, 34. <https://bit.ly/2I7aVJ3>.

<sup>30</sup>see: 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/2KEclcC>.

<sup>31</sup>see: 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/3mfui7>.

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 counsel<sup>32</sup> requested to suspend the session because he was not provided with confidential communication with the client<sup>33</sup>. 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 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.”<sup>34</sup> 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 will<sup>35</sup>.

The right to summon the witness is a fundamental guarantee of a fair trial as it balances the powers of the prosecutor<sup>36</sup> “through an application of the principle of

---

<sup>32</sup>E.g.during the court hearings of the criminal case against Irakli Okruashvili, Monitoring Report: 19.05.2020.

<sup>33</sup>The Report prepared by the HRC court monitor Center on the monitoring of the case of Giorgi Rurua. Last seen: 04.05.2020.

<sup>34</sup>see: Constitution of Georgia, Article 31 (4), <https://bit.ly/2VcSHrH> ; See: also Article 14(2) of the Criminal Procedure Code. <https://bit.ly/3laNZ8F>.

<sup>35</sup>see: Article149 (1) - (3) of the Criminal Procedure Code of Georgia. <https://bit.ly/3laNZ8F>.

<sup>36</sup>see: Legal Digest of International Fair Trial Rights, Comment 7, pp. 150. <https://bit.ly/2JiObWh>.

equality of arms, this guarantee is important for ensuring an effective defence<sup>37</sup>. 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.”<sup>38</sup>

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.<sup>39</sup>

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 problem<sup>40</sup>. When questioning the witnesses remotely as a rule no items could be seen before them (laying on the 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 witness<sup>41</sup>. 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.<sup>42</sup> Stemming from the general rule that a witness shall testify at the court in person,<sup>43</sup> the Code allows the parties as an exception to file a motion to use the testimony of the

---

<sup>37</sup>see: General Comment N.32, citing from the paper p 113 Comment. 39. <https://bit.ly/37idCiT>.

<sup>38</sup> Ibid.

<sup>39</sup>see: case of *Bricmont v Belgium* (ECtHR, 7 July 1989, para. 81. <https://bit.ly/3lc1EMx>.

<sup>40</sup>see: Special Report of the Public Defender: *Report of Monitoring of the Court Sessions of the Criminal Cases held Remotely*. 2020. <https://bit.ly/2V86wYD>.

<sup>41</sup>This problem is also emphasized by the organisation *Rights Georgia* in the Report *Efficiency and Accessibility of the Electronic Justice*: <https://bit.ly/2Vbc98w>.

<sup>42</sup>see: Article 75(2) of the Criminal Procedure Code of Georgia. <https://bit.ly/3laNZ8F>

<sup>43</sup>see: Article 49 (2) (a)(b) of the Criminal Procedure Code of Georgia. <https://bit.ly/3laNZ8F>.

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.”<sup>44</sup>

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.”<sup>45</sup>

### ➤ *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 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 hours<sup>46</sup>, 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 hearings<sup>47</sup>.**

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

---

<sup>44</sup>see: Article 243(1)(2) of the Criminal Procedure Code of Georgia. <https://bit.ly/3laNZ8F>.

<sup>45</sup>see: Case P.K. v. Finland ECtHR (Decision on admissibility) 9 July 2002.

<sup>46</sup> For example, the Monitoring Report on the hearings of the criminal case against Giorgi Esiashvili: 16.11.2020.

<sup>47</sup>see: also the Special Report of Georgian Young Lawyers Association: *Justice in Times of Pandemics*. 2020. <https://bit.ly/2DLrsQ0>.

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 identified<sup>48</sup>.

The practice of the judges asking the parties if they could hear the other participants of the proceedings, etc should be assessed positively.

---

<sup>48</sup>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>.

## 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.*