Georgian Young Lawyers' Association

Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive

LEGAL ANALYSIS

OF CASES OF CRIMINAL AND ADMINISTRATIVE OFFENCES WITH ALLEGED POLITICAL MOTIVE

Tbilisi
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TABLE OF CONTENTS

INTRODUCTION

This research analyzes cases of criminal and administrative offences with alleged political motive. Purpose of the research is to study a specific case and to establish the extent to which political motives could have influenced pre-trial and court proceedings. This was done by evaluating whether or not the applicable laws and regulations were followed.

This report mainly entails legal analysis of persons detained/arrested during and following spring 2009 protest rallies. We and our partner organizations saw the necessity of doing the research after the topic of political prisoners in Georgia became widely discussed in public and international circles[1]. Following served as criteria for case selection: high public interest in a particular case, as well as alleged political motive of criminal prosecution or administrative responsibility.

24 cases were selected for the research, including 6 cases involving administrative violation and 18 criminal cases[2]. The cases have been picked out from several different regions[3]. Eleven cases involved charges of illegal possession of firearms and drugs, as the number of facts of detainment of protest rally participants and opposition activists on the noted charges was increased during the period. The rest of the cases were selected according to publicity they had received due to well-known detained persons and their political activities or due to political activities of the detained person's friends and family. All of these cases are reviewed within the Criminal Procedure Code 1998 having been in force till 2010.

The Georgian Young Lawyers' Association was providing legal service in some of the cases that were reviewed. Cases where legal service to the detained/imprisoned was provided by other lawyers, following methods were utilized for case analysis: interviewing lawyers working on the given case, detailed analysis of the case materials and monitoring of trials by lawyers trained for this purpose in pending cases.

Determination of innocence or guilt of a person does not constitute the aim of the research. We intend to define whether justice was executed in accordance to the legal regulations and whether investigation/agencies of judicial authority followed appropriate procedures in noted cases.

Sequence-wise pending cases are followed by concluded ones in this research.

[1] After the Rose, the Thrones: Political Prisoners in Post-Revolutionary Georgia, fidh Publication, 7th August, 2009, http://www.fidh.org/IMG/article_PDF/article_a6870.pdf last accessed on 25 September, 2010 State of Human Rights in Georgia 2007 /2nd half , 2008/1st and 2nd halfs –Public Defender of Georgia; Lists of allaged political prisoners presented by different political parties.

[2] Most of the cases have been concluded; sentence was delivered and has entered in legal force.

[3] Cases from following regions have been studied: Tbilisi, Shida Kartli,Kvemo Kartli, Samegrelo, Svaneti, Kakheti, Guria

CHAPTER I

CASES INVOLVING ILLEGAL POSSESSION OF FIREARMS OR DRUGS

The Georgian Young Lawyers' Association studied cases where individuals detained (or individuals that are being prosecuted) have been charged with illegal possession, acquisition, storage or transportation/shipping/carriage of firearms or drugs. Although all cases were individual, we could identify common trends that follow each case like a red line and call for immediate response at the policy level. Each case will be presented in the light of basic legal issues that constitute problematic spheres based on the analysis of the cases. Brief description of the noted basic legal issues is presented below.

1.1. Brief Description of Legal Issues

- **Standard for proving illegal acquisition, possession, carriage of firearms**

All of the several conditions should be evident in order to convict a person under Article 236 of the Criminal Code of Georgia:

1. Para 1 of Article 236 is a unified offence (which is constituted by alternative actions[4])
2. The firearms should be usable (certified with explicit findings of an expert[5])
3. Acquisition – is a one-time act, which is a formal crime and is completed upon the moment of acquisition.
4. Storage – is an ongoing[6] crime and is completed upon the termination of the last action[7].
5. Storage – should necessarily imply storing the forbidden item in a circumscribed, protected territory with a restricted access[8].
6. Storage – necessarily requires to be determined whether other individuals had access to this place; i.e. collecting an item in a given apartment or at any other place does not mean that owner or the proprietor should be automatically charged with a crime, as the fact that the forbidden item was stored personally by this individual should be established[9].

It is necessary to determine exact time and date of acquisition for criminal liability. If the noted element has not been specifically defined, the principle that any doubt is resolved in favor of defendant is violated. According to the noted principle, factual circumstances that

[4] Out of the several parts of crime, commitment of one of them is sufficient;

[5] *inter alia,* Judgement of the Supreme Court of Georgia N769ap-09, dated March 19, 2010;

[6] Ongoing crime commences with action or inaction and which thereafter is carried out without let-up;

[7] *inter alia,*Judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia N797ap-09, dated February 22, 2010;

[8] *mutatis mutandis*, Judgement of the Supreme Court of Georgia N669-ap-09, dated January 25, 2010.

[9] *inter alia,* Judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia #1256ap, dated February 27, 2009;

cannot be confirmed by evidence should be resolved in favor of the defendant[10] (*in dubio pro reo*). Conviction based on doubt contradicts both Article 40 of the Constitution of Georgia and the Criminal Procedure Code of Georgia[11], as well as material principles of criminal law[12]. The term "at undetermined time" can be used only when a person is convicted of storage, selling or other cases[13], while in cases of acquisition of firearms (drugs) it is necessary to define the time[14] when the action was performed, as it serves as the basis for defining completion of the crime[15]. If it is impossible for the investigation to precisely define the time of acquisition of the firearms, at minimum following doubts can not be eliminated:

1. Doubt whether time allowed by the statute of limitation has run out[16]
2. Doubt that non-incriminating circumstances or circumstances releasing from responsibility are evident.

Presumption of a fact (i.e. that collecting the prohibited item automatically confirms its acquisition) in cases of **acquisition** of a weapon (or drugs, etc.) is unacceptable, as it makes it impossible to exclude a reasonable doubt whether time allowed by the statute of limitation has run out. As trying a person after expiration of the limitation constitutes violation of Article 42, Para 5 of the Constitution of Georgia[17], it is necessary to prove that time allowed by the statute of limitation has not run out. Fact presumption can not only damage the above mentioned material guarantee but infringe on the principle of fair trial and adversarial hearing as well[18].

Illegal **storage** of firearms or drugs shall also be reviewed. In this case in order to convict a person it is necessary[19] to determine whether:

1. The storage place[20] is sufficiently circumscribed in order to ensure that no one else has access to it, as well as whether the storage place is an isolated territory. Purpose of the noted standard is to rule out that any person other than the owner could have stored the item in the storage place;
2. The convicted individual should have personally stored the item. The doubt that

[10] *inter alia*, judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia #1155ap-08, dated March 9, 2009;

[11] Article 503 of CPC

[12] *Nullum Crimen Sine Lex Certa*

[13] During the unified crime;

[14] Contrary opinion: judgement of the Grand Chamber of the Supreme Court of Georgia, dated June 14, 2006;

[15] Due to the formal nature of crime;

[16] If the prosecution fails to identify the time of acquisition of the weapon, it fails to confirm the fact that the time allowed by the statute of limitation has not run out. Acquisition is a one time act, which is completed at the moment of acquisition. The time allowed by the statute of limitation for a specific crime starts after the crime is committed. Determination of time when the crime was committed may eliminate criminal liability.

[17] Resolution of the Constitutional Court of Georgia #1/1/428,447,459, $ 26, dated May 13, 2009.

[18] Judgement of the ECHR in *Salabiaku v. France*, $28, dated October 7, 1988;

[19] Resolution of the Chamber of Criminal Cases of the Supreme Court of Georgia #669ap-09, dated January 25, 2010;

[20] The place were illegal item is stored.

the item does not belong to the convicted person but to any of his close relatives or his roommates should be dispelled.

Although these circumstances may not have a critical importance if evidence collected in the case authentically establishes the fact that the seized item belongs to the individual

- **Search and legal prosecution based on operative information**

- *Search*

The criminal cases that were examined by us, mainly concerning acquisition and storage of firearms and drugs, are characterized with identical sequence of actions:

As a rule preliminary investigation starts on the basis of a report[21] of a police officer, followed by search of place or a person, afterward a person is detained and criminal prosecution is launched[22].

Such sequence of actions cannot be deemed as a legal sequence within the frames of the law. The Criminal Procedure Code defines quality of investigative actions; specifically it provides for gradation due to their restrictive nature. Correspondingly, the Code imposes court control for some investigative actions to be undertaken, depending on the nature of the action and more specifically, the intensity of restriction associated with the investigative action. Furthermore, there are some investigative actions that require other preconditions apart from the court control.

- *Probable Cause for Search*

Search as an investigative action was qualified by the 1998 Criminal Procedure Code (hereinafter CPC or Procedure Code) as a restrictive investigative activity that requires not only court control but also other preconditions as well according to the law. Specifically, pursuant to Article 317 of CPC "the investigator, prosecutor shall have the right to perform search if evidence collected in the criminal case serves as the basis to presume that there is an item, document noted in Article 315 of the Code stored at a specific place with a certain individual and it has been reported that it has been refused to willfully give up the item." This article explicitly indicates that three cumulative preconditions are necessary for performing a search:

1. *Evidence[23] already existing in the case;*
2. *This evidence should be allowing for a reasonable suspicion that a specific item is stored at a certain place.*
3. *Report that it has been refused to willfully give up the item.*

Pursuant to the Procedure Code, only the search that has been performed in compliance with these preconditions can be qualified as lawful investigative action[24], which in its turn

[21] Written statement of the police officer concerning the operative information that he possessed.

[22] View table N1, p. 7

[23] A single evidence is not enough. There should be more than one evidence.

[24] View schedule #2, p. 7;

can be followed by (if there are sufficient grounds) a person's arrest, i.e. launch of criminal prosecution[25]. Otherwise, if search lacks legal grounds it may not be considered as legal investigative action and criminal prosecution launched on its basis will be unlawful as well.

In reality there is an enormous difference between legal stipulations and practice. While the Code stipulates that a number of preconditions together are necessary for performing a search, law enforcement officers perform search on the basis of a report only, thus significantly lowering the standards of inviolability of personal life[26].

- *Report*

When a search is performed on the basis of a report it is important to find out whether the document can be considered evidence, as only evidence can serve as a precondition for search.

Para 2 Article 110 of applicable Criminal Procedural Code lays out the list of admissible evidence and report is not one of them.

A report is a written statement of a police officer, where he/she indicates that he/she has information about alleged criminal offence. On the basis of the written statement Form #1 is filled out, officially affirming launch of preliminary investigation. Therefore, basically a report is a confirmation of operative information[27] by the police officer and hence it does not constitute evidence – it is not attached to the criminal case pursuant to the procedure prescribed by the Procedural Code and it is not followed by the legal consequences characteristic to evidence.

According to Para 4 of Article 110, "in compliance with stipulation of law, information received by means of operative and investigative activities can be a content of procedure source notification and fact (except for a document) and can be admitted as evidence only in this case." According to the same Article, in order for a report to gain force of evidence, the person who has written the report should be interrogated as a witness[28]. The scope of interrogating the author of the report is not only formal but also substantial: when the person is interrogated as a witness, information provided by him/her is characterized with legal reliability, which means that the person has been warned about duties and responsibilities of a witness and anticipated liabilities for violating these responsibilities, i.e. that he/she will be held criminally liable for providing false information. Author of the report has no such responsibilities and therefore, information provided by him/her cannot be perceived as reliable to the extent that another person's right of privacy guaranteed by the

[25] Detaining a person pursuant to the Procedure Code means instituting criminal prosecution against him, as pursuant to para 6 of Article 145 of the Procedure Code, "when the suspect is detained a decision about recognizing the persons as a suspect is not delivered". It means that a person is already considered to be a suspect. Being a suspect already mea that criminal prosecution has been instituted against this person on the basis of para 43^1 of Article 44 of the Code.

[26] Pursuant to Article 13 of the Criminal Procedure Code, search is considered infringement on inviolability of personal life if legal provisions are not observed.

[27] You may view detailed information about operative information and activities in the Law of Georgia on Operative and Investigative Measures.

[28] View comments of the Criminal Procedure Code, editors: Omar Jorbenadze, Zaza Meishvili. Tbilisi, 2007; p. 276.

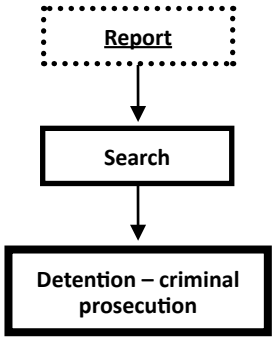
Constitution is restricted on the basis of the information laid out in the report.

As it has been already noted, the Criminal Procedure Code provides for evidence as a prerequisite for performing a search, which means that single evidence is insufficient for performing a search. Therefore, only the testimony of a police officer possessing operative information may not be deemed sufficient, it needs to be further solidified by other evidence.

Frequently search is followed by detaining of a person, i.e. institution of criminal prosecution against him/her. Pursuant to Para c of Article 111 of the Criminal Procedure Code, "the evidence is inadmissible if it has been collected with violation of the procedure prescribed by law". If a person is detained on the basis of evidence collected during the search, and the search has been performed on the basis of a report only, it means that the evidence has been collected by means of an unlawful investigative activity and it should be deemed inadmissible. Therefore, pursuant to subparagraph a of Para 1 of Article 28 of CPC criminal prosecution should be put to an end due to absence of action in the part of the charge that is based on this evidence[29].

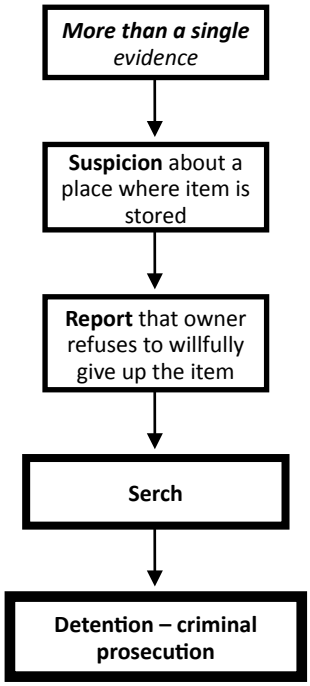
Therefore, we may conclude that police officer's report is an insufficient ground for performing search. Evidences already collected in the case and allowing for a reasonable doubt that the item that investigation is interested in is stored in a specific place and that the owner refuses to willfully give this item up are needed. Correspondingly, in the criminal cases where report is immediately followed by search that afterward serves as the basis for launching prosecution, unlawful criminal prosecution against the person is evident. It should be ceased due to absence of action in the part of the charge that is based on the evidence collected during the search.

Table #1 – Current Practice



[29] For example, if drug substance or firearms has been seized during the search performed on the basis of a report, it is considered that the evidence (drugs, firearms) is inadmissible. Therefore, criminal prosecution should be terminated due to absence of action in part of the charge foreseen by Article 260 of Article 236.

Table #2 – Legal Stipulations



- *Detention*

Pursuant to the Criminal Procedure Code detention is a procedural measure of compulsion. Article 142 of the Code provides for specific grounds for detention. The list laid out by the Code is exhaustive, meaning that it is forbidden to detain a person based on any other grounds.

In most of the criminal cases examined a person was detained on the basis of personal search. In some cases detention as a suspect and detention based on data in the protocol of personal search occurs earlier than search is started[30]. The case materials demonstrate that in such cases, a report only has been drawn up prior to detention, i.e. detention is based on operative information.

- *Probable Cause of Detention*

When a personal search of an individual is performed and he/she is detained afterward, this is the case foreseen by subparagraph c, Para 1 of Article 142 of the Procedure Code: "a clear trace of the committed crime is evident on the person or his/her clothes." Correspondingly, search always occurs before detention in protocol, although it does not mean that such sequence of actions shall necessarily be observed. Search occurs before detention when an

[30] Ref. criminal cases of Roman Kakashvili and Merab Katamadze.

item collected during the search reveals traces of crime or a person is detained as a suspect.

Although when other grounds envisaged by Article 142 are evident, for example a person was caught red-handed, a search is performed. This is the case when detention occurs before search is performed.

As it was already noted, in some of the cases that we have analyzed, detention occurred before search. In such cases, any of the grounds envisaged by Para 1 of Article 142 of CPC should be evident. As we have noted a number of times, operative information does not constitute sufficient basis for detention. It is necessary that any of the circumstances directly envisaged by CPC exist, although analysis of the criminal cases reviewed by us demonstrated that such legal grounds did not exist at the time of detention. Only the item collected during search that was performed after detention served as the basis for the detention. Therefore, it is unclear what served as the legal basis for detention in noted cases.

In conclusion, detention of a person is allowed only on the basis of specific grounds laid out by the Criminal Procedure Code of Georgia, as opposed to operative information. Otherwise, detention is unlawful, which amounts to the basis for releasing the person.

- **Participation of eye-witnesses in search and seizure[31]**

According to the Criminal Procedure Code of Georgia, a witness is an individual that has been summoned by the person who is affected by the search. Purpose of summoning a witness is to observe search and seizure - **the fact, process and results.** A witness is a protective mechanism against any possible arbitrary actions. After witness is summoned, his/her participation is obligatory in investigative activities. Otherwise, collected evidence is deemed inadmissible, as it has been obtained in violation of procedural legislation[32]. Participation entails full monitoring of the process of search in a way that actions of the person performing search are visible.

Summoning a witness is the right of a person to be searched. A witness voluntarily participates in investigative activities. He/she observes investigative activities. The witness shall certify the fact of performing an investigative activity, its process and results with his/her signature[33]. A witness does not lose his/her status of a witness by not signing the protocol. Participant of the process – witness maintains his/her status whether he/she signs the protocol or not, and further issues related to his/her different obligations as a witness remain valid. Not signing the protocol is simply an evaluation of investigative activities described in the document. It is further confirmed by the fact that pursuant to Article 4^1 of CPC sealed evidence is opened in attendance of the witness who has **attended** (as opposed to *signed*) seizure and sealing up of the seized items.

[31] Search and seizure is basically one and the same investigative activities. Search and seizure differ formally from one another in a way that during search location of the item to be searchend is not known, while during seizure the item has already been found;

[32] Subparagraph c of Para 1 of Article 111 of the Criminal Procedure Code;

[33] Para 1 of Article 103 of the Criminal Procedure Code.

- **Obligation to examine evidence at the trial**

According to Article 475 of CPC all evidence should be submitted and examined[34] in court[35]. One of the types of evidence is an exhibit. Pursuant to Article 485 of the CPC the court examines exhibits during court investigation. If exhibits are not examined at all, they may not be utilized during the court dispute[36] or reffered to in the sentence.

Pursuant to Article 496 of CPC, sentence should be substantiated, which means that it should be based only on examined evidence. It constitutes the principle of orality in the process of criminal law[37]. It guarantees adversarial nature of legal proceedings[38]. Infringement on the principle of orality may serve as the basis for violating the right to fair trial guaranteed by Article 6 of the European Human Rights Convention[39].

1.2. Individual cases

1.2.1. Case of Merab Katamadze

1. *Political activity of Merab Katamadze*

Merab Katamadze is a member of the national committee of the Republican Party, editor of the Republicans bulletin.

2. *Criminal Case of Merab Katamadze*

On June 27, 2009 preliminary investigation was launched based on the operative information received by the Criminal Police Department of the Ministry of Interior Affairs of Georgia. In frames of the case the same day, at 06:12 p.m. personal search of Merab Katamadze was performed, whereby a firearm and ammunition were collected during the search. He was detained on the basis of it.

He was arraigned pursuant to Para 1 of Article 236 – acquisition and storage of firearm and ammunition. Next day[40] a bail for Merab Katamadze was set 5 000 (five thousand) GEL. Preliminary investigation is completed. Currently the case has been referred to Tbilisi City Court for review. Although it's been one year after the criminal prosecution was instituted, essential review of the case has not even commenced yet[41].

[34] The only exception is the case when due to characteristics of evidence runs out. In such case forensic findings substitute main evidence.

[35] Otherwise it cannot serve as the basis of sentence.

[36] Para IV of Article 490 of CPC

[37] Para III of Article 20 of CPC

[38] Resolution of the Chamber of Criminal Cases of the Supreme Court of Georgia #255-ap, dated March 24, 2009.

[39] European Convention, Article 6, 3 d, *inter alia,* ***SN v. Sweden***, $44. Human Rights in Criminal Proceedings, **Stefan Trechsel,** Constitutional Court of Georgia, Tbilisi 2009, p. 338.

[40] On June 28, 2009

[41] According to the Criminal Procedure Code of Georgia, Merab Katamadze is a defendant. Duration of legal proceedings for his status is not limited at all. For detailed information please view following subchapter below: "Unreasonable delays in the criminal prosecution and preliminary investigation"

3. *Violations in the criminal case of Merab Katamadze*

- **Illegal firearm storage charge**

According to bill of indictment, Merab Katamadze is charged with illegal acquisition of firearm and ammunition at undetermined time and circumstances, from an unidentified individual.

Such formulation of the charge contradicts applicable law, as for a criminal liability it is necessary to determine the exact time of illegal firearm and ammunition acquisition. Determination of the exact time when the crime was committed is the issue of utmost importance for delivering an objective decision in the case. Pursuant to Article 40 of the Constitution of Georgia any doubts that may not be substantiated in accordance with the procedure prescribed by law is resolved in favor of defendant. The decision on instituting criminal prosecution against the defendent should be solely based on authentic evidence.

- **Operative information, as the basis for criminal prosecution**

Merab Katamadze's case was based on report of detective and investigator Irakli Jikurashvili at MIA's Criminal Police Department, dated June 27, 2009[42].

According to the operative information, Merab Katamadze illegally acquired a firearm from an unidentified individual at an undetermined time and in undetermined circumstances and he was illegally storing the firearm. The report notes that on June 27, 2009 at around 06:00 p.m. Katamadze will be driving his own car in Tbilisi, at Griboedovi Street, carrying the noted firearm that has been illegally acquired.

Merab Katamadze was arrested as a suspect on June 27, 2009 at 06:03 p.m. The report noted that the suspect was detained precisely at 05:59 p.m. According to the same report M. Katamadze is suspected of illegal storage of a firearm and ammunition and following circumstance is quoted as grounds for detention – "the person was caught red-handed". Personal search of Katamadze was performed on June 27, at 06:12 p.m.[43], i.e. after he was detained as a suspect. Indication of the fact that Katamadze was caught red-handed (protocol of suspect's detention) by the agency carrying out the investigation is illegal, as noted grounds did not exist at the time when the protocol was drawn up.

According to the testimony of police officers, they possessed operative information that M. Katamadze was allegedly storing a firearm. They saw M. Katamadze sitting in a car, came up to him and detained him. A weapon in the right pocket of M. Katamadze's pants was found only after his detention. Therefore, the person was detained without any grounds. Specifically, the police officers had not observed M. Katamadze carrying a weapon prior to the detention and they could not have observed it either, as M. Katamadze was sitting in his car, i.e. the alleged fact that the suspect was cought red-handed is not substantiated in this case.

[42] Precise time when the information was received has not been established. The report indicates only the date when it was compiled.

[43] 13 minutes after the detention.

Therefore, the case materials demonstrate that Katamadze was detained on the basis of operative information as opposed to catching him red-handed, which is a violation of procedure law of Georgia.

- **Urgent necessity**

Pursuant to the Criminal Procedure Code, court warrant is necessary for search. Urgent necessity is the only exception, which should be substantiated. In M. Katamadze's case the search was conducted without any court control or substantiation of urgent necessity, which violates the Procedure Code provisions.

- **Failure to perform forensics tests**

During the personal search black handgun with one magazine and two rounds stored in Katamadze's jeans pocket were collected. For a thorough investigation it was necessary for the investigating agency to schedule some kind of forensics test in order to determine connection between the firearm, ammunition and Katamadze. It would have perfected the investigation. Connection of Katamadze with the firearm and the ammunition is confirmed only by search protocol and testimony of persons who conducted the search, without any forensics findings. It was possible to conduct dactyloscopic or other types of tests in this case, which could have established a factual connection between the illegal item and the accused. No such tests were performed.

- **Summoning witnesses**

A witness was not present in Merab Katamadze's case during the search. The protocol notes that the person to be searched refused to summon witnesses. Katamadze himself did not agree with the statement and refused to sign the protocol. Only the testimonies of police officers who had conducted the search were presented for reinforcing the prosecutor's position. Procedures prescribed by law have been observed but there is a reasonable doubt whether or not the defendant indeed refused to summon witnesses.

- **Unreasonable delays in the criminal prosecution and preliminary investigation**

Preliminary investigation and criminal prosecution were delayed in Merab Katamadze's criminal case, where preliminary investigation was completed and the bill of indictment was drawn up five days before expiration of the 12-month term of being an accused, while last investigative activity was carried out on December 14, 2009. The case was basically immovable for almost six months and was referred to court only in June 2010. Although it has been more than ten months after the case was referred, trial has not been scheduled yet.

4. *Conclusion*

Merab Katamadze was detained and charged on the basis of insufficient evidence. The investigation was one-sided and evidence had not been fully and comprehensively examined. Proper investigative procedures as stipulated by law were not followed.

1.2.2. Case of Mamuka Tsintsadze

1. Political activity of Mamuka Tsintsadze

Mamuka Tsintsadze is a member of the youth organization of Republican Party. During 2008 Presidential Elections he actively participated in the pre-election campaign. As a result of his active involvement the presidential candidate of the opposition won the elections with 70% of votes in his village. During April 2009 elections he organized mass departure of people in Tbilisi and he himself was one of the tenants of the "City of Tents". At the same time Mamuka Tsintsadze was one of the witnesses of the search in the criminal case of Gocha Jikia, Republican Party affiliate, where he testified in favor of the defence[44].

2. Criminal Case of Mamuka Tsintsadze

Mamuka Tsintsadze's household was searched on June 10, 2009 and a firearm was collected. He was detained as a suspect the same day. He has been charged pursuant to Article 236 of the Criminal Code – illegal acquisition and storage of firearms. M. Tsintsadze was sentenced to pre-trial detention, which was later substituted by bail. M. Tsintsadze's case is reviewed by Chokhatauri District Court[45]. The investigation is ongoing.

3. Violations in the case of Mamuka Tsintsadze

- **Charges brought against him**

Tsintsadze has been charged with the crime foreseen by Article 236 of the Criminal Code – illegal acquisition and storage of firearms.

According to the bill of indictment, Mamuka Tsintsadze acquired the weapon at an undetermined period of time and under the undetermined circumstances. Therefore, even if Mamuka Tsintsadze had had a weapon, both the investigation and the court failed to determine whether the time allowed by the statute of limitation had run out or whether there were other circumstances that disqualified parts of the crime.

Storage where the weapon was found was not circumscribed. The investigation failed to corroborate that the item was stored by Mamuka Tsintsadze and not by one of his family members, for instance.

Therefore, the bill of indictment is based on a suspicion, as doubts whether the time allowed by the statute of limitation has run out or whether the item belongs to another person has not been dispelled.

- **Search conducted on the basis of operative information**

Search performed in Mamuka Tsintsadze's case was based on operative information only[46];

[44] His testimony contradicted position of the prosecution and testimony of the investigator. At the trial of Gocha Jikia he declared that he was unable to personally witness the fact of weapon seizure.

[45] As of April 2011

[46] Activities of operative agencies are strictly classified under the Law of Georgia on Operative and Investigative Activities". Therefore, information provided by them is classified and qualified as anonymous information.

while in order for the decision to perform search to be legal, it should be based on concrete evidence.

- **Conducting search in urgent necessity**

The resolution of Chokhatauri District Court, dated June 11, 2009, recognized the items seized in urgent necessity as legal. Pursuant to paragraph II of Article 290 of the Procedural Code, when there is an urgent necessity the prosecutor has to prove necessity of search. Although the court decision in M. Tsintsadze's case fails to provide any instructions in this regard. It corroborates the fact that procedure law was violated and the item seized during the search constitutes illegal evidence.

- **Participation of a witness**

A witness was summoned in Mamuka Tsintsadze's case. As search of several places was conducted simultaneously, the witness was unable to attend the fact of seizing the weapon[47]. It can automatically serve as the basis for deeming the seized item as inadmissible. The witness was unable to visually observe the process of search or the time when the weapon was seized, which is unacceptable and if court upholds it afterward, Article 42 of the Constitution stipulating that "evidence obtained in contravention of law shall have no legal force" [48] will be violated.

On June 10, 2009 sealed evidence was opened. The witness, who was summoned by the defendant, did not attend noted investigative activity. The fact confirms that the institute of a witness is fully diminished in this case.

Police officers who participated in search are the only ones who have testified in favor of the prosecution in Mamuka Tsintsadze's criminal case. Testimonies of each of the police officers are identical.

- **Illegal item**

A weapon is indicated as an illegal item in this case. The way the weapon was sealed should be pointed out. Any evidence presumably bearing a trace should be properly bagged and sealed. Otherwise the prosecution will not be able to prove that it has not been tampered with, which is the basis for deeming the evidence inadmissible[49].

In the case of Mamuka Tsintsadze the evidence was wrapped with a "white rope", while the Procedure law does not recognize such practice. Furthermore, no expertise is needed to see that it is impossible to seal a weapon with a rope. It makes it easy to tamper with the trace left on the weapon. Case materials lack basis for dispelling the noted doubt.

[47] Several places were searched simultaneously. When the item was seized the witness was observing search at another place.

[48] Paragraph 7

[49] Clause 5 of Article 121 of the Criminal Procedure Code of Georgia. For detailed information please view the judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia #757ap-09, dated February 8, 2010.

It is particularly interesting that according to the witness'[50] statement, a police officer touched the weapon with his bare hands[51]; afterward the weapon was poorly sealed, making it impossible to prove that it had not been tampered with. It is peculiar that after all of it, fingerprints of M. Tsintsadze only were found on the weapon. The noted circumstance raises a reasonable suspicion about the forensic findings.

- **Illegal protocol on obtaining a sample**

Fingerprints were collected from the seized item. The investigator drew up a protocol for this purpose, guiding the process of opening a seal and swabbing a sample. The protocol (besides the headline) lacked lot of information necessary for drawing up a protocol according to the applicable law. More specifically, scientific methods utilized in the investigative activity have not been described, as mandated by Article 382 of the CPC. It confirms illegal nature of the sample, protocol on sample obtaining and forensic test that followed. If the method utilized to take a fingerprint from the item is not identified, it will be impossible to examine forensic findings and protocol on obtaining a sample at an adversarial hearing, as an opportunity to submit counter arguments for its lawfulness is taken away from the defendant.

- **Delays in the proceedings**

After concluding preliminary investigation into Mamuka Tsintsadze's criminal case and referring it to court, review was scheduled and started in a timely manner[52] (the bill of indictment was drawn up on July 15, 2009 and court review was scheduled for July 30). Although after introductory measure of M. Tsintsadze – arrest - was replaced with bail, the process was delayed. On October 1, 2009 the defence requested questioning the investigator as an additional witness. Since then[53], the process has been postponed either because of absence of the witness from court or frequent change of prosecutors in the trial[54]. Therefore during 18 months it was basically impossible to hold a trial for M. Tsintsadze's case.

Criminal prosecution was instituted against Mamuka Tsintsadze in June 2009. The case still remains unconcluded[55]. According to the Georgian legislation, Mamuka Tsintsadze is bearing a procedure status of a defendant. A bail has been set for him as a preventive measure. There is no term in this case that would limit duration of the process[56].

[50] The testimony of police officer Dolidze, where he notes that the investigator did not wear gloves when he was touching the evidence.

[51] Which may result in destruction of trace and leaving of new [police officers'] fingerprints on the item.

[52] At the stage of referring the case to the court defendant Tsintsadze had been sentenced to imprisonment, which later, during review of the case in court on August 18, 2009 was substituted with bail on the basis of the defence motion.

[53] i. e. by April 2011

[54] When a different prosecutor attends the court session, who is not aware of the criminal case materials, he is usually given a certain amount of time to familiarize himself with the case materials. This was the case in the lawsuit to be reviewed.

[55] April 2011

[56] Nevertheless, there is a threat of violating the principle of reviewing the case in reasonable time, which is an integral part of the right to a fair trial guaranteed by Article 6 of the European Convention.

4. *Conclusion*

Ignoring the role of a witness, evidence obtained in violation of procedural legislation, illegal item sealed up wrongfully and other procedural violations identified throughout the proceedings confirm that process of investigation was conducted unlawfully in Mamuka Tsintsadze's case.

1.2.3. Case of Vladimer Vakhania

1. *Political Activity*

Vladimer Vakhania is a citizen of Russia, although with the 2008 Presidential Decree he was granted citizenship of Georgia as well. Vladimer Vakhania is the author of a number of books and monographs in Georgian and Russian languages.

Vladimer Vakhania elaborated a program of the economic development of Georgia, as well as master plan for turning Zugdidi into a European-style city and seating the monument of Virgin Mary in its center. The master plan was presented to the President's representative in Samegrelo-Zemo Svaneti region, Z. Gorozia. Initially Z. Gorozia welcomed the idea, although ultimately the master plan went without response. Vakhania stated the aforementioned in letters disseminated in press. He also clarified that he had a dispute with former Consul of Georgia to the Russian Federation concerning transfer of monumental icon of Virgin Mary to Georgia, as Z. Pataridze was opposing to the idea.

V. Vakhania had decided to establish a political party Whole Georgia with an agenda for political and economic development of the country, different from that of the authority. Founding convention was scheduled, although the notaries who had been invited to found the convention did not show up and the party could not be founded[57]. Vakhania considers that the notaries did not show up due to the pressure exerted by the authorities against them. The party could be founded only after Vakhania's arrest.

Vladimer Vakhania clarifies that on October 12, 2008, when he was on his way to leave for Moscow, he was stopped by the boarder protection and interior affairs authorities of the airport in the so-called neutral zone of Tbilisi International Airport. He was taken to one of the rooms, where his passports and telephone were seized. He was informed that he had been detained as Russian spy and traitor of the State. He was also threatened that if he did not sign confession he would be physically and morally destroyed. Gross pressure, threats, blackmail, derogatory and insulting remarks continued during one hour as Vakhania states. Although V. Vakhania demanded a number of times, persons who identified themselves as police officers, did not draw up any document concerning seizure of documents (passports), cell-phone or the fact of removing Mr. Vakhania from the flight and detaining him. Vakhania never received his passports and the cell-phone.

It shall be noted that based on Vakhania's lawsuit, Tbilisi City Court established the fact that Vakhania was stopped at the airport, although it did not uphold the fact of seizing the documents.

[57] Pursuant to paragraph 3 of Article 12 of the organic law of Georgia on Political Unions of Citizens, a notary attends the founding meeting and verifies a protocol thereon.

Vakhania addressed the high-ranking Georgian authorities and law-enforcement agencies, as well as international organizations with multiple applications and complaints over the authority's persecution and seizure of passports. On August 19, 2008 Vakhania's car was vandalized and robbed, the fact that he and the public later protested against: on February 13, 2009 protest rally was held in the city of Zugdidi, where the protesters were demanding the authority to stop persecution of Vakhania and give him back his passports. Following the protest press disseminated reports on Vakhania being a Russian agent and he intended to smuggle arms from Georgia to overthrow the government.

International human rights advocates such as Sergei Kovalov and others made statements concerning charges in the criminal case of Vakhania. Press-conferences were held both in Tbilisi and in Moscow about Vakhania being a political prisoner. Talks were held with President of Georgia Mikheil Saakashvili[58].

2. *Criminal Case*

The September 12, 2009 judgment of Zugidi Regional Court pronounced Vakhania guilty under paragraph 2 of Article 154 of the Criminal Code of Georgia – illegal interference in journalist's professional activities, i.e. forcing the journalist to refrain from disseminating the information by making threats of violence and paragraph 1 of Article 236 – illegal acquisition and storage of fire-arms and ammunition. Under paragraph 2 of Article 154 of the Criminal Code of Georgia, he was sentenced to 2 (two) years of imprisonment for, debarred from the right to hold public office for 3 (three) years, while under paragraph 1, Article 236 of the Criminal Code of Georgia he was sentenced to two (2) years of imprisonment. Pursuant to Article 59 of the Criminal Code of Georgia, Vakhania was eventually sentenced to 4 (four) years of imprisonment and he was debarred from the right to hold public office for 3 (three) years.

Chamber of Criminal Courts of Kutaisi Court of Appeals decreased the June 30, 2010 sentence in the punishment part: the court prescribed imprisonment for the term of 1 (one) year and 6 (six) months and disbarred him from the right to hold public office for 3 (three) years for the crime envisaged by paragraph 2, Article 154 of the Criminal Code; for the crime envisaged by paragraph 1 of Article 236 of the Criminal Code of Georgia the Court prescribed imprisonment for the term of 2 (two) years. As a result of accumulating the punishments pursuant to Article 59 of the Criminal Code of Georgia,Vakhania was eventually sentenced to the imprisonment for 3 (three) years and 6 (six) months and disbarred from the right to hold public office for 3 (three) years.

The June 30, 2010 judgment of the Chamber of Criminal Cases of Kutaisi Court of Appeals was appealed by Vladimer Vakhania and lawyers defending his interests pursuant to cassation procedure in the Chamber of Criminal Cases of Supreme Court of Georgia. The Court ruled that the complaint was inadmissible.

[58] Please refer to the following web-sites: http://www.novayagazeta.ru/data/2010/110/11.html; www.vakhania.ge/index.php?=com; www.vakhania.ru/content/view/220/1/; http://www.presa.ge/new/?m=society&AID=754; 21/10/2010, 17:00pm

Violations in the Criminal Case

- **Grounds for Launching Pre-trial Investigation**

On March 15, 2009, Vladimer Vakhania was detained by the officers of Zugdidi district bureau of police as a suspect for charges envisaged by paragraph 2, Article 154 and Article 236 of the Criminal Code of Georgia.

Launch of pre-trial investigation was based on the report of an officer of Zugdidi district department of internal affairs. According to the report, on March 11, 2009, at 17:00 on Imedi TV, Samegrelo regional correspondent reported that a citizen of Russia, living in the city of Zugdidi, Vladimer Vakhania made phone threats against Lela Khubulava, journalist of Samegrelos Kronika newspaper, demanding a tape-recording of his interview to be handed over to him.

It shall be emphasized that neither the investigation nor the defense could obtain from Imedi TV information service a report aired at the afore-mentioned time, featuring the noted information. It means that the information on an allegedly committed crime, which pursuant to Article 261 of the Criminal Procedure Code of Georgia should have served as the basis for launching pre-trial investigation, did not exist. Therefore, the pre-trial investigation was launched without grounds, i.e. in violation of law. Moreover, based on testimonies of witnesses K. Kardava and K. Basilia, as well as convicted Vakhania himself, L. Khubulava reported the fact of forceful interference in journalistic activities at the press conference for the first time, on March 11, 2009 at 19:00; whereas pursuant to the report, the MIA officer heard the information at 17:00 the same day. These circumstances rule out accuracy of information provided in the report.

- **Immediate necessity of the search performed**

Search of Vladimer Vakhania's house was performed in the mode of immediate necessity. As we have mentioned above, pre-trial investigation was launched on March 11, 2009, while search of his house was performed on March 15, the day he was detained, i.e. four days after the investigation was launched. The Criminal Procedure Code views search, an investigative activity, as an action infringing the right to personal life. Correspondingly, pursuant to paragraph 2 of Article 13 it mandates court control for performing search, while in exceptional cases, where immediate necessity is evident, it allows for performing search without court authorization; although, at the same time, it mandates lawfulness of the search performed to be examined by judge. Pursuant to paragraph 4 of Article 290 of the Code, "case where there is a threat of losing trace or exhibit; a person may be detected in the act; items and documents relevant to the case have been found in the process of another investigative activity (examining the crime-scene, investigative experiment, inspection) or it is impossible to obtain judge warrant due to his/her absence." None of the above-listed circumstances were the case during search of Vakhania's house; at the same time the police had sufficient time to apply to court and obtain search warrant. Therefore, as immediate necessity was not in fact evident, lawfulness of the search performed is called in question.

- **Complete and comprehensive investigation**

Vakhania is charged with illegal acquisition and storage of fire-arm and ammunition. These items were seized during search of his bedroom. Vladimer Vakhania disputed ownership of the items. The fact that items of crime were found in his bedroom does not automatically confirm that they belonged to the suspect. In order to determine ownership it is common to perform dactyloscopic test during investigation, which identifies last person holding the item according to finger-prints, which along with other evidence helps court find the truth.

Hence the investigation should have performed dactyloscopic test for the fire-arm and ammunition. Pursuant to paragraph 3 of Article 58 of the Criminal Procedure Code, the investigator is accountable for conducting thorough and objective investigation to determine both incriminating and exculpating circumstances, which means that the investigator should have performed the aforementioned test to ensure comprehensive and complete investigation.

- **Authenticity of Evidence**

Analysis of Vakhania's criminal case revealed lack of authentic corroboration of his actions qualified as crime in both parts of the chrages.

Pursuant to Article 112 of the Criminal Procedure Code, "In a criminal case following shall be corroborated: 1) action (inaction) of the defendant or other individual; b) illegal nature of the action (inaction) c) guilt. When all three elements are evident, the court delivers verdict of guilty. Pursuant to paragraph 3, Article 10 of the Code verdict of guilty shall be based on authentic evidence. If doubts about any of the circumstances remain, they are resolved in favor of the accused – in dubio pro reo. This principle is reflected in paragraph 3 of Article 40 - all doubts that may not be corroborated pursuant to the legal procedure, shall be resolved in favor of the defendant.

Vakhania was charged under two Articles of the Criminal Code (illegal interference into professional activity of journalist – paragraph 2 of Article 154) and illegal acquisition and storage of fire-arm and ammunition (paragraph 1 of Article 236). Pursuant to the cited norms, it should have been authentically corroborated that the accused did in fact commit the alleged actions.

- *Authenticity of evidence in charges under paragraph 2, Article 154 of the Criminal Code of Georgia*

a. Witness statements

In this part of the charges leveled against Vakhania, the court found that he was interviewed by Lela Khubulava, journalist of Samegrelos Kronika about developments in Georgia; although later Vakhania had his relative, Ramaz Vakhania advise the journalist against publishing the interview and demand the tape-recording. He made death threats against the journalist and threatened to blow up her house. Afterwards, intimidated Khubulava was forced to hand the video-tape to him.

The afore-mentioned fact had been stated only by the victim, Lela Khubulava. Other witnesses who corroborate the fact have named the victim as their source of the information, indicating the victim as source of the information. They have not personally witnessed the alleged fact. The defense witnesses declare quite the opposite: when Lela Khubulava arrived at Vakhania's house to hand him the tape-recording, there were five persons visiting Vakhania. They declare that Khubulava and Vakhania talked in private for over 20 minutes. They did not hear any noise of altercation during this time. As the guests were having dinner, Khubulava was invited to the table by Vakhania himself, who even toasted for the journalist. In their opinion Khubilava did not look angry or upset. As for Ramaz Vakhania, who demanded the tape-recording from Khubulava on Vakhania's behalf a number of times states that all he did was to verbally deliver Vakhania's message to Khubulava about returning the tape and that he made no threats. Furthermore, he states that after Lela Khubulava's visit to Vakhania's home, in about couple of days he himself dropped tape-recorder off at Khubulava's office at Vladimer Vakhania's request and gave her an invitation to attend the March 11 founding convention of the political party[59].

The court did not uphold testimonies of the defense witnesses, stating that witnesses are Vladimer Vakhania's relatives and friends, who are trying to help him escape liability.

It is peculiar that Khubulava's statements that she gave during pre-trial investigation and in court differ in the part where she is talking about threats leveled against her: in one statement the journalist maintains that she was intimidated by threats as they seemed real enough, whereas in other statement she maintains that as she did not think the threats were real, she had not been intimidated at all. Furthermore, if threats were in fact made against her and she was scared as threats seemed real enough, it is peculiar that she did not turn to her family or friends – to her sister, for instance, who has stated that she had not been aware of the fact. If the victim was in fact intimidated by threats, it seems odd that she visited Vakhania at home alone or that she did not report the incident to the police.

Phonoscope test performed in the case does not corroborate Khubulava's statement[60]. Specifically, in a statement she gave in court L. Khubulava states that exceptionable remarks addressed to the chairman of the Union of Georgians Living in Russia, Mikheil Khubutia that Vakhania made in the interview served as a motive for pressure exerted against her; whereas the recording of the interview analyzed by experts does not include any exceptionable remarks or any statements at all about Mikheil Khubutia. This fact once again calls L. Khubulava's testimony in question[61].

All of the afore-mentioned facts indicate that testimony of victim L. Khubulava lacks credibility and shall not be considered as authentic. Against this background, upholding her statement and turning down testimonies of the afore-mentioned witnesses calls the verdict in question.

[59] Ref. criminal case, book 1, pp 144-146

[60] Phonoscope test is performed during criminal investigation to convert audio recording into a text.

[61] Please see below for the detailed information concerning the test.

b. Forensic Findings

Results of phonoscope test analyzing text of the interview were presented by the defense at the court of appeals session, in order for it to be examined and included in the case materials. The court separated the test results from the case and did not attach them to the criminal case, stating that it was of no relevance to the case. Thus the court once again violated imperative stipulation of paragraph 1 of Article 364 of the Criminal Procedure Code, which mandates that findings of alternative expertise shall be attached to the criminal case and evaluated along with other evidence.

The noted findings would have provided a meaningful help to the court in terms of examining credibility of Khubulava's statement and forming an opinion on which statements to uphold when elaborating the judgment.

- *Authenticity of evidence in charges under paragraph 1, Article 236 of the Criminal Code of Georgia*

a. Forensic Findings

The court found that Vladimer Vakhania acquired a fire-arm and ammunition and stored them in his house. Both the fire-arm and ammunition were found and seized by police officers during search of his house for the purpose of finding a tape-recording.

a. 1. Graphic analysis

Findings of graphic forensic analysis presented by the defense during review of the case in the court of first instance, attesting that signatures in the name of V. Vakhania on the witness examination protocol, the protocol of suspect detention, the resolution on performing search due to immediate necessity and the search protocol (all of the documents were dated March 15, 2009) have been fabricated, as the documents have been signed by someone other than Vladimer Vakhania.

Witnesses summoned for the house search were J. Chikovani and M. Makatsaria. The graphic analysis concludes that signatures in the name of J. Chikovani at the end of the search protocol, on the document warning about liabilities for giving false statement and witness examination protocol, dated March 16, 2009 had been fabricated as the documents have been signed by someone other than J. Chikovani. Signatures in the name of M. Makatsaria at the end of the search protocol (where the witness is supposed to sign), on the document warning about liabilities for giving false statement and on the backside of the first sheet of the witness examination protocol, dated March 16, 2009 had also been fabricated as the documents have been signed by someone other than M. Makatsaria. These facts indicate that search of Vakhania's house and his detention were performed in essential violation of law.

Evidence obtained in essential violation of law is deemed as inadmissible pursuant to subparagraph "c", paragraph 1 of Article 111 of the Criminal Procedure Code of Georgia. Hence, it shall not have served as the basis of verdict. As for the detention of Vakhania himself, as law was essentially violated in the process, which at the same time degrades his legal con-

dition, pursuant to paragraph 5 of Article 145 of the Criminal Procedure Code, Vakhania should have been released immediately after the violation was detected.

The afore-mentioned circumstances produce a reasonable doubt about the search results, i.e. alleged acquisition and purchase of illegal weapons – fire-arm and ammunition by V. Vakhania.

The court of first instance did not uphold the findings of the analysis. Therefore, the defense scheduled another examination – board examination, which fully reiterated content of the previous examination in its findings. The Court of Appeals, like the court of first instance did not uphold the findings, thus contradicting paragraph 2[62] of Article 19 and paragraph 1 of Article 132[63] of the Criminal Procedure Code of Georgia. It stated that findings of the board examination did not arise from the case materials and contradicts evidence analyzed during the court investigation.

The court's refusal to uphold the finding due to the above-mentioned motive is disputable, as the finding specifically relates to statements of J. Chikovani, M. Makatsaria and the defendant himself, as well as other documents in the case that are discussed below[64].

During the pre-trial investigation J. Chikovani was examined as a witness, where he testified about process and results of the house search; whereas when his statement was published at the court session he declared that the document was missing certain facts that he had pointed out during the examination. Specifically, according to Chikovani's statement in court, he was summoned an hour and a half later, when the search had already been started. At the court session it appeared that the noted fact of significant importance was left out in the examination protocol. Furthermore, the witness' statement was missing the fact that during the search the witness felt sick and went home. Chikovani refused to accept the modified statements and declared that only the facts that he had stated in court were true, whereas statements that he gave and signed during the pre-trial investigation were different from what had been published. Therefore, signature on the published statement was not his. Furthermore, he signed protocol of garage search[65] the very same day the search had been performed. Next day he was forced to go to the police station and sign envelopes and small, clean pieces of paper with stamps on them. Chikovani also points out that he placed his signature along the signature of Makatsaria and that he had not signed protocol of search of the house.

As for the second witness, Makatsaria, he gave an equivocal testimony before the court; more specifically, statement that he gave for the pre-trial investigation describes the process of the house search the following way: he was summoned as a witness and his rights were explained. Items seized during the search were sealed in his presence and he signed

[62] Pursuant to paragraph 2 of Article 19 of the Criminal Procedure Code of Georgia, evidence is evaluated for the purpose of determining their credibility and sufficiency for delivering a conclusion whether alleged crime was committed.

[63] Pursuant to paragraph 1 of Article 132 of the Criminal Procedure Code, each evidence shall be evaluated in terms of credibility.

[64] Ref. Sub-chapter: Witness Statements,

[65] The police officers performed house and garage search. Separate protocols were drawn up for each search.

all relevant documents at once. He agreed with this statement in court, although he also pointed out some contradicting facts. Specifically, he stated that when he and Chikovani arrived at Vakhania's place, search had already been started, an hour and a half ago. During search he lost his consciousness and was taken home. He also describes in details how the police officers were forcing him to sign the documents, which was witnessed by his spouse and an underage child. He states that like Chikovani he signed only the protocol of garage search on the day search was performed, while the next day he was pressured by the police officers into signing "small pieces of paper" (sticky papers with stamps on them)[66]. Having described these circumstances in detail, at the prosecutor's question whether he confirms the statement he gave during the pre-trial investigation, he responded that he does. As for the question whether signatures on witness examination protocols and search protocols are his, he stated that some of them are his, while he is not sure about others. Corroboration of statements that he gave during the pre-trial investigation is invalidated not only by his contradicting statements in court but also by results of graphic forensic analysis that we have discussed above, as the analysis established that signatures on the protocol of Makatsaria's examination as a witness and protocol of the house search was not his.

After the statements made by Chikovani in court pre-trial investigation was launched into the alleged case of giving discordant statements. Before the review of Vakhania's criminal case in the Court of Appeals was finished, a plea bargain was concluded with defendant Chikovani. Noted verdict was attached to V. Vakhania's criminal case at the dispute stage, motioned by the prosecution. The court upheld the noted verdict as prejudice. The judge was guided by the verdict of guilty delivered against Jambul Chikovani for giving discordant statements, as well as findings of graphic analysis that indicate that signature on the search protocol belongs to J. Chikovani. Pursuant to the verdict, J. Chikovani confessed the fact that statements are discordant but says nothing about which statement he agrees with; without any substantiation the Court of Appeals decided that Chikovani's confession was the acknowledgement of authenticity of the statement Chikovani gave during pre-trial investigation. As for the findings of graphic analysis motioned by the investigating authorities, it is unclear why the judge upheld this analysis and turned down the previous two, including the board examination. Hereby, it shall be noted that the analysis commissioned by the investigating authorities examined only J. Chikovani's signature and it says nothing about signatures of Vakhania and Makatsaria. It once again calls the verdict in question in terms of credibility and validity.

a. 2. Analysis of electro technical equipment

The court also failed to examine findings of the analysis of electro technical equipment and a disk that had been repaired after the damage. A video-registrator was installed in Vakhania's house to record the process of search. The findings revealed that the registrator had been subjected to physical impact due to increased voltage and all the information the equipment had recorded was deleted. The information was recovered by highly qualified foreign specialists[67]. The court stated that the finding was not upheld due to its irrelevance;

[66] These paper-sheets are used to ceal the items seized during search.

[67] Information recorded on the disk was recovered in a forensic bureau in Moscow

specifically, the court ruled that the video-registrator did not reflect process of the search. The equipment that in fact registered the process corroborates testimonies of the defense witnesses, specifically the fact that there were a lot of police officers in the yard, as opposed to only five, as it was stated by the officers who performed the search.

b. Witness Statements

Pursuant to the protocol, witnesses of the house search, J. Chikovani and M. Makatsaria attested the search process and results with their signatures during pre-trial investigation (as we have mentioned, according to the expert findings the signatures turned out to be fabricated), while at the Court of First Instance they declared that they were summoned to attend the search of Vakhania's house by police officers an hour and a half after the search was started. The situation described by them fully contradicts the protocol narrative. The witnesses state that there were a lot of police officers and special operational team members in the yard, limiting free movement. Before their arrival there were about 30-40 police officers moving around freely at Vakhania's house and they are not aware of what happened before they got there. Having entered the house, they saw Vakhania sitting at the table in handcuffs. Seized items had not been sealed in their presence and labels of the sealed items had not been signed by them. Furthermore, recordings of the emergency medical service 03 (analyzed by the Court of Appeals) demonstrate that at 22:25 J. Chikovani was diagnosed with hypertensive crisis – blood pressure 200/120 and was injected with several different types of medicine. The fact that J. Chikovani suddenly fell ill and the ambulance arrived is also corroborated by a number of witnesses, including police officers participating in investigative activities. Same recordings demonstrate that they called ambulance for M. Makatsaria as well. Pursuant to the search protocol, search started at 20:50 and finished at 23:00, i.e. the search witnesses could not have attested search results, as at 22:25 emergency medical assistance was provided to them.

The statement of Vakhania's neighbor, I. Kvaratskhelia whose examination was motioned by the defense is noteworthy. In his statement he explicitly notes that he was standing outside the yard of Vakhania's house when he saw a number of cars approaching Vajhania's house. He was covertly watching movement of the police officers when he noticed how one of the police officers took something out of a trunk and entered the yard.

The afore-mentioned circumstances altogether raise serious doubt on whether witnesses fully observed the search process or weather signatures on the witness examination and search protocols are actually theirs. Rightfulness of actions undertaken by the police officers, as recorded in the search protocol is also questionable, and ultimately, corroboration of charges under paragraph 1 of Article 236 of the Criminal Code of Georgia is called in question.

- **Direct and Oral Examination of Evidence**

Ballistic test was performed from the fire-arm and ammunition seized from Vakhania's house in order to determine whether they were fit for use. During the stage of court review, the defense raised a motion for presenting the fire-arm and ammunition as exhibits

at the trial and analyzing them. The court turned down the request, stating that analysis of the items at the trial would not have made any direct impact on the case. Article 20 of the Criminal Procedure Code provides for direct and oral examination of evidence and stipulates that "authorities or an official instituting the proceedings shall... examine exhibits. Deviation from this rule shall be allowed only in certain cases envisaged by this Law". Pursuant to the noted stipulation, the judge who was instituting the proceedings in this case, at the stage of case review, was obliged to examine the items, as there were no special circumstances that would have allowed deviation from the imperative norm. It can be inferred that the judge did not comply with the rule thereby contravening the principle of direct and oral examination of evidence.

- **Unreasonable delay of the process**

It took the court of appeals more than six months to review Vladimer Vakhania's criminal case, whereas there were no special circumstances that would have hindered review of the case within the term mandated by Law[68]. Pursuant to paragraph 2 of Article 528 of the Criminal Procedure Code, the court of appeals shall review the case no later than within 3 months after it was admitted. It means that the court violated the term for case review.

- **Prisoner's Rights**

During his tenure in prison facts of infringement upon Vladimer Vakhania's rights were identified. Article 17 of the Constitution of Georgia prohibits torture, inhumane, cruel and degrading treatment and punishment. Serving the purpose of realization of these rights, paragraph 5 of Article 136 of the Criminal Procedure Code of Georgia stipulates that conditions at the place where a detained or an imprisoned person is held shall ensure dignified existence of person, respect of his honor and dignity, personal inviolability, health care and ability to defend his/her interests.

In Ghavtadze v Georgia, the European Court of Human Rights ruled that Article 3 of the European Convention imposes a positive obligation on the State to secure health care of a prisoner adequately during his/her imprisonment[69]. With the same judgment the Court ruled that prison conditions for prisoners that are sick shall ensure protection of their health, in consideration of concurrent and reasonable requests of the confinement regime[70].

All of the aforementioned guarantees were violated during Vakhania's imprisonment: When he was to be escorted to the trial at civil court, he notified the court with a statement that due to heart-attack and high blood pressure he could not be transported. Therefore, the court session was postponed. At the trial that followed, deterioration of his health condition was clearly evident by his appearance. Ambulances called during this and subsequent trials found that he was undergoing a hypertensive crisis[71]. Alternative tests motioned by

[68] The meeting held in January was continued in June without any grounds for such a long delay interval.

[69] Ref. judgement of the ECHR #23204/07 in Ghavtadze v Georgia, dated March 3, 2009, §76;

[70] Same source.

[71] See the medical document certifying the ambulance called at that time and after that the issued document certifying the critical health condition of Vakhania

the defense were performed twice and they indicate that the patient is in need of a treatment at a medical facility, that he is considered to be dangerously ill and under a high risk of fatal complications. His medical condition was enough of a reason for transferring him to a medical facility of the penitentiary for a treatment, although the prison administration failed to.

It is also important that according to the written statement of the defendant, he was subject to inhumane treatment as he was forcefully injected with substance. The defendant states that before the court of first instance rendered its judgment, when he had decided not to attend the process, he was injected forcefully. As a result, his consciousness was limited temporarily, which made it possible to escort him to the trial against his will. Afterward the defense still requested alternative test in order to shed the light on certain issues, including whether V. Vakhania was intoxicated, among other things. Therefore, toxicologist was invited to the commission, who did not perform a blood test, stating that it had been a long time since the alleged intoxication; i.e. it was too late to perform the test. It was the prison administration who delayed the test, as it groundlessly failed to provide all necessary conditions for performing the test in due time. According to the lawyers, traces of forceful injection were visible on Vakhania's body and both the medical examination and the test would have easily established the fact if they had been performed in due time.

Hereby, it shall be noted that notwithstanding the defendant's statement, pre-trial investigation into the alleged case of inhumane treatment of Vakhania was launched after several months and no investigative activities were performed.

- **Reaction of the law-enforcement authorities to Vakhania's applications**

V. Vakhania himself applied to investigative agencies a number of times with a request to investigate the illegal actions brought against him. As V. Vakhania's lawyers clarify, the applications went without any efficient response by the law-enforcers. As we have already noted, preliminary investigation has been launched into the facts of seizing Vakhania's passports, as well as robbing and vandalizing his car, although no efficient measures have followed. Preliminary investigation was also launched into the case of inhumane treatment of Vakhania in prison. Vakhania's lawyers raised persistent motions for examination of witnesses, which have not been examined yet by the investigator.

Vakhania states that during his tenure in prison[72], he was subjected to pressure. Specifically, a prosecutor visited him, attempting to force him to plead guilty and then leave the country. Vakhania stated the noted fact at the court of appeals trial and applied to the General Prosecutor with a request for undertaking respective measures. Although his application points out elements of crime, the law enforcement officers did not react to the fact.

- **Selective Justice**

Crime envisaged by Article 154 of the Criminal Code of Georgia - illegal interference into professional activity of journalists is an extremely important leverage for journalists to de-

[72] According to V. Vakhania, pressure was exerted against her on June 11-12, 2010.

fend their legal activities. In order for this Article to apply, there should be a special subject, a victim and this victim should be a journalist.

Currently in practice of criminal proceedings there are some cases, where although elements of the crime envisaged by Article 154 are evident, the alleged crime has been qualified under a different Article. The trend is corroborated by facts of violence exerted against journalists of Maestro TV and Kavkazia TV, analyzed by us.

On June 15, 2009, during the protest rally held outside the MIA Tbilisi headquarters, journalists of Maestro TV who were preparing a report featuring the rally were physically insulted by the police officers, seizing the journalists' video cameras and information materials they had already obtained. These activities directly amount to the crime envisaged by Article 154 of the Criminal Code. Legal proceedings were instituted under Article 266 of the Criminal Code – organization or active involvement in a group activity, causing a disturbance. Composition of this crime has nothing to deal with Article 154. On the basis of the content of this crime it becomes evident that the investigation was launched for the purpose of identifying organizers of the group activity or its active participants, as opposed to investigating the criminal activities brought against the journalists. This fact unequivocally indicates that the criminal action went without a response, as pre-trial investigation was not initiated.

The aforementioned facts clearly demonstrates that in one case law-enforcement officers reacted immediately (criminal case of Vladimer Vakhania), whereas in another case (actions brought against Maestro TV and Kavkazia journalists) the alleged criminal activities went without a response.

3. *Conclusion*

Analysis of Vladimer Vakhania's criminal case revealed multiple essential procedural violations both during the process of investigation as well as during the stage of court review. These violations had an extremely significant influence on Vakhania's conviction, which raises reasonable doubts about Vakhania's verdict of guilty in terms of its credibility and legitimacy.

1.2.4. Case of Gocha Jikia

1. *Political activity of Gocha Jikia*

Gocha Jikia is supporter of Republican Party from Chokhatauri. He actively participated in protest rallies in fall 2007 and spring 2009.

2. *Criminal case of Gocha Jikia*

With the resolution of Chokhatauri Regional Court, dated July 29, 2009 for the case #1/49-09, Gocha Jikia was found guilty in committing the actions foreseen by para I and II of Article 236 of CPC. Specifically, he was charged with illegal acquisition, storage, carriage of ammunition, explosive material and explosive device. He was sentenced to 3 years and 6

months of imprisonment. The Court of Appeals amended punishment part of the sentence and prescribed a penalty in the amount of GEL 4 000, which was alleviated considering the term Gocha Jikia had served in prison and the final amount of the penalty was set at GEL 2 500.

3. *Violations in the case of Gocha Jikia*

- **Charges brought against Gocha Jikia**

Gocha Jikia has been charged with illegal acquisition of ammunition, explosive material and explosive device. The judgment delivered in his case fails to provide substantiation whether the time allowed by the statute of limitation for the crime committed has run out.

- **Search conducted on the basis of operative information**

Initial investigative activity – search was based solely on operative information in Gocha Jikia's criminal case.

- **Necessity of immediate search**

Search was conducted in the mode of immediate necessity. The investigative action was based on a report, although the report fails to specify exact time when the investigative agencies became aware of the information about alleged crime, which brings the immediate necessity of search in question. An immediate necessity is when the need of immediate action is evident. In Gocha Jikia's case the prosecution failed to prove and the court could not establish that the police officers were acting in the case of immediate necessity[73].

- **Uncertain findings of a forensics expert**

Pursuant to the Criminal Code of Georgia, acquisition, storage, carriage, shipping, transportation or selling of firearms that are usable is punishable[74]. The charges brought against Gocha Jikia were based on the fact that three types of ammunition were seized from Jikia[75], including capsule detonator[76]. As for the latter, the expert estimated that it "it probably belonged to usable ammunition"[77]. Therefore, convicting G. Jikia for the third weapon was unacceptable as it was useless for combat purposes.

[73] According to the Supreme Court of Georgia statistics, 99.9% of all please for conducting a search were granted. Source: < http://www.supremecourt.ge/default.aspx?sec_id=1171&lang=1 > (retrieved in September 2010).

[74] The judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia #1014ap-09, dated June 24, 2010. This is the case of convicted Roman Kakashvili who is discussed later in this report. Roman Kakashvili was charged with acquisition and storage of a weapon and bullets. The supreme court of Georgia dismissed the charge about acquisition and storage of bullets, as according to the forensic finding the bullets were most probably useless for combat purposes.

[75] Three types of ammunition were seized in Jikia's case.

[76] When several weapons are seized charges are brought under a single Article. The capsule detonator belonged to one of the ammunitions out of the three types of weapons collected during the search.

[77] Ref. decision of Chokhatauri Regional Court in Gocha Jikia's case;

- **Participation of witnesses**

When witnesses[78] were questioned at the trial, they directly indicated that they were not able to see the person performing investigative activity - the investigator - at all; they were also unable to describe the actions he had performed. Pursuant to Para 1, Article 102 of CPC, witness is summoned for the purpose of certifying the fact, the process and results of the search performed. As the witness testimonies clarify, they were not given an opportunity to observe the process of searching. According to the testimonies of Tsintsadze and Berdzenishvili[79], they were unable to see all the actions performed by the investigator. They did not see where the items were collected from, as the door of the vehicle was closed. Therefore, the lawfulness of seizure of the items is doubtful.

The witnesses were not provided with an opportunity to thoroughly observe the process of searching; therefore, only the police officers participating in the search testified in favor of the prosecution in G. Jikia's criminal case.

- **Evidence collected during search**

The case materials demonstrate[80] that items seized during the search were wrapped in a black plastic bag that was torn and thrown away by investigator Tskvitinidze. Pursuant to Para 8 of Article 323 of CPC, all items seized during search should be "described in the protocol in detail, bagged and sealed when possible". As the plastic bag, ammunition placed in it, explosive material and explosive device constitute the items seized during search, they should have been sealed according to applicable procedures and sent for a dactyloscopic test. It could have been used as an exhibit due to a fingerprint or any other individual trace on it (it could served as the basis for a different investigative action or a source of a different version). Instead, the seized items were partially destroyed[81].

- **Dactyloscopic test**

Dactyloscopic test has not been performed for any of the weapons seized from G. Jikia. The test would have authentically confirmed storage of the weapons by G. Jikia. As the test was not performed, the doubt whether the items actually belonged to G. Jikia may not be deemed as substantiated.

- **The punishment of Jikia**

The court imposed a penalty as a punishment measure against Jikia. The prescribed punishment is peculiar, as it is unusually lenient considering the facts that the defendant did not cooperate with the prosecution, no alleviating circumstances were evident and he was sentenced for both alternative parts of the charge brought against him.

[78] Mamuka Tsintsadze was The witness in this case; his case has been discussed earlier in this report.

[79] The noted persons were witnesses.

[80] see the minutes of trial: interrogation of the witnesses, Nino Berdzenishvili, Mamuka Tsintsadze, Valerian Saluqvadze, Archil Siradze, Anton Dolidze, Irakli Tsqvitinidze, Kakha Berdzenishvili

[81] Integrity of the plastic bag has been violated and any possible trace on it erased due to mechanical impact.

- **Delays in criminal prosecution**

Gocha Jikia's case attracts attention for another reason as well. In Gocha Jikia's case preliminary investigation was started on November 26, 2007. Basically the investigation exhausted all investigative activities that later served as the basis for the sentence in the period of three months. From an objective viewpoint it was possible to conclude proceedings of the criminal case and refer the case to court; while instead the case was unreasonably delayed and referred to court in November 2008 (ten months after the last principal investigative activity was held). First trial was held on March 30, 2009 (four months after the case was referred to court), several days prior to the launch of Spring 2009 protest rallies.

According to the Georgian legislation preliminary investigation is limited to a certain period of time. A person can be convicted of one and the same crime during 12 months only[82]. According to the CPC a person is considered to be an accused before the case with a bill of indictment is referred to a court. Afterward a person receives a status of a defendant[83]. The accused can be released on bail during 12 months only, as the status is valid during the noted period of time. Although the law does not provide for a limited term for bearing the status of a defendant[84]. When the latter is released on bail, criminal prosecution can be basically put on hold for an indefinite period of time.It is safe to say that in this case the legislative flaw has been effectively used against the political opponent This sort of regulation is a flaw of the criminal procedure legislation.

4. *Conclusion*

All of the matters reviewed above demonstrate the gross violation of procedural as well as material legislation.

1.2.5. Case of Tamaz Tlashadze

1. *Political activities of Tamaz Tlashadze*

Tamaz Tlashadze is an activist of Republican Party in Gori and a founder of the non-governmental organization Our City. He participated in spring 2009 protest rallies outside the Parliament of Georgia and was a lodger of the City of Tents.

2. *Criminal Case of Tamaz Tlashadze*

Tamaz Tlashadze was detained on June 15, 2009 at around 11:30 p.m. He was convicted pursuant to Para 1 of Article 260 of the Criminal Code – illicit acquisition and storage of narcotics. Gori Regional Court sentenced him to 3 years of imprisonment. Tbilisi Court of

[82] Pursuant to Article 75 of the Criminal Procedure Code

[83] Additionally, the Criminal Procedure Code allows for defining terms by means of forced measures. For example, pursuant to Article 162 of CPC, a term of pre-trial detention for an accused person should not exceed 9 months. Correspondingly, when instituting imprisonment both the court and the prosecutor's office are limited with a nine month term. Sentence is delivered during nine months after referring the case with bill of indictments. When a bail is granted as a measure, there are no term limitations in this case.

[84] A person acquires status of a defendant after charges are brought against him/her and the case has been referred to court with the bill of indictment.

Appeals repealed the sentence in the punishment part and reduced term of imprisonment to six months. On December 14, 2009 Tlashadze was released from prison. With the court's decision, pursuant to the Law of Georgia on Combating Narcotic Crime his driving license was suspended for five years, his right to pursue his activities at pedagogic or educational institution or at state and local self-governance treasury (budget) institution – at agencies of public authority, as well as his passive election right and right to make, store and carry a weapon were adjudged.

3. *Violations in Tamaz Tlashadze's Case*

- **Charges brought against Tlashadze**

Para 1 of Article 260 of the Criminal Code that served as the basis for convicting Tamaz Tlashadze includes several alternative compositions, including illegal acquisition and storage of drugs.

Tamaz Tlashadze was convicted for illegal acquisition and storage of drugs. The problem with the noted charge is corroborating the fact of illegal acquisition. Based on the constitutional principle of resolving all doubts in favor of the defendant, Tlashadze should not have been convicted for acquisition of drugs as the fact of illegal acquisition had not been corroborated.

- **Evidence that was not been examined during the trial**

On July 15, 2009 the police officers found a single pill during search of the convict, which according to the June 16, 2009 forensic finding of Shida Kartli Forensic Division of Forensic Main Division of MIA contained 0, 00418 g of "Buprenorphine".

The collected evidence was recognized as an exhibit pursuant to the applicable Georgian legislation. During the review of the case in the Court of First Instance the judge published all evidence, including the resolution on recognizing evidence as an exhibit, although the evidence itself – the pill – had not been examined[85].

Although the Court failed to examine or inspect the exhibit, during the review of Tamaz Tlashadze's case, during the court dispute, the evidence[86] was used by the defense as well as the court that based its sentence[87] on the noted evidence. Therefore, whether such evidence in fact existed is questionable.

- **Search and Detention of the Defendant**

Tamaz Tlashadze was searched on July 15, 2009 and detained afterward. Specifically, his search was started at 23:25 and finished 23:40. It was followed by his formal detention at 23:42.

There was no **evidence** in Tamaz Tlashadze's case that would confirm he had narcotics

[85] Ref. to the minutes of trial, p. 20

[86] Ref, to the minutes of trial, p. 29

[87] Sentence #1/b-1513-09 of Gori Regional Court, dated August 14.

before the search was performed. His search was based only on operative information. Operative information is not a sufficient guarantee for qualifying encroachment on human rights as legal. In this case there is a reasonable doubt whether or not Tamaz Tlashadze indeed possessed narcotics as the prosecution failed to submit any evidence (that existed in the case and that we were aware of) that could corroborate alleged possession of drugs by T. Tlashadze. Existence of evidence and conducting investigative activities in general aims to eliminate all arbitral actions by the investigative agencies. As source of information is unidentified, making it impossible to verify the information, it is unclear how the police officers learned about the offence committed by Tlashadze.

- **Immediate necessity**

The search in this case was compelled by a necessity for immediate action. Resolutions of neither the investigator nor the judge indicate to the circumstances that necessitated immediate action. Failure to provide grounds for immediate necessity violates provisions of Article 20 of the Constitution of Georgia[88] as well as procedure legislation that allows for restriction of constitutional rights without prior notice of the judge only in cases of extreme necessity.

- **Witness**

A witness had not been summoned during search in Tamaz Tlashadze's case. The protocol notes that the person to be searched refused to invite witnesses. Tlashadze himself did not agree with the statement and did not sign the protocol. Summoning a witness to attend a search is one of the rights of a person to be searched. Tlashadze states that no one explained the noted right to him. Therefore, he did not sign the protocol. The prosecution failed to present an argument that would justify failure to summon a witness. There is therefore a reasonable doubt as to whether or not the police upheld the law governing proper procedures during searches[89].

Furthermore, position of the prosecution at the trial was corroborated by the police officers only who personally conducted the investigation activities. According to the Georgian legislation, a person who detained the suspect can testify as a witness in a criminal case, although considering suspicions about whether the refusal to invite witnesses by the person to be searched was legal, lawfulness of testimonies of the police officers is doubtful.

- **Dactyloscopic Test**

In cases where drugs have been seized it is difficult yet possible to perform dactyloscopic test due to the small amount of the seized item. In the case of T. Tlashadze the investigators hadn't attempted to perform pre-trial test prior to forensic test. In the given criminal case first test that was performed was chemical, making it impossible to perform dactyloscopic test[90].

[88] Article 20 of the Constitution of Georgia lays out the procedure for legal restriction of the right to private life.

[89] Explain the right of inviting a witness.

[90] Due to the nature of test to be performed

- **Tlashadze's Punishment**

Tlashadze was sentenced to 6 months of imprisonment as a final punishment pursuant to Article 260 of the Criminal Code of Georgia. The crime foreseen by the Article is particularly grave. The Article defines unified crime of alternative composition. Committing one of the compositions constitutes a complete offence. T. Tlashadze was convicted for two compositions – storage and acquisition. Therefore, it would have been fair to sentence Tlashadze to higher punishment. General practice of court clearly demonstrates that when convicting a person pursuant to Article 260 of the Code, punishment is higher than in the given case.

4. *Conclusion*

Procedural law has been violated a number of times in Tamaz Tlashadze's case, which gives rise to severe doubt as to the reasoning and lawfulness of the overall criminal proceeding against him.

1.2.6. Case of David Gudadze

1. *Political activities of Davit Gudadze*

Davit Gudadze is a member of Gori organization of Republican Party and an active participant of oppositional protest rallies in 2009.

2. *Case of Davit Gudadze*

Davit Gudadze was detained on June 15, 2009. With its August 15, 2009 decision Gori Regional Court found him guilty pursuant to Para 1 and 2 of Article 236 of the Criminal Code - illicit acquisition, storage and carriage of ammunition. He was sentenced to four years of imprisonment. Tbilisi Court of Appeals deemed the verdict of the First Instance Court legal and grounded, only decreasing the punishment that had been prescribed. Instead of the four years of imprisonment prescribed for all offences it ordered the defendant to pay a fine in the amount of GEL 3,000 as final punishment. Considering the pre-trial detention, pursuant to Para 5 of Article 62 of the Criminal Code, sanction in the amount of GEL 2000 was prescribed to Davit Gudadze as final punishment

3. *Violations in Davit Gudadze's Case*

- **Charges brought against Davit Gudadze**

Davit Gudadze has been charged with illegal acquisition of ammunition. Similar to the above-discussed cases, the sentence fails to prove whether the time allowed by the statute of limitation has run out. The case materials do not include evidence dispelling the noted suspicion. Instead, it's been noted that acquisition took place at an unidentified time and under unidentified circumstances. Therefore, it was not confirmed that the time allowed by the statute of limitation had not run out.

- **Search performed on the basis of operative information**

The search in Davit Gudadze's case was performed on the basis of operative information. The case materials include a report of Mikheil Papashvili, investigator, who states that according to operative information a hand grenade is stored in a vehicle with government license plates GUD 300. Afterward a search compelled by a necessity for immediate action was performed. During the proceedings source of the operative information was not revealed. Therefore, search in the given case was performed in violation of legal provisions.

- **Necessity of immediate search**

The search compelled by a necessity for immediate action was performed. Pursuant to the Criminal Procedure Code, grounds should be provided for immediate necessity. The noted procedure was based on a report drawn up by the operative agency. Corresponding search was performed on the basis of a report. Decision of an investigator on performing a search fails to indicate any grounds for immediate necessity of search. Furthermore, the court authorized the immediate search without paying attention to when the police became aware of the information, on the grounds, that the submitted report did not include the date and time of information reception, even though details regarding the time and date at which the police became aware of the information are logically necessary to establishing whether or not the legal procedure is justified due to urgent necessity.

- **Inviting a witness**

Inviting a witness is one of the guarantees for the owner of the place to be searched. This guarantee is also a right of a person to be searched. The law mandates the noted right to be explained to the person to be searched. Davit Gudadze stated that the right had not been explained to him. Therefore, he refused to sign the protocol. As David Gudadze was not given an opportunity to invite witnesses, only the police officers testified against him in the case[91].

- **Evidence that has not been examined during the trial**

Like other cases, neither of courts examined the evidence during court investigation, notwithstanding the fact that the Criminal Procedure Code explicitly mandates examination of evidence during the trial.

- **Failure to conduct forensic tests**

Dactyloscopic expertise is one of the best ways to prove whether the person in fact possessed the item. Findings of the test are used together with other evidence to establish the fact of acquisition and storage of firearm, whereas in the given case, like other cases discussed in this report, the test was not performed.

[91] Gudadze states throughout the criminal proceedings that he was not explained and as a result not allowed to invite witnesses.

Like other cases in this report, ballistic expertise was performed in such a way that made it impossible to perform dactyloscopic expertise. Motion of the defense on scheduling dactyloscopic expertise was turned down due to the fact that after ballistic expertise held, it would be impossible to identify finger prints[92].

- **Punishment of Gudadze**

David Gudadze was prescribed sanction instead of imprisonment and the sanction was later decreased to GEL 2,000 pursuant to Para 5 of Article 62, which constitutes positively disproportional and unsubstantiated punishment for the defendant.

Pursuant to the procedure prescribed by Para V of Article 62 of the Criminal Code, if detention was awarded as main punishment, the court shall substitute the punishment with a sanction and commute the awarded sentence in consideration of the time of detention or shall completely release the person from it. Regrettably, there are no unified criteria that can serve as the basis for utilizing the noted procedure, neither there is a legal balance between imprisonment and sanction. To put it simply, the number of days that equals for instance GEL 1000 sanction is unclear, etc. It is necessary for the court practice to establish criteria that can serve as the basis for converting a prison term into a sanction.

4. *Conclusion*

The content of the charges against the defendants, pre-trial and trial activities, and punishment prescribed were all conducted with several violations of criminal procedure legislation.

1.2.7. Case of Roman Kakashvili

1. *Political activities of Roman Kakashvili*

Roman Kakashvili is a chairperson of Kareli regional organization of Freedom party. He was involved in the Spring 2009 rallies outside the Parliament of Georgia and resided in the City of Tents.

2. *Criminal Case of Roman Kakashvili*

Roman Kakashvili was arrested on June 17, 2009. At the time of the arrest a firearm and a 9mm cartridge was seized from him. With its September 15, 2009 decision Khashuri Regional Court found Kakashvili guilty pursuant to Article 236 of the Criminal Code, Para 1 and 2 - illicit acquisition, storage and carriage of ammunition and fire-arm. He was sentenced to 3 years and 6 months of imprisonment. With the decision of Tbilisi Court of Appeals dated Nov. 17, 2009 Kakashvili was convicted with Para 1 and 2 of Article 236 of the Criminal Code of Georgia and a sanction in the amount of GEL 5 000 was prescribed to him. Pursuant to Para 5 of Article 62 of the Criminal Code due to the five-month imprisonment the punish-

[92] As during the ballistic expertise fingerprints vanish due to various exposures.

ment was commuted and the final amount of sanction was fixed at GEL 2 000. With the June 24, 2010 verdict of the Chamber of Criminal Cases of the Supreme Court of Georgia the sentence of the Court of Appeals was upheld and the conviction in the part of 9 mm cartridge was repealed due to uncertain finding of forensic expert.

3. *Violations in Roman Kakashvili's Case*

- **Charges brought against Kakashvili**

Roman Kakashvili has been charged with illegal acquisition of ammunition and firearm. Similar to the cases discussed above, the sentence in Kakashvili's case fails to prove whether the time allowed for this offence by the statute of limitation has run out. The case materials do not include evidence dispelling the noted suspicion. Instead, it's been noted that acquisition took place at an unidentified time and under unidentified circumstances.

- **Operative information that served as the basis for detention**

Roman Kakashvili was detained on June 17, 2009. It is peculiar that in Kakashvili's case detention took place before search. The case materials demonstrate that the detention was based on operative information. The protocol does not even formally specify grounds for the detention. The police officers clarify that he was caught red-handed – they paid a visit to Kakashvili on the basis of operative information, took him out of the horse cart, detained him, searched him afterward and found the ammunition and fire-arm. In this case the detention was groundless. Therefore, the situation is peculiar as Kakashvili was detained without any reasonable doubts. The basis for restricting his rights was operative information only, while the firearm seized during the search performed after the detention served as the basis for the detention, i.e. first the person was detained and then grounds for detention were found.

- **Necessity of Immediate Search**

The search in Roman Kakashvili's case was compelled by a necessity for immediate action. Neither the Act of search, search protocol or the court decree cites grounds for the immediate investigative action.

- **Evidence that has not been examined in court**

Another important issue that the Supreme Court of Georgia has not responded to is the issue of examining evidence in court. The Georgian legislation mandates examination of all evidence at the trial. The law explicitly stipulates that all exhibits should be examined and inspected at the trial; otherwise it is forbidden to cite the evidence in the court sentence. Khashuri Regional Court and Tbilisi Court of Appeals explicitly cite evidence without examining it, which constitutes violation of law.

- **Dactyloscopic Expertise**

Dactyloscopic expertise has not been performed in this case, while in fact it is impossible to acquire or store an item without certain physical contact. Therefore, finding traces of physical contact would have served as solid evidence in favor of the prosecution and would have ensured thorough examination of the case.

- **Police officers as witnesses and absence of a witness**

Police officers were the only persons that testified in favor of the prosecution. Witnesses of search had not been summoned. Inviting a witness to observe process of search is one of the rights of a defendant and refusal to exercise this right should be willful, explicit and unequivocal. Taking into consideration the fact that in this criminal case the defense presented its claim about "planting the fire-arm" as well as the fact that the refusal to invite a search witness is only indicated in the search protocol[93] by the investigator who performed the search, willful refusal of the defendant to utilize his right to invite a witness is not corroborated by a standard beyond the reasonable doubt.

- **Testimony of witness Ivane Nanetashvili**

The motion to interrogate Ivane Nanetashvili was raised by the defense. He described the fact of Kakashvili's detention in details, because he was nearby, and pointed out that during detention search was not performed. He clarified that Kakashvili was forcefully seated in the police car and taken away. The testimony of the witness was disregarded by courts. The court based its verdict only on testimony of police officers.

- **Kakashvili's Punishment**

Two charges had been brought against Roman Kakashvili. Court prescribed a sanction in the amount of GEL 5,000 that cannot be deemed as an adequate punishment, especially when taking into consideration the fact that the defendant does not plead guilty of any of the crimes. Para V of Article 67 of the Criminal Code of Georgia has been applied to this case without any consistent criteria or grounds.

4. *Conclusion*

All of the above-discussed circumstances explicitly indicate that proceedings in Roman Kakashvili's criminal case were administered unlawfully.

1.2.8. Case of Mamuka Shengelia

1. *Political Activities of Mamuka Shengelia*

Mamuka Shengelia used to work at MIA's Border Police till 2009. He is one of the activists of the political movement Democratic Movement for the United Georgia and is considered to be a close friend of Badri Bitsadze.

[93] That has not been signed by the person to be searched

2. *Criminal Case of Mamuka Shengelia*

Mamuka Shengelia was charged pursuant to Article 19, Para 2a of Article 260 of the Criminal Code of Georgia – attempt to acquire narcotic substance in large quantities; Para 1 of Article 236 of the Criminal Code of Georgia – illicit acquisition and storage of firearm, ammunition, and explosive device (two episodes). He was also charged as accomplice to the crime foreseen by the same Article as the third episode: accomplice to illegal storage of firearm pursuant to Article 25, 236 of the Criminal Code. Later the bill of indictments further elaborated charges concerning firearms and Shengelia was charged for storage pursuant to two episodes of the Article instead of acquisition and storage.

On October 12, 2009 M. Shengelia was found guilty as charged and sentenced to total of 7 years of imprisonment and ordered to pay a fine in the amount of GEL 3 000, including GEL 1000 for the crime foreseen by Para 1 of Article 236 (one episode); GEL 1000 for the crime foreseen by Para 1, Article 236 (second episode); GEL 1000 for the crime foreseen by Article 25, 236 of the Criminal Code (third episode); and 7 years of imprisonment pursuant to Para 1a of Article 19, 260 of the Code. The sentence was upheld both by the Court of Appeals and the Supreme Court.

3. *Violations in Mamuka Shengelia's Case*

- ***Cause of Detention***

On March 17, 2009 the Department of Constitutional Security of MIA started investigation into Mamuka Shengelia's case involving illegal storage of fire-arms foreseen by Para 1 of Article 236 of the Criminal Code of Georgia.

Statement of Dimitry Kinkladze (former co-worker of Mamuka Shengelia) served as the basis for starting the investigation. According to the statement on March 14, 2009 D. Kinkladze in a private conversation with M. Shengelia learned that M. Shengelia was involved in the oppositional movement of Nino Burjanadze, who together with Badri Bitsadze intended to overthrow the authority by any means possible. Shengelia also had mentioned that he was Badri Bitsadze's right arm. Additionally, from the Border Police Shengelia had taken with him unregistered firearm and ammunition. Dimitry Kinkladze willfully cooperated with the law enforcement officers and offered Mamuka Shengelia purchase of the fire-arm and drugs on March 19, 2009. M. Shengelia refused to buy firearm from D. Kinkladze, although helped him get in touch with another person who purchased the weapon on March 20, 2009. As for the narcotic substance, it was simultaneously offered in forms of powder and injection.

On March 23, 2009 at 05:33 Mamuka Shengelia was detained as a suspect in his own home on charges of being an accomplice to purchase of fire-arm (Article 25, Para 1 of Article 236 of the Criminal Code of Georgia). A possibility that the person may hide was indicated as grounds for detention. Arrest as the coercive measure was applied to him.

- ***Search***

On March 23, 2009 after the detention of Mamuka Shengelia, a personal search of Mamuka Shengelia was performed in his apartment in Tbilisi from 6:05 to 6:40. During the search that was compelled by a necessity for immediate action, a cell-phone with two SIM-cards were seized and recognized as evidence.

The same day, on March 23, 2009 from 6:55 to 8:45 a search of his apartment (located in Tbilisi) was performed and six different types of fire-arms as well as ammunition were seized. The search was compelled by a necessity for immediate action. Out of the seized fire-arms five had a license to store and carry. "AKS" rifle only was the one without a license. The search was performed in presence of the defendant's spouse – owner of the house. In the search protocol Shengelia's spouse noted that the AKS rifle found in their bedroom did not belong to her spouse, that the rifle had never been stored in their apartment and she had never seen it before.

On March 23, 2009 from 07:20 to 10:35 M. Shengelia's house in the village of Ghari, Oni Region was searched, compelled by an immediate necessity. The search was performed in presence of the head Ghari community and two neighbors. Different types of weapons (grenades, grenade-launchers, rifles) and ammunition were seized. The protocol cites witnesses stating that "Mamuka Shengelia has not been at this house for five years."

- ***Search compelled by necessity of immediate action***

In all three cases search compelled by an immediate necessity was illegal, as there in fact were no circumstances necessitating immediate action, provided by Para 4 of Article 290 of the Criminal Code of Georgia.

Information specified in the statement of Kinkladze is cited as the basis for search of the apartments. The investigation was already aware of the information on March 17, 2009. The search was performed 6 days after the statement was given – on March 23. Therefore, based on the case materials they already knew about the item to be seized and the place it was stored at. Pursuant to Articles 317 and 318, the investigation could have applied to a judge in advance for securing a search warrant, which they did not, thus violating applicable procedure law that can serve as the basis for declaring the seized item imperatively inadmissible.

- ***Inviting Witnesses***

Inviting a witness to observe process of search is one of the rights of a defendant and refusal to exercise this right should be willful, explicit and unequivocal. In the search protocol of Mamuka Shengelia it is noted that Sh. Melikishvili[94] refused to invite witnesses, although in an interview the latter declared that her right to invite a witness was explained only after the weapon had been seized, when the protocol was drawn up. It is hard to determine whether the person to be searched in fact refused to invite witnesses. The prosecution

[94] Spouse of Mamuka Shengelia

in any case carries the burden of the proof. Mechanism for making an entry in the search protocol by a person performing a search is ineffective. Additional guarantees shall be provided.

- ***Punishment of Mamuka Shengelia***

It should be noted that the punishment that has been prescribed to Mamuka Shengelia for the charges brought against him are clearly inadequate. Although he was charged with illegal storage of a number of illicit items – several grenade-launchers, grenades, rifles and other ammunition, a minimum punishment – sanction in the amount of GEL 1000 (for each episode) was prescribed to him. It clearly differs from punishments that have been imposed in other cases, on other individuals that have been charged pursuant to the same Article. It should also be noted that he was found guilty for three counts of violation of Article 236 of the Criminal Code of Georgia. Sanction in the amount of GEL 1000 was prescribed to him for all three violations.

- ***Forensic Tests***

Ballistic tests have confirmed that the weapon that was seized during the search was usable, as for the anti-armor grenades and grenade-launchers it is stated that they are probably usable. Final entry of the finding does not constitute certain evidence, as it is dubious. Therefore, utilization of the noted entry as the basis of delivering the verdict of guilty is violation of law, as pursuant to Para 6 of Article 371 of the Criminal Code of Georgia, dubious findings of an expert on circumstances to be examined shall have no meaning of evidence.

Following served as the basis of charges on narcotic substance: D.Kinkadze submitted a substance to the investigation that was chemically tested on March 19, 2009 and it was found out that the substance contained 0,0883g "heroine". Half of the substance was sealed and attached to the criminal case as evidence, another half was provided to Mamuka Shengelia in forms of injection and powder by D. Kinkladze by means of a controlled procedure[95]. After the controlled provision, on March 23, Mamuka Shengelia's home was searched. During the search narcotic substance had not been seized, although M. Shengelia was charged with illegal acquisition and storage of drugs in large quantity. Later the charge was specified and attempt to acquire drugs in large quantities remained. The charge was based on the testimony of witness D. Kinkladze, hidden video and audio recording and chemical forensic test. Noted evidence also served as the basis of the verdict of guilty.

As narcotic substance had not been found during search of M. Shengelia's home, basically the type and amount of substance that had been offered by means of a controlled provision defined and caused qualification of charges brought against Shengelia, as well as the punishment. Furthermore, as the chemical expertise has been performed for substance submitted by D. Kinkladze and not for the substance provided to M. Shengelia, a reasonable suspicion on the type and amount of substance offered to the convicted exists. The doubts could not be dispelled with video material. Specifically, it is impossible for forensics

[95] One of the types of operative investigative activity

to define the type and amount of substance that has been taped. Therefore, the doubt whether the forensic test was performed for the substance that was taped has not been dismissed. Pursuant to Para 5 of Article 121 of the Criminal Procedure Code, "an exhibit shall be deemed inadmissible if doubts whether the substance has been allegedly replaced, or its characteristics and features have been modified or traces on it have been tampered have not been rejected."

Dactyloscopic test was also performed for the weapon that was seized in the case. As multiple and different set of fingerprints were identified on the weapon, the item was deemed as useless for examination. Results of dactyloscopic test could have been extremely important in this case, as according to the entries made by witnesses that attended search of the house located in Village of Ghari, Mamuka Shengelia has not visited the house for five years.

4. *Conclusion*

Due to a number of reasons we were unable to thoroughly analyze the case of Mamuka Shengelia[96]. Nevertheless, case materials at our hand demonstrate that justice was instituted in fundamental violation of law that had a direct influence in terms of credibly proving that Shengelia had committed the crime.

1.2.9. Edisher Jobava

1. *Edisher Jobava's Political Activities*

Edisher Jobava is an active member of the political party New Rights. He represented the party in Sakrebulo of Khobi Municipality. He was actively resisting representative of the majority in the government in making decisions that in his opinion were unacceptable. He applied to Chairperson of Sakrebulo and Gamgebeli of the region with a request to establish a faction. He was warned several times against his political resistance; nevertheless he continued his political activities. He was an active participant of Spring 2009 protest rallies.

Edisher Jobava used to work at Black Sea Terminal Ltd. It is important that when entering or exiting the office building he was examined with a metal detector.

2. *Criminal Case of Edisher Jobava*

Edisher Jobava was charged pursuant to Para 1 of Article 236 of the Criminal Code of Georgia – illicit acquisition and storage of fire-arms; and Para 1 of Article 260 – illicit acquisition and storage of narcotics. After signing a plea bargaining agreement, he was received a one year suspended sentence, he was ordered to pay a sanction in the amount of GEL 2000 and was also deprived of the rights foreseen by the legislation.

[96] We were not able to study Mr. Shengelia's case thoroughly since Shengelia's family and lawyer failed to submit all the materials related to the present case.

3. *Violations in the Criminal Case of Edisher Jobava*

- **Charges brought against Jobava**

In both cases charges for illegal acquisition of drugs and fire-arm are based on acquisition of a property at an undetermined time and under unidentified circumstances, which as we have stated a number of times, is an issue.

- **Search**

Due to the peculiarities of this case we deem it expedient to thoroughly describe factual circumstances. The day he was detained Edisher Jobava left his office and headed home by a minibus. The minibus was on its way when it was stopped by police officers, Jobava, who was ordered to get off, was searched. Noted investigative activity was based on operative information. At the time the investigative activity was carried out, there was no evidence obtained pursuant to applicable procedures or any other information (evidence attached to the case later) that would have indicated that Jobava had stored an item illegally. Procedure law was violated and human rights were unlawfully restricted.

During the search narcotic substance and a weapon were seized. As it was noted above, Jobava had left the office that day and he had undergone routine inspection that would ruled out any possibility that he might be carrying a weapon. It should also be noted that after leaving his office and getting on the mini bus, the bus stopped only once and Jobava did not get off. Therefore, it is unclear where Jobava acquired the item. The case materials contained no preliminary information[97] that would have served as the basis for instituting criminal prosecution in Jobava's case and factual circumstances did not support his liability.

- **Search compelled by necessity of immediate action**

On June 19, 2009 search was performed against Jobava, compelled by necessity of immediate action. Like in other cases, the search in this case was groundless. Neither the court decree nor the decree on search compelled by necessity of immediate action contains factual circumstances that, according to the applicable law, are necessary to be evident in such case. The constitutional right of personal inviolability was violated, as were stipulations of the Criminal Procedure Code.

- **Witness of search**

Pursuant to the Criminal Procedure Code of Georgia, a witness of search is a person who is invited by the person to be searched for him/her to observe search, seizure, or examination of the locale, the process and the results. Police officers forced Edisher Jobava to get off the bus. Prior to the personal search he had not been asked whether he wanted to summon a witness. Although according to the search protocol, Edisher Jibava refused to summon a witness. Counter statement has not been proved at the trial. The refusal to exercise the noted right was not willful, explicit and final[98].

[97] Apart from operative information

[98] In any case, it is not evident from the case materials.

- **Failure to Perform Forensic Test**

Dactyloscopic test was not performed for the fire-arm seized during the search. Dactyloscopic expertise allows confirming whether the person had touched the weapon. Therefore, failure to perform the test leaves certain questions unanswered, which is inadmissible in criminal proceedings as the latter calls for scrupulous approach in the process of making any decision against the defendant.

- **Refusing witnesses requested by the defense**

The defense made multiple requests to the detective of Khobi Regional Division for interrogating additional witnesses, which was turned down without grounds. The prosecution was guided by the testimonies of police officers only.

As the defense stated, interrogation of additional witnesses would have clarified that after leaving his office Jobava was not carrying firearms or drugs. Jobava left his office without carrying a weapon, which is confirmed by peculiarities of his work, while additional witnesses would have confirmed Jobava's condition after he left the Black Sea Terminal. The defense states that interrogation of additional witnesses would have terminated Jobava's criminal prosecution with high probability or the verdict of not guilty would have been delivered.

The defense interviewed one of the employees of the Black Sea Terminal, Gogi Kardava. He stated that he and Edisher Jobava left the office the same time and the metal detector did not pick up on anything illegal. He notes that right after undergoing the metal detector inspection they left the office for Khobi and got on the mini bus. The mini bus made a single stop to let an elderly woman get on. Afterward the police officers stopped the bus and ordered Jobava to get off. Jobava had only a T-shirt on and passengers did not notice anything that resembled a weapon around his waist. One of the co-workers of Jobava, Gogita Kvirkvelia, who was also sitting in the mini-bus tried to get off the mini-bus but the police did not allow him to. They ordered the driver to leave the territory immediately. The noted witness has not been examined by the investigator. Jobava says he received a phone call with threats when the defense' motion to interrogate the witness was reviewed[99].

Edisher Jobava does not plead guilty as charged. He notes that he did not carry any illegal item or substance when he was searched. He states that only thing that he had in his pocket was a cell-phone, a 20 GEL bill and a card certifying that he is an employee of the Black Sea Terminal Ltd.

Edisher Jobava used to work at the Black Sea Terminal Ltd. When exiting or entering the office he was inspected by a metal detector and video surveillance. In order to establish the truth in the criminal case of Edisher Jobava, on July 3, 2009, video footage of Edisher Jobava entering and exiting the office was requested from the head of the security service of the Black Sea Terminal Ltd. The request of the defense was turned down unlawfully - as the information constituted Jobava's personal information, it should have been issued at the request of his lawyer.

[99] Jobava communicated it to his lawyer.

- **Interdictory measures**

The defense applied to Khobi Regional Court with a motion to substitute the two-month detention on remand with bail. With the August 17, 2009 decision of Khobi Regional Court the motion was granted. A bail in the amount of 2,000 GEL was granted to Edisher Jobava and he was released from the courtroom, which is peculiar as Jobava was released with a minimum amount of bail foreseen by law, while he was charged with committing a grave and particularly grave crime.

- **Forced plea bargaining agreement**

Motion to interrogate additional witnesses was raised in Khobi Regional Court. Prior to reviewing the motion judge announced a break. Edisher Jobava said he received a call on his cell-phone during the break from an unidentified person who threatened to destroy him and his family members if he did not plead guilty. When the trial was renewed, judge started reviewing the motion of the defense concerning examination of additional witnesses. Jobava rejected the motion and plead guilty as charged and applied to the prosecutor for signing a plea bargaining agreement. The prosecutor immediately agreed to conclude the agreement.

4. *Findings*

A number of violations were observed in Edisher Jobava's criminal case, which raises doubts as to whether or not the given criminal case was conducted in conformity of the law.

1.2.10. Case of Zuriko (Mamuka) Chkhvimiani

1. *Political activities of Zuriko (Mamuka) Chkhvimiani*

Mamuka Chkvimiani is a chairman of the Dmanisi regional organization of Conservative Party. He participated in Spring 2009 protest rallies and was one of the organizers of the City of Tents.

2. *Criminal Case of Zuriko (Mamuka) Chkhvimiani*

Mamuka Chkvimiani was detained on June 25, 2009. Search was performed on the basis of operative information. A single combat hand grenade and 5 cartridges were seized. He was charged pursuant to Para 1 of Article 236 of the Criminal Code of Georgia – illicit acquisition and storage of explosive device and ammunition. On June 26, 2009, Dmanisi Regional Court sentenced Chkhvimiani to the detention on remand. After refering the case to the Court, during substantial review of the case, during the stage of examination of evidence the prosecution dropped the charges and with the September 29, 2009 order of the court criminal proceedings were closed.

3. *Violations in the Criminal Case of Zuriko (Mamuka) Chkhvimiani*

The crime foreseen by Article 236 of the Criminal Code constitutes formal crime. Corroborating this crime does not require much effort. First of all, it should be proved that the person has the illicit item, that he/she has purchased it at a specific time and the item is fit for use according to the forensic findings. The noted facts are frequently proved by search protocol, the seized ítem, forensic tests performed for this item and testimonies of the officers who performed the search. All of the above-stated evidence was present in Mamuka Chkhvimiani's case. Explosive device and ammunition were seized, that were fit for use and the police officers gave the same testimonies. On the face of it, all elements for corroborating the crime were evident, although the prosecution refused to continue the legal proceedings. The charges were dropped due to the testimonies of witnesses that attended process of the search, who were clearly exposing illegal actions of the police officers[100], as well as confirming that prior to search, officers were moving from one room to another in Mamuka Chkhvimiani's house. Mamuka Chkhvimiani's spouse explicitly indicated that the police officers planted ammunition in her room. Although evidence and crime solving methods in this case and other cases discussed above were one and the same, criminal prosecution was dismissed only in Chkhvimiani's case[101], due to existance of witnesses in his case. Witness testimonies played the decisive role in Mamuka Chkhvimiani's proceedings.

1.2.11. Case of Merab Ratishvili

1. *Political activities of Merab Ratishvili*

Merab Ratishvili is the holder of dual citizenship of Georgia and Russia. His family lives in Russia. Prior to detention he had a business in Russia and was frequently commuting back and forth. On September 27, 2007 he organized a conference of applied science on Separatism and Organized Crime, where academic personnel from various countries and representatives of governmental agencies (from Germany, Serbia, Israel, Azerbaijan) were invited. At the conference it was decided to form a club to combat separatism. M. Ratishvili was elected as a chair of the club. At the same time he was involved in other activities as well: he was trying to find investors for the development of National Golf Association that he had formed and to this end he pursued international economic cooperation in frames of the CIS countries in Moscow. Merab Ratishvili had friendly relations with leaders of oppositional party. He was providing financial support for Paata Davitaia's party By Ourselves. He was detained on October 2007, one week before the Autumn 2007 protest rallies were launched.

The report of the Public Defender of Georgia covering the first half of 2008 views Merab Ratishvili as a political prisoner.

2. *Criminal Case of Merab Ratishvili*

On October 27, 2007 the Special Operative Department of MIA (hereinafter, SOD) launched

[100] As they started walking around the apartment before arrival of the witnesses, the seized items were found in their absence.

[101] Which in terms of legal consequences equals to being discharged.

a preliminary investigation into the alleged acquisition and storage of drugs by Merab Ratishvili. He was arrested the same day on the way to his house with a driver. During the search of the vehicle an injection needle was seized with a big volume of "methadone" in it. During search of his apartment same drug located in the right pocket of a jacket in a particularly large amount was seized. The drug abuse test determined that he was under the influence of methadone and a sanction was imposed on him pursuant to administrative procedure. Along with his vehicle and house his office was searched and the law enforcers seized all electronic and hardcopy documents. In addition to the documents, t-shirts of the oppositional party By Ourselves were also seized from his house. According to the case materials, these documents were examined for the purposes of investigation in order to determine whether they constituted spy information, which has not been confirmed[102].

Tbilisi City Court found Ratishvili guilty pursuant to Para 3a of Article 260 and sentenced him to 9 (nine) years of imprisonment. The decision was upheld by the Tbilisi Court of Appeals. The Supreme Court of Georgia delivered a decision not to review M. Ratishvili's case.

3. *Violations in Merab Ratishvili's Case*

- **Probable Cause for Prosecution**

Operative information – phone tapping - served as the basis of criminal prosecution of Merab Ratishvili. Specifically, SOD raised a motion in court requesting a warrant for phone tapping stating following as grounds: in one of the SOD's ongoing criminal cases unidentified individual sold drugs to Gia Meladze and according to the operative information a person named Merab using a specific phone number could have been one of the drug sellers. The court issued a warrant for phone tapping on October 24. Merab Ratishvili was detained after two days. The operative information received by means of phone tapping served as basis for the detention, specifically the fact that Merab Ratishvili was asked for "four lumps" of sugar by a person who, as the dialogue demonstrates, was absolutely unknown to Ratishvili. The person called Ratishvili twice, both times Ratishvili could not identify him and most importantly he was unaware of what he was talking about. Before that Ratishvili received a phone call from his friend, owner of Agari Sugar Gocha Zasokhovi to discuss selling of actual sugar to his relative. The police considered that the word "sugar" indicated drugs and decided that he was selling drugs.

Both material and formal types of violations are evident in the noted episode:

The fact that he police groundlessly considered that the word "sugar" indicated drugs constitutes material violation[103]. The police failed to take any measures to verify whether the assumption was true. The assumption was based on the judgement that in practice the

[102] Ref. to the criminal case documents, pp.99-102, where during preliminary investigation, a letter of the Special Operative Department was sent to the Department of Counter-Intelligence of MIA inquiring whether the documents contained information classified as state secret, which was not confirmed by examination.

[103] Ref. the testimony of investigator Ejibia, where he declares that last conversation with some person named Malkhazia is ciphered. Minutes of the trial, p.132

word "sugar" is frequently used to indicate "methadone"[104]. The police should have at least identified owners of the two telephone numbers, listened to their conversations and determined their ties and afterward, if the findings allowed for reasonable suspicion, the police could have assumed that "sugar" indicated drugs. It is peculiar and should be emphasized that the investigation was trying to identify the person selling drugs but it did not try to identify the person who bought drugs, moreover, when the purpose of the measure is to determine Ratishvili's relation with Gia Meladze. In the given case the person who called Ratishvili for acquisition of "sugar" did not arouse any interest of the police and without even attempting to identify this person the police launched criminal prosecution against Ratishvili.

Formal violation at the launch of prosecution was caused by the material violation: first personal search and then search of the vehicle of M. Ratishvili was performed and drugs were seized. Ratishvili was detained afterward. Article 317 of the Criminal Procedure Code clarifies grounds for search: "an investigator, a prosecutor have the right to perform search, provided the evidence collected in the criminal case allows for a assumption that... at a certain place or with a certain person the item or the document specified in Article 325[105] of the Code is stored and there is report indicating that the person refuses to give up the item or the document willfully". In the provision it is clearly indicated that evidence allowing for reasonable assumption that the person is storing a specific item is necessary for performing a search. Search in this case was based on the recording of conversation obtained by means of wiretapping, which as we have noted above may not be considered as evidence due to the fact that it fails to demonstrate that Merab Ratishvili was involved in selling drugs and was possibly storing them. Therefore, as search can not be deemed as legal, it is safe to say that Ratishvili's detention based on the search – i.e. launch of criminal prosecution - is illegal.

- **Lawfulness of investigative activities**

Merab Ratishvili was charged on the basis of the fact that drugs were found in the middle of the backseat in his car and in a pocket of the jacket hung in the wardrobe in his apartment, i.e. determining whether search of the car and the apartment were legal is the core of justice in this case, as Ratishvili's sentence was based on the search findings.

- Search of the vehicle

Search of Ratishvili's vehicle was accompanied with substantial violations. As the driver notes, the car was in a traffic jam when two cars pulled over, one in front of the vehicle

[104] Ref. notification of N. Kapanadze, the head of the service V, Unit to Combat Illegal Drug Trafficking, Special Operative Department of MIA. In the notification Kapanadze declares that it is likely that M. Ratishvili is storing drug substance, "Methadone". Criminal Case, p.2; The notification is based on tapped telephone conversation with someone named Malkhaza, where he is asking M. Ratishvili for "sugar". Correspondingly, the police considered that the word "sugar" indicated drug substance "methadone".

[105] Pursuant to Article 315 of the Criminal Procedure Code of Georgia, this is a weapon, an item bearing traces of a crime, an item and the valuables obtained by illegal means, other item and document that are necessary for determining case circumstances.

and another in the back. Several persons got out of the cars. They started hitting Ratishvili's vehicle with bats and cried at the persons sitting in the car to get out immediately.

Para 6 of Article 323 of the Criminal Procedure Code, governing procedures of search stipulates that an investigator or a prosecutor proposes to willfully give up the item to be seized and if the person refuses to do so, the law enforcement officer is authorized to perform search, as a stricter measure. Pursuant to Para 4 of Article 102 of the Code, the person's right to invite a witness to attend search can be restricted only in cases of immediate necessity, meaning when a real threat to life or health of a person exists or there is an actual danger that evidence will be damaged, destroyed or hidden. In the given case immediate necessity was not evident. The law enforcers were in full control of the situation when they ordered Ratishvili and Abesadze (driver) to get out of the car. As a counter-argument one of the police officers declared in court that as during search these persons were not arrested, they could act freely, including hide evidence. In this event, officers performing the search would have been unable to restrict such action. Therefore, the search was performed in absence of witnesses[106]. Judge upheld the argument later in the sentence that was delivered. The evaluation is inaccurate both factually and legally: a) the law enforcement officers were factually able to control these persons and had enough capacity to do so due to their numeral and physical advantage. b) If any of such actions occurred during the reasonable period of time for inviting a witness, the officers were authorized by law to record them in the protocol, pursuant to Para 3 of Article 326 of the Criminal Procedure Code and start search immediately, in absence of a witness.

During search of Ratishvili's car a search protocol was drawn up. Pursuant to Para 8 of Article 323 of the Procedure Code, all items seized during search should be bagged and sealed, if possible. The protocol does not record the fact of bagging and sealing the needle, which shall not be evaluated as a minor violation of law. In the process of legalizing the action the court did not even discuss the noted detail. According to the procedure law, the court makes its decision based on evidence at hand. The finding of chemical forensic test dealing with exterior description of evidence also points out the violation in the process of procedural attachment of the evidence. The finding notes that there are unclear signatures on the seals, four on each. The protocol that describes the process of finding the item is signed by three persons only, while the fourth person – the defendant himself has not signed any of the documents, including the sealed item. It is unclear who the fourth signature belongs to. Therefore, authenticity of the evidence is suspicious, specifically there is a reasonable doubt that it has been replaced or tampered with to eliminate traces on the item. Pursuant to Para 5 of Article 121 of the Procedure Code of Georgia if such doubt has not been dispelled, the evidence is deemed inadmissible. Nevertheless, the sentence was based on the evidence and this episode of the charge was not excluded from incriminating actions that the defendant was charged with.

[106] Ref. minutes of the Court of First Instance trial: interrogation of the witnesses, Mamuka Pachulia and Ramaz Ejibia, pp. 8, 52.

- Search of the apartment

During the search of the apartment testimonies of the prosecution witnesses confirm that in addition to the individuals recorded in the protocol one more person – another police officer Nika Kapanadze also attended the search. As Nika Kapanadze himself and the police officers clarify, he did not participate in search of the apartment, he was just present there. When evaluating the fact the judge stated that the noted person did not participate in search and was not obligated by law to sign the search protocol, as only the officers participating in the search are obligated to do so. Such evaluation exceeds all legal frames, as it is not based on law. The Procedure Code recognizes two types of individuals during search – person that performs the search and a witness. The individual that attends search but does not participate in it is a witness, while an individual who is directly involved in the search is a person that performs the search. Pursuant to the definition, clearly this person was a witness. Under Para 1 of Article 326 of the Procedure Code "...protocol is certified with a signature... by an official that performed the search, witness...". Even if Kapanadze did not personally perform the search, he should have signed the protocol as a witness. Although in the given case Nika Kapanadze may not be considered as a witness. Witness is summoned by a person searched, while Kapanadze had not been summoned by Ratishvili's spouse. Ultimately, it is determined that Kapanadze does not have any status in the given investigative action. The purpose of drawing up an investigative protocol is to thoroughly reflect the situation and revive the process before the judge. The noted circumstance creates doubt as to whether or not the events described by the protocol accurately reflect the reality. The protocol of the apartment search is the principal evidence as it confirms that Ratishvili stored drugs in large quantities. As the protocol did not turn out to be authentic evidence, the sentence should not have been based on it. The whole essence of the Procedure Code is that the sentence should be based on authentic evidence dispelling any doubts.

- *Dactyloscopic Test*

Article 18 of the Criminal Procedure Code mandates thorough, objective and comprehensive examination of case circumstances. This is the constitutional principle of criminal legal proceedings.

When the law enforcement officers found a needle during the search of Ratishvili's car, ownership of the needle was questionable, as along with Ratishvili his driver was also maintaining that he had not seen the needle in the car: when the police ordered them to open the door, the driver turned back and asked Ratishvili what to do. If there was something like a needle on the backseat of the car (where the officers found it), he would have noticed it but he saw nothing. In order to determine the ownership, the investigation should have performed dactyloscopic test for the needle and identified the most recent fingerprints on it. It would have greatly contributed to thorough and comprehensive investigation of the case. To the contrary, during the search the police officers failed to even use rubber gloves to protect traces on the weapon. The police officer directly touched the needle and took it in his hands, thus encouraging distortion of the trace left on the item.

- **Proof**

According to the procedure legislation, evidence is collected and secured during preliminary investigation, while the evidence is examined and evaluated in court. *Proof* is combination of these processes.

The process of proof shall be handled in a way that ultimately the sentence is based on accordant evidence dispelling all doubts, as mandated by Para 5 of Article 132 of the Code.

In this case, the court violated its obligations, as it failed to duly examine and evaluate the evidence submitted. It ignored violations committed during collection and securing of evidence, it failed to collate the evidence examined on trial, it groundlessly upheld one type of evidence and turned down another and failed to eliminate doubts toward the evidence that served as the basis for the verdict of guilty.

- Examination of evidence

It has already been clearly confirmed that during search of the vehicle and the apartment the law was violated both from material and procedure point of view. Nevertheless, the court considered the evidence when making its decision and wrongfully dismissed the violations; specifically it did not qualify the violations as infringements of law and did not discuss some of them at all.

- Evaluation of evidence

Police officers who performed search of the vehicle, the apartment, the office, and the driver and M. Ratishvili's spouse Eka Jikhvashvili, who was present during the apartment search were examined as witnesses. Testimonies of the witnesses are essentially contradictory when it comes to describing the circumstances that are vital for proving the charges. The police officers state that during the investigation activities Ratishvili was informed about his rights in a timely manner; violence has not been exerted against him; the vehicle search was performed exactly as it is described in corresponding protocol; the apartment search was performed in full compliance with the law and Ratishvili's spouse, who was at home during the search was informed about her rights clearly and in a timely manner. There were total of 5-6 persons present during the search of the car and the apartment. In both cases, Ratishvili and his spouse were able to observe the process. Ratishvili, his spouse and the driver pointed out different circumstances and their statements are upheld by existing circumstances.

Ratishvili maintains that the police officers forced him to move to the backseat of the car, made him lie down and tied his hands behind his back with handcuffs. During the process, they twisted his finger and hurt him a lot. At the same time, Ratishvili felt a thrust of a needle in his thigh. Then he was forced to sit in the SUV standing behind his car. Ratishvili asked the police officer sitting next to him to loosen the handcuffs slightly and turned to show his hands. When the police officer started to loosen the handcuffs, he fiercely pulled the chain. Ratishvili felt an acute pain and another thrust of a needle in his second thigh. He turned around immediately and saw the police officer wearing rubber gloves and handing an unidentified item to a person standing outside.

Based on the circumstances described above, Ratishvili declares that he was drugged with methadone, which was also established by the drug abuse test. Furthermore, he states that he can identify the person who injected him with drugs in the car. The information provided by him is further reinforced by the fact that he has never been registered as a drug abuser. The police officers are rejecting the noted facts, as well as presence of an SUV on the scene, while Ratishvili's driver explicitly indicates that he saw an SUV behind the car, he also saw couple of persons coming out of the vehicle, who started hitting the car with bats. He also states that the police officers pushed Ratishvili to the backseat of the car and he never saw him again, although he heard Ratishvili screaming "my finger!" The driver was shortly pushed to fall down and tied with handcuffs. There is one contradiction among testimonies of the police officers themselves; more specifically, one of the police officers, Rolan Meskhi confirms that the driver was handcuffed during the search, while others reject the fact. The testimony of the driver himself completes and confirms Ratishvili's statement. The information provided by Ratishvili is of significant importance for the case, as it confirms that he was unable to control the car. Furthermore, it confirms that his rights were violated and violence was exerted against him when police officers had no grounds for his detention yet. Moreover, the driver's statement that Ratishvili was pushed to the backseat of the car and that he heard him screaming of pain, increases trustworthiness of information provided by Ratishvili concerning the fact that before and after he was seated in the car he was shot with needles. Due to the noted fact, the drug abuse test determined that he was under the influence. The driver's testimonies were not upheld by the court. The court clarified that the testimonies lack trustworthiness as he is Ratishvili's personal driver and is helping him escape the criminal liability. Hereby, it should be considered that Ratishvili and his driver knew each other for over three months only. The deliberation of the judge lacks grounds, especially considering the fact that the judge upheld testimonies of all of the police officers. It is also peculiar that as the judge points out in his verdict, the alleged fact that the driver was tied with handcuffs is not confirmed by anyone but the driver himself. The judge failed to take into account the statement of one of the police officers, Rolan Meskhi who confirmed the noted fact during court investigation. The fact that the driver and Ratishvili were handcuffed before the police officers started search indicates that the police officers had freedom to act arbitrarily.

Citing bias as a motive, the judge did not uphold testimony of Ratishvili's spouse E. Jikhvashvili concerning the apartment search. According to her statement, she opened the door after her husband Ratishvili, who was standing outside, asked her to. When she opened the door, she saw Ratishvili in handcuffs. More than 10 persons entered the apartment and scattered throughout the apartment. It was impossible for a single person to pay attention to them and observe what they were doing. The situation was uncontrollable. The judge clarifies that Jikhvashvili's statement is groundless, as she had already signed the search protocol without expressing any concerns or claims. At the same time, the judge disregarded the fact that along with groundlessly curtailing her right to summon witnesses, the procedural rights, including legal consequences of signing the protocol were not clarified to her. Jikhvashvili's statement is important in a way that it emphasizes inadmissibility of exhibits seized during the search, which served as the basis of the verdict; furthermore, it confirms that the detained was first taken to his home to help open the apartment and

only afterward, he was taken to the police department. Pursuant to Para 2 of Article 154 of the Procedure Code, the person who has detained the suspect is obligated to take him immediately to the police department; Therefore, the right of the detained has clearly been violated. In his judgement, the judge fails to substantiate why the testimonies of the police officers are trustworthy unlike testimonies of the driver and Jikhvashvili and why they are objective. The court upheld testimonies of the police officers without grounds and turned down the evidence provided by another party.

4. Conclusion

All of the above discussed information confirms that preliminary investigation and court review were conducted with both material and procedural violations, meaning that the the verdict delivered in Ratishvili's case is unlawful.

CHAPTER II

CRIMINAL CASES NOT RELATED TO UNLAWFUL POSSESSION OR STORAGE OF NARCOTIC DRUGS OR FIREARMS

The Georgian Young Lawyers' Association has studied a number of high-profile criminal cases that are not related to unlawful possession or storage of narcotic drugs or firearms but that turned out to be of interest due to the arrested person's membership of a political party or the political activity of people surrounding the arrested person.

2.1. The pre-election incident of 3 May 2010 and criminal cases allegedly related to the incident

- **Political background**

On 3 May 2010, a few weeks before the Election Day, Governor of Samegrelo-Zemo Svaneti Region **Zaza Gorozia**, Chief of Regional Police **Tengiz Gunava**, Chief of Regional Financial Police **Giorgi Shedania**, high-ranking official of the Ministry of Internal Affairs **Anzor Margiani** and other officials were visiting the Mestia region. They were accompanied by local Mestia Gamgebeli **Gocha Chelidze**. As the local residents have stated, these officials had an escort of dozens of people in masks armed with submachine guns who were moving around on pickup-type vehicles.

According to eyewitnesses, the visit was aimed at pressuring and intimidating candidates participating in the election process. In particular, at night, from 11:30 in the evening till 3:00 hours in the morning, these persons were allegedly taking candidates nominated by the political party "Tavisupleba" (Freedom) to the administrative building in Mestia forcing them to sign for a pre-drafted written request for the removal of own candidatures from the official list of election candidates. Despite the fact that pre-trial investigation on the fact of exerting pressure upon opposition candidates started already in June 2010, no criminal prosecution of specific high-ranking officials has been launched this far. In addition, in spite of a promise made by the Government as to their wish to investigate the case

in an objective and transparent manner, the public has not yet been informed about the progress or results of the investigation. Unlike the protracted investigation of the 3 May violent incident, criminal prosecution was immediately launched against eyewitnesses or their relatives. In particular, in the given report, we will present an analysis of criminal cases conducted against Neli Naveriani and David Zhorzholiani.

Neli Naveriani was a candidate from the opposition political party "Alliance for Georgia" at the local self-governance elections. Distinguished with criticism of the Government, she was actively participating in the pre-election campaign. She was the first to make a public announcement concerning the 3 May incident; in addition, in the course of criminal investigation launched in relation to the mentioned fact, she testified to the investigation authorities as a witness directly naming alleged perpetrators of the incident in question. Having become a member of the local self-governance body (Sakrebulo), Naveriani formed an opposition faction. She paid attention to lawfulness of the activity of the previous-convocation Sakrebulo and starting looking closer into relevant materials.

Kakha Zhorzholiani, brother of detained David Zhorzholiani, was distinguished with special activeness during the pre-election campaign. He was a candidate on behalf of the coalition "Alliance for Georgia". During the 3 May incident, he managed to help opposition majoritarian candidates Vakhtang Nakani and Leri Nakani leave the Mestia municipality local government (Gamgeoba) building as these two were being pressured to sign a request for their own deregistration from the list of election candidates.

In summer 2010, when the elections were over, criminal cases were opened against Neli Naveriani and Kakha Zhorzholiani's brother David Zhorzholiani. Materials of these criminal cases contain a handful of substantive violations making it impossible to ascertain truth in the cases.

- **Each Case**

1. The Criminal Case Concerning Neli Naveriani

Neli Naveriani was charged with the commission of the crime under paragraphs (a) and (b) of Article 181(2) of the Criminal Code; in particular, extortion committed by a group of persons and with the intention to extort property having a large value. A basis of the accusation was the fact that a land plot possessed by the family of Naveriani's spouse for several decades was sold by the Government at an auction; thereafter, the new owner sold the land plot to a Canadian investor. Neli Naveriani, together with her family members, requested the investor's representative David Qukhilava to pay her family monetary compensation for the land plot they used to possess for years.

The court found Naveriani guilty for the paragraphs (a) and (b) of Article 181(2) of the Criminal Code and sentenced her to 4 years of imprisonment. The Court of Appeals upheld the previous sentence. The convict waived the right to appeal for cassation

Violations in the criminal case concerning Neli Naveriani

- **Substantive violations:**

- *Crime qualification*

Pursuant to the Criminal Code, extortion means "a demand to transfer other's property or a title to property or a demand to grant the use of property where the demand is accompanied with a **threat** of use of violence against the victim or his close relative or of destruction or damaging of their property or of disclosure of disgracing information on them or of publicizing of such information as may substantively violate their rights." As the quoted provision reads, in order for "extortion" to be considered committed, it must have been accompanied with a *threat*. Where no fact of threatening has occurred, the crime of extortion cannot be contemplated as long as the fact of threatening is a substantive element of the given crime. When the accusation was presented against her, Neli Naveriani pleaded not guilty; next day she pleaded partly guilty and during the third interrogation she pleaded fully guilty stating that, *as she was explained*, the making of a demand for the payment of money was to be considered as an already completed crime and she did not plead guilty before because she was unaware that this was the case. It goes without saying that the making of a demand for payment is not enough to make up the crime of extortion. It is necessary that the making of such a demand be accompanied with a threat as stipulated in Article 181 of the Criminal Code. There is no single evidence in the case materials that could prove that Neli Naveriani had threatened the victim and threatened to use force against him. According to the case materials, the Japaridzes (members of Naveriani's family) threatened D. Qukhilava with bloodshed. Neli Naveriani was merely present during this conversation. As already mentioned, the accusation presented against Neli Naveriani implies an accusation of having committed a group crime. She would be a member of such group only if she would inferentially act in pursuance of the intention of the whole group or, in other words, if she would join the group in threatening the relevant person. The case circumstances make it clear that she did not have such subjective attitude; on the contrary, according to the statement she made to the investigation authorities, she was demanding the payment of compensation with participation of and in consultation with lawyers. This fact excludes her participation in the threatening of the victim. Therefore, it is excluded that she was threatening the victim – a threat being a substantive element of the crime of extortion. Thus it follows that no accusation can be made against Neli Naveriani under Article 181 of the Criminal Code.

Another substantive element of the crime of extortion is that *the property or the title to property which is being extorted must belong to another person.* In the case of Naverian, the property of concern is the land plot, which had long been possessed by the ancestors of Naverian's spouse and the title to the land plot had been passing from generation to generation. Ownership of this property had never been a matter of dispute. In Naverian's understanding too, the land belonged to her spouse's family. It should also be taken into account that, in an overwhelming majority, titles to land plots in villages that had been transferred to local residents before have not been registered in the Public Register. According to the rules of civil law, a title to an immovable property is valid only if it is registered

in the Public Register. In the case of Naveriani, such document does not exist but the case concerns alleged commission of criminal conduct. Principles guiding criminal law are different. When it comes to prosecuting a person for a crime committed with intent, first of all, the subjective element of crime – perception of unlawfulness – must be ascertained. Since Article 181 of the Criminal Code prescribes criminal liability for the extortion of other person's property, it is of crucial importance to ascertain whether the alleged perpetrator perceived the given property as somebody else's property. Materials of the case in question suggest that Naveriani deems the land plot to be her property and considers that she is entitled to a compensation for the reason that a third party misappropriated her property (see Naverian's interrogation protocol). The fact that the crime under Article 181 falls within the category of intentional crimes is confirmed by Article 10 of the Criminal Code, which stipulates that "negligently committed conduct is considered a crime only if the relevant article so prescribes". The article in question does not prescribe that.

Arguments provided above suggest that Naverian was accused in the absence of substantive elements of the crime she was accused of.

- **Procedural violations**

- *Objectivity of investigation*

The Law of Georgia on Criminal Intelligence and Investigative Measures sets out a system of criminal intelligence and investigative measures designed for investigation of crimes and determines a specific list of such measures. The list is exhaustive in the sense that only the measures included in the list are allowed by law. According to the case materials, victim Qukhilava, after he made a statement to the police on the fact that the Japaridzes demanded him payment of the compensation amount, received 70,000 (seventy thousand) Georgian Lari from the Ministry of Internal Affairs; the cash was pre-processed by the police and was designed for its handing over to the Japaridzes. Such a mode of action on the part of the police does not fit into the definition of any of the criminal intelligence measures envisaged by law. When it comes to measures directed at revealing criminal activity, they should be only such as are directly prescribed by law in order to avoid undue interference with an individual's legally protected sphere. The use by the investigating authorities of a person with a victim's status in implementing such a measure goes beyond the limits established by law because the law clearly points to persons who may be participating in criminal intelligence activities and persons having a victim's status are not among them. It follows that the abovementioned criminal intelligence measure was implemented in violation of law by the law enforcement authorities. In particular, the police have violated both the Law on Criminal Intelligence and Investigative Measures and the principle of objective investigation envisaged by Article 18 of the Criminal Procedure Code, since the investigating authorities have artificially arranged a legally wrong situation for the purpose of producing evidence.

- ***The right to defense***

The right to defense is one of the fundamental principles envisaged by the Criminal Procedure Code. This implies that an accused person must know what crime he is accused of;

in other words, the accused person must receive an accurate explanation of what actions or omissions are implied by elements of the crime he is charged with. As it is shown in Neli Naveriani's statement given to the investigation authorities, no one explained to her that the crime of extortion necessarily includes the element of threat. Moreover, she was incorrectly explained that a demand for the payment of compensation as such constituted a crime.

Regarding the pace of investigation it is worthwile to note that while the investigation of the 3 May incident is being protracted regardless of existence of a handful of evidence, the investigation initiated on the basis of victim Qukhilava's complaint concerning extortion was completed in just 5 days and the authorities have prosecuted those whom they considered suspects in very short order.

The Court Instances did not take into consideration the above mentioned issues and completely relied on the prosecution position in all counts.

2. The Criminal Case Concerning David Zhorzholiani

David Zhorzholiani was charged with a crime envisaged by paragraph 1 of Article 117 of the Criminal Code. According to the materials of investigation, David Zhorzholiani was interfered with and stopped by Murtaz Kvitsiani as he was driving a vehicle. After that, they started a dispute between each other that grew into a physical fight. At some point, Zhorzholiani threw a stone towards Murtaz Kvitsiani hitting his head and inflicting a serious injury. However, in reality, eyewitnesses say that the reason of dispute was the crash of the cars as a result of which Zhorzholiani's car was damaged.

The court found him guilty for the paragraph 1 of Article 117 of the Criminal Code and sentenced him to 3 years of imprisonment. The Court of Appeals upheld the previous sentence. The Supreme Court deemed the complaint inadmissible

Violations in the Criminal Case Concerning David Zhorzholiani

- **Adequate amount of evidence**

The following persons were interrogated in the case: the victim, two police officers who witnessed the fact, the doctor who carried out a forensic medical examination and three more persons who were present at the place of incident. Of all of the persons interrogated, only the police officers have specifically named Zhorzholiani as the one who threw a stone hitting Kvitsiani in the head. Other witnesses are saying that they did not see who hit Kvitsiani with a stone. Pursuant to paragraph 1, Article 19 of the Criminal Procedure Code of Georgia, in time of pre-trial investigation, following the collection of evidence, the person in charge of the criminal proceedings shall assess the available evidence based on internal belief. According to paragraph 2 of the same Article, "evidence are assessed for the purpose of ascertaining: [...] their irrefutability and sufficiency for concluding that the crime was committed." In the case in question, the testimony given only by two police officers that it was Zhorzholiani who hit Kvitsiani with a stone in the head does not make up a sufficient amount of evidence for bringing charges and are less credible also in terms of irrefutability.

In particular, testimonies given by the three other persons seem more credible because these persons have no connection to or interest in the outcome of the case; they are neutral. The police officers' neutrality, however, is compromised as they are directly involved in the proceedings leading to another procedural violation that will be discussed later in the document.

- **Objectivity of investigation**

Exclusion of certain persons from participation into criminal proceedings provides a guarantee for objectivity of investigation. Article 105 of the Criminal Procedure Code lists grounds for recusal. Pursuant to paragraph (1)(c) of the Article, "... an investigator cannot participate in proceedings in a criminal case if he is involved in the same case as a witness." Contrary to this stipulation, one of the police officers interrogated as a witness approached Zhorzholiani's father for the purpose of obtaining a testimony from him. At that moment, the police officer in question was performing the functions of an investigator in the same case in which he was involved as a witness thus directly violating the requirement of the Criminal Procedure Code. Zhorzholiani's father refused to testify due to distrust to the mentioned police officer. A protocol drawn up on this matter cannot be found in the case materials. The above circumstance suggests that one of the fundamental requirements of objective investigation – to have each stage of investigation conducted by a person who has no conflict of interest prescribed by law in the case – was not observed.

- **A comprehensive legal response to a specific fact**

The dispute between Zhorzholiani and Kvitsiani started as a result of a crash into each other of the cars they were driving, as stated by eyewitnesses Nino Japaridze and Tsitsino Ratiani. These persons had not been interrogated as witnesses; however, because two police officers were at the place of incident as it occurred, they should have known about the fact of the car accident. The fact of the car accident was not followed by any legal response; in particular, no protocol on administrative violation was drawn up; no determination was made as to who violated traffic rules; and, accordingly, no fining receipts were issued. Moreover, the fact that the car accident happened even cannot be seen from the case materials.

- **Proportionality between the selected measure of procedural constraint and its purpose**

Pursuant to the Criminal Procedure Code, the purpose of use of a procedural constraint measure is to safeguard the interests of pre-trial investigation in the process of collection of evidence. A procedural constraint measure should be selected in a way to be as proportional to the mentioned goal as possible. The prosecution side approaching the court with a motion to order detention of the accused person as a measure of procedural constraint must, in line with Article 151 of the Criminal Procedure Code, substantiate necessity of use of such a measure and that other, milder measure cannot ensure the achievement of the goal of the given constraint measure. In particular, the prosecution side bears the burden to prove that the accused person will escape, impede the investigation process, destroy evi-

dence, intimidate witness, etc. David Zhorzholiani had no previous criminal record and, in the given case, he was first accused of conduct considered as a crime of less gravity. Accordingly, there was no basis for ordering his detention. The goal of the procedural constraint measure would be completely satisfied also by using a measure not involving deprivation of liberty. On the merits of the case, the investigating authorities' motion was not justifiable.

Like Naveriani's case, here in this case too the Court Instances did not take into consideration the above mentioned issues and completely relied on the prosecution position in all counts.

- **Conclusion**

It follows from the aforesaid that there have been violations of both substantive and procedural rules of criminal laws in the cases led against Neli Naveriani and David Zhorzholiani, leaving serious doubts about the legality of the prosecution launched against these persons.

2.2. The Other Criminal Cases

2.2.1. Case of Sergi Beselia and Rati Milorava

1. *Political background of Sergo Beselia and Rati Milorava*

Sergo Beselia is brother of Eka Beselia who is a former member of the political party Movement for United Georgia and currently lider of "solidarity to illegal prisoners"; Rati Milorava is Eka Beselia's son. At the trial, the defense has noted a number of times that the criminal prosecution was instituted against the defendant due to political activities of Eka Beselia.

2. *Criminal Case of Sergo Beselia and Rati Milorava*

These are the following circumstances of the case: following the incident that took place at café-bar *Elza* on August 19, 2009, in Daba Kobuleti, pre-trial investigation and afterward, criminal proceedings were instituted against Sergo Beselia, Rati Milorava, Roin Tsagareli and Valerian Kirvalidze under Articles 239 and 353 of the Criminal Code of Georgia. The District Court of Kobuleti delivered a verdict that found all four of the defendants guilty of all episodes of crime. The verdict was appealed according to the appeals procedure. During the court dispute and motioned by the prosecution, a criminal case was singled out and under the April 21, 2010 decision of Kutaisi Court of Appeals a plea bargain was struck between Adjara A/R prosecutor Zviad Pkhakadze and the defendants Valeri Krivalidze and Roin Tsagareli. Under the April 27, 2010 decision, the punishment prescribed by Batumi City Court was upheld against Rati Milorava and Sergo Beselia. Under the July 20, 2010 decision N587-ap-10 of the chamber of criminal cases of the Supreme Court of Georgia, cassation appeal was not admitted.

3. *Violations in the criminal case of Sergo Beselia and Rati Milorava*

- **Striking a plea bargain during the appeal trial and two of the defendants changing their statements, interlocution**

Following the incident at café-bar *Eliza*, criminal proceedings were instituted against 4 individuals. None of them plead guilty[107]. Versions of the prosecution and the defense were founded on completely different factual elements. Sergo Beselia, Rati Milorava, Roin Tsagareli and Valerian Kirvalidze were charged under Articles 239 (Hooliganism) and 353 (Resistance, Threat or Violence against Protector of Public Order or Other Government Representative) of the Criminal Code of Georgia. None of the defendants plead guilty in hooliganism or resisting "police officers in uniforms". Under the December 24, 2009 decision of Batumi City Court, all four defendants were found guilty in all episodes of crime.

Chapter XIV[1] of Georgia regulates the institute of plea bargaining. It does not define stages of striking a plea bargain. Correspondingly, the law allows for an opportunity to strike a plea bargain during any stage of the trial. Article 679[1] establishes one prohibition for court and stipulates that it has the right to offer a plea bargain to parties before the court dispute begins[108]. Hereby, several important factors should be considered – under Article 15[1] of the Criminal Procedure Code of Georgia, a plea bargain shall not encroach upon the principle of court's independence. Furthermore, human rights and most of all, an individual's the right to a fair trial should be observed.

The case of Beselia and Milorava is an interesting precedent in its essence. During the court dispute, motioned by the prosecutor, a criminal case involving two of the defendants was singled out and a plea bargain was struck. As a result of the plea bargain, a judgment was delivered. The judgment was interlocutory and Sergo Beselia and Rati Milorava were essentially denied a possibility to defend themselves. The right to a fair trial means giving equal opportunity to parties during the court dispute. When after the court investigation two out of the four defendants pleads guilty and strikes a plea bargain with prosecution in a couple of days, the adversary principle of court is violated, as the prosecution clearly has an advantage. By granting the prosecution an unlimited authority to strike a plea bargain[109], the defense is deprived from an opportunity to make an actual influence on the outcome of court dispute, which violates the principle that all parties are equal.

The right to strike a plea bargain should necessarily be limited according to the stage of a court dispute. If Sergo Beselia and Rati Milorava had an opportunity to defend themselves and submit their arguments at least at the initial stage of the court investigation, the adversary principle of court would not have been violated but in fact, the right of Beselia and Milorava to adversary justice was limited by striking the plea bargain during the dispute stage, when evidence was already examined.

Striking a plea bargain in this case created an interlocution that was upheld against Sergo

[107] Ref. protocol of session of the court of first instance

[108] First paragraph does not provide specific instances of the court review; hence, noted rights may apply to appeal review as well.

[109] Particularly in light of the fact that Article 55 of the Criminal Code allows for application of minimum punishment and Article 63 of the Criminal Code allows for application of conditional sentence.

Beselia and Rati Milorava[110]. In future, it is recommended to limit the right to strike a plea bargain to a certain stage of the process.

- **Ordering preventive measures**

The matter of preventive measures in the case of Beselia and Milorava was discussed on August 21, 2009, from 07:00pm to 11:10pm. At the trial the defense raised several motions and the process was also adjourned several times for a short period of time. The judge granted a bail to Rati Milorava, whereas he prescribed a preventive detention to Sergo Beselia. The time when the judgment[111] was delivered is peculiar.

Specifically, the court ordered preventive measure against Rati Milorava at 08:55pm, i.e. 2 hour and 15 minutes before the process was over and before arguments of the dispute parties were heard.

- **Ako Chkuaseli's Action**

According to the case materials, both the defendants and the injured parties implicate Ako Chkuaseli as an instigator of the hooliganism. Specifically, Ako Chkuaseli threw himself against the table, started conflict and acted provokingly. Nevertheless, the prosecution failed to undertake an investigative measure against the person, who was the instigator of hooliganism according to the prosecution itself.

It is safe to conclude that in this case the discretion of criminal prosecution used by the prosecutor's office was not applied equally to everyone involved.

- **Criminal qualification of actions of Beselia and Milorava**

Sergo Beselia was convicted for:

1. Hooliganism (Article 239 of the Criminal Code of Georgia) and correspondingly, sentenced to 6 months of imprisonment and fine of GEL 4000; and

2. Resisting to police officers and correspondingly, sentenced to 2 years of imprisonment.

The verdict of appeals does not specify which action of Sergo Beselia served as the basis for his conviction for hooliganism – clash with Sergo Japaria or with police officers.

Under the Article 239 of the Criminal Code of Georgia, "hooliganism, i.e. the action which grossly violates public order or demonstrates open contempt toward the public, committed under violence or threat of violence,- shall be punishable."

Objective element (*actus reus*) of this crime entails an action committed under violence or a threat of violence. One of the signs of objective element of the crime is its outcome, i.e. violation of public order. Open contempt of public also amounts to an objective element

[110] It does not indicate explicitly but if the Georgian law does not provide otherwise, it should be deemed as interlocution. It constitutes fact presumption.

[111] I.e. a document of proceedings that serves as the basis for prescribing preventive measures.

of this crime. Correspondingly, all kinds of quarrel, dispute or loud conversation incited by personal motives, even if they violate public order, may not be committed under an open contempt toward public; correspondingly, the action would lack the objective element of an open public contempt. I.e. violating public order does not *a priori* equal disrespect of the society. According to the Supreme Court case law, motive of the conflict is important, notwithstanding the scene of the fight[112]. Hooliganism is ruled out when motive of the fight is personal, notwithstanding the scene of the fight[113].

Statements of both the defense and the prosecution confirm passive role of Sergo Beselia in the initial action of Ako Chkuaseli. During the conflict provoked by the latter, Beselia was trying to mediate the tension by pacifying Chkuaseli. Beselia got involved in the clash after his sister was sworn at, i.e. his motive was personal when he got involved in the fight.

Under Article 121 of the Criminal Code of Georgia, Intentional serious or less serious damage to health under sudden mental anxiety that was caused by the **victim's** illegal violence, **grave offence,** or other **gross immoral action** against the criminal or **his/her close relative**[114], as well as by the psychic trauma corollary to the repeated illegal or immoral actions of the victim, - shall be punishable". When qualifying an action under Article 121 of the Criminal Code, grave or less severe damage to health should be evident. The victim, Japarize suffered light injuries. The noted injury was caused by his, as victim's actions, which excludes any liability for the action.

Qualifying Sergo Beselia's case as hooliganism is groundless, as his action was motivated with his personal interest, as opposed to the aim of disrespecting the society. Specifically, during the first stage of the conflict Beselia was trying to reconcile the sides (confirmed by witness testimonies). Afterward, his action can only be qualified according to harm inflicted to health but as the damage that resulted was a minor harm to health, criminal liability shall be ruled out[115].

Second episode that took place outside, against the law enforcement officers, was qualified under another Article; therefore, hooliganism in this episode of crime should be ruled out as one action may not be qualified under two articles[116]. Correspondingly, materials in the criminal case fail to substantiate that hooliganism was committed by Sergo Beselia.

As for charges for resisting police officers, following signs should be evident:

- Inflicting damage to a police officer – a person perceived as a police officer;
- Putting up a resistance

[112] Judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia N210ap-, dated February 28, 2007

[113] Judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia N109ap-10, dated May 7, 2010

[114] The victim, Japaridze swore at Sergo Beselia's sister, Eka Beselia. Note of Article 109 of the Criminal Code of Georgia, "a biological sister" is defined as a close relative for the purposes of this Code.

[115] A sudden mental anxiety rules out any liability for light injuries, except for when an attempt to commit graver crime is evident.

[116] The principle of *Ne bis in idem* (not as in the title of Article 4 (double jeopardy) of Protocol 7 of ECHR but when one action is qualified under one or more Articles and amount to artificial composition for ideal aggregation of crimes and when general and specific Articles compete).

- to impede the protection of public order or terminate or change his/her activity[117]

The defense submitted a claim in the criminal case concerning the fact that uniforms and apparel of police officers in this case had been replaced, whereas traces of physical abuse perpetrated against them had been caused by artificial influence. In order to substantiate their allegation, the defense cited report of a patrol police officer, reporting the crime to his chief. The report only indicates that the detained have committed hooliganism; furthermore, the defense clearly states that color of the shirt indicated in the case materials does not match the data indicated in the protocol of seizure. The defense also raised its concerns regarding the protocol of seizure but, the prosecution failed to prove otherwise. Lawyers of Beselia and Milorava alleged that the evidence were seized unlawfully, as the shirts were seized in the mode of immediate necessity despite the fact that they were at the police station, without any risks that the evidence would be damaged. The aforementioned circumstances allow for a reasonable doubt that the evidence was tampered with, which serves as the basis for declaring the evidence as inadmissible[118]. Although the defense raised the motion, the courts failed to address these issues.

- **Video recording that confirms that pressure was exerted against Rati Milorava**

During the court investigation, the protocol of Rati Milorava's identification was submitted to Batumi City Court as evidence. On December 18, 2009 the court published a video material attached to the protocol. The footage shows Prosecutor Giorgi Davitashvili exerting illegal pressure against Rati Milorava, who was a suspect in the case at that time. The prosecutor was trying to mislead Milorava by deceiving him that lawyers had refused to provide protection for him. The court of first instance, as well as the court of appeals refused to release the footage. The court stated that the noted investigative activity "was unfinished". Furthermore, the state prosecutors refused that the footage was evidence of the prosecution.

The Georgian law does not recognize the notion of an "unfinished" investigative activity. The protocol of investigative activities[119], which is included in the criminal case file, shall be classified as admissible or inadmissible evidence. It is unclear what the court meant by "unfinished" investigative activity – admissible evidence that was deemed as inadmissible, or any new legal status of a document containing relevant information. Article 111 of the Criminal Procedure Code of Georgia allows for deeming inadmissible evidence of prosecution as admissible, when motioned by the defense. It constitutes an important guarantee, which means that the court should have released the evidence requested by defense, even if the evidence was deemed as inadmissible. The court's refusal constitutes an unjustified encroachment on the defense's right.

[117] This action is a formal crime determined by a purpose, i.e. its commitment does not require damage as an ending result. Resistance, along with other circumstances, equals crime *a priori* and no other legal results are necessary to be evident. Similar to any other formal crime determined by a purpose, direct intention is necessary to be evident for an action to be qualified under Article 353 of the Criminal Code of Georgia.

[118] Under section V of Article 121 of the Criminal Procedure Code of Georgia

[119] i.e. an act that describes an investigative measure

Furthermore, it should be noted that making threats and exerting physical pressure is prohibited not only by the Georgian legislation (Criminal Procedure Code of Georgia) but by Article 3 of ECHR as well. The noted article protects an individual from mental coercion.

The method of deception was used against Rati Milorava, which in its turn can be evaluated as a degrading treatment, as it causes an underage individual to feel unprotected. It constitutes a gross violation of human rights and requires a remedy. When such violation is committed by a prosecutor, it is judge who should react to the violation, as he/she has corresponding authority and obligation. Otherwise, it would constitute violation of the procedural aspect of Article 3 of ECHR[120].

- **Restricting the right to defense**

The right to defense is warranted by the Constitution of Georgia. It guarantees adversary process. In this light, case involving an underage person is particularly important, as in this case the noted right becomes an obligation of the authorities.

The ethics commission of the Georgian Lawyers' Association ruled that the right to protection was violated against convict Sergo Beselia during pre-trial investigation, when during the process of identification the police officers assigned a defender to him against his will.

Furthermore, the ethics commission underlined that in Rati Milorava's case the prosecutor exerted an influence against the lawyer and the latter was under his influence. The action of the prosecutor and weakness of the lawyer is particularly alarming. Based on the aforementioned conditions, it is safe to conclude that the right to defense was curtailed.

Decision of the Lawyers' Association clearly upholds the fact that public defender failed to properly discharge its statutory obligations, which indicates that the right of Beselia and Milorava to protection was curtailed during the pre-trial investigation.

- **Premature release of the convicts**

Discriminatory use of pardoning, premature release or other measures is one of the common forms and means for political prosecution. When certain persons receive unjustified preferential treatment by decision-makers, there is a good chance that prosecution is politically motivated. It applies to exemption from punishment, as well as expungement.

Two other defendants in the case of Beselia and Milorava changed their statements. The prosecution struck a plea bargain with them, which turned out to be impossible for Beselia and Milorava. With the April 21, 2010 verdict Valerian Tsagareli was sentenced to conditional sentence and two years of probation; Roin Tsagareli, who had been sentenced to one year and 4 months of imprisonment, was prematurely released on probation in a couple of weeks. Under the judgment of Tskaltubo district court, Roin Tsagareli was exempted from further punishment several weeks after the sentence was delivered.

Proportionality of punishment incorporates several factors: firstly, the punishment prescribed should be justified by objective factors founded in a consistent practice. Further-

[120] *mutatis mutandis*, judgement of ECHR in *Aksoy v. Turkey*, $ 59, dated December 18, 1996.

more, proportionality of punishment also entails formation of a consistent approach in terms of exemption from punishment; i.e. proportionality of punishment entails proportionality of procedures for prescribing and serving a punishment.

Roin Tsagareli was prematurely released in couple of weeks after his sentence was delivered. How did the penitentiary system determine that there was no need for Tsagareli to serve remaining punishment for correction[121]? The noted question arises in light of the fact that unlike Roin Tsagareli, premature release or circumstances relieving the criminal liability did not apply to Sergo Beselia. It is safe to conclude that in this case the principle of proportionality of punishment was violated.

- **Pardoning of Rati Milorava and Sergo Beselia**

On August 28, 2010, under the decree of the President of Georgia, Rati Milorava and Sergo Beselia were pardoned. None of the convicts had personally applied to the president for pardoning.

Sergo Beselia's case is particularly interesting, as a significant term of sentence was still left for him to serve. He did not apply for pardoning, did not repent his crime or plead guilty for that matter[122], which is a necessary condition for pardoning a convict[123].

As for Rati Milorava, his case is peculiar in a way that he had not served his sentence at all[124], did not repent his crime and was in hiding. Pardoning a wanted person is clearly unjustified.

The aforementioned conditions indicate that the rules regulating the pardoning of convicts were not followed and there was no clear justification for pardoning the defendants.

4. *Conclusion*

Sergo Beselia's and Rati Milorava's right to defense was curtailed. Two defendants testified against them. Their statement was different from the one delivered during review of the case in the court of first instance. After they changed their statements, they received certain privileges from the prosecution. They struck a plea bargain with the prosecution, an interlocutory document in the case of Sergo Beselia and Rati Milorava.

The court unjustifiably failed to respond to the violation of Rati Milorava's rights.

Based on the aforementioned it is safe to conclude that the case of Sergo Beselia and Rati Melorava was carried out with multiple violations of laws and procedures and that the defendents were not granted a just and fair trial.

[121] Basis for premature release under the Georgian law.

[122] Presidential Decree N227, dated July 19, 2004 prohibits pardoning in such case (with exception of the underage – Sergo Beselia had already reached 18 years of age by that time)

[123] Nevertheless, under §7 of Article 2 of the Presidential Decree N227, dated July 19, 2004, president can make a decision for pardoning without complying with statutory procedures. As corresponding criteria have not been defined, it is unclear when the noted rule for pardoning can be applied, which allows for a discriminatory practice.

[124] Milorava did not serve a single day of the term that he had been prescribed to.

2.2.2. The Criminal Case Concerning Shalva Goginashvili

1. *Shalva Goginashvili's political activity*

Shalva Goginashvili is a member of the movement entitled "7th November". He actively participated in protest rallies in April 2009.

2. *The Criminal Case Concerning Shalva Goginashvili*

On 28 May 2009, investigation stated "on the fact of attempted murder and hooliganism occurred in front of the Parliament building on Rustaveli Avenue on 28 May 2009" under Articles 19 and 109(1)(a) of the Criminal Code of Georgia (attempted murder in relation to performance of official work or public duties by the victim or his close relative) as well as Article 239 of the Code (hooliganism). Later on, the investigation replaced the article on hooliganism with Article 353(1) of the Criminal Code (use of resistance, threat or violence against a law enforcement official or other representative of the authorities). That day, a protest rally was taking place on Rustaveli Avenue. During the rally, there was a clash between the rally participants and police officers as a result of which two police officers were wounded. Shalva Goginashvili is accused of wounding one of these police officers. By Judgment of the Tbilisi City Court, Shalva Goginashvili was sentenced to 12 (twelve) years of deprivation of liberty under Article 19 – 109(1)(a) and 3 (three) years of deprivation of liberty under Article 353 of the Criminal Code. In total, he was sentenced to 15 (fifteen) years of imprisonment. The Tbilisi Appeals Court left the Tbilisi City Court's judgment in force unchanged. The judgment was challenged before the Supreme Court and was ruled as inadmissible.

Operative information that became a basis for launching investigation

Similar to other criminal cases, in this case too, operative information served as a basis for launching investigation. In particular, it was a report drafted by a police officer stating that a cameraman was abducted. During court proceedings, no proof was submitted to show how this information had been obtained. Based on the police officer's report, an investigative group went out to find the cameraman. All of the witnesses interrogated have stated that they are unaware of the identity of the cameraman and they do not know him even visually. The cameraman is known only to witness *Tsikhelashvili* (who is Chief of the First Unit of the Tbilisi Office of the Constitutional Security Department) and only visually. He was informed about disappearance of the cameraman by some other cameraman named Zviad whose last name is unknown to him. According to the testimony of one of the witnesses, the witnesses were not explained the criteria by which the investigation was going to find the disappeared cameraman.[125] These circumstances raise doubts as to whether the disappeared cameraman really exists and whether an investigating group actually went out to search for him.

[125] against the background that he has never known the disappeared person

3. *Violations in the Criminal Case Concerning Shalva Goginashvili*

- **The occurred incident and criminal prosecution**

Pre-trial investigation was launched in relation to the incident of 28 May and Shalva Goginashvili was arrested several weeks later, on 16 June. From 28 May till 16 June, Shalva Goginashvili continued to actively participate in protest rallies. Police officers were plodding around at the rallies all the time without either stopping or arresting him; they identified and arrested him only on 16 June.

On 16 June, the procedure of Shalva Goginashvili's identification was held. This type of investigative measure has the feature that the persons among whom the suspect should be identified should be visually similar to each other.[126] According to Sh. Goginashvili's explanation, among the persons to be identified, only he had traces of beating and only he was demonstrated handcuffed; accordingly, the witness would have no hard time pointing at him. Following the procedure, he was detained. The way this investigative measure was carried out raises reasonable doubts regarding the lawfulness of Sh. Goginashvili's arrest.

- **Evidence**

Rules of seizure of physical evidence and legalization (registration) of the procedure were also violated in Sh. Goginashvili's case. The violations may be divided into three types:

- The witness has given self-controversial testimonies concerning physical evidence. In particular, witness Sulaberidze (a police officer) stated at the pre-trial investigation stage that he took certain items (the wounded victim's garments) from the hospital nurse[127] while at the judicial review stage he explained that he found those garments in the reception hall of the Iv. Javakhishvili Tbilisi State University's Inpatient Clinic. He said he recognized the garments because Bochorishvili (the wounded victim) had them on and thus he took them with him.[128] He carried these garments with him for whole 4 days and only after that he handed them over to the investigator. In other words, the investigator did not receive the physical evidence on time. According to the procedural legislation, the garments must have been presented to a forensic expert who would ascertain what types of damages, if any, could be found on them and whether these damages coincided with the injuries found on the wounded person's body. In this case, it is also interesting to look into the way the physical evidence was sealed by the investigation authorities. Any physical evidence which may possibly contain crime-related traces must be properly packed. The rationale is that, unless a piece of physical evidence is properly packed, it cannot refute any possible doubts as to alteration of its essence or features that may in the end lead to finding such an item as inadmissible evidence. Contrary to this rule, pieces of physical evidence in Sh. Goginashvili's case were in

[126] Chapter 42 of the 1998 Criminal Code of Georgia

[127] which were declared as admissible evidence later

[128] Regardless of substantial controversies between the same witness's testimonies (concerning the origin of the physical evidence, which is of crucial importance for the outcome of the case), appropriate response measures prescribed by law were not taken

the hands of a police officer, a witness, for 4 days without any procedural registration. Such an exercise certainly cannot exclude doubts as to whether the traces on the physical evidence were altered or not. Accordingly, the mentioned evidence is questionable and must have been declared inadmissible.

- The case materials contain protocols of presentation and seizure of physical evidence in which the lists of the named items (garments) do not coincide with each other. In particular, the 2 June 2009 resolution on the seizure of items in the circumstances of urgent necessity says that on 28 May 2009 Sulaberidze took Bochorishvili's puffer jacket and a T-shirt from the hospital. The same resolution states that "the puffer jacket and the T-shirt" must be seized from Sulaberidze. Against this background, a protocol on seizure dated the same date states that the following items were recovered from witness Sulaberidze: "a dark-colored jacket with long sleeves, a beige jacket without sleeves and a puffer jacket wearable at both sides." The investigator's motion concerning the registration (legalization) of physical evidence dated 3 June 2009 also mentions a jacket and puffer jacket. In his resolution, the judge also legalized (procedurally registered) a jacket and a puffer jacket.[129] The forensic report contains an analysis of a shirt, a vest and a short-sleeved T-shirt. To summarize, the pieces evidence as presented, seized and legalized (registered) do not coincide with and are not identical to each other. In the end, it is unclear what the investigator has seized and what the forensics have examined. Therefore, a doubt is raised that should be decided in favor of the accused person.
- Another issue is a problem too when it comes to presented and seized pieces of physical evidence. A forensic examination of traces was conducted on the physical evidence – Bochorishvili's garments to determine the type of damages inflicted. Damages examined on the same garments as described in the latter forensic report and the protocol on seizure are differing in size (different sizes are indicated in the two different documents concerning the same damages on the same garment). Where there are such inconsistencies as to the origin and features of the piece of physical evidence, such evidence must be declared inadmissible. The role of a physical piece of evidence is to prove a fact on a matter of dispute. Such a role cannot be performed by an item having doubtful origin and dubious content. The aforesaid confirms the pieces of physical evidence were obtained and legalized (registered) in violation of law for which reason such evidence must be declared inadmissible.

  The same argument is valid also when it comes to a blood sample taken from wounded Bochorishvili. The resolution on carrying out a collective biological and trace examination does not indicate the number of seal package containing the blood sample; the same is true about the above-mentioned garment submitted for forensic examination; the rules of extracting and sealing a sample are violated in this case as well.

[129] According to victim Bochorishvili's testimony proper, on the day of incident he was wearing blue jeans trousers, a beige puffer jacket and a black cap.

- **Forensic report**

The report on the victim Bochorishvili's forensic medical examination constitutes one of the most important evidence in the given criminal case. This report has served as a basis for qualifying the conduct as attempted murder.[130] The examination was carried out on the basis of medical history cards. The medical history cards are in fact photocopies verified with a stamp while only original copies should be submitted for forensic examination. A major problem is that there are two different medical history cards containing different data. In particular, injuries found on the victim's body are described differently in these two cards. For example, the first card says that the victim has a wound in the form of a perforation and a cut with the dimensions 1.0 x 0.5 cm, with straight angles, moderately bleeding. Unlike this, the other card reads: a defect of diaphragm having a length of about 3 cm. More suspicious is the fact that the forensic report contains blank spaces in the form of dots as if something is missing (such as "an injury sizing . . ."). Due to the mentioned suspicious circumstances, the defense side submitted a motion requesting the medical history cards provided to the forensic examiner be presented to the court for analysis but the motion was rejected. The first instance court deemed it imprudent to analyze and review these documents. During the proceedings in the court, a motion requesting the forensic examiner's interrogation was presented with a view of obtaining explanations about the suspicious points existing in the forensic report. The latter motion was upheld but the forensic examiner summoned by the court as a witness did not appear at the hearing and the court refused to use its right to ensure forced appearance of the witness before it.

However, it should be mentioned that forensic examiner Eka Chavleishvili was interrogated by the Appeals Court. According to the defense side, she stated to the court that the study of inconsistencies found in medical history card falls within the competence of clinicians and, to clarify the matter, a commission of experts should perform the examination. She also stated that she is not a clinician and she as a basic expert prepared the medical forensic report only on the basis of the medical history cards. She has not medically examined victim Bochorishvili.

After the above statement was made to the court at the hearing, the defense side requested the court to order examination by a commission experts; the latter motion was not upheld by the Appeals Court on the motive of lack of substantiation. However, it should be noted here that minutes of the mentioned hearing in the Appeals Court does not specify that the forensic expert, in testifying before the court, pointed out the importance of appointing an examination by a commission of experts. Having read the minutes, the defense side provided the court with its comment on this matter. The minute-taking official of the court verbally disagreed with the defense side's comment and called it groundless and unsubstantiated. Based on the minute-taker's explanation, the Appeals Court rejected the defense side's request to include its comment into minutes of the above-mentioned hearing. The latter decision of the court was then challenged before the Supreme Court by rule of an additional cassation complaint.

[130] Location and seriousness of a wound is a major basis for differentiating between the legal qualification of injury to health and that of attempted murder. This specific factor is a threshold separating a completed crime from incomplete criminal conduct (as well as a ground for deciding whether there has been a crime at all in general). See Order of the Criminal Cases Chamber of the Georgian Supreme Court No. 411ap dated 26 October 2005

According to the minutes of the hearing held at the Appeals Court, the expert being interrogated as a witness explains that where they are facing an inconsistency in medical documentation they usually ask for the intervention of an expert. She specifically points out that dots and question marks in a medical card constitute an ambiguity but for her as an expert everything was clear in the protocol. Therefore, she deemed it unnecessary to ask for an explanation from the physician who drafted the medical history card. According to the minutes of the hearing, the witness says that she is neither a specialist nor a clinician but rather a basic expert. However, the minutes do not make it clear what she means. The defense party explained that, in its understanding, the expert's statement meant that it was necessary for clinicians to analyze the inconsistencies existing in the contents of the medical history cards and to have the medical documents examined by a commission of experts.

The expert's explanation that the ambiguity existing in the medical history cards is understandable for her as an expert lacks credibility because a forensic report must be conducted so as to exclude any ambiguity. Credibility of evidence is indispensable also for the final judgment to be irrefutable that leaves no space for doubts.

The defense side presented a documented interview to the Appeals Court. In particular, the defense side interviewed Professor Amiran Antadze of the Iv. Javakhishvili Tbilisi State University who was the first to medically examine victim Bochorishvili and draft a protocol of surgery. According to his explanation, at the time of initial surgical treatment, no penetrating wound was found in the pleura cavity. Regardless of the defense side's motion, professor was not interrogated in the Appeals Court as the Court deemed it unnecessary to do so. Accordingly, the Court did not accept the professor's explanation presented in the form of a paper document.

Following the forensic examination carried out at the order of the Appeals Court, the defense side had an alternative examination carried out and submitted its results to the Supreme Court. According to report of the alternative examination, examination of the wound does not unequivocally lead to a conclusion that there exists a penetrating wound into the pleura cavity. Also, according to the alternative report, "there is an inconsistency as to the location of the wound, which is of material importance for the purpose of discussing the possibility of the diaphragm being injured." At the same time, we would like to point out that the expert who carried out the alternative examination deemed it necessary to examine victim Bochorishvili personally.

To summarize, the above-described facts confirm that results of the forensic examination carried out using only the medical history cards are questionable; especially, taking into account that the medical history cards contain inconsistent data about the same wounds. To shed light to the case, it was necessary to appoint an additional, repeated examination. According to Article 361 of the Criminal Procedure Code of Georgia, a repeated examination should be appointed when the report of a forensic examination already carried out lacks substantiation, its accuracy is questionable, the evidence on which the report is based lacks credibility or when the examination was carried out in violation of the established criminal procedure rules. The fact that the prosecution-appointed forensic examination used medical history cards containing controversial data and that, accordingly, both accuracy of the medical cards and the results of the examination carried out are questionable, made it nec-

essary to appoint a repeated, additional forensic examination. Nevertheless, the defense side's motion to have a repeated expertise appointed was rejected by the Appeals Court. Instead, the report of the examination appointed by the prosecution became a basis for qualifying the crime as it was qualified. The fact that the forensic report is questionable makes the criminal qualification of the conduct disputable too. Any doubt or allegation should be decided in favor of the accused (indicted) person but did not happen in the given case.

- **Interrogation of witnesses of the defense side**

Only police officers have been interrogated in the case. The defense side raised a motion for interrogating additional witnesses who were present at the scene and eye-witnessed the incident.[131] The court dismissed the motion on the motive that, without a video recording, it could not be proved that the given witnesses were relevant in the case. After that, the defense side requested the start of the judicial review phase with the examination of evidence, in particular, with projecting the video recording of the incident. The court dismissed this motion too. Afterwards, when at the stage of examination of evidence during the hearing, the video recording was published and examined as a newly-discovered circumstance the defense side again raised a motion for the court to allow interrogation of additional witnesses who could be seen on the video tape as being present at the scene. The judge again dismissed the motion stating that the court has already made a decision on that matter.

The above-described circumstances point to the fact that the rights of the defense side have been unjustifiably restricted in the given case. According to Article 15 of the Criminal Procedure Code, criminal proceedings shall be guided by the principle of equality of and competition between the parties; the same article stipulates that the court must create for both the prosecution and the defense the conditions for the submission of evidence for the purpose of their comprehensive and complete examination. Pursuant to Article 18 of the same Procedure Code, the same painstaking effort should be applied to clarify circumstances both proving and refuting the accused person's guilt. In the given case, the defense was unjustifiably denied the chance to use this right.

- ***Legal qualification of Sh. Goginashvili's conduct***

The legal qualification assigned to Sh. Gogianshvili's conduct in the given case is disputable as well. In general, attempted murder and intentional infliction of serious bodily injury (Articles 108, 109 and 117 of the Criminal Code) are similar to each other by substance because qualification of conduct as one of these crimes depends on the conclusion of a forensic medical expert who determines the gravity of the injury inflicted; also, in both cases, a threat to human life must exist. In particular, what matters for legal qualification is the relation between the victim and the indicted person before the criminal conduct, the location of the hit, the type of wound, the type and number of hits[132].

[131] Among them was eyewitness Bidzina Gegidze

[132] The Special Part of Criminal Law, Book 1 published in 2006, p. 32

When it comes to the present case, it should be noted that Goginashvili did not know the victim before the incident and had had no relations with him. Nor did he know that the victim was a police officer. Accordingly, a question is raised: why would he want to kill the victim? It becomes even more complicated when we get to discussing the aggravating circumstance, which in the given case is said to be a "murder in relation to the performance of the victim's public duties". Neither the victim nor the persons standing close to him wore law enforcement uniforms. The doubt as to whether this person was a law enforcement official and whether he was performing public duties in that moment has not been eradicated. Accordingly, a question raised is how Goginashvili could guess that the victim was a law enforcement official. This doubt had not been refuted at court hearings either. The defense side had repeatedly been demanding the Ministry of Internal Affairs to provide information as to whether victim Bochorishvili was a member of police but it had never received any reply. Afterwards, the defense side submitted a similar motion to the court but the court dismissed the motion. In other words, no single document can be found in the case materials that would prove that the victim Bochorishvili was a law enforcement official of the Ministry of Internal Affairs. In addition to this, Bochorishvili's medical history card no. 986 (which is part of the case materials) states that Bochorishvili is temporarily unemployed. The mentioned medical history card was filled out by a physician of the Iv. Javakhishvili Tbilisi State University Clinical Hospital, as dictated by victim Bochorishvili.

The legal qualification of Goginashvili's conduct as it exists in the given case is largely due to the forensic expert's conclusion as to the gravity of injury inflicted to the victim's health. Because the forensic conclusion contains strong grounds for serious objections and doubts (see part III) that have not been answered and refuted at the court hearing stage, it is disputable that Shalva Goginashvili's conduct was assigned a correct legal qualification of attempted murder.

4. *Conclusion*

Materials of the criminal case concerning Shalva Goginashvili demonstrate violations of procedures and raise serious doubt about the validity of the evidence and the legal qualification assigned to his conduct; these circumstances point to a high enough degree of probability to allege that justice was improperly administered in the given case.

2.2.3. The Case Concerning Kote Kapanadze

1. *Kote Kapanadze's political activity*

Kote Kapanadze worked as acting chief inspector at the Taxpayers' Auditing (Checks) Unit of the Telavi Tax Inspection of the Ministry of Finance Tax Department. On 12 October 2007, he was appointed Chief Inspector at the "Lagodekhi" Customs Checkpoint of the Telavi Regional Tax Inspection. He was released from office on 18 June 2009 based on his personal request. Kote's brother Vazha Kapanadze is a member of political party "New Rights". He founded his party's regional office in Lagodekhi. K. Kapanadze got actively involved in the mentioned political party's activities; in particular, he was collecting signatures to support the holding of a plebiscite on pre-term presidential election.

2. *The Criminal Case Concerning Kote Kapanadze*

Kote Kapanadze was charged with commission of the crime under Article 332 of the Criminal Code of Georgia, in particular: abuse of official authority by a public official against public interests, for gaining proceeds for another person, which caused a substantive infringement upon the State's lawful interest. Kote Kapanadze and Tamaz Iarajuli working as inspectors conducted a check of individual entrepreneur Aidin Mailov on the basis of official order in 2007; the audit covered the period from 1 October 2005 till 1 July 2007. The prosecution's submission was that the imported goods should have been taxed on the basis of the invoice and not the customs declaration. By judgment of the Telavi District Court, the initial charge was replaced with Article 342 of the Criminal Code implying neglect of official duties. Kote Kapanadze was sentenced to deprivation of liberty for 2 (two) years and 6 months. The judgment was left in forced by the Tbilisi Appeals Court. The judgment was challanged before the Supreme Court and was ruled as inadmissible.

Operative information that became a basis for launching investigation

As in other criminal cases, in this case too a piece of operative information, in particular, a police officer's report, served as a basis for launching investigation. In more details, *Zaza Chikvaidze*, Inspector-Investigator of the Investigation Department of the Revenue Service Tax Inspection produced a report based on operative information. He received the information verbally and drafted a report on the fact of use of tax identification code of the late individual entrepreneur Aidin Mailov. The investigator did not inquire into whether the individual enterprise "Aidin Mailov" had been liquidated; nor did he check who was running the activity and whether they were registered at the tax inspection. According to Chikvaidze's statement, Aidin Mailov's family members were using their late father's tax identification code and running business under his code. The police officer's report points to the identification code as the one obtained as part of operative information; it therefore turns out that the agent who provided information to officer Chikvaidze knew the code by heart. It is unclear from the case materials what happened to the investigation launched in relation to the use of the late person's identification code. Instead, this served as a basis for checking individual entrepreneur Aidin Mailov's documentation followed with starting criminal prosecution against Kapanadze.

3. *Violations in the criminal case concerning Kote Kapanadze*

- **Criminal Prosecution**

Pre-trial investigation started on 23 May 2009 on the basis of a police officer's report. Investigator Jichonia contacted Kapanadze by phone on 15 June and requested his appearance to the police on 16 June. The investigator explained that Kapanadze was to appear with the status of a suspect while investigative measures in relation to the other convict Iarajuli started only on 23 June, following Kapanadze's arrest. According to Kapanadze's say, the investigator did indeed talk to him on the phone but without explaining that he was to appear with the status of a suspect. Because Kapanadze did not appear before the investigator on 16 June, the same day the police produced a resolution on Kapanadze's forced appearance

before the investigation authority. Nevertheless, neither a notice of summons with the status of a suspect nor the resolution on forced appearance was handed to Kapanadze or his family members – a fact confirmed by case materials. Kapanadze was arrested on 23 June in Rustavi, at dawn, in his relative's home. It is clear from the investigation authorities' actions that the police was interested in arresting Kapanadze. Nothing but the investigator himself confirms the allegation as if Kapanadze was summoned or that he failed to appear; and the investigator was able to produce such a document or a report at a later stage as well and to add it to the case materials.

The fact that the investigation was interested in Kapanadze can be seen also in view of the forensic examination appointed by the investigation authorities. In particular, the examination did not cover 2007 or subsequent periods while the judicial order on the checking of the individual entrepreneur concerned the years of 2005 to 2009. If we follow the investigation's logic and check the remaining years as well by rules they applied during the check, it will turn out that the hidden taxes would be more in amount and the difference would be even higher. However, in checking the individual entrepreneur, the investigation did not cover the periods indicated in the judicial order, including the period till 23 May 2009. It is worth noting that at that time Kapanadze was working for a different employer and, accordingly, he would not have any connection with the checking of the individual entrepreneur. According to the investigation authorities' lead, they were unable to check the entire period as they could not find tax documents for the period of 2007 till 2009; in other words, the tax inspection had lost the documentation. If so, these persons should have been subjected to investigation as well. The investigation authorities violated Article 18 of the Criminal Procedure Code enshrining the principle of comprehensive, complete and objective investigation of all of the circumstances of the case. However, nor did the court become interested in these violations thus breaching the same article mentioned above.

The direction in which the authorities were investigating is revealed by the very first question posed in the resolution sent to the forensic expert concerning the convicted persons. In particular, the very first question was: what volume of facts Kapanadze and Iarajuli failed to reveal during the check they conducted. No question was asked about existence of any violations in the activity of the individual entrepreneur and no one has got interested in his further fate.

- **The procedural constraint measure**

The prosecution addressed the court with a motion to apply detention as a measure of procedural constraint. The judge of the Telavi District Court rejected the prosecution's request and ordered remand on bail instead. K. Kapanadze's brother addressed the Public Register with a request to issue a document certifying property title to an immovable property (because the immovable property was to be used as collateral). The title document must have been prepared in an accelerated time frame but the Public Register discovered some shortcoming and notified Kote Kapanadze's brother thereon by means of a short text message. Surprisingly, the Public Register corrected the shortcoming right after the Appeals Court replaced the remand on bail with a stricter measure of procedural constraint – pre-trial detention. Interestingly, the shortcoming somehow was corrected by itself, without the

Kapanadzes making any effort, and again K. Kapanadze's brother received another short text message that the shortcoming was corrected. When K. Kapanadze's brother received the first text message from the Public Register that the latter had discovered a shortcoming, he had nothing left but to provide the prosecution office with a document confirming title to his relative's property instead. Despite this, Kapanadze was not released pending trial because, according to the investigator's explanation, the matter of selection of a measure of procedural constraint was to be reviewed by the Investigative Panel of the Appeals Court. Consequently, he was in Tbilisi and the case materials were at the Appeals Court too. Pursuant to the legislation in force, in particular Article 168 of the Criminal Procedure Code, remand on bail can be applied until the bail amount or title to immovable property is deposited; once a formal document is submitted confirming the payment of money or use of immovable property as collateral, the detained person must be released immediately, since the ground for his detention has ceased to exist.

It should also be noted that the judge of the Telavi District Court who dismissed the prosecution office's motion for using detention as a measure of procedural constraint and ordered Kote Kapanadze's remand on bail, later, was transferred from Telavi to the Khelvachauri District Court.

- **Evidence**

- **Testimonies of witnesses**

In the present case, a major problem has been assessment of evidence by the court. A total of two witnesses and both indicted persons were interrogated concerning the protocol on the results of the tax check. Of these persons, everyone except one person confirms that the check was conducted in a correct manner. However, the prosecution argues against Kapanadze and Iarajuli that, as they were checking the individual entrepreneur's activity, they had to be guided with the principle that imported goods should be taxed on the basis of an invoice and not a customs declaration. However, the testimonies of witnesses suggest on the contrary. In particular, according to testimonies of witness *Chuniashvili* (Deputy Chief of Tax Inspection and the person in charge of the Taxpayers Tax Audit Service who was leading the checkup process) and testimonies of indicted Iarajuli and Kapanadze, the protocol on checkup results was considered lawful and this is why the order was issued. The usual rule was that an order authorizing a checkup would be issued by the chief of the tax inspection; the order would be accompanied with a checkup plan. In this specific case, details of checkup were agreed with Head of Unit T. Gumberidze. The amounts of net value, profit and costs of the goods imported by individual entrepreneur Mailov were determined on the basis of the tax declaration and accounting documents. A group of experts from the Export – Import Unit would usually make a correction to the invoice-based price of goods. They were giving instructions on how to correct the value of goods. The experts would then customs-clear the goods based on the corrected value and, accordingly, the entrepreneur had thus had to pay customs taxes and the Value Added Tax based on an increased price. There was a similar situation in the Tax Inspection in terms of invoices. Experts were considering that their corrected value was realistic and not the price indicated in the invoice.

There were cases when an entrepreneur did not have an invoice at all. The customs department considered only their corrected value as a real price and the price indicated in the invoice was regarded to have been artificially reduced. Following a checking procedure, a protocol on the results of the check would be drawn up and presented to the head of unit for control. Afterwards, the legal unit would prepare a draft order concerning the specific amount of tax to be paid by the relevant taxpayer. Only after these procedures had been completed, a draft order would be submitted to Chuniashvili or other deputy or the chief. If any of these persons would doubt correctness of the protocol, they could double-check it by means of repeated inspection. In the present case, higher officials did not doubt correctness of the protocol drafted Kapanadze and Iarajuli and the protocol was signed by them unchanged. The protocol was considered to be drawn up in a correct and lawful manner and this is why the order was issued. Without the order, the protocol would have no legal force; in other words, without the order, no tax would accrue to Aidin Mailov.

Bearing in mind the above circumstances, logic prompts for a question: if the protocol had been drafted incorrectly, why were the persons who checked the protocol and issued an order on the basis of that protocol not brought to justice?

The only witness who gave a testimony differing from all of those mentioned above was expert Pilauri who conducted forensic examination at the investigation authorities' request. It took only 24 hours for the expert to study case materials making 3 volumes and to deliver a conclusion. According to his testimony, the invoice was a primary document for taxation purposes. In 2004-2005, it would be difficult for a person conducting a tax check to find out what the case was due to ambiguous information contained in customs declarations unless he also had an invoice at hand. According to the expert's statement, an invoice means a bill in Georgian language. He further stated that the method with which the given individual entrepreneur was checked and by means of which Kapanadze and Iarajuli drafted the protocol had never been used in practice. Expert Pilauri denies existence of any dispute on whether invoices or customs declarations should prevail but a different position is found in Protocol of the Revenue Service Consultation Council No. 6 dated 23 May 2008 which reads:

"At its session, as one of the matters submitted to it, the Revenue Service Consultation Council has reviewed Letters of the Tbilisi Regional Center No. 01/02-03/1614 and 01/02-03/1998 dated 8 April 2008 which concerned determination of tax deductibles related to provision of goods imported on consignment. As a result of review, the Council has made the following decision: an invoice issued by the exporter (and confirmed by both the exporter and importer) which makes it possible to determine tax deductibles shall be considered as a primary document for tax purposes within the meaning of Article 93 of the Tax Code of Georgia; tax deductibles shall be calculated from the amount indicated in an invoice and not from customs values stipulated in a customs declaration."

The above excerpt confirms that, in practice, there indeed exist a dispute as to which document (an invoice or a customs declaration) should regarded as primary document and which document should serve as a basis for calculating costs. The legislation in force was unclear on this matter as well. Against this background, we deem it unacceptable to prosecute a person under criminal law due to a matter on which no clear guidelines exist. It

should also be noted that, as we were examining the issue, we addressed the Revenue Service requesting copies of Letters of the Tbilisi Regional Center No. 01/02-03/1614 and 01/02-03/1998 dated 8 April 2008 concerning determination of tax deductibles related to provision of goods imported on consignment. We supposed that the problem of our interest would be described in detail in these letters; however, we did not receive the requested copies from the Revenue Service. Nor was this information provided to Vazha Kapanadze (Kote Kapanadze's brother). The court in charge of the case also did not uphold the defense side's motion for requesting and familiarizing with these letters.

- **Forensic conclusions**

The case materials contain a forensic accountant's conclusion that served as a basis for presenting charges against Kapanadze. The forensic examination on accounting standards was conducted at the investigation authorities' initiative; the forensic expert found that the tax inspectors failed to fully reveal facts of tax evasion as a result of the checkup they carried out. The defense side, on the other hand, having used it right under applicable law, submitted a report of an alternative examination, which contradicts the results of the examination authored by the investigation authorities. According to the alternative forensic report, Kapanadze and Iarajuli did not violate requirements of the Tax Code and carried out the checkup in a correct manner. For the purpose of finding truth in the case, it was prudent to appoint another, complex examination. However, the defense side's motion for having a complex examination appointed was rejected by the court. In this case too, we are facing a problem related to comprehensiveness, completeness and objectivity of evaluation of evidence.

- **Legal basis**

According to the customs legislation, by submitting a customs declaration, an importer provides the customs authorities with information on all the expenses he has incurred in relation to purchase and transportation of the goods to the Georgian customs territory. The customs authorities are then checking the provided information by means of its relevant service to determine the value of the goods and customs taxes payable on the goods. Pursuant to Article 69(3) of the Customs Code, after a customs declaration is registered, it is considered as a document confirming the fact of legal importance. An invoice can acquire a legal force only if an entrepreneur declares it to the customs authorities according to the established forms. Otherwise, an importer is released from any liability that may arise due to incorrect data indicated in the invoice. In order for an invoice to gain a legal force, or to say in other words, for an invoice to become a primary document for tax purposes, it must be confirmed by both the exporter and the importer. In addition, to be considered as a tax document, an invoice must meet the requirements listed in Article 93 of the Tax Code of Georgia.

In the view of specialists (Expert M. Tsevelidze from the independent forensic examinations center "Vector" and Expert David Narmania), since 2003, the new Customs Code has introduced 6 methods of determining a customs value of goods based on international

standards; due to this novelty, an invoice has lost the function of a tax document remaining rather a waybill or a bill of lading. Pursuant to Article 93(2) of the Tax Code and Article 69(3) of the Customs Code, a document confirming expenses is the customs declaration and only the latter shall be used for taxation purposes. An invoice or a proportional method (terms as they were used by Experts Pilauri and Berishvili in their forensic report) are not used for taxation purposes, pursuant to the Georgian legislation. The possibility of an invoice gaining the function of a document having importance for taxation and customs purposes nationwide can happen only if the current Georgian legislation governing this matter is completely ignored. Net value of imported goods is the value indicated in the customs declaration, which is the basis for calculating taxes. According to Article 69(3) of the Customs Code, from the moment of its registration, a customs declaration is a legal document confirming relevant facts.

We would also like to note here that, for the purpose of drawing a parallel to the present case, we addressed the Tbilisi City Court with a request to provide us with the following public information: whether the Court has delivered acquitting or convicting judgments on similar cases in 2004 – 2006.[133] According to the information received from the Court, the latter has not delivered either acquitting or convicting judgments on similar cases in the mentioned period. However, the judgments sent to us by the Court (which mostly concern violations of customs rules) are mentioning only a customs declaration as a document used for determining quantity, value and type of imported goods and not an invoice. Thus, it can be concluded it is a customs declaration and not an invoice that provides applicable information on imported goods.

4. ***Conclusion***

In the criminal case concerning Kote Kapanadze, the prosecution relied only on the forensic report produced at the request of the investigation authorities. Credibility of the investigation-authored forensic report is doubtful because there is an alternative examination report that points to the contrary. The existing doubts and allegations have not been refuted by the court. Therefore, it can be concluded with a high degree of probability that justice was not properly administered in the present case. The court failed to contribute to comprehensive, complete and objective evaluation of evidence.

2.2.4. The Case Concerning Melor Vachnadze

1. *Melor Vachnadze's political activity*

Melor Vachnadze was an activist of the political movement "7th November". Later, he founded a movement entitled "Join Us". Since 2007, he was actively participating in opposition protest rallies. He became a victim of physical violence several times before his arrest. In particular, he was beaten up for a number of times by persons in masks. According to his own explanation, these persons were members of law enforcement authorities.

[133] We requested information on convictions under the same Article as was used to try Kapanadze as well as under another similar provision (Article 214 of the Criminal Code concerning violations of customs rules)

Melor Vachnadze describes the facts of pressure and threat against him as follows:

On 15 March 2009, Melor Vachnadze and several other members of the movement "7th November" were arrested and taken away by police officers for a checkup on use of drugs. As no signs of narcotic drugs were found in their bodies, Melor Vachnadze and other arrestees were released after several hours.

On 31 March 2009 when Melor Vachnadze was holding a peaceful rally together with other activists, they were raided by persons in masks and police officers. Melor Vachnadze was severely beaten up.

On 23 April 2009, at night, near his home, he was pushed into a car and abducted by unknown persons. He managed to escape.[134]

On 4 May 2009, he received a phone call from a person unknown to him who threatened him with arrest. On 5 May, he had an argument with Nika Avaliani, a journalist working for the Public Broadcaster. Due to the dispute and controversy, Melor Vachnadze and two of his friends were arrested on 6 May and charged with hooliganism (Article 239(2) of the Criminal Code of Georgia). On 7 May, upon the Patriarch's plea and payment of a bail himself, he was released. This case has been sent to court but judicial review has not started yet.

In May 2009, at night, Melor Vachnadze was followed by several persons unknown to him accompanied also by police officers. During the pursuit, some of the persons chasing him made several shots from firearms. He managed to approach other members of a rally following which the unknown persons stopped chasing him.

In the period of 2007 – 2009, he was periodically receiving threat calls on the phone. Unknown persons were demanding Melor Vachnadze to stop being active and not to participate in political actions any more (the case is under investigation).

2. The criminal case concerning Melor Vachnadze

On 26 May 2008, pre-trial investigation was launched under the article on hooliganism. One year after the investigation started, Melor Vachnadze was tried and found guilty by court for the commission of a crime under Article 180(2)(b) of the Criminal Code (fraud, that is the taking possession of other person's property by means of deception, which caused serious damage). He was sentenced to deprivation of liberty for the term of four years. The Appeals Court left the first instance judgment in force unchanged. The judgment was challanged before the Supreme Court and was ruled as inadmissible.

The courts that reviewed Melor Vachnadze's case relied on the following factual circumstances: Melod Vachnadze and his friend G. Gzirishvili had made an oral agreement between each other that Melor Vachnadze would sell his wife's vehicle to Gzirishvili. Gzirishvili agreed to the deal and paid the agreed price in several installments. After Gzirishvili paid the sum to Vachnadze, the latter sold the car to another person, Khmaladze, without handing the car over to Gzirishvili. As Vachnadze himself argued, Gzirishvili paid him USD 500 as earnest money but because Gzirishvili did not pay the full sum he sold his wife's car to someone else.

[134] This case is under investigation

3. Violations in the criminal case concerning Melor Vachnadze

- **Impartiality of the criminal prosecution**

Pre-trial investigation of the case started on 28 May 2008.[135] However, at the inception, no investigative activity was carried out; even the victim was not interrogated. Progress of the case renewed about a year later; in particular, the process of interrogation of the victim and the witnesses started in May 2009 (coinciding with Melor Vachnadze's participation in protest rallies in April). Melor Vachnadze was presented charges on 27 July 2009. It is unclear why the case had been motionless for more than 1 year and suddenly prosecution was renewed only when Vachnadze got actively involved in the ongoing political process**.**

- **Lawfulness of the judgment**

According to the descriptive part of the convicting judgment handed down in the criminal case concerning Melor Vachnadze, Vachnadze sold a vehicle to the victim and was paid for the sold item by the victim. Despite that, Vachnadze did not physically hand over the sold item to the victim, selling it to another person instead. The court regarded Vachnadze's above-referenced action as fraud. In light of evidence existing in the case materials and factual circumstances of the case, we are of the view that lawfulness of the judgment passed against Melor Vachnadze and the legal qualification of fraud assigned to his conduct is questionable.

According to the text of Article 180 of the Criminal Code, one of the substantive elements of the crime of fraud is deception in the sense that deception must occur **in the moment** when the offender takes possession of the property. Deception is the very method of taking possession of an item or other property. Deception may take place in both passive and active manner. Active deception is the case when a person is mislead by providing him with false information and the mislead person hands over his property to the offender on the basis of such information. Passive deception is the case when facts having legal importance are hidden on purpose leading the person to transfer his property to the offender. In the latter case, the holding back of facts must occur before the transfer of property for the deception to be considered a method of misappropriation (wrongly taking possession of property). **If passive deception takes place after the taking of possession of an item, such conduct cannot be qualified as fraud. In this case, the conduct falls within civil law relations, in particular within law of obligations within civil law.** When Vachnadze received one of the installments of the total agreed sum in January and another installment in February, he had not committed any deception at that time; in particular, he had not sold the car yet and, therefore, he could not conceal this information from Gzirishvili. This means that he had not deceived Gzirishvili and he took possession of the money paid by Gzirishvili in good faith, as agreed, without any false data or unlawful method involved. Had he actually sold the car to a third person and had he concealed this information to Gzirishvili in the moment he was accepting payment from Gzirishvili – this would constitute a crime of fraud. How-

[135] The Georgian Criminal Procedure Code does not envisage the notion of "launching a pre-trial investigation'; the latter starts upon receipt of information on the commission of crime *per se.* At a clerical level, investigation authorities are using the so-called Form 1 to register the fact and time of start of pre-trial investigation.

ever, the fact that such circumstances did not exist was confirmed by judicial investigation.

Another issue is worth mentioned as well: had Vachnadze pre-planned to sell the car to another person later? In other words, did he have a prior intent to deceive Gzirishvili? None of the evidence contained in the case materials points to existence of such intent. It is important to note that, in his judgment, the judge is not discussing these circumstances and focuses only on the actual existence of an agreement and the fact of violation of that agreement; at the same time, the judge himself considers it proven that Vachnadze sold the car to another person only after he accepted payment from Gzirishvili. The judge does not discuss whether he has ascertained that Vachnadze accepted payment from Gzirishvili by means of deception. Breach of obligation assumed by an agreement as such does not constitute a sufficient ground to assign the legal qualification of fraud to such conduct.

The above-described circumstance point to the fact that the crime of fraud has not been committed by Vachnadze and the latter's conduct is a matter of a dispute within the frames of civil law.

- **Non-uniform practice**

The Criminal Code provides a list of conducts punishable under criminal law. Procedural law determines rules on how to qualify certain conduct as a certain crime. A crime is an action or omission that infringes upon[136] or is linked with public interests.[137] Public importance of an action or omission is the threshold that separates criminal sphere from civil relations.

The legislation does not prescribe a single criterion to distinguish a civil delict (tort) from a crime. Due to this reason, grey areas are very frequent when it comes to economic crimes especially. For example, is it a crime of fraud if a debtor fails to pay a debt to a creditor (provided that the debtor knew in advance that he would be unable to pay back)? At a glance, such conduct meets the formal requirements to constitute the crime of fraud but, at the same time, it is a pure matter of civil law because it may well be considered as breach of a contract of loan. It is necessary to elaborate a uniform and clear standard to make it possible to differentiate between the two forms of liability (criminal and civil). There is no clear court practice established by the Georgian Supreme Court on this issue.[138]

A majority of legal advice issued by the Legal Aid Center of the Georgian Young Lawyers' Association in the area of criminal law concerns rules of challenging decisions of investigation authorities related to failure to start pre-trial investigation. In most cases, the rationale behind such decisions of investigation bodies is that the matter of dispute falls within the area of civil law.

Lawyers from the Georgian Young Lawyers' Association have been addressing the Georgian law enforcement bodies numerous times requesting that they launch pre-trial investiga-

[136] In particular, when the object of crime is a public interest as such (for example, *State sovereignty*)

[137] This implies a situation when the object of crime *per se* is an individual interest (for example, health of a human being) but, due to the increased threat posed by a wrongdoing as well as its importance to public and requirements of law-and-order, the conduct is considered a crime

[138] See, *inter alia,* Order of the Supreme Court of Georgia No. 992-ap-09 dated 3 June 2010

tion on behalf of victims in the cases where the victims' rights had been violated by other persons. *An example* is the case of citizen E.M. whose residential apartment was unlawfully misappropriated by a third person using false documents. The Georgian Prosecution Office considered this issue as a matter of civil disputed and, on this ground, refused to start pre-trial investigation of the case; this being so against the background that the apartment was misappropriated using false documents or, in other words, using **deception as a method**. A positive example in relation to Vachnadze's case is the case concerning T.G. in which contracts of loan and mortgage were concluded in observance of rules established by but one of the parties failed to honor its obligations under the contract. The prosecution office stopped pre-trial investigation on the very ground that an essential element of the crime of fraud – **taking possession of an item by means of deception** – was not present. In the latter case, citizen T.G. concluded contracts with several persons one by another but did not pay back to any of them. Judging from these circumstances, it can be supposed that T.G. was acting with a prior understanding that he would not be unable to pay for the debts. It is still impossible to assert with absolute certainty that he had such intent though. Nevertheless, if the cases concerning M. Vachnadze and T.G. are compared to each other, it demonstrates that it is not clear what standards and criteria the prosecution is applying in order to qualify a case as fraud.

We believe that the Georgian Supreme Court should provide its explanation on the matter to help establish a uniform approach to similar cases.

- **Irrefutability of evidence**

Although it is not clear-cut whether the conduct for which Vachnadze was convicted is a crime or a matter of civil dispute, another important issue is the degree of irrefutability of evidence relied on by the court.

According to both the Constitution and the Criminal Procedure Code, a judgment must be based only on irrefutable evidence[139] and the degree of irrefutability of any specific piece of evidence is a matter of *proof*. The final stage of the process of proof is the evaluation of all the available evidence by the court.

In the case concerning Melor Vachnadze, the court did not properly evaluate the evidence submitted to it. None of the persons interrogated as witnesses confirmed the fact of handover of the first installment[140] by Gzirishvili to Vachnadze. Only the victim stated this in his testimony; his testimony was made public at the court hearing due to death of the victim. Other witnesses are indirect witnesses who stated that the fact of handover of the first installment became known to them only by narration and they personally have not evidenced the process. As for the victim's spouse, she stated that she saw how Gzirishvili handed over the money to Vachnadze. However, Gzirishvili's spouses' testimony cannot be regarded irrefutable due to the fact that, as she stated herself, Gzirishvili and Vachnadze got into a car slamming the door behind them after which Gzirishvili gave the sum taken

[139] Par 3 of Article 10 and Par 2 of Article 503 of the Criminal Procedure Code (adopted in 1998)

[140] In particular, the fact of handing over USD 4,100; as regards the remaining USD 1,000, the defense side has not disputed it

out from an envelope to Vachnadze. Accordingly, Gzirishvili wife was not in a position to see the amount of money handed over because she was not in the car at that moment. It follows that the judgment, in fact, relies on the testimony made public at the court hearing, which is prohibited by Article 481(1) of the Criminal Procedure Code: "Reading out a testimony of a witness at a court hearing given during pre-trial investigation ... is allowed if the witness has passed away ... however such a testimony cannot be a ground for passing a convicting judgment against the indicted person." The meaning of the quoted provision is that a judgment must be based only on circumstances irrefutably established by a court at its hearing; accordingly, a testimony made public cannot provide the court with irrefutable information.

Furthermore, there has been a violation of the principle of competitiveness implying that a party must have the chance to participate in the examination of the other party's evidence[141]. In other words, once a testimony has been made public, the defense side cannot participate in interrogation of the author of the testimony, that is, in the examination of such evidence. This is the rationale why the legislator has prohibited use of a publicized testimony as a ground for handing down a convicting judgment. Contrary to this rule, as mentioned above, in Melor Vachnadze's case, the court relied on such a testimony in convicting Vachnadze.[142]

4. Conclusion

In the case concerning Melor Vachnadze the court gave an incorrect legal qualification of crime to Vachnadze's conduct. Evidence submitted was not evaluated properly. Consequently, both material and procedural rules of criminal law were violated.

2.2.5. Case of Leval Gogichaishvili

1. *Political activities of Levan Gogichaishvili*

Levan Gogichaishvili was a chairman of the youth organization of the New Rights political movement, as well as the human rights advocate and member of the Equality Institute board. Since 2006 he has been one of the founders of the November 7 movement and an active participant. He is also a board member of the organization. Levan Gogichaishvili actively participated in protest rallies and was detained a number of times pursuant to the administrative procedure. He was an active participant of the Fall 2007 and the Spring 2009 protest rallies.

2. *Criminal Case of Levan Gogichaishvili*

On June 9, 2009 investigation into the alleged fact of intentional damage inflicted to Davit Lezhava's health was launched in the 4th department of MIA's Old City Bureau of Tbilisi.

On June 16, 2009 Levan Gogichaishvili was detained as a suspect in the noted criminal case.

[141] Par 6 of Article 439 of the Criminal Procedure Code (adopted in 1998)

[142] Though, in a formal sense, it did refer to other evidences as well

Levan Gogichaishvili was charged with violation of subparagraph "c" [143], Paragraph 5 of Article 177 of the Criminal Code of Georgia and was sentenced to imprisonment by judge's order.

Gogichaishvili's charges were reviewed by the Board of Criminal Cases of Tbilisi City Court and pronounced him guilty. The convicted was sentenced to seven years of imprisonment. Tbilisi City Court's verdict of guilty was appealed pursuant to the appeals procedure. The Chamber of Appeals upheld the verdict delivered by Tbilisi City Court. The decision was appealed pursuant to the cassation procedure. The Supreme Court declined to review the case.

3. *Violations in the criminal case of Levan Gogichaishvili*

- **Evaluation of Evidence**

Although the investigation into Gogichaishvili's case revealed some contradicting evidence, the court failed to corroborate grounds for upholding the evidence submitted by one party and turning down the evidence submitted by another.

Persons examined as witnesses in the process of investigation, who were present at the crime scene do not corroborate charges leveled against L. Gogichaishvili. The witnesses confirm the fact that Davit Lezhava was stabbed, although they are unaware of the circumstances.

The verdict of guilty against Gogichaishvili is based on the statements of victim Davit Lezhava and witness Tia Tsereteli.

As Tia Tsereteli, who was examined as a witness in the case maintains she witnessed the development on the crime scene (alleged fact of Gogichaishvili stabbing Lezhava) when she was driving with her friends from Daba Tskneti to Tbilisi and accidentally witnessed the fact.

Statements of witnesses[144] examined during court investigation rule out a vehicle driving by the crime scene on the central highway at the time when D. Lezhava was stabbed, which at least calls the statement of witness Tia Tseretely in question, especially when the victim himself stated that there were no vehicles driving by at the time when he was stabbed.

It is noteworthy that the court partially upheld the victim's testimony when it delivered the verdict of guilty; specifically, the court upheld part of Davit Lezhava's statement where he argued that L. Gogichaishvili was the person who stabbed him; whereas the part of the statement where Davit Lezhava emphasizes that there were no vehicles driving by the scene when he was stabbed, was not been upheld by the court.

Legal analysis of facts established during the court investigation reveals that most part of the witness statements (including witnesses of the prosecution) do not corroborate charges leveled against Gogichaishvili. Nevertheless, the court upheld the facts that corroborate the charges (statement of the victim and Tia Tsereteli), whereas it did not evaluate the

[143] Intentionally inflicting grave damage to health with hooligan intent

[144] Vazha Korkotashvili, Konstantine Nanitashvili

statements of witnesses that do not corroborate the charges.

According to Tea Tsereteli's testimony, she saw something that none of the witnesses present at the scene did (the fact of L. Gogichaishvili stabbing Lezhava). Furthermore, as she clarifies, it had been raining earlier that day and it was raining when she drove by the crime scene. Although she was looking out of the wet window glasses of the car in night-lights (the fact occurred at 3 am), she managed to identify Levan Gogichaishvili at a glance. Furthermore, she saw how "that boy hit him with something shiny, resembling a knife blade", though she is not sure what it was, as she never got out of the car.

Court findings cited in the judgment fail to correspond with actual evidence in Gogichaishvili's case, which amounts to substantial violation of Article 539[145] of the Procedure Code of Georgia.

- **Questionable Evidence**

On June 16, 2009 sister of victim Davit Lezhava – Irina Lezhava was examined as a witness in N1 Temporary Detention Isolator of Tbilisi. The latter had been detained by officers of the Special Operations Department (SOD) for use, acquisition and storage of drugs. The detained was charged with violation of Paragraph 3 of Article 260 of the Criminal Code of Georgia on June 15, 2009. The noted Article envisages life-time imprisonment as punishment for criminal liability.

Irina Lezhava, charged with drug use, demanded to be examined as a witness in criminal investigation into the alleged fact of incurring health damage to Davit Lezhava. She testified against Levan Gogichaishvili and her statement served as the basis for his detention. After making a statement that incriminated Levan Gogichaishvili, Irina Lezhava was released immediately notwithstanding the fact that she had been charged for committing an especially grave crime. The state prosecution motioned for granting bail in the amount of GEL 2000 (two thousand).

It has been determined that the criminal incident against Davit Lezhava occurred on June 9, 2009, while Irina Lezhava did not testify in the case until June 16, 2009, i.e. until she was detained. She incriminated Gogichaishvili only after she was detained. All of it questions Irina Lezhava's objectivity and her statement. It is also peculiar that Davit Lezhava was questioned the very same day Irina Lezhava – a person detained for drug use, acquisition and storage – was examined as a witness. Davit Lezhava gave his statement after her sister did and therefore, by incriminating L. Gogichaishvili, he basically corroborated his sister's statement.

Pursuant to the procedure law, all suspicions that may not be dispelled by other evidence, shall be resolved in favor of the defendant, which was not the case in L. Gogichaishvili's case.

[145] Pursuant to Article 539, it serves as the basis for modifying or repealing a verdict.

- **Qualification of the Action**

Levan Gogichaishvili was charged for intentionally inflicting damage to health with hooligan intent.

The noted qualification does not derive from evidence collected in the case.

According to the bill of indictment Levan Gogichaishvili gratuitously insulted Davit Lezhava verbally, who slapped him in the face for the insult. At the same time, L. Gogichaishvili inflicted an injury to Davit Lezhava with hooligan intent – he injured Lezhava in his left groin with a stab-wound by a knife that he was carrying.

Factual circumstances reflected in the descriptive part of the verdict do not derive from the evidence analyzed during the court investigation, as the investigation determined that Davit Lezhava verbally insulted Giorgi Alkhazanishvili, a friend of Levan Gogichaishvili, which has also been corroborated by the victim, Davit Lezhava.

Legal analysis of Davit Lezhava's testimonies rules out any hooligan intent, as the victim himself clarifies that Gogichaishvili undertook the action that he was later charged for, only after Davit Lezhava verbally insulted Levan Gogichaishvili's closest friend. Furthermore, the court investigation determined that victim Davit Lezhava was the first one to physically insult by slapping Gogichaishvili in the face.

Although the bill of indictment as well as the sentence indicates that L. Gogichaishvili stabbed the victim gratuitously, such explanation is insufficient for corroborating hooligan intent, as in the case of a hooligan intent, subjective composition of the crime shall be evident[146]. In any of such case, even the slightest motive for an action shall be evident that acted as an inner driving force of the person committing a crime with hooligan intent. The motive shall necessarily be established.

In the given case, neither the bill of indictment nor the judgments of the court first instance, court of appeals and cassation court fail to establish the aforementioned essential element of subjective composition of crime allegedly committed by Gogichaishvili, which was of critical importance for correct qualification of the action. Therefore, conclusion in incriminating documents in L. Gogichaishvili case that he inflicted the damage with hooligan intent is groundless, as it has not been substantiated.

Correspondingly, the court failed to observe provisions of Articles 18 and 19 of the Criminal Code of Georgia in the process of elaborating its judgment in L. Gogichaishvili's criminal case. All factual circumstances established by the case materials had not been properly evaluated, which from legal point of view, resulted in wrongful qualification of Leval Gogichaishvili's action.

***4**. Conclusion*

The verdict rendered in L. Gogichaishvili's case is not based on irrefutable evidence; furthermore, qualification of L. Gogichaishvili's actions as a crime with hooligan intent is questionable.

[146] Decision of the Supreme Court rendered in Case #74ao Meotishvili;

CHAPTER III
CASES OF ADMINISTRATIVE VIOLATION

This chapter features results of analysis of several administrative cases that were highly publicized.

3.1. Case of Irakli Kakabadze

1. *Political activities of Irakli Kakabadze*

Irakli Kakabadze is a poet and a U.S. citizen. He is the founder of Equality Institute. Irakli Kakabadze organized/participated in various protest rallies for over the years. He was detained or fined pursuant to the administrative procedure a number of times.

2. *Irakli Kakabadze's Case of Administrative Offence*

Irakli Kakabadze was detained at George Bush Str. on August 14, 2010. He participated in a peaceful protest rally at the junction of George Bush and Lech Kachinsky Streets. Rally participants demanded George Bush Str. to be renamed after a famous American poet – Walt Whitman. The administrative protocol specifies Article 173 of the Code of Administrative Offences of Georgia as the legal basis for detention (disobedience to the legal orders or instructions of law enforcement officers). The detained Kakabadze and two other rally participants - poets, who were also detained by the patrol police, were standing on the so-called "safety island" and polyphonically reading poetry by Whitman and other poets. The rally was peaceful; moreover, as the rally participants were standing on the "safety island" they were not blocking the traffic either. The patrol officers appeared in a couple of minutes. They demanded the rally participants to leave the safety island. The protesters obeyed the order and moved to a sidewalk. Afterward the police officers detained Kakabadze, who was already standing on the sidewalk. Kakabadze did not resist the detention.

On August 15, 2010 Tbilisi City Court reviewed the noted case and delivered a decision that found Kakabadze guilty of committing an administrative offence. Kakabadze was ordered to pay a fine in the amount of 400 GEL.

3. *Violations in the case of Irakli Kakabadze*

- **Qualification of the action**

The protocol of administrative offences was drawn up on the basis of Article 173 of the Code of Administrative Offences of Georgia. Therefore, the court should have discussed the matter whether the detained had in fact committed the action envisaged by this Article. Offence envisaged by Article 173 occurs only when the following pre-conditions are evident:

1. ***Lawful order*** *of a law enforcement officer*
2. ***Malicious disobedience*** *to the above-mentioned order.*

- ***Presence of Lawful Order***

During review of the case on trial the patrol police officers failed to precisely clarify what their lawful order was, which was disobeyed by the detained persons. All three officers that attended the court session provided different explanations of the lawful order that was given. Specifically, one of the officers stated the following: the rally participants were ordered to leave the so-called "safety island" and move to the sidewalk; while other clarified that they ordered the protesters to leave the "safety island" and stop reading the poetry. The third officer declared that the detained persons were ordered to stop covering billboards with graffiti and leave the traffic lane. Explanations that radically differed from one another did not raise any suspicions in court.

Clearly, the order to stop reading poetry may not be deemed as lawful due to the fact that freedom to express and disseminate opinion is a constitutional rights, guaranteed by the supreme law of the land.

The order to leave the "safety island" may not be deemed as lawful due to the fact that there are no legal provisions that prohibit standing on such islands. As the "island" is detached from the traffic lane, traffic is not blocked by a person standing on the island.

As for the order to stop covering billboard with graffiti, no such order was given, as there were no patrol officers on the scene when the billboard was painted. It was testified by the detained and corroborated by witnesses examined during the trial. Furthermore, the fact is clearly demonstrated by a video-tape that the court refused to see. Correspondingly, the police officers could not have given such order. The witnesses examined at the trial, as well as the detained persons declared that during the time the billboard was painted, there was no police and they did not give (and clearly would not have given) any order. When the patrol officers arrived at the Bush square, the billboard was already painted, which rules out existence of an order to cease the action. By the time the patrol police arrived, the action was already completed.

- ***Malicious Disobedience to the Order***

The law qualifies **malicious** disobedience as an administrative offence, as opposed to any kind of disobedience. In the given case, not only malicious disobedience but any disobedience at all was not evident. Specifically, order of the patrol police to move to the sidewalk was met willingly, without any resistance.

Therefore, evidently there was no lawful order of patrol officers. Nevertheless, the rally participants obliged to their order and moved to the sidewalk, which also rules out "malicious disobedience". It was corroborated by the patrol officers themselves.

- **Thorough investigation of the case circumstances**

The court groundlessly turned down the defense motion to see and examine materials submitted by the defense and to attach them to the case. Pursuant to Article 130 of the Code of Administrative Offences, the court was obliged to comprehensively, thoroughly and fully examine the case circumstances before making the decision. At the court session witness-

es, the detained persons and patrol officers provided clearly conflicting explanations. Even the testimonies of the patrol officers were contradicting. They gave different responses to one and the same questions and described case circumstances differently. In such case the court itself should have taken interest in details of the case circumstances in order to determine whether Kakabadze had in fact committed the offence envisaged by Article 173 of the Code of Administrative Offences of Georgia and should have made a fair decision. The court was aware that a number of cameramen where shooting the protest rally. It should have examined materials from the noted sources in order to avoid groundless imposition of administrative sanction on Kakabadze. Instead the court "did not deem it necessary" to allow and examine video material featuring the protest rally from the beginning to end. The noted evidence would have allowed the court to ascertain the factual circumstances of the case. By refusing to turn down the defense motion, the court also violated Article 236 of the Code of Administrative Offences. Paragraph 1 of this Article stipulates, ***"Any factual data on the basis of which the agency (official) determines, in the order established by the law, the presence or absence of administrative offence, is evidence of the case of administrative violation"***.

- **One-sided Evaluation of Evidence**

Pursuant to Article 237 **"an agency (an official) guided by law and legal consciousness, will evaluate the evidence according to his/her personal beliefs, based on thorough, comprehensive and objective examination of all evidence of the case, cumulatively"**. I.e. the court should have at least seen the submitted video-tape, which would have allowed it to ascertain and better examine the case circumstances. Afterward, it would have been up to the court to decide whether to consider it when making the decision.

Decision of the court was based solely on testimonies of the police officers and protocols of offence drawn up by them, while evidence of the defense (clarifications, witness testimonies, video material) was not discussed by the court at all. The case review demonstrated that factual circumstances described by the defense and the prosecution were essentially conflicting. Therefore, the decision should not have been based on testimonies of a single party.

It is substantiated by the fact that the court upheld the allegation that Kakabadze was addressing to the patrol officers as "dogs", which is a derogatory term. In the process of establishing the allegation, the court was only guided by clarifications of the police officers, while it disregarded Kakabadze's clarification that he was only reading poetry. If the court had seen the video-material, it would have learned that Kakabadze had not insulted the patrol officers.

- **Lawfulness of the Protocol of Administrative Offence**

The protocol of administrative offence itself was drawn up groundlessly, for as we have already mentioned, Kakabadze's actions did not display any signs of the offence envisaged by Article 173 of the Code of Administrative Offences. His actions contained signs of the offence envisaged by Article 150 of the Code of Administrative Offences/ distortion of the

city façade/; therefore, the protocol could have been drawn up based on the noted grounds only.

The law prescribes fine in the amount of 50 GEL for the offence envisaged by Article 150. It shall also be noted that patrol officers are not authorized to administratively detain the person who has committed such offence. I. Kakabadze was detained and had to spend a night in a temporary detention isolator[147].

- **Investigation of the beating**

During detention of Irakli Kakabadze a protocol of detention was drawn up, indicating that the detainee had no visible bodily injuries. Irakli Kakabadze clarifies that after the detention he was transferred to the building of the Ministry of Interior Affairs (Hereinafter MIA), where he was verbally and physically abused. As a result, several injuries were inflicted to him. The protocol of external examination of the detainee at Tbilisi N2 Temporary Detention Isolator (Dighmis Masivi, building of MIA Headquarters) confirms the bodily injuries.

On August 17, 2010, the Public Defender of Georgia addressed a letter to the Chief Prosecutor of Georgia, requesting immediate response to the fact. On September 6, 2010, the defense lawyer of Irakli Kakabadze also addressed the Chief Prosecutor with an application, requesting the information whether preliminary investigation into the fact stated in Public Defender's statement had been launched. The lawyer has not received a response yet, which allows us to assume that preliminary investigation into the case has not been started.

- **Civil Lawsuit against Irakli Kakabadze**

It shall be noted that while several violations were committed against Irakli Kakabadze and went without a response, on September 17, 2010, Tbilisi City Court filed a lawsuit in the Board of Civil Cases of Tbilisi City Court, requesting compensation in the amount of 1926,23 GEL for damages inflicted by Kakabadze. As the claimant clarifies, the noted amount was spent to dismantle and replace the damaged billboards.

4. *Conclusion*

In Kakabadze's case the law was grossly violated both by the patrol police officers, as well as the court. Specifically, the protocol of administrative offence was drawn up under the Article that envisaged graver measures for offence that Kakabadze had not committed, as opposed to the Article Kakabadze had in fact violated. At the court session, it became evident that violations envisaged by Article 173 were not present in Kakabadze's activities. Nevertheless, the court's evaluation of the evidence was one-sided and its decision was basically based on clarifications of patrol inspectors, whose statements contradicted one another. Furthermore, the court groundlessly refused to grant their request to attach the case with evidence that directly affected the case and could have had an essential impact on the court's decision. Moreover, the court refused not only to allow the evidence but also

[147] Irakli Kakabadze was detained on August 14, at 19:45 and released on August 15, first half of the day, after the trial.

to examine it and did not take any interest in the noted material. All of the aforementioned information confirms that justice in Kakabadze's case was administered unlawfully.

3.2. Cases of Persons Detained pursuant to Administrative Procedure on June 15, 2009

On June 15, 2009, representatives of various youth movements, up to 100 persons, were holding a rally outside the MIA, main headquarters in Tbilisi, protesting against the administrative detention of several of their fellows on June 12. On June 12, representatives of youth organizations held the so-called "hall of shame" outside the Parliament of Georgia. During the protest rally, there was a clash between the protesters and security officers of the Chairman of Parliament. Same evening several participants of the rally were detained pursuant to administrative procedure. This is what the June 15, 2009 rally participants were protesting against. Police officers armed with clubs dispersed the rally only a few minutes after it started. 38 participants of the rally were detained. Fines were imposed on 33 of them, while 5 was sentenced to administrative imprisonment.

Below is the analysis of the five detained persons' cases[148].

1. *Political activities of the detained persons*

Merab Chikashvili –*Ratom?* Movement;

Dachi Tsaguria –November 7 movement;

Mikheil Meskhi – Equality Institute

Giorgi Sabanadze – Youth organization of the political party Young Rights

Giorgi Chitarishvili _ November 7 movement.

2. *Cases of Administrative Offence*

The aforementioned individuals (except for Giorgi Chitarishvili, who was found guilty pursuant to Article 173 of the Code of Administrative Offences), were found guilty pursuant to Article 166 (petty hooliganism) and Article 173 (malicious disobedience to the legal orders or instructions of law enforcement officers) of the Code of Administrative Offences. They were sentenced to 30 days of administrative imprisonment with the decision of the Board of Administrative Cases of Tbilisi City Court.

As the law enforcement agencies and the court clarify, the detained committed petty hooliganism by using bad language outside the Parliament of Georgia – at a public place, on June 12, 2009. Furthermore, they violated Article 173 of the Code of Administrative Offences by disobeying the order of the law enforcers to move away from the traffic lane, by disobedience and resistance during detention.

[148] As the cases are identical, all five cases are analyzed together.

3. *Violations in cases of administrative offence*

- **Petty hooliganism**

The detained persons were found guilty for petty hooliganism without the law enforcement authorities presenting any evidence substantiating the charge at the trial. The only evidence presented at the trial were protocol of detention and the protocol of deeming persons as offenders, drawn up on June 15, 2009, by the investigating inspectors that detained the persons, i.e. the protocols were drawn up by individuals, who witnessed the fact that occurred on June 15, as opposed to the fact that occurred on June 12. In any case, the court materials do not establish that the persons who committed hooligan offence on June 12 were detained on June 15 by the very same police officers who witnessed their hooliganism. The court found the persons guilty of the offence under Article 166 without examining the concrete evidence that corroborated the fact of using bad language outside the Parliament by the detainees on June 12. The court did not take an interest in whether the police officer present at the trial had witnessed the noted fact, or who furnished him with the information and what guided him when drawing up the protocol. Finally, it shall be pointed out that no evidence, except for the protocol drawn up on June 15, was submitted to corroborate that the detainees had committed petty hooliganism. The police did not submit any other evidence - a video recording for instance. Neither the person who drew up the protocol of administrative violation mentions what information served as the basis for establishing the fact that the detainees had committed a petty hooliganism.

Malicious disobedience to the legal orders or instructions of law enforcement officers

In order for an action to be qualified under the aforementioned Article, it is necessary for a ***legal order*** of law enforcement authorities addressed to the detainees to be evident, which was not the case. Specifically, the police officers started raiding the rally without ordering the protesters to disperse[149]. Hence, the law enforcement officers did not issue any legal orders. Furthermore, the protesters (including the detainees) were standing on the sidewalk, on the right side across the Tbilisi police headquarters. They were not blocking the road, or hindering the traffic and the pedestrians[150]. Hence, their protest rally met all the requirements of the Georgian legislation and specifically the law of Georgia on Assembly and Manifestation. Therefore, an order of the law enforcement authorities to disperse and move away from the traffic lane could not have been a legal one, as the protesters were not standing on the traffic lane anyway.

Another mandatory request for qualifying a person's actions as offence under Article 173 is a ***malicious disobedience*** to order or instructions of the law enforcement authorities. We are facing several issues in this regard:

- As the law enforcers did not issue a lawful order or any kind of order for that mat-

[149] Ref. http://itv.ge/?p=10551

[150] It is corroborated by video footage on Internet TV www.itv.ge (http://itv.ge/?p=10551) and amateur cameras. The footage that captured the rally and its dispersion was destroyed by law enforcement officers, while other national TV channels did not cover the rally. Ref. to the 2009 (IQ) Report of the Public Defender to the Parliament, discussing the June 15, 2009 developments in details.

ter to the rally participants, it is peculiar that the detainees shall take responsibility for malicious disobedience.

- Considering that the protest rally was held in compliance with the legal procedure - i.e. the rally participants were not blocking the building of police headquarters or hindering the traffic and the pedestrians - order of police officers, if there was any, could not have been legal.
- The law specifically emphasizes that a **malicious disobedience**, as opposed to disobedience in general constitutes an offence, which court shall interpret in line with the situation and circumstances of a given case, in order to establish whether the disobedience was in fact malicious. Malicious disobedience itself constitutes apparent physical resistance by violent ways, including swearing and gross abuse. All of the cases fail to substantiate why the disobedience was malicious or specifically what actions were undertaken by the detainees.

It shall be noted that Article 173 of the Code of Administrative Offences may not be applied alone, as qualification of an action as an offence under the noted Article shall be proceeded by illegal actions committed by a person that would be followed by a legal order of a police on ceasing the action. Therefore, disobedience to legal orders cannot be argued in a case where no illegal actions are evident.

- **Evidence**

Only the protocols of administrative offence and detention were submitted as evidence in these cases and only the police officers that detained the suspects gave the explanations on trial, i.e. they were representing the prosecution. The police did not submit any other evidence corroborating that the offence was committed. It shall be noted that in the case that concerns an allegedly committed offence and the issue of sentencing a person to imprisonment is discussed, the burden of proof falls on the police. They shall submit authentic evidence that the offence was committed. Testimony only of a person that detained the suspect and its submission on a trial cannot be considered as sufficient evidence for pronouncing a person as an administrative offender. Hereby, it shall be underlined that the European Court of Human rights in cases GUREPKA v. UKRAINE[151] and GALSTYAN v. ARMENIA[152]clarified that administrative imprisonment equals to the criminal detention. Therefore, the court applied stipulations of Article 5 and Article 6 to administrative imprisonment as well and noted that guarantees enjoyed persons subjected to criminal detention shall be guaranteed for persons subjected to administrative detention, which adds to the importance of the burden of proof and submitting authentic evidence during the review of cases of administrative imprisonment urgency. Correspondingly, a police officer that detained a person pursuant to administrative procedure, and represents the prosecution on trial, may not be deemed at the same time as a neutral witness, corroborating the fact of committing

[151] Judgment of the European Court of Human Right - Gurepka v. Ukraine, 6/12/2005 no. 61406/00, 6/12/2005, para 55

[152] Judgment of the European Court of Human Right - Galstyan v. Armenia, 15/02/2008 no. 26986/03, 15/02/2008, para 60

the offence. Therefore, testimony of the police officer may not be deemed as sufficient evidence for convicting a person of committing an administrative offence and sentencing him/her to imprisonment.

- **Curtailing the right to defense**

We consider that in the noted cases the detainees' rights to defense were curtailed. Although the minutes of court session indicate that the judge provided explanation concerning the noted right and the detainees themselves refused to exercise it, the defendants clarify the following: Dachi Tsaguria categorically requested lawyer, and the process was even obstructed due to the request, although he was not given an opportunity to make a phone call. Mikheil Meskhi was given 10 minutes only to bring a lawyer. Deeming it impossible to find a lawyer within such short period of time, he refused to exercise the right. As Giorgi Sabanadze clarified, he had not been informed about his right to a lawyer. Giorgi Chitarishvili states that when he requested participation of a lawyer, the judge responded with an irony. Merab Chikashvili was the only detainee, who turned down his right to a lawyer, clarifying that due to his grave health condition[153] he wanted the process to end soon, in order to get medical assistance in time. He also clarifies that his physical pain impeded his ability to evaluate the situation properly.

Additionally, two facts corroborate that the detainees' right to defense was curtailed. After the media outlets reported the fact that rally participants were dispersed and the protesters were detained, the chairperson of the Georgian Young Lawyers Association (Hereafter GYLA) issued orders for protection of the detainees and sent lawyers to Tbilisi headquarters of the MIA. The lawyers were prevented from visiting the detainees, as it was stated that the protesters were not held there. Later it turned out that the detainees were in fact held at the headquarters before transferring to court. Another significant fact is that lawyers of the GYLA were not even allowed to the trial to protect the detainees. Specifically, a representative of Mandaturi (supervisor's) service physically obstructed GYLA's lawyers from providing defense to Dachi Tsaguria and Mikheil Meskhi, stating the motive that all trials had already been concluded; while earlier staff-members of the Chancellery attempted to mislead the lawyers intentionally by maintaining that the trial had not even started, as a judge had not yet been assigned to the case. Therefore, GYLA's lawyers were unable to provide defense to Dachi Tsaguria and Mikheil Meskhi in the process of their conviction to administrative imprisonment. On June 16, 2009, we addressed the chairperson of Tbilisi City Court with a letter concerning the matter, calling for a response to the facts of obstructing lawyers to attend the trials. The court's response stated that it reacted to the fact pointed out by GYLA by issuing a warning to the head of the office of Tbilisi City Court for inadequately performing his work duties. The noted action demonstrates that the court itself recognizes that the right to defense was restricted.

Pursuant to Paragraph 3 of Article 42 of the Constitution of Georgia, "the right to defense is guaranteed", which along with other procedural guarantees envisages accessibility of a detainee to a defender immediately upon detention, as well as the right of a defender

[153] he was beaten during the detention.

to unrestrictedly engage in any stage of the legal proceedings. Furthermore, pursuant to paragraph 1 of Article 252 of the Code of Administrative Offences, a detainee has the right to use a lawyer's legal aid.

Considering all of the aforementioned, it is obvious that the detainees' right to defence was curtailed.

- **Investigation of physical violence exerted against the persons detained on June 15, 2009**

During dispersion of the rally, police officers physically abused the rally participants. As we have already mentioned, video footage and photo material corroborates that the police officers exerted severe physical violence against the rally participants. Furthermore, the detainees were also beaten at the headquarters of the Ministry of Interior Affairs in Tbilisi, which is corroborated by the public defender himself, who was personally monitoring the rally process and was detained and beaten during the rally[154]. As a result of the noted physical violence, multiple bodily injuries were inflicted to the rally participants. The bodily injuries of persons detained pursuant to the administrative procedure for imprisonment is corroborated by the protocols of external examination, as well as the patients' medical cards issued by the Tbilisi Emergency Medical Assistance Center.

Lawyers addressed the General Prosecutor of Georgia with an application requesting launch of preliminary investigation into the June 15, 2009 developments as the abuse of power by the police officers and inhumane and degrading treatment had occured. At the same time, the application requested medical examination for establishing gravity of the victims' injuries. The application went without a response: medical examination was not performed, the victims were not questioned and the police officers violating the law were not identified. The only response that we got from the Prosecutor's office was that the preliminary investigation under Article 226 of the Criminal Code (Organizing Group Action Disrupting Public Order or Active Participation Therein) had been launched, where the aforementioned individuals are not involved as parties. Instead of identifying police officers violating the law, preliminary investigation was launched under Article 226 with a possibility of instituting legal prosecution against the victimized rally participants for violating the Article.

- **Prison Conditions**

Prison conditions and discriminating treatment in prisons is one of the objective criteria that serve as the basis for granting the status of political prisoner by experts of Council of Europe[155]. Therefore, it is important to review prison conditions in these cases as reported by prisoners and lawyers.

After the detainees were sentenced to imprisonment, they were placed in the temporary detention isolator at the headquarters of the MIA, where they spend 30 days in unbearable conditions. Specifically, a cell where 5-6 prisoners were placed lacked air conditioning,

[154] Ref. 2009 (IQ) Report of Public Defender, pp. 133.

[155] Ref. Objective criteria of political prisoner, elaborated by the experts of Council of Europe (3 May 2001)

windows were closed and the prisoners were subject to constant lack of oxygen. It shall also be considered that it was summer (June-July) and it was very hot. The detainees did not sleep on beds. They were sleeping on an elevated area, made of wood, without any mattress, pillows or linens. The lavatory in the cell is not properly detached from the rest of the cell and the prisoners had to use the lavatory in each other's presence. During the term, the detainees were not taken out even once for a walk. They were offered to take a shower only on the 26th day of the detention. It shall be noted that two detainees Mikheil Meskhi and Dachi Tsaguria were taken to separate cells after several days upon detention, while the rest of the detainees were placed in a 16sq.m. cells with other 5-6 prisoners. Being alone was particularly difficult for Mikheil Meskhi and the administration of the isolator was requested to place another prisoner detained pursuant to administrative procedure with him in the cell. Although prisoners were complaining about how overcrowded the cells were, Mikheil Meskhi and Dachi Tsaguria spent the whole term alone in cells.

It shall be noted that the detainees and their lawyers raised a number of times the issue of providing the detainees with the opportunity of a walk and a shower, opening a window of the cell for at least several hours a day and resolving other issues but the administration did not respond to the requests, partially due to the fact that procedures and conditions for serving administrative imprisonment as a sentence were not regulated by law. It was only on February 1, 2010 that the Minister of Interior Affairs adopted the decree N108[156] to eliminate the issue, which to some extent regulated the procedure for serving administrative imprisonment, although issues in this sphere remain to be unresolved and additional guarantees are needed. GYLA elaborated a legislative package of amendments to the Code of Administrative Offences, which was submitted to the task-force of reforms in the field of criminal law with the Ministry of Justice of Georgia.

The problematic situation in isolators of temporary detention was also reflected in the 2007 report of the Council of Europe anti-torture Committee's visit to Georgia. The Committee explicitly indicates that all detainees that are to spend more than 24 hours in the temporary detention isolator shall be provided with an opportunity of a walk and a shower. They shall also be furnished with an opportunity to have with basic items of hygiene, as well as books, newspapers and magazines. It is particularly important for the persons sentenced to administrative imprisonment, who may spend up to 30 days in the isolator[157]. The issue becomes particularly significant nowadays when the term of administrative imprisonment has been increased to 90 days. It shall be noted that the 2010 report of the Council of Europe anti-torture Committee's visit to Georgia once more refers to the same issues concerning the temporary detention isolators that were pointed out by the 2007 report, as the government failed to resolve a number of issues identified by the previous report[158].

[156] On adopting typical statute of the temporary detention isolators of the Ministry of Interior Affairs of Georgia, regulations of the isolators and additional instructions governing activities of the isolators.

[157] Georgia: Visit 2007 (report) CPT. http://www.cpt.coe.int/en/hudoc-cpt.htm

[158] Georgia: Visit 2010 (report) CPT

4. *Conclusion*

Considering the aforementioned, it is safe to conclude that the legal proceedings against all of the five detainees was administered in violation of law – they were convicted as offenders notwithstanding the lack of evidence; their right to defence was violated; the fact of beating went without a response and they were placed in prison in unbearable conditions.

CONCLUSION

Legal analysis of cases reviewed in the research determined methodical errors in the execution of criminal justice in relation to individuals who can be considered as possible opponents of the authority due to political or public activities of these persons or their friends and family. The analysis discovered both legislative flaws and wrong interpretation of procedure legislation, as well as malpractice reinforced by inaccurate practice of the applicable law. In the cases that have been analyzed, any doubt, whether caused by legislative flaw or failure to collect authentic evidence, is generally interpreted against the detained, the accused or the defendant. Judicial authority fails to properly control arbitrary actions of the investigative agency. Furthermore, position of the prosecution is almost always upheld by the judicial authority, whose role in the process of implementation of justice is profoundly diminished.

The research that was undertaken for this report focused on a representative sample of cases where there were allegations of political motives for prosecution. The noted deficiencies in the judicial process and the established violations of legal and procedural norms do indeed give rise to concern over the administration of justice in these cases. We have not performed a cross-comparison with similar cases where allegations of political motives are absent, within the scope of research undertaken for this report. However, given the serious nature of the deficiencies observed by us, we see two possible conclusions:

1) The cases under our review are representative examples of politically motivated prosecution,

or, if the cases under our review are "normal" and not politically motivated, that:

2) the process of prosecution on criminal and administrative offences in Georgia is seriously flawed across the board.

The latter would be an equally grave conclusion.