

# MONITORING CRIMINAL TRIALS IN BATUMI, KUTAISI AND TBILISI CITY AND APPELLATE COURTS

**Monitoring Report №6**  
**Period Covered: January - August, 2014**  
**December, 2014**  
**Tbilisi, Georgia**

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



# *Georgian Young Lawyers' Association*

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

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## THE MAIN TRENDS

### FIRST APPEARANCE SESSIONS (PREVENTIVE MEASURES)

- Compared to the previous monitoring period (July-December 2013):
  - The percentage of the defendants for whom the prosecution requested imprisonment as a preventive measure increased from 55% to 60%.
  - The percentage of the defendants who were ordered imprisonment as a preventive measure decreased from 42% to 37%.
  - The percentage of the defendants who were ordered bail as a preventive measure decreased from 55% to 52%.
  - The percentage of the defendants who were ordered an alternative preventive measure and who were left without any preventive measure increased from 3% to 11%.
- For the first time since the launch of the monitoring (October 2011), GYLA observed three cases in which the judge considered illegal detention protocol and released the defendant from the courtroom.
- In this reporting period (January-August 2014), we observed 11 cases in which, despite the prosecution's motion, the court has released the defendant on his own recognizance and did not order any preventive measure. Furthermore, it was in 2013 when GYLA first observed that two defendants were released without any preventive measure.
- Further, for the first time throughout the monitoring we identified the cases in which the prosecutor did not demand use of preventive measures against defendants who were not already in custody.<sup>1</sup> GYLA found total of 7 such cases. Prosecution also did not demand use of preventive measures against 3 defendants who were already in custody. Total of 21 (6%) cases were transferred for pre-trial review without ordering

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<sup>1</sup> During the previous reporting periods we detected several cases where defendant had already been convicted for a different crime and was held in custody, which is why prosecution no longer requested application of any additional preventive measures.

any preventive measure against any of the defendants. GYLA welcomes the improvement and remains hopeful that prosecutors and courts will demand and use imprisonment as a preventive measure only in exceptional cases, as the measure of the last resort.

- Generally, the courts applied two types of preventive measures: imprisonment and bail. Although, compared to the previous reporting periods, judges ordered alternative preventive measures more frequently including: 2 cases of personal guarantee and 13 agreements about proper conduct and not leaving the territory.
- During both the current and the previous reporting period (July-December 2013), courts continued to adequately substantiate rulings on imprisonment. In particular, court substantiated 93% of its rulings on imprisonment and 82% of rulings on bails, while in the previous reporting period 87% of the decisions on the imprisonment and 84% of bail decisions were substantiated.
- Similar to the previous reporting period, judges appeared to give more consideration when imposing preventive measures, instead of automatically granting preventative measure requested by the prosecution:
  - In 34% of the cases in which the prosecution requested imprisonment, the court ordered bail;
  - In 3% of the cases in which the prosecution requested imprisonment, the court did not apply any preventive measure against the defendants;
  - In 1 of the cases in which the prosecution requested imprisonment, the court ordered personal guarantee.
  - In 55% of cases in which the prosecution requested bail, the court reduced requested amount;
  - In 9% of the cases in which the prosecution requested bail, defendants were released under agreement on proper conduct and not leaving the territory.
  - In 4% of the cases in which the prosecution requested bail the court did not apply any preventive measure against the defendants;

- As in the previous monitoring periods, the courts have failed to publish any information about the first appearances in advance. However, in Batumi and Kutaisi City Courts the bailiffs continued to verbally announce information concerning the first appearance hearings.

### **PRE-TRIAL HEARINGS**

- Since the launch of the monitoring project (October, 2011), during this monitoring period, the second case was observed in which the judge terminated the criminal prosecution at the pre-trial hearing stage and did not forward the case for the merit hearing.
- As in the previous reporting periods, courts routinely granted prosecution motions to submit evidence. As for defense, it seemed more passive than in the previous periods. In 192 cases, of which none was high profile, the defense filed motions for submission of evidence in only 44 cases (23%). During the previous reporting period the rate was at 36%.

### **PLEA AGREEMENT SESSIONS**

- Compared to the previous reporting period, judges seemed more active at the plea agreement hearings and did not automatically approve prosecution's motions on the plea agreements. For the first time since the launch of the monitoring project (October, 2011), the case was observed in which the judge asked additional question during the plea agreement session and expressed interest in fairness and lawfulness of the plea agreement conditions. Since fairness and lawfulness of the 3 plea agreement conditions seemed less convincing for the judge and parties refrained from introducing amendments to the agreement, the judge did not approve them. GYLA assesses the development positively and remains hopeful that in future judges will be more active in identifying lawfulness and fairness of plea agreement and will approve them only after proper examination.



- For the past three monitoring periods, the number of the plea-agreements imposing fine has decreased. The share, for the current monitoring period was 44%, whereas in the previous periods the percentage of cases in which the fines were imposed was 68%, 50% and 49%. Nevertheless, the average fine in concluded plea-agreements increased from GEL 1850 during the previous period to GEL 4873. It should be noted that the previous three reporting periods illustrated the decrease in the amount of the average fines ordered. Namely, in July-December 2012 the amount of average fine ordered was GEL 9115, in January-June 2013 this amount decreased to GEL 3295 and in July-December 2013 it decreased even more and was GEL 1850.
- The cases of ordering community labor in the plea-agreements decreased from 7% to 5%. In the fourth monitoring period the indicator increased from 1% to 7%.

#### **OTHER KEY FINDINGS**

- As in the previous reporting periods, defense was typically passive compared to the prosecution, except for high-profile cases, where the defense was very active.
- Of the finished 204 cases (135 plea agreements and 69 merit hearings), the defendant was acquitted only in one case. In the previous reporting period three acquittals were observed, including two high-profile ones<sup>2</sup>.
- As in the previous monitoring period, judges performed much better in informing defendants about their right in terms of plea agreements. The quality of explaining other rights to defendants has also improved.
- Situation did not change in terms of search and seizures. Of 48 motions about search and seizure, the court issued advance permit on its conduct only in two cases. In the other 46 cases the court legalized already conducted searches. It creates

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<sup>2</sup> Nikoloz Gvaramia (the ex-Minister of Justice and Education) and Kakha Getsadze, (the former Gamgebeli of Zestaphoni Municipality).

doubt as to compliance of the law enforcement authorities and the court with their obligation not to conduct or legalize searches that are not appropriately justified on the basis of urgent necessity.

- The problem regarding the right to public hearing was also observed at jury selection sessions during the previous monitoring periods; although no official order restricting attendance was issued by the judge. However, since January 2014 court resolved problems concerning publicity of jury selection sessions and individuals were given a chance to attend them without a problem.
- There continues to be a problem with the timeliness of the proceedings. Except for the first appearances, 26% of other sessions started with more than 5 minute delay. As opposed to the previous reporting period it's a better result, where 38% of sessions started with a delay.

## **INTRODUCTION**

Georgian Young Lawyers' Association (GYLA) has been carrying out its court monitoring project since October 2011. GYLA initially implemented its monitoring project at the Tbilisi City Court's (TCC) Criminal Chamber. On December 1, 2012, GYLA broadened the scope of the monitoring project to also include Kutaisi City Court (KCC). In March 2014, monitoring was launched at the Batumi City Court (BCC). Identical methods of monitoring were applied in all three cities.<sup>3</sup>

GYLA presented its first and second trial monitoring reports (covering October 2011 to March 2012) to the public and stakeholders in June 2012. Presentation of GYLA's third report (covering July to December 2012) was held in April 2013. The presentation of the fourth monitoring report (covering January to July 2013) was held in October 2013 and the fifth report (covering the period from July 2013 to December) was submitted in April, 2014.

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<sup>3</sup> Due to the smaller number of cases in Kutaisi and Batumi, monitoring is conducted by a single observer. In Tbilisi City Court monitoring was conducted by three observers, as in the previous reporting periods.

This is GYLA's sixth trial monitoring report, covering the period from January, 2014 to August, 2014. The report also submits results of the trial monitoring with jury participation. Similar to the previous reporting periods, the purpose of monitoring criminal case proceedings was to increase their transparency, reflect the actual process in the courtrooms and provide relevant information to the public. This report also presents recommendations based on the newly discovered problems. The recommendations aim to promote the improvement of the criminal justice system.

Within the period of January-August 15, 2014 GYLA monitored 1167 court hearings<sup>4</sup>, including:

- 283 first appearance sessions;
- 226 pre-trial hearings;
- 138 plea-agreement sessions;
- 495 main hearings;
- 19 appellate hearings;
- 3 sessions for jury selection;
- 3 jury trials.

Of these 1167 hearings, 447 took place in Tbilisi City Court (TCC), 320 took place in Kutaisi City Court (KCC), 381 were held in Batumi City Court (BCC), 16 in Tbilisi Appellate Court, and 3 in Kutaisi Appellate Court. GYLA did not analyze the jury and the appeal trials separately, since no distinctive trends were identified at these hearings - jury and other substantial hearings seemed to be handled in the same manner.

In its previous monitoring report, GYLA noted that certain improvements took place during the period after the 2012 parliamentary elections. Specifically, judges appear to give more consideration when imposing preventive measures. In the current monitoring period GYLA is pleased to note frequency of using preventive measures other than imprisonment and bail and activeness of the judges at the plea- agreement sessions.

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<sup>4</sup> From the start of GYLA's monitoring it is the highest indicator of hearings attended by GYLA's monitors.

## **METHODOLOGY**

All of the information in this report was obtained by monitors through their direct monitoring of the hearings. GYLA's monitors did not communicate with the parties, and did not review case materials or decisions. GYLA's experienced lawyers and analysts performed the analysis of the information obtained.

Similar to the previous reporting periods, GYLA's monitors applied questionnaires prepared specifically for the monitoring project.

Information gathered by the monitors was evaluated, and compliance of courts' activities with international standards, the Constitution of Georgia and the applicable procedures and laws was examined by GYLA's analysts and experienced lawyers.

The questionnaires included both close-ended questions requiring a "yes/no" answer and open-ended questions that allowed monitors to explain their observations. Further, similar to the previous reporting period GYLA's monitors made transcripts of trial discussions and particularly important motions in certain cases, giving more clarity and context to their observations. Through this process monitors were able to collect objective, measurable data, while at the same time recording more subjective facts and developments. The attached charts may not fully reflect this more subjective information; however, GYLA's conclusions are based on the analysis of all of the information gathered by the monitors.

In the view of the complexity of the criminal proceedings, GYLA's monitors typically attended individual court hearings rather than monitoring one trial throughout its entire cycle. However, there were certain exceptions. "High profile cases" – selected by GYLA's monitors and analysts according to criteria elaborated beforehand – were monitored throughout an entire cycle, to the extent possible. These cases involved gross violations of rights, high public interest, or other distinguishing characteristics. GYLA monitored such cases in the Appellate Court as well.

## **STRUCTURE OF THE REPORT**

There are five key sections in the report:

The first section presents key observations related to the two stages of the criminal proceedings (the initial appearance of the defendants before the court and the pre-trial hearings) and the plea agreement hearings.

The report then provides an evaluation of the basic rights that defendants have during the criminal proceedings. These rights include equality of arms and adversarial principle, the right to defense, the prohibition of the ill-treatment, the right to substantiated judgment, and the right to an interpreter.

The third part of the report relates to the conduct of the parties at the trial. It covers only the conduct that directly violates procedural legislation or ethical norms.

The fourth part of the report covers technical gaps associated with the court proceedings.

Lastly, the report's Conclusion highlights the key issues identified during the reporting cycle and presents GYLA's recommendations based on observed problems during the monitoring period.

GYLA remains hopeful that the information obtained through the monitoring process will help create a clearer picture of the current situation in Georgia's courts, and serve as a useful source of information for the ongoing debates on judicial reform.

## **A. OBSERVATIONS REGARDING SPECIFIC STAGES OF CRIMINAL PROCEEDINGS**

### **I. INITIAL APPEARANCES**

According to the Article 198 of the Criminal Procedure Code of Georgia (CPC), during a defendant's first appearance the court considers what measure should be used to ensure that the defendant returns to the court for the further hearings and does not either commit a crime while awaiting resolution of the case or obstruct investigation. Such a "preventive measure" must be substantiated, meaning that a preventive measure imposed must correspond to the goals of the preventive measure.

Many different types of preventive measures are available to the court. These include: imprisonment, bail, and appropriate conduct agreement, and supervision of the conduct of a military serviceman by commanders-in-chief.

Code of Criminal Procedure (CPC) Article 198(3) provides:

When filing a motion to apply a preventive measure, the prosecutor must justify the reason behind his/her choice of the preventive measure and the inappropriateness of a less restrictive preventive measure.

Accordingly, the burden of justifying a preventive measure is carried by the prosecution; the defense does not need to submit the evidence, opposing the preventive measure.

Further, CPC Article 198(5) describes various circumstances that the court must consider before it can impose a preventive measure:

When deciding on the application of a preventive measure and its specific type, the court shall take into consideration the defendant's character, scope of the activities, age, health condition, family and financial status, restitution made by the defendant for the damaged property, whether the defendant has violated the previously applied preventive measure and other circumstances.

The decision of the court on the preventive measures must be substantiated, as a substantiated decision at each stage of the proceed-

ings is part of the right to a fair trial, guaranteed by the Criminal Procedure Code<sup>5</sup> and reinforced by a number of judgments by the European Court of Human Rights (European Court).<sup>6</sup>

### ***1.1. General Trends***

During this reporting period, GYLA monitored 283 first appearance hearings (141 in TCC, 37 in KCC and 105 in BCC) concerning 326 defendants.<sup>7</sup> Compared to previous monitoring periods, the general picture has improved considerably. Nevertheless, other previous troubling practices remained unchanged.

From the start of monitoring by GYLA, the situation has increased considerably in terms of substantiation of preventive measures. During the first and the second court monitoring periods, courts granted all of the prosecution's motions for preventive measures, indicating apparent bias in favor of the prosecution. During the third monitoring period the situation changed somewhat, particularly in the period after the October 2012 elections, with courts sometimes rejecting the prosecution's motion for the preventive measures. During the next monitoring period, this trend in favor of the defense has continued. Courts were relatively active in examining motions for preventive measures, and were not merely bound by the prosecution's demand. In the current reporting period the approach has improved even further, and judges showed more efforts in determining the grounds of the prosecution's motions and the defense position. In addition, the prosecution attempted to apply to the court with more reasoned motions. Accordingly, the number of the substantiated preventive measures has increased significantly.

Although the positive trend of the previous reporting period in terms of the reduced requests for imprisonments as a preventive measure has changed, the motions of the prosecution became more substantiated when they requested imprisonment. When requesting bail as preventive measure the prosecution's motions still lacked substantia-

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<sup>5</sup> Criminal Procedure Code of Georgia, Article 194 para.2.

<sup>6</sup> E.g., *Hiro Balani v. Spain*, no. 18064/91, Para. 27 (9 December 1994).

<sup>7</sup> More than one accused participated in some first appearance hearings.

tion, since they seldom submitted information about the defendant's financial status. However, in such cases, the court played its positive role and attempted to acquire information from the defendants. We should note that the situation was best in TCC; the worst was in BCC, where judges maintain their passive role and do not attempt to collect all of the necessary information in the course of examining motions on the preventive measures.

The situation has not improved significantly in terms of defense at the first appearance sessions; although defense less frequently agreed with the prosecution's position and attempted to substantiate its position with certain argumentation when requesting imprisonment and bail. However, there were still some cases, in which the defense objected to the prosecutions' charges formally and did not bring forward any valid argumentation for it.

As opposed to the previous monitoring periods, GYLA observed changed practice in terms of ordering preventive measures. The Court no longer applies only two preventive measures: imprisonment and bail and leaves defendants without any preventive measure more often. In addition, prosecutors also requested alternative preventive measures and sometimes asked for the pre-trial hearings without any preventive measure.

The court ordered imprisonment to 37% of defendants and bail to 52% of defendants. Monitoring revealed 11 cases in which the court left the defendant without a preventive measure despite the prosecutor's demand (in 6 cases prosecution demanded imprisonment and in 5 cases - bail). Moreover, this monitoring period reflected the first cases in which the prosecution did not ask for any preventive measure and requested appointment of the pre-trial hearing. In total, there were 10 cases in which the prosecution did not demand a preventive measure (3 defendants were already convicted for other offence and were in custody.) In total, 21 defendants were left without a preventive measure in the reporting period.

The court applied agreement on not leaving the territory and proper conduct as the preventive measure with 13 defendants. Only three of them had lawyers. It should be noted that in two cases this preventive measure was requested by the prosecution, while in other 11 cases it had requested bail.



GYLA evaluates the cases positively and remains hopeful that prosecutors and judges will be more active to apply alternative ways of preventive measures and will leave defendants without preventive measure when there is no such necessity.

In 13 of 326 cases, the defense requested preventive measure other than bail (4 were requests to leave the defendant without any preventive measure, 2- personal guarantee and 5 agreements on not leaving the state and proper conduct. In two other cases the defense requested to apply any preventive measure less strict than bail). The court granted none of the 13 motions.

## ***1.2. Specific Preventive Measures***

### **1.2.1. Bail**

Bail is a preventive measure which helps ensure the defendant's return and prevent the committing the future crimes or interference with the prosecution by requiring the defendant to deposit funds in order to be released until the judgment is delivered. The defendant or the person who posted bail in favor of the defendant shall be repaid the amount of the bail in full (with consideration of the rate at the time when the bail was posted), or the lien which was imposed shall be lifted from the pledged property, within one month after the execution of the court judgment, provided that the defendant has fulfilled his/her obligation precisely and honestly, and a preventive measure applied against him/her has not been replaced by a more restrictive preventive measure<sup>8</sup>.

As a type of a preventive measure, bail is subject to all of the obligations under the Criminal Procedure Code for the application of a preventive measure. As a result, the prosecutor must justify the reason behind his/her choice of a preventive measure, and the court must take into consideration a variety of circumstances, including the defendant's character, financial status and other significant characteristics, even when the prosecutor does not provide the information relating to such circumstances. The defense is not obligated to present the information about these circumstances, as it is the prosecution

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<sup>8</sup> Criminal Procedure Code, Article 200.

that must justify the relevance and proportionality of the preventive measure sought.<sup>9</sup>

Hence, the appropriateness of the bail depends on substantiation of its necessity.

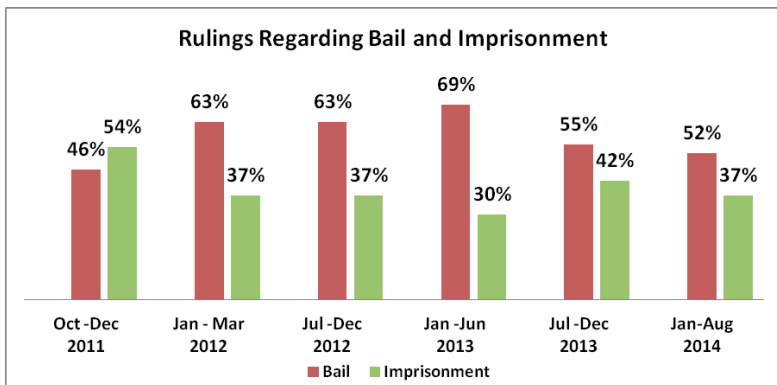
### Findings

The practices observed during the current monitoring period are considerably different from what we found during the initial periods of the monitoring. In particular, judges no longer grant prosecution's motions for preventive measures automatically; rather, they order preventive measures based on more profound discussions.

Compared to all the previous stages of the monitoring, except the first one, bails were granted to fewer defendants. In certain cases, even though the prosecution demanded imprisonment, court ordered bails. During the present reporting period, 52% of 326 defendants were ordered bail.

The diagram below illustrates the situation over the course of the monitoring project regarding the use of bail and imprisonment as a preventive measure (from October 2011 through August 15, 2014).

Chart N1

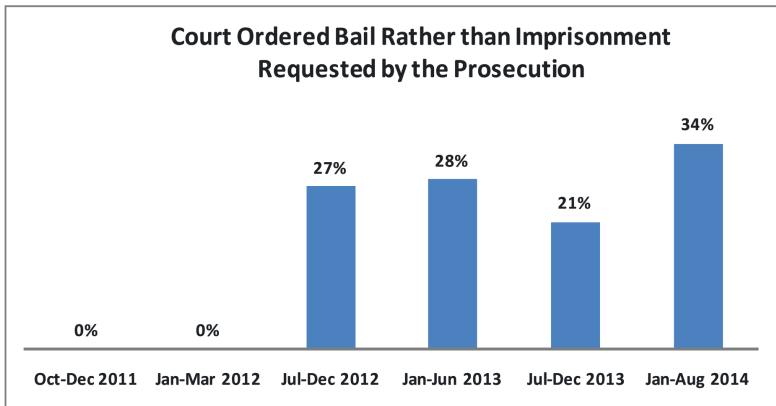


<sup>9</sup> According to Criminal Procedure Code, Article 200 para.2.

During the reporting period, bail was applied as a preventive measure in 34% of the cases in which the prosecution demanded an imprisonment (the bail was granted to 67 individuals out of 195). During the reporting period the court ordered bail most frequently, despite the prosecutions' demand for an imprisonment.

The diagram below illustrates the situation over the course of the monitoring project regarding ordering bail rather than imprisonment (from October 2011 through August 15, 2014).

Chart N2

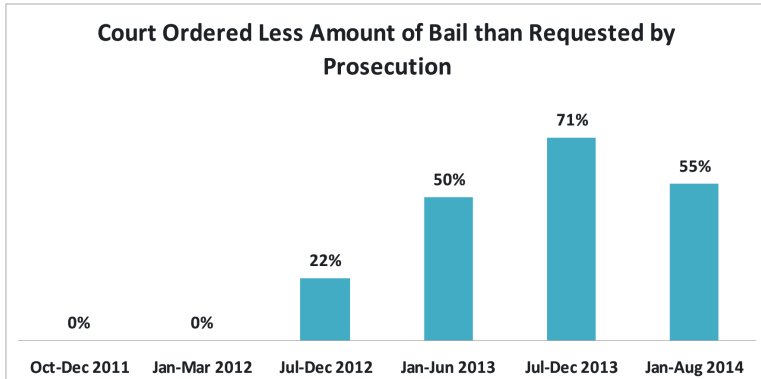


During the present reporting period, the prosecution requested bail in 36% of cases (118 from 326). Out of 118 demanded bails, court granted 102. In 55% of the cases in which the prosecution demanded bail (56 out of 102 cases), the amount of bail ordered was less than the amount demanded; while in 45% of the cases (46 cases) the amount of bail ordered was equal to the amount demanded (the diagram below illustrates the situation over the course of the monitoring project, from October 2011 through August 15, 2014). In 16 additional cases, the court rejected prosecution's demands for the bail. Of these, it did not order any preventive measures against the defendants in 5 cases and ordered an agreement of proper conduct and not leaving the territory in 11 cases.

The diagram below illustrates the situation over the course of the monitoring project regarding ordering less amount of bail than re-

quested by the prosecution (from October 2011 through August 15, 2014).

Chart N3

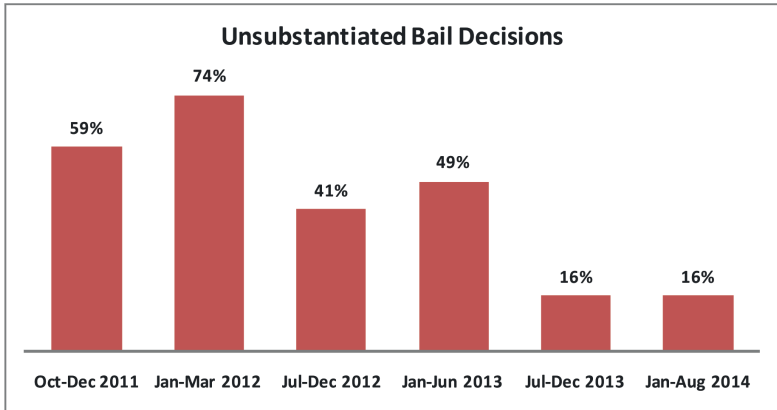


50,000 GEL remained the maximum amount ordered in bail during the reporting period, while 1,000 GEL remained the minimum amount. Despite the positive changes, certain flaws were detected in the use of bail.

Order of bail as a preventive measure should be proportionate and substantiated, meaning that the bail should be proportionate to the financial capacity of a defendant concerned and crime alleged. The decision should be made on the basis of the analysis of all relevant circumstances, so that the judge is convinced that the defendant has the financial capacity to post the amount of the bail ordered. If the defendant cannot post the bail, it must be replaced by a stricter preventive measure – imprisonment. Unsubstantiated bails may basically equal to imprisonment.

Out of 169 decisions setting the bail, GYLA believes that 27 (or 16%) were unsubstantiated, which marks a significant improvement from the initial stages of the monitoring project, but not a significant change from the previous period of monitoring. The diagram below illustrates results throughout the monitoring period (from October 2011 through August 15, 2014).

Chart N4



GYLA believes that bails are unfounded in cases in which:

- The decision to grant motion of the prosecution for a bail was granted by judges without any proper substantiation based on charges, defendant’s character, financial status and other significant characteristics. This failure is particularly significant in cases in which the defendant is not represented by a lawyer.
- When ordering bail instead of an imprisonment against the demand of the prosecution, judges did not look into the financial capacity of the defendant to post a bail. The result may be that the defendants remained in prison even though the judge intended that they be released on bail.

Below are examples of unsubstantiated bail:

- A person was charged with violation of the traffic safety regulations, resulting in the grave bodily injury. The defendant confessed to and repented for the crime. The defendant had no prior criminal record. The prosecution did not present a single argument in support of applying a preventive measure against the defendant. Stressing this fact, the lawyer demanded not to apply a preventive measure against the defendant. Nevertheless, without looking into the financial capacity of the defendant, the judge ordered the defendant to pay GEL 4,000 in bail as demanded by the prosecution.

- A person was charged with the illegal acquisition and storage of the firearm and intentionally inflicting less severe damage to health on purpose, which is qualified as a less severe crime. The prosecution motioned for the imprisonment stating the defendant was trying to escape after committing crime. The lawyer motioned for bail in the amount of GEL 5,000 and presented character witness statements by the defendant's fellow-villagers and neighbors, as well as the defendant's affidavit stating that the shot had been fired accidentally. Further, the defendant was a student and the defense presented certificates about his achievements at the university. The judge rejected the motion for imprisonment but he ordered the defendant to bail in the amount of GEL 20 000 without looking into his financial capacity. GYLA believes that it was a completely inappropriate amount of bail considering the circumstances of the case.
- A person was charged with resisting the police officer. He had the prior record but it had been purged under the act of pardon. The defendant confessed on the crime. The prosecutor demanded bail in the amount of GEL 5,000 without providing a single substantiated argument during the trial, except for the grounds formally determined by the Criminal Code. The lawyer motioned for release on defendant's own recognizance and presented two guarantors at the trial. One of the guarantors had his own construction company and he also promised to provide employment for the defendant. Nevertheless, without any substantiation or looking into financial capacity of the defendant, the judges ordered bail in the amount of GEL 5,000.
- A father, the only breadwinner for his children, was charged for illegal acquisition and storage of the firearm. The defendant submitted the firearm himself to the police and was detained. The prosecutor demanded imprisonment but failed to give specific reasons, while the defense motioned for a bail of GEL 2,000. The judge ordered a bail in the amount of GEL 10 000, and until the bail was paid the defendant had to remain in detention. GYLA considers it, as an utterly inappropriate measure. If it was the intension of the judge to free the defendant from the imprisonment, he should have ordered bail that the

defendant would have been able to post, close to the amount demanded by the defense. It is ambiguous what the motivation for the judge's decision was.

We also found three positive instances bail application, in which judge deemed record of the detention illegal and released the defendant from the courtroom, ordering him to bail while the prosecution demanded imprisonment. Notably, these were the first times we found positive use of the bail since October 2011, when GYLA began its monitoring. GYLA welcomes the precedent and remains hopeful that judges will resort to this opportunity more often and leave defendants in imprisonment only as a measure of last resort.

In the first case, two defendants were detained and charged with theft. The prosecution demanded imprisonment. The lawyer was not able to adequately highlight weaknesses of the prosecution and reinforce the defense's position; however, the judge fully realized his obligation and further looked into the detention of the persons to first determine whether the detention was substantiated and imprisonment should be ordered:

**Judge:** *"How did the defendants and the investigator communicate?"*

**Prosecutor:** *"the defendants were summoned [to the investigating agency] as witnesses. They confessed to the robbery while being questioned."*

**Judge:** *"On what grounds were they arrested?"*

**Prosecutor:** *"the risk of hiding."*

**Judge:** *"Please provide a single piece of evidence that would create a reasonable doubt that the defendants may hide from the investigation."*

As the prosecutors could not provide a response, the judge deemed the record of the detention illegal, ordered defendants to bail, and released them from the courtroom.

### **Another Example of the Positive Use of the Bail**

*The individual was charged with two counts of theft; in particular, he stole two bottles of cognac with total worth of 882 GEL. The police detained him in urgent necessity at night and demanded imprisonment as a preventive measure during the trial. The judge demanded that the prosecution substantiate grounds for the defendant's urgent detention. The prosecution stated that there was a risk he would hide. The judge did not uphold the argument based on the following circumstances: the defendant willingly followed the law enforcement officers to the investigating agency; he did not try to hide after committing the crime and nor did he change a place of his residence. Therefore, the court deemed the detention illegal and released the defendant from courtroom ordering him a bail.*

### **1.2.2. Imprisonment**

Imprisonment is the deprivation of liberty. Therefore, application of this measure – particularly before the final determination of guilt has been made – must be considered in relation to an individual's right to liberty, one of the most important rights in a democratic society.

The right to liberty is guaranteed by the Constitution of Georgia,<sup>10</sup> the European Convention on Human Rights,<sup>11</sup> and the Criminal Procedure Code.<sup>12</sup>

Under these provisions, the grounds for imprisoning a defendant before a final determination of guilt are: a) a risk that an individual would flee; b) need to prevent the obstruction in obtaining an evidence; and c) to avoid committing of a new crime. Even then, imprisonment may only be used when other measures are insufficient. Under the European Convention on Human Rights (ECHR),<sup>13</sup> and

<sup>10</sup> Constitution of Georgia, Article 18 para.1 and 2.

<sup>11</sup> European Convention on Human Rights, Article 5 para.1.

<sup>12</sup> Criminal Procedure Code of Georgia, Article 205 para.1.

<sup>13</sup> Jėčius v. Lithuania; The Right to Liberty and Security of the Person, A Guide to the



national procedural legislation,<sup>14</sup> a court is obliged to review the imprisonment upon the party's request, and the denial to consider such request is a deprivation of the right to liberty.

### ***Findings***

This reporting period revealed progress in terms of applying imprisonment as a preventive measure. Although compared to the previous reporting period, the prosecution's requests for imprisonment as a preventive measure were more frequent, they became more substantiated. Moreover, when the prosecution's requests for an imprisonment as a preventative measure were not substantiated, courts granted those requests less frequently.<sup>15</sup>

Of the 326 defendants observed at the first appearances, the prosecution requested imprisonment in 195 cases (60%). It is the highest indicator since the start of the monitoring (October, 2011). The court granted the prosecution's motion in only 121 cases (62%), the lowest percentage since the start of the monitoring project. The charts below illustrate the situation over the entire monitoring (from October 2011, until August 15, 2014).

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Implementation of Article 5 of the European Convention on Human Rights, Monica Macovei, Human Rights Handbooks, No.5, Council of Europe, p.60-61.

<sup>14</sup> Criminal Procedure Code of Georgia, Article 206.

<sup>15</sup> It was first observed by GYLA in previous monitoring period since it began monitoring in October 2011. Until October 212 GYLA did not observe the fact when the court did not grant prosecution's motion to order imprisonment as a preventative measure.

Chart N5

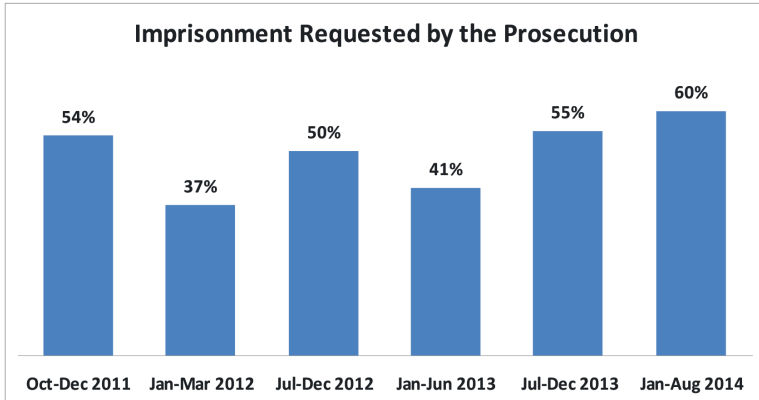
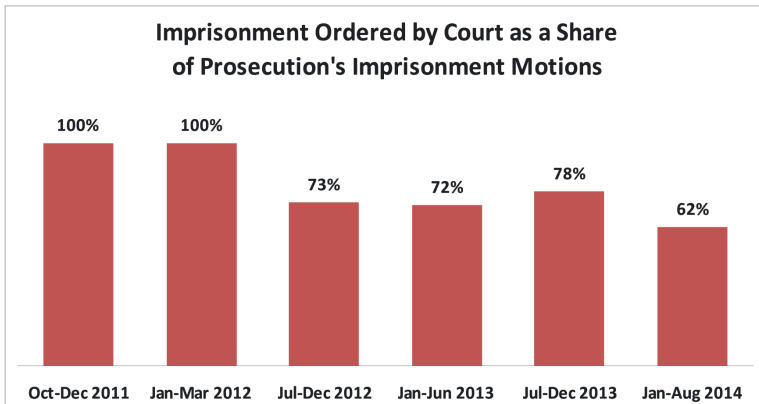
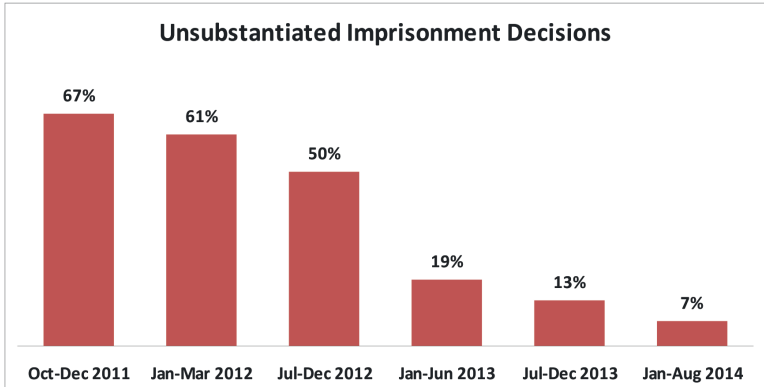


Chart N6



Of the 121 imprisonment decisions during this monitoring period, GYLA considered only nine (7%) unsubstantiated, with the prosecution not having enough evidence to show the necessity of imprisonment and citing only the gravity of offence as a justification. However, as opposed to the previous reporting period, the figure of unsubstantiated imprisonments has decreased even more, which is a significant achievement. The charts below illustrate the situation over the entire monitoring:

Chart N7



### **An Example of the Unsubstantiated Imprisonment**

*The person was charged with resisting the police officer, which is a less severe crime. Without any concrete arguments, the prosecutor demanded imprisonment as a preventive measure. The defense noted during the trial that the defendant had a 3-year old child, a pensioner mother and he was the only breadwinner for his family. The lawyer demanded bail in the amount of GEL 3, 000. Without any substantiation the court ordered the defendant to imprisonment.*

### **1.2.3. Personal Guarantee**

Of the first appearance hearings observed during this monitoring period, the defense proposed a personal guarantee as the preventative measure for the 2 of the 326 defendants. Of these two cases, the judge granted none of the motions.

However, the court applied personal guarantee as preventive measure in two other cases. In one case prosecutor was the initiator of the personal guarantee, which was a unique case for the whole monitoring project (October 2011- August 2014). As for another case, the court applied personal guarantee instead of the requested imprisonment. GYLA welcomes the initiative and deems that judges should be

active in applying personal guarantee as a preventive measure whenever possible.

#### **1.2.4. Agreement on Not Leaving the Country and Proper Conduct**

An agreement to not leave the country and proper conduct may be used as a preventive measure if the defendant is charged with a crime that envisages imprisonment for less than one year.<sup>16</sup> During this monitoring period GYLA observed 48 defendants who were eligible for such a preventive measure, but the court considered it appropriate only in 13 cases. The indicator is nonetheless higher than in the previous reporting period. GYLA remains hopeful that the courts will continue to apply the measure more intensively in all appropriate cases.

In the other 35 cases, 4 defendants were released from the courtroom without any preventive measure. As for the remaining 31 defendants, regretfully the judge did not attempt to find out possibility of applying other alternative preventive measures and ordered bail or imprisonment.

#### **Positive Examples of using Alternative Measures**

*In four similar cases, individuals had been charged for the drug-related crime (Article 273 of the Criminal Code). A lawyer did not participate in any of the trials and defendants defended themselves. The prosecution demanded bail in all four cases without providing any substantiation, while the defendants contested the use of the measure. The judge has fully performed his obligations and sentenced the defendants to a lighter proportionate measure – agreement on proper conduct and not leaving the country.*

### **1.3. Publishing Information about Hearings in Advance**

The monitoring of the initial appearances also confirmed an ongoing procedural problem that obstructs a defendant's right to a public

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<sup>16</sup> The Criminal Procedure Code of Georgia, Article 202.

hearing, as guaranteed by the Constitution of Georgia<sup>17</sup>, the European Convention on Human Rights,<sup>18</sup> and the Criminal Procedure Code of Georgia.<sup>19</sup>

To make this right effective, it is not sufficient for the public to merely have the right to attend a criminal proceeding; the public must also have the right to be informed in advance about a proceeding so that it has an opportunity to attend. Therefore, the right to a public trial obligates the court to publish the date and place of the first appearance hearing in advance, the full name and surname of a defendant, and the charges against him/her.

### ***Findings***

In *none* of the 283 first appearances monitored by GYLA (141 hearings held in TCC, 37 in KCC and 105 in BCC) did the court publish information about those hearings in advance.

This complete failure to publish information on first appearance hearings in advance has been observed since GYLA began monitoring in October 2011 and was reflected in all the monitoring reports. Despite GYLA's focus on the problem, the situation remains unchanged. The representatives of the TCC previously claimed that this was because of the technical limitations associated with the fact that first appearances are held within 24 hours of the arrest, and expressed readiness to settle the technical problems. No measures were undertaken despite given promises.

Situation is somewhat better in BCC and KCC where, though dates of hearings are not displayed on the monitor as in TCC, but court bailiffs announce information about the place of the pending sessions and identity of a defendant some time before start of the sessions; however, they fail to specify submitted charges.

GYLA considers that the method applied by the BCC and KCC is insufficient, since individuals willing to attend first appearance sessions are deprived of the chance to determine time and place of the session reasonably in advance. Furthermore, public is not informed about

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<sup>17</sup> Constitution of Georgia, Article 85.

<sup>18</sup> European Convention on Human Rights, Article 6 para.1.

<sup>19</sup> Criminal Procedure Code of Georgia, Article 10.

charges. GYLA hopes that it is a temporary measure, applied until courts administrations eliminate technical gaps.

## **II. PRE-TRIAL HEARINGS**

At a pre-trial hearing, the court considers the admissibility of evidence that will be considered at the main hearing. This stage is of the extreme importance, as only evidence deemed admissible by the court at the pre-trial hearing may be considered at the main hearing, and the verdict at the main hearing will be based on that evidence. In addition, the issue of whether to terminate the prosecution or continue the proceeding for an examination on the merits is decided at this stage.<sup>20</sup>

A court's rulings on pre-trial motions must be impartial and free from bias in favor of the either side. The right of a defendant to impartial proceedings is guaranteed under the Article 84 of the Constitution of Georgia, Article 6 of the ECHR, and under the Criminal Procedure Code of Georgia.

Although pre-trial hearings typically relate to the admissibility of the evidence, parties can also submit other motions at that stage.

### ***Findings***

Since the start of its monitoring program (October, 2011), during this monitoring period GYLA observed the second case in which the court terminated the case at the pre-trial hearing stage.

Otherwise, results of the current monitoring period are nearly identical to the previous periods. Courts mainly granted prosecution motions to submit evidence. As for defense, it agreed to the prosecution's motions. Compared to the previous reporting period, objection of defense on prosecution's motions decreased from 36% to 23%.

Following interesting trends have been revealed at the observed pre-trial hearings:

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<sup>20</sup> The court is to terminate a prosecution if it determines that, with a high probability, the evidence submitted by the prosecution fails to establish the committing of an offence by the defendant.

- 26 of the 226 pre-trial hearings observed were postponed and one was partially closed. In the remaining 199 hearings, in which the prosecution submitted motions to submit evidence, 9 trials were postponed before the judge made the decision. From the remaining 190 cases, in 184 cases the court fully granted all of prosecutions' motions on admissibility of evidence and in 6 cases – partially.
- The defense objected to 24 of the prosecution's 199 motions. Of these 24 objections, the court partially held the prosecution's evidence inadmissible in five cases and in six cases postponed the hearings until making the decision by the judge.
- The defense submitted motions to submit evidence in only 48 of the 195 (24%) cases<sup>21</sup>. In 34 of the 48 cases, the prosecution agreed to the motions and the court granted them. In other 14 cases the court fully granted 3 motions, partially granted other 3 motions, rejected 4 and 4 were postponed until making the decision by the judge.

### III. PLEA AGREEMENT HEARINGS

A plea agreement is a type of expedited proceeding at which a defense and a prosecution conclude an agreement as to punishment if the defendant pleads guilty to a particular charge.

Under the Article 213 of the Criminal Procedure Code, when a plea agreement is reached the judge must verify whether the charges brought against the defendant are lawful and whether the agreed-to punishment set out in the prosecutor's motion for acceptance of the plea agreement is fair.

In order to ensure that punishment is fair, a judge must consider the actual circumstances involved, taking into consideration the individual characteristics of the defendant, the circumstances under which the crime was committed, and the agreed-to punishment. The law does not specify how to guarantee a fair punishment. However, based on the general principles of sentencing, e.g. when ordering a fine a

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<sup>21</sup> Of the 226 sessions, 31 were postponed until the defense stated motion on submission of the evidences.

judge can look into financial capacity of a defendant; whether s/he is able to pay the fine; whether the fine is proportionate to the damage inflicted; circumstances under which the crime was committed and anticipated measure of punishment. Further, judge can also make changes in plea bargain, if the parties consent. In particular, under the law if a judge believes that evidence is insufficient to deliver a verdict without main hearing or rules that a plea bargain falls short of other stipulations of the Criminal Procedure Code of Georgia, s/he may offer parties to modify provisions of the plea agreement during a trial, with supervising prosecutor's consent. If the court is not satisfied with conditions of a modified plea bargain, it refuses to approve the agreement.

It gives a judge although limited but a certain leverage to influence fairness of a punishment.

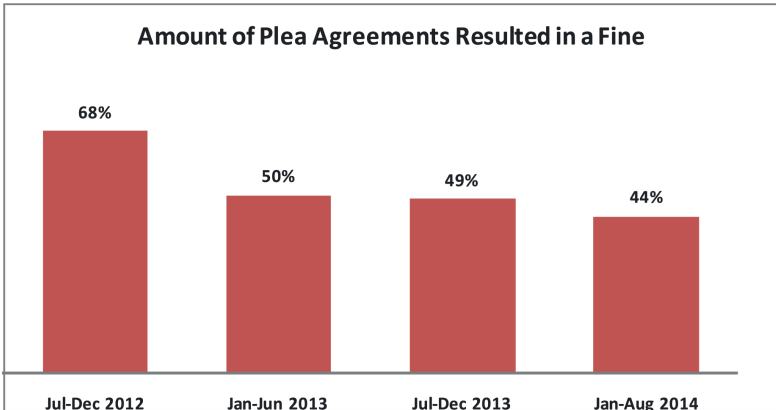
### **Findings:**

Unlike the previous reporting periods, we found that the court's involvement in reviewing plea agreements was more active, which is a positive development. In the previous reporting periods, when reviewing plea agreements, judges limited themselves to their procedural obligations only and asked defendants as a formality whether they agreed to a plea agreement or not. In the present reporting period judges refused to approve three plea agreements, believing that their provisions were unfair and illegal. Further, during the seven trials judge asked questions in an attempt to examine whether the punishment was fair. In one of the cases, the judge suggested the prosecutor to decrease the amount of fine envisaged under the plea agreement, stating that the current amount was disproportionate to the financial capacity of the defendant. In the two other plea agreements judge made certain technical corrections and corrected the legal flaws.

Of 204 hearings where a conclusive judgment was delivered in 135 (66%) plea agreement was approved. Compared to the previous period, the percentage of the plea agreements in which a fine was imposed declined slightly. This continues the trend that has taken place since GYLA began monitoring this issue. The diagram illustrates the situation for the reporting periods during which GYLA has been monitoring this aspect (July 2012- August 15, 2014).

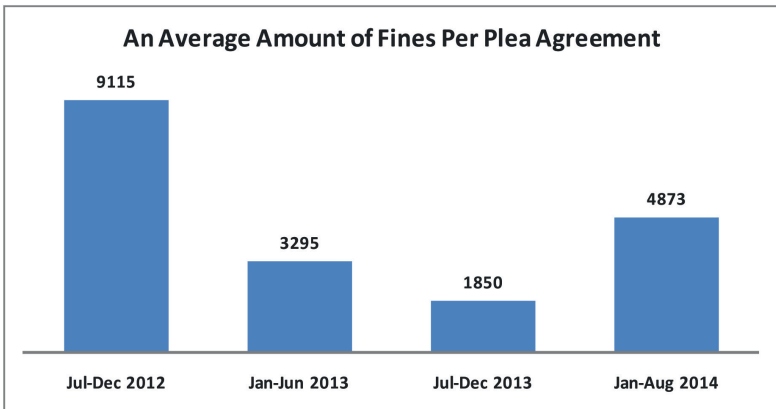


Chart N8



As for the amount of fines per agreement, the amount of fines increased again, despite the last periods' trend of decreasing the average amount of fines. During the current monitoring period, 59 plea agreements resulted in a total of GEL 287,000 in fines (an average of GEL 4,873 per plea agreement). The diagram below illustrates situation for the reporting periods during which GYLA has been monitoring this aspect (July 2012- August 15, 2014).

Chart N9

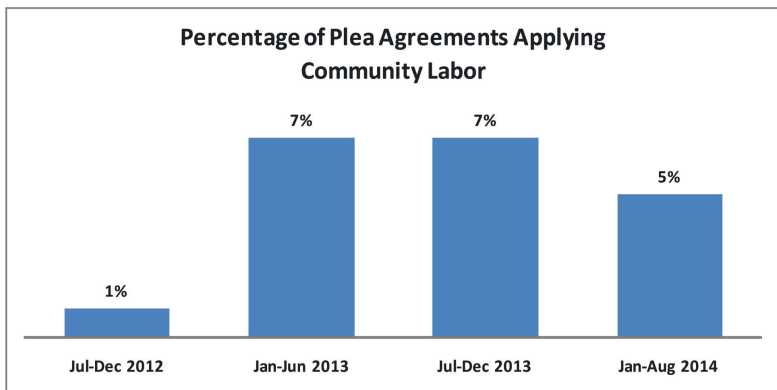


The range of fines during the current monitoring period was between GEL 1000 and GEL 30000; during the previous monitoring period, fines ranged from GEL 500 to GEL 5000.

In the current reporting period, percentage of the plea agreements applying community labor decreased from 7% to 5%. Though it should be noted that in the third monitoring period (July-December 2012) it was only 1%. Percentage of the plea agreements applying community labor increased from 1% to 7% in the fourth monitoring period (January –June, 2013) and remained 7% in the fifth monitoring period (July – December 2013).

The diagram below illustrates the situation for the reporting periods that GYLA has monitored this aspect (July 2012- August 15, 2014).

Chart N10



## **B. MONITORING RESULTS ON SPECIFIC RIGHTS**

### **I. EQUALITY OF ARMS AND THE ADVERSARIAL PROCESS**

Equality of arms and the adversarial process are the key principles of the criminal proceedings, established by the Article 42 of the Constitution of Georgia, Article 6 of the ECHR, and Articles 9 and 25 of the Criminal Procedure Code of Georgia.

The meaning of these principles is that the parties to a proceeding have an equal right to present evidence in the case and to enjoy equal rights during the process.<sup>22</sup> To safeguard this right, the judge must ensure the equality of arms during the trial, meaning that s/he must provide both parties with an equal opportunity to examine the evidence without interference. Further, the judge should not exceed the scope of the charges, but should be bound by the positions presented by the parties.

The principle of the equality of arms is of particular importance in criminal proceedings, where the prosecution has the resources and power of the state behind it and the defense is at a disadvantage.

### ***Findings***

GYLA's monitoring has found that the judges were mostly acting within the scope of their powers, ensuring that everyone had equal opportunities to represent their interests. In a majority of the cases, judges did not get involved in questioning the witnesses, were able to protect order in courtrooms, and ensured equality of parties.

Nevertheless, GYLA found certain flaws. In two of the cases judge interfered with the powers of the prosecutor by intruding into the process of questioning witness and grossly violating the principle of equality of parties and adversary proceedings.

- During the hearing on merits of the case, the prosecutor could not question witnesses adequately. His functions were later undertaken by the judge himself by asking questions to witnesses that the prosecutor should have asked. The judge asked

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<sup>22</sup> Constitution of Georgia, Article 42 para.6.

total of 17 questions to witnesses in favor of the prosecutor. The judge has also violated the rule established by the law, and asked 16 questions to witness without party's prior permission.

- In another case, the judge determined the type of questioning for the prosecution. In particular, he indicated that the witness should first start telling the story, followed by clarifying questions of the prosecutor.

During the monitoring we detected inconsistent practice of the court towards a number of the following issues:

- The court applied inconsistent approach towards examining the evidence that parties had not exchanged with each other as required under the regulations of the criminal proceedings. In one case, the judge refused to examine such the evidence, while during another trial held the same day the same judge examined the evidence but refused to enclose the evidence to his decision. In particular, the first case involved marriage and children's birth certificates of the defendant presented by the defense during the trial. The judge refused to examine them. In the second case, lawyer presented defendant's certificates and diplomas that judge examined. Notably, the judge cited Article 83 para 6<sup>23</sup> of the Criminal Procedure Code in both cases.
- In one of the cases, the judge applied inconsistent practice for regulating the process of questioning the witnesses. In particular, in the case of Ivane Merabishvili<sup>24</sup> (May 26 episode), during the cross-examination of Nino Burjanadze,<sup>25</sup> the defense was not allowed to comprehensively question the witness as the judge gave Burjanadze complete freedom to answer questions as she pleased. Consequently, the witness often made political statements instead of answering questions asked by the

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<sup>23</sup> Criminal Procedure Code of Georgia, Article 83 para.6: "Five days prior to the pre-trial hearing the parties shall provide each other and the court with all the information available at their hand at that moment regarding the evidence to be submitted to the court".

<sup>24</sup> Ivane Merabishvili – the former Minister of Interior and the former Prime Minister.

<sup>25</sup> Nino Burjanadze – the former Chairperson of the Parliament of Georgia.

defense and talked about what she pleased, including recent developments in Ukraine. The judge did not allow the lawyer to stop witness and to ask the question again, which is why the questioning lasted for three hours and was completely ineffective for the defense. The judge did not employ similar wrongful practice towards the other witnesses.

GYLA believes that it is important to establish a uniform legal practice, in order to rule out selective prosecution and for the parties to enjoy equal conditions. They must be given an opportunity to determine strategy that is best suited for their interests.

GYLA also found court's inconsistent approach towards observing order in a courtroom. In a number of cases, the court was inadequately lenient, negatively impacting effectiveness of the process, while on other cases it took all necessary measures to protect order. For instance,

- In one of the high-profile trials against Ivane Merabishvili on dispersion of May 26 rally the judge had a hard time protecting order in the courtroom. Attendees were making noise and were laughing at emotional testimonies of the witnesses. Prosecutors expressed their protest over the issue, but the judge has issued warnings only. He did not resort to any stricter measures and was in fact not able to control the situation in the courtroom.
- During one of the hearings of the other case, attendees loudly expressed their positions, shouting "comedy show", etc. Prosecutors noted that the noise interfered with their questioning of witnesses. The judge issued only a warning but without any success. After some time when it was impossible to continue the process the judge informally banished two individuals from the courtroom, without seizing their identity cards or recording their names to limit their right to attend other trials. In a conversation with the court bailiff, GYLA monitor found that these individuals violated order during every hearing of the case and hindered the proceedings.
- During one of the trials the attendees were noisy, hindering the process. Even though the courtroom was small and it

should not have been difficult to control it, the judge did not issue any warnings.

- To contrast, during one of the high-profile cases against Bachana Akhalaia<sup>26</sup>, attendees expressed constant aggression against a witness while he was questioned; in particular, they were swearing at him and calling him abusive names. Judge banished several individuals from the courtroom. As sanctions were unsuccessful and attendees continued to violate the order, the judge closed the trial to the public.

#### Other Findings:

- Out of the 498 main hearings (including 3 jury trials) attended by the monitors of GYLA, 7 were closed lately. In remaining 491 cases, witnesses were questioned in 206(42%), with judge asking questions in 7(3%) cases. In these 7 cases, judges violated the procedural requirements in four instances by asking questions to the witnesses without consent of the parties. There has been an improvement compared to the initial reporting periods of the monitoring project, when judges asked questions more frequently in violation of the procedural requirements.
- Similar to the previous monitoring period, there were cases at merit hearings in which the court failed to ensure separation of witnesses already examined and the witnesses that were yet to be examined, that should have been ensured by the court.<sup>27</sup> From the 206 cases in which the witnesses were interrogated, in 5 cases they were standing outside, sharing with each other the statements they gave. Unfortunately, the court did not do anything to prevent this.

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<sup>26</sup> Bachana Akhalaia – the former Minister of the Defense and the former head of the Penitentiary Department.

<sup>27</sup> Para.2, Article 118 of the CPC stipulates that “a witness should be questioned in isolation from other witnesses. Further, the court should take measures for preventing witnesses summoned for questioning in the same case from communicating with one another before the questioning is over.”

## **II. RIGHT TO DEFENSE**

The defendant's right to a defense is of the critical importance in the criminal proceedings, and is guaranteed under the Article 42 of the Constitution of Georgia and the Article 6 of the ECHR. In addition, Article 45 of the Criminal Procedure Code requires the defendant to have a lawyer if the enjoyment of the right to a defense may be at risk; for example, when the defendant does not have command of the language of the proceedings or is in the process of the plea bargaining, or has certain physical or mental disabilities that hinder him/her in defending him/herself).

For a full enjoyment of the right to defense, the defense should be given adequate time and opportunity to prepare its position. Further, the defense attorney should use all of the available legal means for defending the client.

### **Findings**

The monitoring results suggest that the right to defense was generally protected and that an attorney was provided in the cases of mandatory defense. Moreover, in all cases in which the defense asked for postponement of the case to become more familiar with the case materials and prepare the defense, the judge granted the motion. It should be noted that prosecution did not oppose the motions.

Nevertheless, GYLA's monitors observed the some violations of the right to defense, when either the court did not give the chance to implement an effective defense, law enforcement bodies restricted rights to defense, or the lawyer was too passive and fell short of applying all of the available resources for the protection of the defendant's interests.

Here are examples of violating right to defense by courts and law enforcement agencies:

- During defendant's first appearance before the court, the defendant stated that he had spent some time in the mental institution for the treatment while the prosecution had not submitted any certificate to prove it. Consequently, the defendant could have been eligible to the mandatory defense, while neither the prosecution nor the court examined this issue.

GYLA considers there was the alleged violation of the right to defense in this case.

- During another first appearance before the court, the defendant stated that while in custody he was not given his glasses or the possibility to meet his lawyer, which he had the right to.

### **Positive Example of the Judge's Reaction**

*At the first appearance session the defendant was a citizen of Azerbaijan who did not know Georgian and therefore was entitled to the mandatory defense. As it was determined at the hearing, he was detained on March 24, but the lawyer was not appointed until March 27. The prosecutor alleged that it was a technical gap, since they applied to the Legal Aid bureau for appointing the lawyer on March 26, though the notification reached the bureau on March 27. The judge observed violation of the right to defense, considered the circumstance when applying preventive measure, and released the defendant from the detention and ordered bail.*

Examples of unqualified and passive defense:

- During the first appearance before the court of a defendant who was a foreign citizen entitled to the mandatory defense (since he did not speak Georgian language) and therefore had a state appointed counsel, it was found that the counsel had not even visited the defendant or seen him before. They first met during the trial. Notably, before the court's arrival the lawyer received the information about the defendant from the prosecution instead of the defendant himself. Clearly, the counsel's representation of the defendant's interests during the trial was insufficient and only formal.
- At another initial appearance, during the direct questioning prosecutors were asking leading questions in violation of law,<sup>28</sup> but the defense did not respond to the violation and did not object to these questions.

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<sup>28</sup> Under the para.2, Article 224 of the CPC, "leading questions shall be prohibited during direct examination. A party has the right to file a motion to avoid a leading question and/or to deem the question or its response as inadmissible evidence."



- During one of the initial appearances, defense lawyer appeared unqualified in that he had difficulty remember terms like “restraining”, “guarantee”, etc.

GYLA also found one positive example of the court promoting the right to defense. During an initial appearance before court the defendant, who had been charged with theft and pled not guilty, did not have a lawyer. He was defending himself. The judge interviewed him about the details of the case, giving him an opportunity to express his position in a comprehensive way. After the trial was over, the judge acted in a considerate way and gave advice to the defendant, saying that if he was really not guilty, he needed to think through the ways he could prove his innocence; that if he was really innocent, he needed to convince the prosecutor that he did not commit the crime. The judge also advised the defendant to find proof of his innocence before the pre-trial hearing was held.

### **III. PROHIBITION AGAINST ILL-TREATMENT**

Ill-treatment is prohibited under the Constitution of Georgia, the ECHR and the Criminal Procedure Code. The prohibition provides protection against torture and degrading treatment.

For the implementation of this right, the defendant must be aware of his right to be protected from the ill-treatment and be informed of the right to file a claim against the ill-treatment with an impartial judge. Logically, this means that the court has an obligation to inform the defendant of these rights. The obligation is particularly important when the defendant is in the custody and the state has a complete physical control over him/her.

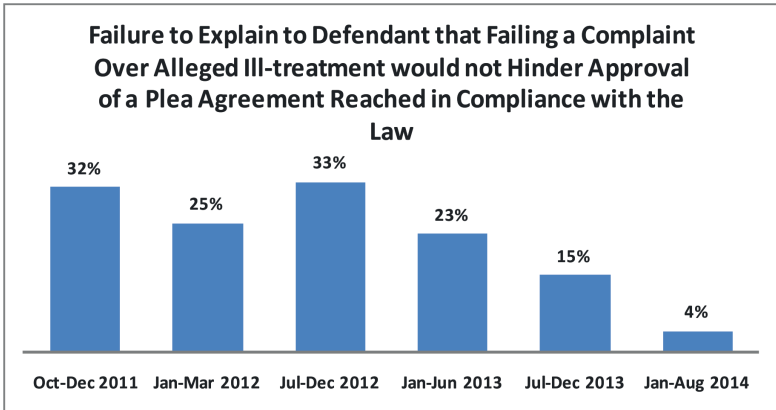
As a result, GYLA would again like to highlight a legal gap related to the ill-treatment of the defendants. Under the Criminal Procedure Code, a judge is authorized only to explain to a defendant his/her right against ill-treatment and to hear alleged facts of the ill-treatment. The law does not establish a procedure through which a judge can take meaningful action when ill-treatment is alleged; instead, a judge is only empowered to declare whether an ill-treatment took place.

## ***Findings***

Compared to the previous monitoring period, the judge explained to the defendants the right to file a complaint over an alleged ill-treatment in a higher percentage of cases:

- Of the first appearances observed, judges failed to explain to defendants their right to file a complaint over an alleged ill-treatment and did not inquire whether the defendant alleged ill-treatment in 16 of 283 hearings (5%). During the previous reporting period, judges failed to do so in 9 of 87 hearings (10%). It should be noted that the rate was 28% at the beginning of the monitoring project (October –December, 2011).
- For the last two monitoring periods, situation improved considerably in terms of explaining plea-agreement rights. In all of the 135 observed cases, the court inquired whether a plea bargain had been reached through coercion, pressure, deception or any illegal promise. During the previous period, judges explained the right also in 100% of plea agreements (68 sessions).
- GYLA found out that during this monitoring period, in only 4% of the plea agreements (5 of 135) did the judges fail to explain to the defendants that filing a complaint over an alleged ill-treatment would not hinder approval of a plea agreement reached in compliance with the law. The below diagram illustrates results of the whole period of monitoring (October, 2011 August 15, 2014).

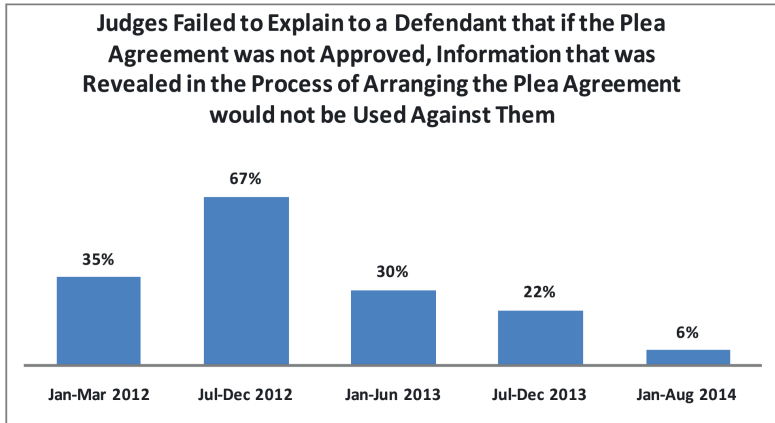
Chart N11



- In 6% of the cases in which a plea bargain was reached (8 of 135), the judges failed to explain to a defendant that if the plea agreement was not approved, information that was revealed in the process of arranging the plea agreement would not be used against them. This is much improved result since the last monitoring period, when the judge failed to inform the defendant in 15 out of the 68 cases (22%). This continues the trend that has taken place since the third reporting period (July-December 2012).

The diagram illustrates situation for the reporting periods during which GYLA has been monitoring this aspect (January 2012- August 15, 2014).

Chart N12



#### **IV. RIGHT TO A SUBSTANTIATED (REASONED) DECISION**

The right to a fair trial is an internationally recognized right of a defendant, which is encompassed with the right of a defendant to a motivated decision by the court.<sup>29</sup>

To assess the reasoning of the decisions and determine if there was a trend, GYLA again monitored search and seizures that were conducted without prior approval by a judge and were later justified on the grounds of an urgent necessity. GYLA opines that this is an area that requires separate research that is outside the scope of the current court monitoring project. Although GYLA only provides a snapshot of the issue, we believe this information helps to demonstrate the developments in the Georgian courts.

Search and seizure is an investigative action that curtails the right to privacy; the law therefore provides for the court's control of search and seizures. All motions for search and seizure must be examined by court, and a reasonable decision on the motion must be delivered.

Articles 119-120 of the Criminal Procedure Code strictly outline the two preconditions for the search and seizure: substantiated pre-

<sup>29</sup> Criminal Procedure Code of Georgia, Article 194 para.2.

sumption that the evidence of a crime and a court's warrant will be obtained as a result of the search. Search and seizure without a court's warrant is also allowed, but only in extraordinary cases in which there is an urgent necessity to do so. Even so, the judge must then either legalize or invalidate the search and seizure post factum.

### ***Findings***

Situation has not changed in cases of decisions on search and seizures, in which GYLA again observed apparent violations of the right to a motivated (reasoned) decision.

As in the previous reporting period, in nearly all of the cases observed by GYLA search and seizures were justified based on the urgent necessity and legalized later by the court. Namely, of 48 cases of search and seizure only two were performed with the court's warrant, while the remaining 46 cases were legalized later by the court.

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

#### **A Positive Example of the Judge's Response**

*GYLA found one positive example in which the judge acted in the best interests of the defendant and outside his minimum legal obligations by deeming illegally performed search and seizure as inadmissible evidence and urged the prosecutor to launch an investigation of the government officials, responsible for the illegal search and seizure.*

## **V. RIGHT TO A PUBLIC HEARING**

As noted above, the right to a public hearing is an important right of a defendant and the public itself, guaranteed at both the national and international level.

For the comprehensive implementation of the right, the court must ensure that proceedings are conducted in a way that if a representative of the public attends, s/he has no trouble hearing and understanding the ongoing processes. It also means ensuring an equal opportunity for attendance at the hearing. Furthermore, the court must make the verdict public, indicating punishment, the applicable legislation on which the verdict was based, and the right of a defendant to appeal the decision.<sup>30</sup>

It should be noted that amendments were made to the Organic Law on Common Courts in May 2013, with a view to ensure more publicity of the hearings. As a result of those amendments, the public broadcaster and other TV companies became entitled to carry out video and audio recording of the trials.<sup>31</sup>

### ***Findings***

Monitoring revealed that the right to a public hearing was usually safeguarded. Similar to the previous reporting period, the major exception was the first appearance hearings in the TCC, where information about the hearings was never provided in advance.

Moreover, in 10 of the 884 (10%) hearings that did not involve first appearances, no advance information was published about the date and time of the hearings; however, this is a better result compared to the previous reporting period, when in 22% no advance information was published on the hearings that did not involve a first appearance. It should be noted that best situation is in the Batumi City Court and the worst is in the TCC.

GYLA also observed the following additional violations:

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<sup>30</sup> Criminal Procedure Code of Georgia, Article 277 para.1.

<sup>31</sup> Organic Law of Georgia on Common Courts, Article 13<sup>1</sup> (effective since 1 May, 2013).

- In the 6 cases of 884 (0.6%), the information published about the court sessions was either incomplete or incorrect. For instance, the notice provided did not specify the courtroom of the session or listed the wrong place.
- In all three open hearings of jury selection monitored by GYLA, information was published in advance and individuals had an opportunity to attend them without restriction. Notably, in the previous monitoring period individuals had no opportunity to attend jury selection session, since bailiffs were guarding the entrance of the room even though the session was not closed by the judge. GYLA assesses positively resolution of the problem by the court and remains hopeful that similar barriers will not be observed in future.
- In 18 of 1167 cases (1.5%) defendant's relatives or other interested persons were unable to attend due to the small size of the courtroom. Among them were 11 high-profile cases (including the case of Giorgi Ugulava<sup>32</sup>, Bachana Akhalaia's case and that of Ivane Merabishvili and Zurab Zhvania<sup>33</sup>).
- 69 of the 488 (14%) main hearings observed<sup>34</sup> ended with the public announcement of a final judgment. Of those 69 judgments, 68 (98%) were convictions and only one was an acquittal. From the 68 convictions, four were high-profile cases and 64 ordinary ones. The below diagram illustrates situation regarding guilty verdicts throughout the whole monitoring period (October 2011 - August 2014)

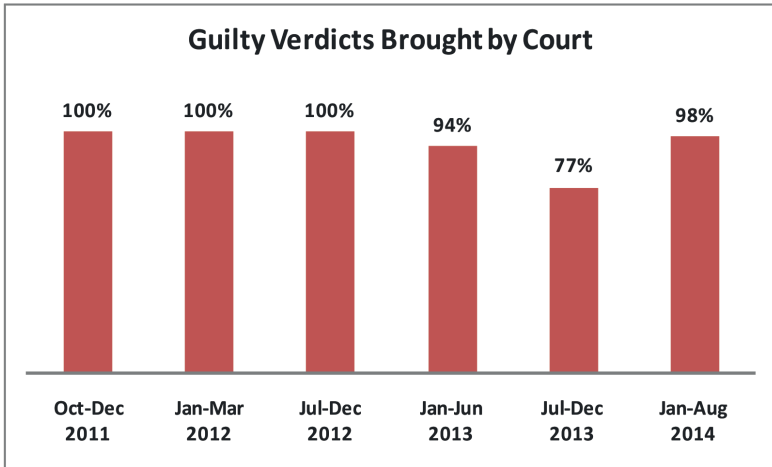
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<sup>32</sup> Giorgi Ugulava – the former Mayor of Tbilisi.

<sup>33</sup> Zurab Zhvania – the former Prime Minister of Georgia.

<sup>34</sup> Seven hearings were closed.

Chart N13



- Compared to the previous monitoring periods the judge did not approve three of the 138 plea agreements (2%). In the 135 approved plea agreements, the judge failed to announce the judgement publicly only in two cases (1%). In both those cases, the judge only announced that the plea agreement had been approved and left the room.

## VI. RIGHT TO BE ASSISTED BY AN INTERPRETER

The Constitution of Georgia<sup>35</sup>, the Criminal Procedure Code<sup>36</sup> and international conventions to which Georgia is a party<sup>37</sup> stipulate that when an individual does not have command of the language of the proceedings, s/he must be assisted by an interpreter at the state expense.

<sup>35</sup> Constitution of Georgia, Article 85 para.2: „Legal proceedings shall be conducted in the state language. An individual not having a command of the state language shall be provided with an interpreter“.

<sup>36</sup> Criminal procedure Code of Georgia, Article 38 para.8.

<sup>37</sup> European Convention on Human Rights, Article 6 para.3.



### **Findings**

In the course of monitoring GYLA observed 57 hearings during which the participation of an interpreter was mandatory. It should be noted that in all cases effective interpretation service was ensured by the court.

Furthermore, GYLA monitors observed one positive case, in which the judge postponed the hearings on his own initiative with a view to appoint an interpreter to the defendant (the example is provided in the text box below).

#### **Appointment of an Interpreter upon the Judge's Initiative**

In one case, the defendant was speaking in Arabic and interpreter of Arabic was invited to the hearing. When the judge tried to find out the identity of the defendant, he expressed some doubts about proficiency of the translator and asked if she had sufficient knowledge of Arabic. The translator alleged that the defendant was speaking a specific dialect and it was difficult to translate the speech. The judge postponed the hearing adding that the next session will be appointed with presence of an additional translator.

### **C. CONDUCT OF PARTIES DURING THE TRIAL**

GYLA observed both unethical and illegal actions of the parties, including the court, at a number of hearings. Even though every such case entails curtailing of individual rights to a certain extent, they predominantly illustrate a lack of professionalism and lack of competence of the parties. The present section of the report does not include cases that involve interpretation of norms or lawful (even if unreasonable) use of their discretionary powers by parties.

### **Courts**

During one of the initial appearances, where defendant was charged with murder that under the Criminal Procedure Code is subject to a jury trial, judge did not explain to the defendant that he had the

right to a jury trial; instead, the judge directly referred the case for the main hearing. By doing so, the judge violated the right of a defendant guaranteed by applicable legislation<sup>38</sup>. Notably, the defense lawyer did not protest the fact, which suggests the lawyer's lack of qualification or indifference.

It should be noted that the Criminal Procedure Code does not contain any direct procedures for restoring defendant's right to presumption of innocence. Protection of the presumption of innocence has an essential impact on a defendant's legal interests and therefore, the law must regulate procedures for restoring the right of a defendant.

GYLA also found two violations of the presumption of innocence by the court:

- During the initial appearance of the defendant before the court, charged with an attempt to rob a woman, it was stated that the defendant had also physically abused the woman. The dialogue between the judge and the defendant was as follows:

**Judge:** *"What did the woman do to you, why did you beat her?"*

**Defendant:** *"I was inebriated."*

**Judge:** *"Do you think you should beat a woman every time you get drunk?"*

- During another initial hearing, where a defendant was charged with the attempted theft, the judge asked the defendant the following questions: *"why are you doing this [theft], tell me. You were found guilty [of committing theft] once, and you continue to [break into] other people's houses. Why are you doing this? Did anyone get you into this? Why are you doing this? Do you or do you not realize that theft is wrong?"*

In the foregoing cases judge concluded that defendants had committed crime before all the evidence was examined and final decision was delivered.

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<sup>38</sup> Under the para.3, Article 129 of the CPC, "if a defendant was charged with crime subject to jury trial, a judge shall explain to the defendant provisions of jury trial and related rights. Further, the judge should determine whether parties refuse their right to jury trial. If parties do not refuse jury trial jointly, judge shall schedule date for selection of jurors."

## ***Lawyers***

During two hearings of the same case (a pre-trial hearing and a main hearing), two defendants shared the same lawyer. One of the defendants pled guilty, while another pled not guilty. Correspondingly, there was a conflict of interests between the defendants and the lawyer had no right to protect both. The lawyer violated Para."b" of Article 60 of the Criminal Procedure Code of Georgia, stipulating that "a lawyer shall not participate in a criminal proceedings, if he or she is or was providing legal assistance to an individual whose interests conflict with interests of the defendant concerned."

During initial appearance of the defendant, charged with the crime related to the psychotropic substance<sup>39</sup> punishable by deprivation of freedom from 1 to 5 years, the lawyer objected to the use of any restraining measure. As an alternative, he requested that the defendant sign an agreement of proper conduct and not leaving the country. This suggests the lawyer's lack of qualification and knowledge of law, considering that pursuant to Article 202 of the CPC, an agreement of proper conduct and not leaving the country can be signed in cases that involve crime punishable by the deprivation of freedom for no more than one year.

At the main hearing, during the cross-examination, the defense lawyer objected to the question of the prosecution, saying that it was a leading question and suggested a response. The lawyer lacked qualification and knowledge of law, considering that para.2, Article 245 of the CPC allows leading questions during cross-examination. Notably, neither the judge nor the prosecutor pointed out the mistake. Further, the lawyer remained very passive during the trial and asked few questions to witnesses.

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<sup>39</sup> Criminal Procedure Code of Georgia, Article 260<sup>1</sup> para.1.

#### **D. TIMELINESS OF THE COURT PROCEEDINGS**

GYLA's monitoring revealed problems on timeliness of the hearings. In the reporting period, 250 of the 884 hearings that did not involve first appearances (28%) started with more than 5 minutes delay.

- In 88 cases (35%) the judge was late;
- In 39 cases (16%) the other session went overtime in the same courtroom;
- In 35 cases (14%) the defendant was late;
- In 23 cases (9 %) the lawyer was late;
- In 9 cases (4%) the prosecutor was late;
- In the remaining 56 cases (22%) other reasons were observed.

## CONCLUSIONS

- In the reporting period courts continued to improve in certain aspects. Percentage of the rulings upholding unsubstantiated motions for the preventive measures has further decreased, especially in terms of imprisonment decisions.
- The situation has also changed regarding the type of the preventive measures applied – there has been a more frequent use of measures other than bail and imprisonment by judges. In particular, 5% of the defendants were ordered alternative preventive measures and 6% of the defendants were released without ordering any of the preventive measures. For the first time we found the cases in which the prosecution did not file a motion for the use of any type of preventive measure and demanded scheduling a preliminary trial. Notably, none of them were high-profile cases.
- The motion of the prosecution for a preventive measure remains unsubstantiated mostly when it comes to bail. One potential positive change is that the court often tries to look into the financial capacity of a defendant. Courts no longer grant the prosecution's motion for imprisonment automatically. Consequently, its decisions imposing imprisonment are more substantiated.
- Throughout the monitoring project (from October 2011 through August 15, 2014) there was the second case in which the court terminated criminal prosecution during the preliminary hearing.
- Court also resolved the problem of attendance of the jury selection hearings, which are now accessible for everyone.
- Similar to the previous period of monitoring, courts were not able to publish advance schedule of the initial appearances before a court.
- Similar to the previous reporting periods, the pre-trial motions remained a routine process. Courts generally agreed to the motions of the prosecution for the submission of evidence. The defense mostly refrained from submitting its own evidence or demanding that evidence submitted by the prosecution be deemed inadmissible.

- As to searches and seizures, we still question the fulfillment of obligations by the law enforcement authorities and a court prohibiting them from conducting or legalizing searches and seizures when an e urgent necessity is not properly documented.
- From the beginning of the monitoring project (from October 2011 through August 15, 2014) we have found tree cases in which a judge deemed the punishment determined by a plea bargain illegal and refused to approve the plea bargain. There have been no other important improvements in the process of the plea-bargaining; however, compared to the previous periods, a court seemed to be more actively engaged. Even though percentage of the plea bargains that ordered punishment had decreased, average amount of a fine had almost tripled compared to the previous reporting period.
- As to the concrete rights of a defendant, no significant improvements have been made but judges informed the defendants about their rights against an ill-treatment more effectively and their practice of examining whether the plea bargains were the result of an ill-treatment has improved.
- Starting trials on time remains a problem. Often judges arrive late at trials.

## **RECOMMENDATIONS**

Based on the observations in this as well as all the previous reporting cycles, GYLA proposes the following recommendations:

1. Courts should take advantage of their discretion regarding the preventive measures. Courts should use less severe measures (measures other than imprisonment and bail) more often in appropriate cases, and refrain from applying any preventive measure when the prosecution fails to justify its necessity. Courts must also demand more reasoned preventive measure motions, and impose the burden of proof upon the prosecution, especially in the bail cases.
2. Judges should fully explain the options of preventive measures and the possibility of their imposition to the defendants who do not have lawyers. Besides, judges should try to find out on their

own initiative whether it is possible to use a less restrictive preventive measure rather than a bail or imprisonment.

3. When hearing a plea agreement, judges should be more active, determine whether the punishment is appropriate. Judges should take appropriate measures to ensure that the punishment is proportional to the crime and if it is not, they should use their power to reject the plea agreements.
4. In the course of a witness examination, a judge should follow the rule established by the law, and ask questions to witnesses only upon the parties' permission.
5. The court should establish a uniform practice regarding the examination of evidence that parties had not exchanged with each other as required under the regulations of the criminal proceedings. The court should also avoid inconsistent approaches towards the witnesses.
6. Defense lawyers should carry out an effective and vigorous defense at all stages of a case.
7. Judges should apply all proportionate measures to maintain order in a courtroom and ensure that parties are able to fully represent their positions.
8. Judges should provide defendants with a complete and clear explanation of their rights.
9. A change should be made to the procedure law that will allow a defendant to request a jury trial even if a pre-trial hearing judge violated his legal interest by not explaining to the defendant the right to a jury before proceeding to the main hearing.
10. Courts and law enforcement authorities should show more responsibility towards the measures of the search and the seizure. Law enforcement authorities should apply these measures as a last resort, and judges should grant a warrant for search and seizure only on the basis of a comprehensive examination.
11. Courts should ensure publication of a full and an accurate information about upcoming trials.

## სისხლის სამართლის პროცესების მონიტორინგი ბათუმის ქუთაისისა და თბილისის საქალაქო და სააპელაციო სასამართლოებში

მონიტორინგის ანგარიში №6  
პერიოდი: იანვარი - აგვისტო, 2014  
დეკემბერი, 2014  
თბილისი, საქართველო

მონიტორინგის განხორციელება შესაძლებელი გახდა ამერიკის  
შეერთებული შტატების საერთაშორისო განვითარების სააგენტოს (USAID)  
გულუხვი თანადგომით. წარმოდგენილ კვლევაზე პასუხისმგებელია საია და  
ის არ გამოხატავს USAID-ის, ამერიკის მთავრობისა და  
აღმოსავლეთ-დასავლეთის მართვის ინსტიტუტის მოსაზრებებს (EWMII).





## სისხლის სამართლის პროცესების მონიტორინგი ბათუმის ქუთაისისა და თბილისის საქალაქო და სააპელაციო სასამართლოებში

მონიტორინგის ანგარიში №6  
პერიოდი: იანვარი - აგვისტო, 2014  
დეკემბერი, 2014  
თბილისი, საქართველო

მონიტორინგის განხორციელება შესაძლებელი გახდა ამერიკის შეერთებული შტატების საერთაშორისო განვითარების სააგენტოს (USAID) გულუხვი თანადგომით. წარმოდგენილ კვლევაზე პასუხისმგებელია საია და ის არ გამოხატავს USAID-ის, ამერიკის მთავრობისა და აღმოსავლეთ-დასავლეთის მართვის ინსტიტუტის მოსაზრებებს (EWMII).

