Georgian Young Lawyers' Association

MONITORING CRIMINAL TRIALS IN TBILISI, KUTAISI, BATUMI, GORI AND TELAVI COURTS

Monitoring Report №12
Period covered: February 2017 - February 2018

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EXECUTIVE SUMMARY

The aim of the report is to identify gaps existing in the legislation and practice, including positive trends by attending and analyzing criminal court trials, which reveal the strengths and weaknesses of the judicial system of Georgia. The report reflects the issues of criminal proceedings conducted from February 2017 to March 2018, as well as the main trends identified since October 2011 to date.

The problem that has been repeatedly revealed by the court monitoring for over the years is the formal or inadequate role of the judge in exercising judicial control over human rights, including as follows:

- The role of the judge when responding to cases of alleged ill-treatment is limited to only the right of asking questions to a defendant. The detained is under the control of the state and an alleged crime/misconduct may be committed by employee of a state authority, thus there is a high likelihood that the investigation will not be conducted in a comprehensive, complete and objective manner. In such circumstances, it is of particular importance to increase the role of the judge in terms of effective response to facts of alleged ill-treatment.

- The monitoring has shown that judges avoid examination and assessment of the lawfulness of detentions. To some extent, this is due to the legislative gaps. It is necessary that the legislation should appropriately provide for the mechanisms and procedures for reviewing detentions, which will clearly determine the responsibility of the judge to examine the lawfulness of a detention at the first appearance court hearing. Otherwise, a detainee may be unlawfully remained in custody or be imposed overly strict preventive measures.

- Almost always the Prosecutor's Office conducts searches and seizures under the ground of urgent necessity, which in almost every case are legalized by the Court. The rule of exception strictly defined in the law has become a norm in practice. Any search or seizure approved by the court without a thorough examination is an unlawful interference in the right of the defendant, which may prejudice the defendant's right to a fair trial and place the defense side in an unequal position compared to the prosecution at the stage of consideration on the merits.

- The court monitoring has shown that judges demonstrate less diligence towards the periodic review of the imprisonment and almost in all cases leave detention unchanged, and in most cases the Court fails to substantiate the necessity of extending the term of imprisonment.

- In spite of individual positive examples, the Court still formally examines the fairness and legality of sentences when entering into plea agreements. It is

essential that the courts should show more concern regarding the matter and state whether they agree with the qualification of an offense and punishment. The monitoring has shown that in a number of cases the sentences imposed on the accused were overly strict or too lenient.

In this reporting period like the previous ones, the rate of imposition of the most severe preventive measures - imprisonment and bail- has been high, and alternative preventive measures have been hardly used. In some cases, this is due to the lack of substantiation on the use of the preventive measures, when the Prosecutor's Office demands imposition of bail or imprisonment without giving a proper reasoning, and the Court grants such motions. However, there are the cases when the Court is obligated to apply severe form of preventive measure because of the legislative gap, which is due to an insufficient number of alternative measures and the legal restrictions on their use. This leads to imposition of a more severe preventive measure against the defendant, when there is no such necessity.

It should be positively evaluated that a part of the recommendations issued based on the thematic monitoring on domestic violence, domestic crime and violence against women has been fulfilled. The legislation has been amended which now envisages more guarantees for the protection of women victims of violence. In addition, the MIA developed a special mechanism for protection of human rights in 2018.

Some improvements have been observed in this reporting period. More often the prosecution requests the imposition of sentences of appropriate severity on the cases of domestic violence, domestic crime and violence against women. However, the Prosecutor's Office still finds it problematic to indicate discriminatory grounds in gender/sex related crimes, which then leads to the imposition of more lenient preventive measures or sentences by the Court, and ultimately does not ensure the achievement of the goals envisaged by the preventive measure / sentence.

The importance and relevance of the issues identified by the monitoring report demonstrates the existence of a number of problems in the criminal justice system and the necessity of implementation of relevant reforms therein. Georgian Young Lawyers' Association (GYLA) hopes that the findings and recommendations provided in the report will be used to improve judicial practice, approaches of the Prosecutor's Office and defense counsel, and legislation.

METHODOLOGY

GYLA has been implementing the court monitoring project since October 2011. GYLA originally carried out the monitoring project in the Criminal Cases Panel of Tbilisi City Court. On December 1, 2012, GYLA expanded the scope of monitoring and covered Kutaisi City Court as well. In March 2014, monitoring was launched in

Batumi City Court. In September 2016, Telavi and Gori courts were added to the monitoring process. In all five cities the identical methodology of monitoring was applied.

So far, GYLA has already prepared eleven monitoring reports, which covered the trends identified from October 2011 to February 2017. This time we would like to present the twelfth court trial monitoring report, which covers the period from February 2017 to February 2018. All the information provided in the report has been obtained by attending and observing court hearings. GYLA monitors did not communicate with the parties to case proceedings and did not discuss case materials or final decisions.

Like the previous monitoring periods, GYLA's monitors used questionnaires prepared specifically for the monitoring project. GYLA's analysts and lawyers assessed the information gathered by the monitors, compliance of the courts' activities with international standards, the Constitution of Georgia and the current legislation. The questionnaires included both close-ended questions requiring "yes/no" answers as well as open-ended questions which allowed the monitors to explain extensively and provide their observations. In addition, similar to the previous reporting periods, GYLA's monitors, in certain cases, made transcripts of trial discussions and particularly important motions in order to add more clarity and context to their observations. Through this procedure the monitors were able to collect objective, measurable data and, at the same time, to identify other important facts.

The report does not have ambition to review and process all court trials and sessions taking place in the courts, but the data provided contains important and noteworthy information for members of the judiciary, Prosecutor's Office and Bar Association, as well as legislative and executive authorities. Moreover, the court monitoring did not examine factual circumstances of cases, statements made by participants of court sessions and the content of case materials. In particular, GYLA did not analyze the issues related to the circumstances of specific offenses and determine the guilt or innocence of particular persons.

Depending on the length and various stages of criminal proceedings, the GYLA's monitors, as a rule, through a random selection attended specific court hearings rather than all court sessions. Nevertheless, the following exceptions were made:

- the so-called 'high profile' cases, in which defendants were former political figures;
- a part of domestic violence cases, where GYLA monitored the court sessions from the first appearance sessions up to the announcement of final judgments;
- GYLA also monitored the cases which were selected due to gross violation of human rights, high public interest and other specific factors;

From February 2017 to February 2018 inclusive, the GYLA's monitors attended and monitored 2144 court hearings. Among them were:

- 415 - First appearance court hearings;
- 303 - Plea agreement court hearings;
- 444 - Pre-trial court hearings;
- 982 - Court hearings on the merits;

KEY FINDINGS

Preventive measures:

- In the reporting period, usage of preventive measures, namely imprisonment and bail, increased. Of the preventive measure hearings observed by GYLA, imprisonment and bail accounted for 386 (97%) out of 397, where the court used one of the preventive measures. Accordingly, the percentage of alternative preventive measures further decreased[1];
- None of the of court hearings attended by GYLA monitors in Gori and Telavi District Courts imposed any alternative preventive measures. Batumi and Kutaisi City Courts used an alternative preventive measure in only one case each, and only Tbilisi City Court applied personal surety as a preventive measure;
- The unsubstantiated imposition of imprisonment and bail as preventive measures still remains problematic. Compared with the previous reporting period, the percent of unsubstantiated decisions slightly decreased. In particular, 17 (12%) out of 141 imprisonment was unsubstantiated and was not used as an extreme measure as required by the law[2]. In 73 (30%[3]) of the 245 cases bail was unsubstantiated and/or inadequately grounded.
- The highest rate of unsubstantiated bail decisions was 33% in Kutaisi. In other cities, the percentage of unsubstantiated bail decisions was as follows: Gori - 30%, Telavi, Tbilisi, Batumi - 28%. The highest percentage of unsubstantiated decisions imposing detention was 17% in Kutaisi. In other cities: Tbilisi - 14%, Batumi - 10%, Telavi and Gori - 8%;

1 In the previous reporting period, bail was imposed in 96% of cases, and in 94% of cases during the reporting period of 2016.

2 In the previous reporting period, the rate of unsubstantiated detention was 14%.

3 In the previous reporting period, the rate of unsubstantiated bail was 31%.

- In the reporting period, the motions of the prosecution for imposition of imprisonment as a preventative measure increased by 2 percentage points, from 43 % to 45 %. The courts granted 75% of the prosecution's motions to impose detention. The last two reporting periods showed the tendency of increase in granting the prosecution's motions for detention. In the previous reporting period, the judge granted the prosecutor's motion for detention in 72% of cases, and in 60% of the cases during the reporting period of 2016;

- The approach expressed by the court and the Prosecutor's Office leaves an impression that the gravity of a crime and the severity of a sentence are still the main bases for the selection of the preventive measure, which contradicts the Criminal Procedure Code of Georgia and international standards;

- Carrying out a qualified, comprehensive examination of court hearings which review preventive measures is still problematic, especially when court sessions last no more than 15 minutes. In 81 (20%) out of 415 preventive measure court hearings lasted from 5 minutes to 15 minutes. In Kutaisi City Court, 53 (50%) from 103 of court sessions imposing a preventive measure do not exceed 15 minutes;

- Frequently the prosecutor does not have information or adequate reasoning regarding the amount of the bail requested. In particular, the prosecution failed to consider defendants' financial status and did not provide sufficient substantiation when requesting bail in 88% of cases;

- Imprisonment pending the payment of bail was used in 64 cases. In 25 of them (39%), the preventive measure was unsubstantiated and/or insufficiently justified. These cases may be deemed examples of "clandestine detention";

- The types of major prevention measures provided for in Article 199(1) of the Criminal Procedure Code of Georgia (CPCG) are not sufficient. In some cases, judges are facing difficulty, when they are obliged to use severe measures such as bail or imprisonment, even if there is a possibility to use less lenient preventive measures because formal and factual circumstances are giving this possibility. We are facing problem in article 199(1) of CPCG, because there cannot be used less lenient preventive measures when there is no personal surety and additionally penalty for crime is more than 1 year.

Preventive measure used in domestic crime cases:

- GYLA monitors attended 71 court hearings on imposition of restrictive measures in domestic violence cases. The Prosecutor's Office requested imprisonment for such offenses in 56 (79%) cases, the courts granted the prosecution's motions for detention in 32 (57%) cases. It is noteworthy that the prosecutor requested imprisonment for other types of crimes in 45% of cases and the Court upheld motions for detention for other types of offenses in 75% of cases;

- The bail imposed by the court in 16 of 36 (44%) domestic violence cases was an unreasonably lenient measure that could not guarantee defendant's proper behavior, the safety of victims, or prevent further crime;

- In domestic violence crimes, it is essential that law enforcement authorities and the Prosecution's Office have a timely and efficient response. In 8 out of 71 (11%) first appearance court hearings reviewing domestic violence, the Prosecutor's Office submitted a preventive measure motion to the court only one month or more after the crime occurred. In 3 cases it was revealed that the reason for delaying the motion for a preventive measure was the inefficient work of the state authorities;

- There is a particularly alarming practice in Kutaisi City Court in terms of imposing preventive measures in domestic violence cases. In all 23 cases which were observed by GYLA monitor, the judge did not impose imprisonment as a preventive measure; 16 (70%) out of 23 cases were unsubstantiated. In particular, in 12 (52%) cases the bail was an unreasonably lenient measure, and in 4 (11%) cases the amount of the bail was incompatible with the financial state of the defendants.

- With regard to domestic violence, there were 9 cases from 71 when a defense counsel produces a notarized letter at the preventive measure hearing indicating that the victim (spouse) does not have any complaint against the defendant; Unfortunately, court's approach is problematic, because judges take into account victims notarized letter and use more lenient preventive measure than it needs to be used.

Preventive measure used in drug-related crimes:

- In 66 drug-related cases that did not involve small quantities for personal consumption only imprisonment 29 (44%) and bail 37 (56%) were imposed as preventative measures;

- The amounts of bail imposed by the court on drug-related crimes exceed those applied for other types of offenses. The reporting period revealed that bail with a guarantee of remand was used two times more frequently against drug-related offenses than for other crimes.

- In the reporting period, we identified 92 (22%) from the 415 cases unsubstantiated decisions on application of preventive measures, 31 (33%) from the 97 cases of these were related to drug offenses;

Reviewing preventive measures:

- GYLA attended 116 preliminary court hearings reviewing the issue of changing the preventive measure. The preventive measure – imprisonment - was left unchanged by the court in 106 (91%) cases. In 69 (65%) cases the court did not

substantiate or provide sufficient reasoning concerning the grounds why it was necessary to leave imprisonment in effect;

- In 3 out of 5 cases, the imposed bail was replaced with imprisonment, the reason for which was incapability of the defendant to post the amount of the bail;

The lack of proper judicial control:

- Despite cases of alleged torture / ill-treatment of defendants identified during court hearings, the role of the court is formal. The judge does not have sufficient legal tools to appropriately respond to such cases. Moreover, in a number of cases, even though the Prosecutor's Office became aware of such information, it avoided launching an investigation;

- Still challenging is the lack of proper judicial control over the lawfulness of arrests, which may be due to faulty legislation. In most cases, judges do not examine the lawfulness of arrests at the court sessions;

- Searches and seizures conducted under "urgent necessity" still remain a persistent problem. In 142 (92%) from 155 cases, searches and seizures were carried out under the ground of urgent necessity, and in 140 (99%) of the cases the court recognized the search as lawful;

Plea agreement:

- In contrast to the previous reporting period, the situation in terms of courts informing defendants comprehensively of their rights when discussing plea agreements has significantly deteriorated. Specifically, in 60 (20%) out of 297 of plea agreeements, judges did not inform the defendant that if the court does not approve a plea agreement, any information which he/she submits to the plea agreement court hearing cannot be used against the defendant in the future[4]. Moreover, in 44 (15%) out of 297 cases, judges failed to explain to the defendants that filing a complaint alleging torture, inhuman or degrading treatment would not prevent the approval of a plea agreement in accordance with the law[5];

- 139 (46%) out of 303 of plea agreement court sessions lasted from 5 minutes to 15 minutes. In such a short period of time, the court cannot fully inform a defendant of his/her rights envisaged in the Chapter XXI of the CPCG, become convinced that the defendant agrees to the terms of the plea agreement, consider whether the size/form of the sentence imposed under the plea agreement is proportionate, and then make a decision. This once again marks the problem that judicial control over the conclusion of plea agreements is a

4 In the previous reporting period, this rate was 16%.

5 In the previous reporting period, the right was not informed only in 5% cases.

mere formality;

- For the crimes which result in death of humans or damage to bodily health or property, often plea agreement are signed in such a manner that the position and interests of victims are not presented by prosecutors to the court;

- Plea agreement court hearings revealed the problem of the lack of communication between defense lawyers assigned at the state's expense and defendants, namely in 72 (48%) out of 150 cases there was a communication problem between the defense lawyers and defendants (e.g. defense lawyers and defendants did not have a shared position; defendant did not have complete information about the possible sentence; the accused was not aware of his/her rights, etc.);

Merits:

- 463 (47%) out of 982 hearings on the merits are postponed immediately after their opening, often because the prosecution witness was not available, leaving the impression that court sessions are deliberately delayed;

- The monitoring has revealed two cases of violence against women when the offense occurred with the discriminatory motives. However, as in the previous reporting period, the prosecution failed to draw attention to possible discriminatory motives in the cases of violence against women. Despite clear circumstances indicating gender discrimination, the analysis produced by prosecutors does not include any reasoning in that regard;

- In 69 (95%) out of 73 domestic violence cases guilty verdicts are rendered, but mostly (75%) the punishment is much more lenient than imprisonment. In 35 (51%) cases out of 69, the court sentenced the defendant to community labour, 14 defendants (20%) were imposed a suspended sentence and probation period, and 17 (25%) persons were imposed the fixed term imprisonment.

I. TRENDS IDENTIFIED DURING FIRST APPEARANCE COURT HEARINGS- GENERAL OVERVIEW

1. BRIEF OVERVIEW OF THE LEGISLATION

Article 196 of the Criminal Procedure Code of Georgia (hereinafter CPCG) determines the right of a defendant to be subjected to judicial control within the shortest period of time. The judge shall discuss the lawfulness of detention, the expediency of application of restraint measures, and types of preventive measures to be imposed. At the same time, proper/qualified judicial control plays a significant role in preventing any possible ill-treatment against the accused.

Initial appearance of a detained accused before the court hearing is not only the right of an accused, but the state's obligation to place the detainee under the jurisdiction of the court. This right/obligation are strengthened by both the Georgian legislation and international agreements.

The defendant, according to the Criminal Procedure Code of Georgia and international conventions, shall have the following minimum rights at the first appearance hearing: to appear before the court voluntarily, to have a defense lawyer, if necessary, enjoy the right of an interpreter's service, to make reasoned and specific decisions, have the right to appeal a court ruling.

Article 198 of the CPCG sets out the goals and grounds in which case a preventive/ restraint measure shall be used. First of all, the use of restraint measures shall have a preventative purpose. The goal of a preventive measure is not to prove the guilt of a person, but the reasoning should be about whether it is reasonable to impose a measure of preventive. The goal and purpose of imposing a preventive measure is to ensure due implementation of justice.[6] At the initial appearance of an accused before the court, in addition to other procedures, the Court shall examine which preventive measure shall be imposed to prevent the defendant from avoiding the court trial, further criminal activity and interference with the investigation until the final verdict is announced on the case. Imposition of a preventive measure shall be substantiated, which means that the use of a particular kind of constraint measure shall be in compliance with the goals envisaged by the law.

The Court may use one of the several measures of preventive envisaged by the Criminal Procedure Code of Georgia: imprisonment, bail, personal surety, an agreement not to leave and to behave properly, supervision by the command of the

6 The transcript of the protocol №646n II-40 of the Constitutional Court of Georgia of 26/06/2015.

behaviour of a military service member. In addition, the court shall be authorized to apply the following additional measures against the accused along with the main preventive measure,[7] for example: obligation to surrender a passport or any other identity document; prohibition to approach the victim; implementation of electronic monitoring.

2. ANALYSIS OF COURT SESSIONS

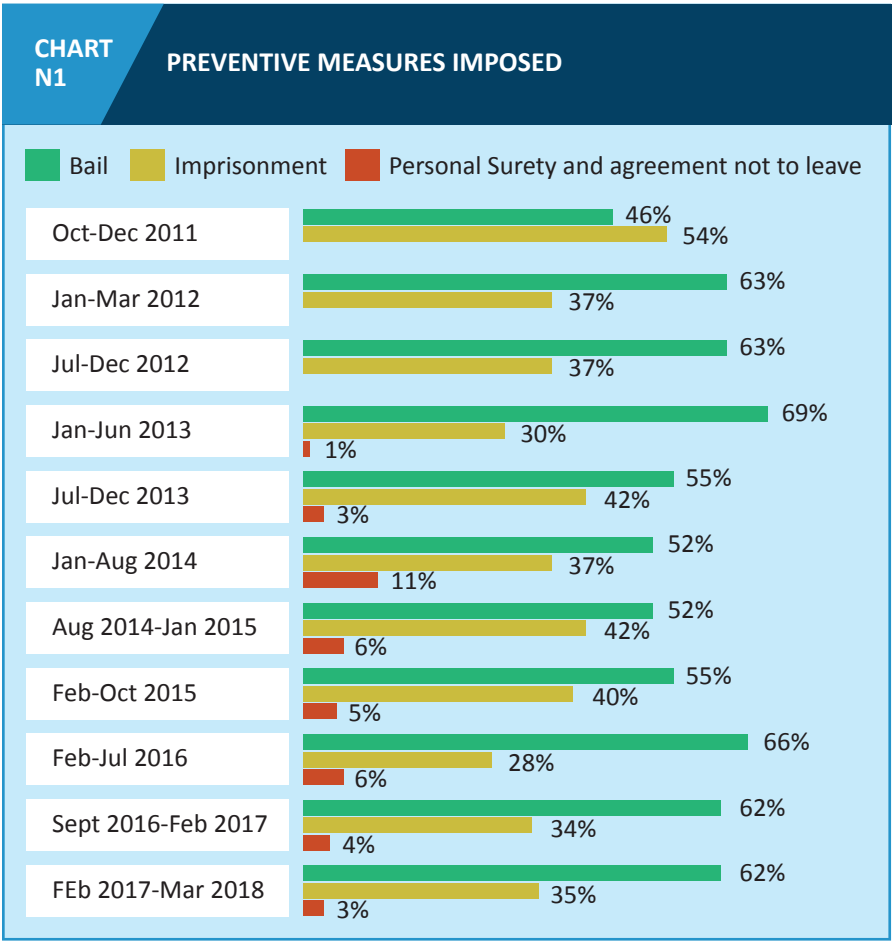
The courts mainly impose two types of preventive measures - bail and detention (more than 97% in total). However, the last two reporting periods have seen a further reduction in the already low rate of other preventive measures (3%[8]). The results of the monitoring show that the courts do not perceive an agreement on not to leave, proper behavior or personal surety as alternative measures to bail or imprisonment. Unlike the previous reporting period, unjustified imposition of imprisonment and bail has slightly reduced[9]. In particular, 12% of the decisions on application of detention were unsubstantiated, and in case of bail 30% cases were unsubstantiated and/or bail was an extremely strict measure.

7 Article 199(2) of the CPCG.

8 In the previous reporting period, other types of preventive measures were used in 4% of the cases, and 6% according to the 2016 report.

9 In the previous reporting period 14% of the decisions on the use of detention were unsubstantiated and 31% in case of bail.

The chart below illustrates the use of the preventive measures during the entire monitoring period (from October 2011 to February 2018)



2.1. PREVENTIVE MEASURES ACCORDING TO THE CITIES / DISTRICTS

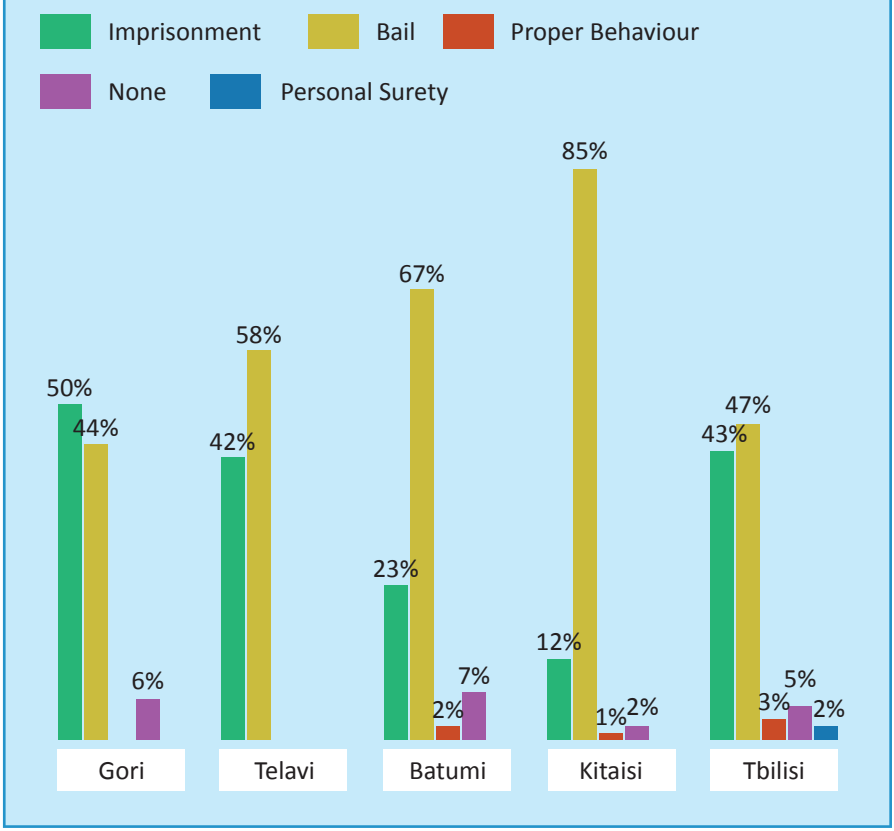
Tbilisi City Court rarely uses alternative types of preventive measures, while other courts impose only bail and imprisonment. The Gori (52 cases) and Telavi (31 cases) District Courts did not use any alternative types of preventive measures. The Batumi (43 cases) and Kutaisi (103 cases) City Courts applied an agreement on to leave and proper behavior only in single cases. The Tbilisi City Court (186 cases) applied alternative preventive measures in 9 cases and among them 4 were

personal surety, which only Tbilisi City Court applied.

It is noteworthy that not a signle defendant was left without a preventive measure by Telavi District Court; the defendants in 3 cases each in Gori and Batumi courts, 2 cases in Kutaisi and 10 cases in Tbilisi were left without imposing any restraining measures.

Chart N2 provides statistics on the preventive measures applied by various courts from February 2017 to February 2018.

CHART N2 **PREVENTIVE MEASURES IMPOSED ACCORDING TO THE CITIES - (FEB.2017-MAR.2018)**



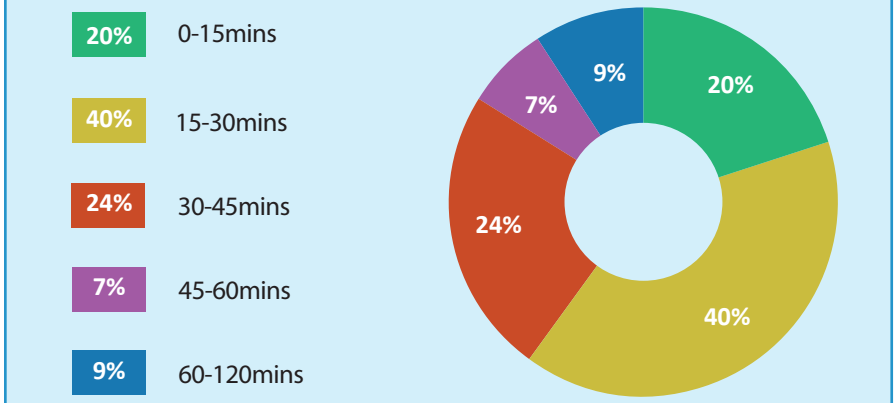
2.2. DURATION OF INITIAL APPEARANCE COURT HEARINGS

Initial appearance of the defendant before the court is of great importance for implementation of the right to fair trial. The judge is obligated to inform the defendant in an easy and comprehensible language of all his/her rights envisaged in Article 197 of the CPCG, explain the essence of a specific charge imposed on the defendant in non-technical language and explain the types and extent of any possible sentence envisaged under a specific charge. At the same time, if a defendant appears before the court as a detainee (54% of the cases during the reporting period), the judge should examine the lawfulness of the detention, inform the detainee of his/her right to file a complaint on torture or inhuman treatment, and find out whether the defendant has a complaint about violation of the procedural rights. After this, the Court is obligated to review the prosecutor's motion on application of any preventive measure and check for the presence of any threats listed in Article 198 (2) of the CPCG before imposition of a preventive measure, review the appropriateness of a specific preventive measure, and substantiate the decision on non-application of other less severe preventive measure.

20% of the initial appearance court sessions lasted from 5 minutes to 15 minutes. When the length of a court hearing does not exceed 15 minutes, it seems absolutely unattainable to examine all the issues envisaged by the Criminal Code of Georgia in a qualified and comprehensive manner at the court session with the view to imposing a restraining measure.

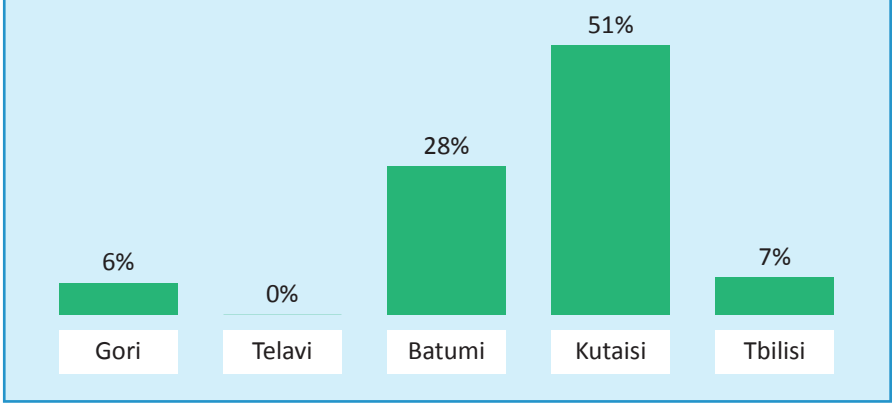
The chart below shows the duration of initial appearance court sessions in minutes from February 2017 to February 2018.

CHART N3 **DURATION OF PREVENTIVE MEASURE COURT SESSIONS (FEB.2017-MAR.2018)**



The chart below shows the length of the court hearings according to the cities, the duration of which hardly exceeded 30 minutes from February 2017 to February 2018.

CHART N4 **DURATION OF PREVENTIVE MEASURE COURT SESSIONS FROM 1 TO 15 MINUTES (FEB.2017-MAR.2018)**



The monitoring has shown that at the court hearings which last no more than 30 minutes human rights are not explained properly, in particular, the Courts did not comprehensively inform the accused of their rights in 31% of the cases when first appearance court hearing lasted no more than 30 minutes.

Kutaisi City Court is noteworthy, as more than 50% of the court hearings lasted no more than 15 minutes, leaving the impression that judges did not comprehensively scrutinize case circumstances during the court hearing and mostly delivered insufficiently grounded decisions on imposition of the preventive measures. This finding is confirmed by our monitoring, which shows that decisions of the Kutaisi City Court on preventive measures compared with other courts are far less substantiated.

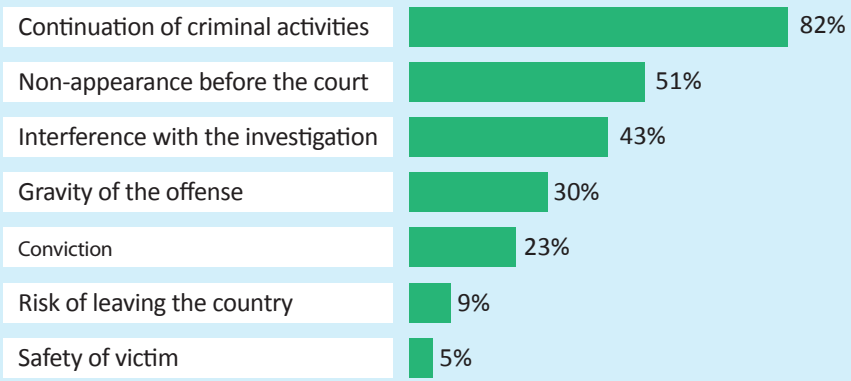
2.3. APPROACHES OF THE PROSECUTOR'S OFFICE DURING PREVENTIVE MEASURE SESSIONS

Like the previous reporting period, the Prosecutor's Office tried to substantiate motions on the application of preventive measures, but unfortunately, the prosecutor's approach seemed to be problematic because mostly his/her motions were merely of a formal nature. Although the prosecution indicated the goals and grounds for the use of preventive measures, the arguments in some cases were not related to specific factual circumstances. It seemed that the prosecution was

more focused on the gravity and nature of the offense rather than the threats and risks needed to achieve the goal of preventive measures. The motions submitted by the prosecution requesting detention were far more justified than in cases of bail. In addition, frequently the prosecution did not have information or presented inadequate reasoning on the financial status of defendants. Consequently, in high percentage of cases (88%) the amount of the bail requested by the prosecutor was disproportionate and incompatible with the financial state of the defendant.

The chart below provides information on the reasons which the prosecutor's Office presented as the substantiation of the motions for the restraining measures from February 2017 to February 2018.

CHART N5 **ARGUMENTS OF THE PROSECUTOR'S OFFICE WHEN REQUESTING PREVENTIVE MEASURES (FEB.2017-MAR.2018)**



As chart N5 shows, prosecutors refer to several grounds simultaneously provided for in Article 198 (2) of the CPCG when submitting a motion for application of a restraining measure. In more than half of the preventive measure court hearings, the prosecutors, along with other grounds, indicated the risk that a defendant would go into hiding (51% of the court hearings), but the court did not share the substantiation on the risk of the defendants fleeing in 73% of these cases. Moreover, frequently prosecutors additionally indicate several other grounds without presenting proper reasoning.

2.4. APPROACHES OF THE COURT DURING PREVENTIVE MEASURE SESSIONS

Positive examples were also observed in court judgments; however, the percentage

(22%) of unjustified decisions on the imposition of imprisonment and bail indicates the gaps and challenges existing in this regard. In some cases, The court's abstract assessment when justifying the use of a preventive measure, which contradicts the standard of a grounded assumption which requires substantiation of the use of a specific restraining measure seems problematic as well.

The approaches of the court and the Prosecutor's Office create an impression that merely the gravity of the offense and severity of the punishment are the basis for the imposition of preventive measures.

2.5. POSITION OF DEFENSE COUNSEL DURING PREVENTIVE MEASURE COURT SESSIONS

The position of the defense counsel at preventive measure court hearings should be also noted, which in most cases did not take adequate steps to protect the best interests of defendants and defense lawyers only formally opposed the prosecution, showed up unprepared at court trials or did not object to motions submitted by the prosecutor. There were court hearings at which defense lawyers had the possibility to legitimately request the application of less severe restrictive measures than offered by the prosecutor, and/or that the court leave the defendant without a preventive measure, but they did not do so. This formed the impression that the defense counsel was ineffective and did not make adequate efforts to protect the best interests of defendants.

Despite the general situation, there were some cases when lawyers presented substantiated, legally sound and qualified motions on the imposition of restrictive measures and there were also few cases when the defense lawyer was able to dismiss the arguments brought by the prosecutor and presented counter arguments, which the court took into consideration.

Although defense lawyers are limited in time to prepare for the first appearance court hearing of the accused and the burden of proof is imposed on the prosecutor, it is necessary that defense lawyers protect the best interests of defendants effectively and require that the prosecutor prove the motion on preventive measures.

II. USING IMPRISONMENT AS A PREVENTIVE MEASURE

1. BRIEF OVERVIEW OF THE LEGISLATION

Freedom of movement is guaranteed by the Constitution of Georgia, the European Convention on Human Rights, and the Criminal Procedure Code of Georgia. Therefore, it may be restricted only when imprisonment is the only deterrent mechanism to implement justice. Imprisonment is an extreme measure and the

grounds for the arrest of an accused may be as follows: a) to prevent the accused from hiding; b) to prevent the accused from interfering with rendering of justice; c) to prevent the accused from committing a new crime.

The above threats must be confirmed by convincing and relevant circumstances and evidence. The burden of proof for the application of detention shall be always imposed on the prosecution. The prosecutor shall, to the maximum extent, submit facts and information, which will convince an objective observer of the presence of the grounds for imprisonment and prove the impossibility of using other less severe restraining measures by presenting factual circumstances rather than referring to the personal characteristics of the defendant, the gravity of a crime, or the severity of the sentence.

When submitting a motion for detention, prosecutors often indicate all grounds envisaged in Article 198(2) of the CPCG, which is indisputably wrong. Unsubstantiated reference to a number of grounds does not add credibility to the motion, but on the contrary poses the motion as a standard and template one.

The Court shall properly assess a motion submitted by the prosecution, take into consideration the degree of risks and threats and provide sound reasoning for the decisions on the use of detention. Any imprisonment imposed by the Court shall be unjustified if such decision is not based on specific factual circumstances, provides abstract assessment of threats and a particular goal can be achieved with other less severe measures of restriction.

In any case, pre-trial detention should be reasonable and necessary[10]. According to the recommendation of the Committee of Ministers of the Council of Europe, imprisonment should be used as an exceptional preventive measure. It should not be mandatory and should not be used for the purposes of punishment.[11]

2. ANALYSIS OF COURT SESSIONS

According to GYLA's monitoring process the imposition of imprisonment as a preventive measure, created the impression that the mechanism was used for the purpose of punishing a person. Unfortunately, the prosecution and the judicial authorities still do not perceive imprisonment as an extreme measure and fail to recognize that only the gravity of the offense and severity of the sentence cannot be used to justify its imposition. During the reporting period, compared with the previous reporting period, the rate of unsubstantiated decisions on imposition of

10 *Pacuria v. Georgia*, no. 30779/04, 6 November, 2007, §62-65.

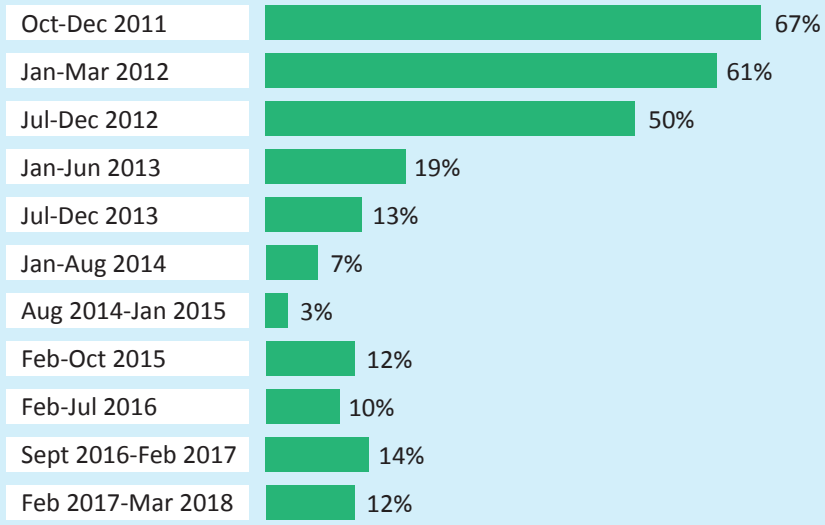
11 Recommendation №R (80)11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial

imprisonment slightly decreased to 12%.[12] In particular, 17 court judgments out of 141 on imposition of detention were unsubstantiated and overly strict.

Gori District Court used imprisonment as a preventive measure in 26(50%) cases out of 52 preventive measure hearings, 2 of them were unreasonably severe measures; Telavi District Court used imprisonment in 13(42%) cases out of 31 - 1 being unsubstantiated; Batumi City Court used imprisonment in 10(23%) cases out of 43 - 1 being unsubstantiated; Kutaisi City Court used imprisonment in 12(17%) cases out of 103 - 2 being unsubstantiated and Tbilisi City Court used imprisonment in 80(43%) cases out of 186 - 11 of them were unreasonably severe measure.

The chart below illustrates the monitoring results of the judgments on imposition of unsubstantiated imprisonment during the whole monitoring period (from October 2011 to February 2018).

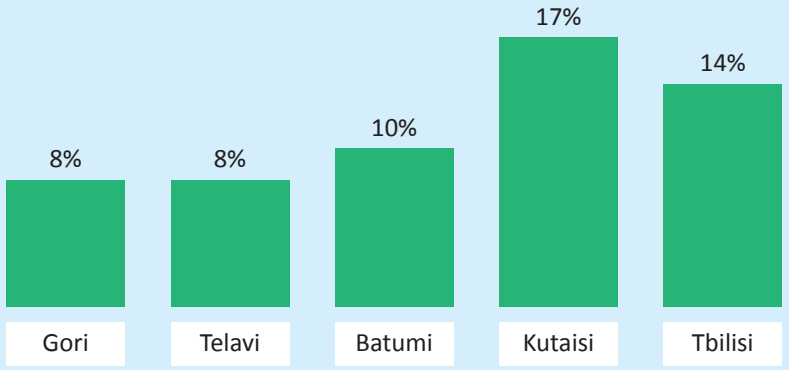
CHART N6 **UNSUBSTANTIATED DECISIONS ON IMPOSITION OF IMPRISONMENT**



12 14% of the custody decisions during the previous reporting period were unsubstantiated.

The chart below illustrates unjustified court judgments on imposing the custody as a restraining measure according to the cities from February 2017 to February 2018.

CHART N7 **UNSUBSTANTIATED DECISIONS ON IMPOSITION OF IMPRISONMENT BY CITY (FEB.2017-MAR.2018)**



Like the previous reporting period, the prosecution sought to justify motions on application of imprisonment and brought up relevant arguments to this end. In 30% of cases, the prosecution named the gravity of a crime and the severity of the punishment and did not refer to the threats and risks associated thereof. There were rare cases when the judge did not grant motions and presented reasonable arguments for such refusal in the court ruling.

In the example below the judge provides the substantiated arguments in the court judgment and refused to grant the motion on the detention:

> The defendant was charged with robbery (Article 177(2) (a) and Article 4(c) of the CCG). The prosecutor requested imprisonment as a preventive measure and indicated the threat of committing a new crime as the ground. The person had been convicted and the prosecutor also indicated the danger that the accused could go into hiding, which was based only on the fact that the charge implied a term imprisonment.

The Court explained as follows: "The Court agrees with the position of the prosecution that there is a real and formal basis for the use of the preventive measure and the obtained information provides sufficient grounds that the defendant may indeed have committed the crime he has been charged with and there is a threat of commission of another crime and exertion of pressure on the witnesses, however the degree of the threats does not require imposition of the imprisonment. The accused admits to committing the crime and is remorseful and must be less motivated to commit a new offense. He was released from the penitentiary institution in 2015 which has become the basis for the charge and sentence under the above Article, however, the previous offense was committed in 2006, since when a long time has passed…"

Having examined the financial state of the defendant, the court imposed bail on the defendant in the amount of 2000 GEL as a preventive measure.

The decision is noteworthy as the court examined the financial state of the defendant, whether the detainee was employed or not, whether he owned a real property and took into consideration the financial state of the defendant at the moment of delivering the court judgment.

However, in 12% of cases where imprisonment was used the courts despite the lack of adequate reasoning and inappropriate examination of the case circumstances provided by the Prosecutor's Office, imposed imprisonment.

In the example below the court granted the prosecutor's motion for detention based on the threat that the detainee would go into hiding because of the fear of imprisonment:

The defendant was charged with theft (Article 177(2) (a) of the CCG). The accused appeared voluntarily before the court, admitted to committing the crime and cooperated with the investigation. The defendant had not been convicted before.

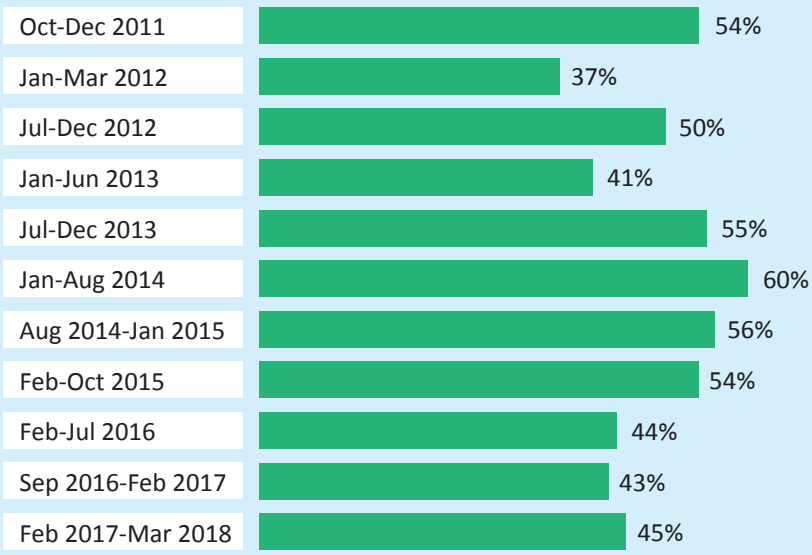
The prosecutor's motion for detention as a preventive measure was granted by the court.

The main argument of both the prosecutor and the court was the danger that the defendant would flee, as he was a foreign national and could leave the country.

The argument is irrelevant and unreasonable since the defendant appeared before the court voluntarily. In addition, the judge could apply a less severe preventive measure and take the defendant's passport as an additional action, which would neutralize the threat of fleeing.

The chart below illustrates the frequency of the detentions requested by the prosecution during the entire period of the monitoring (from October 2011 to February 2018)

CHART N8 **IMPRISONMENT DEMANDED BY PROSECUTORS**



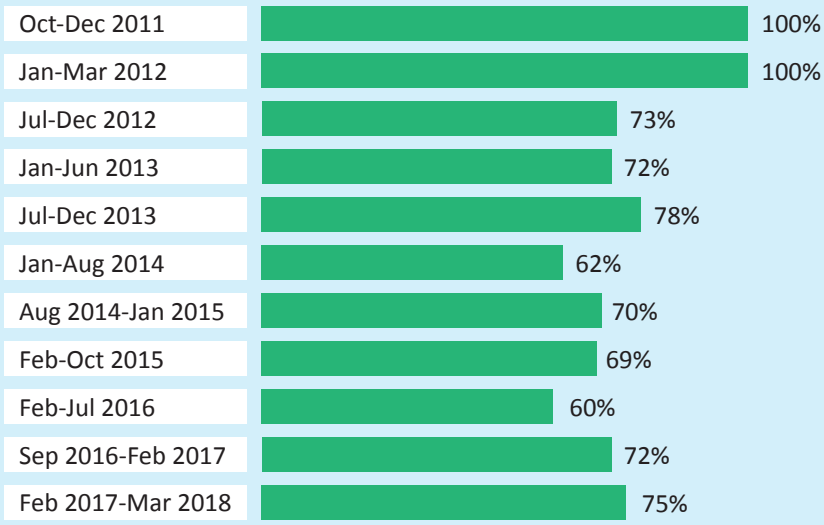
During this reporting period, it is noteworthy that the motions of the prosecution for imprisonment increased by 2 percentage points from 43% to 45%, and that the percentage of motions for detention granted by courts also increased. In the previous reporting period, courts granted the prosecution's motions for imprisonment in 72% of the cases, and in this reporting period the rate was 75%.

Of the remaining 25% of cases, in 24.5% of the cases [13] the court did not grant the motions for imprisonment and imposed bail, and in 0.5% the preventive measure was an agreement not to leave and to behave properly.

13 Of 188 defendants against whom the prosecutor requested detention, the judge sentenced 141 defendants to imprisonment, imposed a bail on 46 defendants, and for 1 defendant used an agreement on not to leave and proper behaviour.

The chart below illustrates the statistics of the motions granted by the Court during the entire monitoring period (from October 2011 to February 2018)

CHART N9 **MOTIONS ON IMPRISONMENT GRANTED BY THE COURT**



III. USING BAIL AS A PREVENTIVE MEASURE

1. BRIEF OVERVIEW OF THE LEGISLATION

Bail is a strict form of preventive measure, the purpose of which is to ensure the defendant's return to the court and prevent further criminal activities or interference with proper administration of justice.

According to Article 200(2) of the CPCG, the amount of the bail shall be determined by taking into consideration the gravity of the crime committed and the financial status of the accused. The minimum amount of the bail shall not be less than 1 000 GEL. The accused or the person who posted bail or the equivalent real property shall be fully reimbursed with the monetary sum deposited as the bail or the immovable property within a month after the execution of the judgment. The above-mentioned regulation applies if the accused has fulfilled his/her obligations

properly and in good faith and the preventive measure used against him/her has not been replaced with a more severe measure of restraint.[14]Article 200 of the CPCG directly obliges the prosecutor to determine the financial (property) status of the defendant before requesting bail (the amount). Also, the court shall be obliged to take into account the capabilities of the defendant together with other circumstances when imposing bail as a preventive measure and its amount. [15]The Court shall also pay attention to the above mentioned circumstances when the Prosecutor's Office fails to provide relevant information. The defense counsel is not obliged to submit information, since the prosecution shall prove the expediency and proportionality of the preventive measure.

The bail may be replaced with a much stricter preventive measure if the defendant: a) has not timely paid the amount of the bail imposed; b) has violated the terms and conditions of the bail; or c) has violated the law.

In case of failure to pay the bail amount, it **may be** replaced with a more severe preventive measure - imprisonment. This provision means that it is not mandatory to impose a stricter preventive measure on the accused because of non-payment of the bail amount. At the initial stage, the prosecutor may decide whether to address the court with a motion to change the restrictive measure. At the next stage, the court shall review the necessity to replace the preventive measure. Initially the prosecutor, and then the court, shall determine why the bail has not been paid, whether the accused deliberately avoided paying the bail or it was due to any objective circumstances.

There are two types of bail: bail with and without a guarantee of remand. The bail with a guarantee of remand detention means that the accused shall remain in a penitentiary establishment until he/she can pay the bail amount (or 50% of the bail amount).[16]

The bail with a guarantee of remand may be imposed only on the defendant who turns up at the initial appearance court hearing as a detainee. However, in case of using the bail as a preventive measure against the detainee, it is not mandatory to impose bail with a guarantee of remand.

An unsubstantiated and excessive amount of bail is actually equal to a person's imprisonment (the so-called "clandestine detention"). Imposition of an unsubstantiated and excessively large bail amount bears particularly high risks in that if the bail is unpaid it may be replaced with detention as a preventive measure. It is also important that the bail should have a preventive effect, namely, property loss must be a significant financial damage to a defendant, as a result of which he/

14 Criminal Procedure Code of Georgia, Article 200.

15 For example: the personality of the accused, his/her activities, age, health status, etc.

16 Article 200(6) of the CPCG

she will try to fulfill the bail terms[17].

In addition to the national legislation, the European Court of Human Rights has indicated in a number of its decisions that in the process of determining the bail amount, a person's property status and his/her relations with the person who pays the bail must be assessed.[18]Also, states shall discuss this issue with the same diligence as the issue of necessity of imposition of imprisonment as a preventive measure.[19]

2. ANALYSIS OF COURT SESSIONS

GYLA has identified cases of violation of the above-mentioned regulations and standards when the prosecution unjustifiably demanded the use of bail and failed to present information on the financial status of the defendant. Frequently, the prosecution limits itself only to the justification for bail and avoids talking about the amount of bail. Although the courts tried to determine the financial status of defendants, the bail imposed against the defendants in a majority of the cases was not a proportionate or appropriate preventive measure.

The court monitoring has shown that the percentage of unsubstantiated decisions on the use of bail has actually remained unchanged compared to the previous reporting period (which covered the period from September 2017 to February 2017) and is 30%, which is very high.[20] The prosecutors frequently failed to substantiate the necessity of imposition of bail, and demonstrated less effort to justify its appropriateness than when they are requesting imprisonment. In few cases, the prosecution did not even speak about the goals of the preventive measure and threats, and only read out the content of the charge imposed. Also, sometimes, even though the prosecutor referred to the abstract nature of risks, the judge upheld the motions and demonstrated less enthusiasm to examine the grounds and reasonability of the measure.[21]

17 Commentaries on the Criminal Procedure Code of Georgia, Group of Authors, Edited: Giorgi Giorgadze, Tbilisi, 2015, 577-578.

18 *Neumeister v. Austria*, no.1936/63, 27 June, 1968, §18;*Iwanczuk v. Poland*, no. 25196/94,15 November, 2001, §66-70.

19 *Iwanczuk V. Poland*, no. 25196/94,15 November, 2001, §66-70.

20 In the previous reporting period, the use of the bail was unsubstantiated in 31% of the cases.

21 GYLA believes that the bail is unsubstantiated when for example, judges support the prosecution's motion on the imposition of a bail without proper justification and reasoning, which shall be based on the guilt, personality of the accused, his/her financial status and other important circumstances of a case. Non-examination of these circumstances by judges is even more damaging when a defendant does not have a defense lawyer; despite the prosecution's demand for the imposition of the bail instead of imprisonment, judges do not examine the defendant's financial status and other essential circumstances for imposing a bail; Although defense agrees with the prosecutor on the imposition of the bail and the defense lawyer's consent on the imposition of the bail, GYLA still deems the imposed bail unsubstantiated, as the defense's consent or willingness to pay the bail amount does not exacerbate or neutralize those threats, for which prevention measures are applied.

During this reporting period, the prosecutor requested the imposition of bail against 49% of the defendants (205 out of 415 defendants). Compared to the previous reporting period, this rate is 5 percentage points lower. The amount of the bail imposed varied from 1000 to 50.000 GEL. The average amount of bail used during this reporting period amounted to 3 245 GEL.

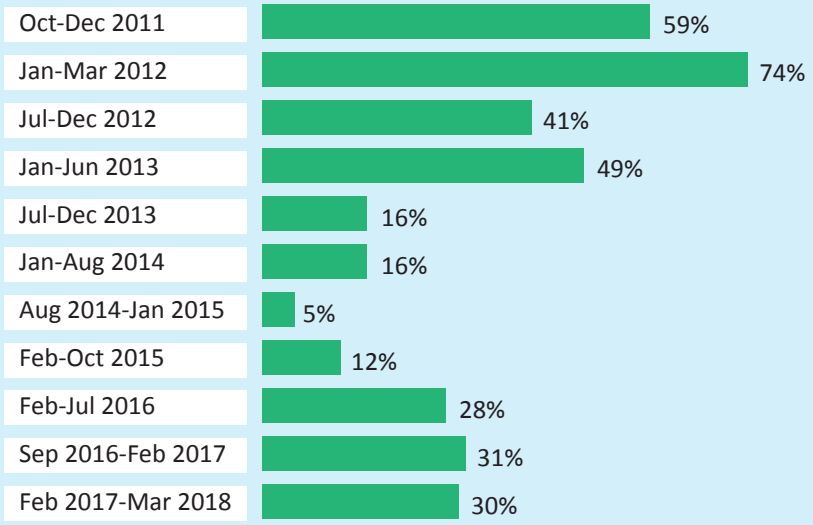
In 24 cases (12%), the court did not grant the prosecution's motion on the use of bail in this reporting period, upholding the motions of the prosecution for bail in 88% of cases, which is 4 percentage points more than in the previous period.[22] Of the 24 cases where the court did not grant the prosecutor's motion for bail, 14 defendants (58%) were left without a preventive measure, 6 (25%) accused signed an agreement on not to leave and proper behavior, and in 4 (17%) cases personal surety was applied. GYLA approves the fact of using alternative preventive measures by the courts and the fact of leaving the defendants without imprisonment where appropriate.

Besides non-application of restraining measures by the courts, there were a few cases when the prosecutor did not request the use of a preventive measure. 11 such cases were reported (3%), but the above mentioned occurred because the defendants had already been convicted of other crimes or had been imposed imprisonment in another case as a preventive measure.

22 In the previous reporting period, the court granted the motions submitted by the prosecution on the use of the bail in 25 (16%) cases.

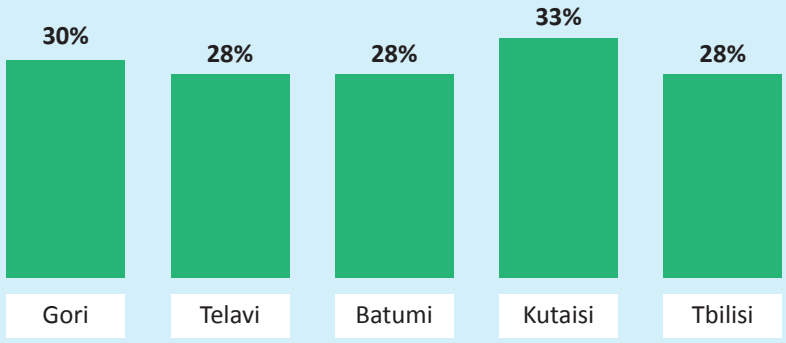
The chart below illustrates the trend of unsubstantiated imposition of the bail throughout the monitoring period (from October 2011 to February 2018)

CHART N10 **UNSUBSTANTIATED DECISIONS IMPOSING BAIL**



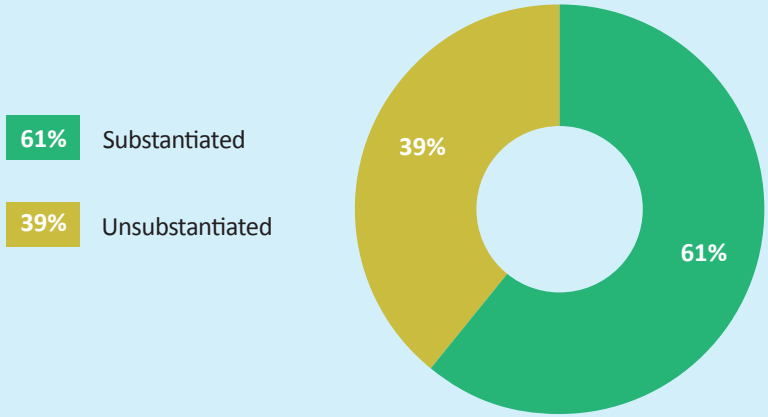
The chart below provides the information on unsubstantiated use of the bail according to the cities from February 2017 to February 2018.

CHART N11 **UNSUBSTANTIATED DECISIONS IMPOSING BAIL ACCORDING TO THE CITIES (FEB. 2017 - MAR 2018)**



The chart below provides the information on the number of unsubstantiated bail with a guarantee of remand.

CHART N12 **BAIL WITH A GUARANTEE OF REMAND (FEB 2017-MAR 2018)**



The court used bail with a guarantee of remand in 64 of 245 cases (26%). In 25 of the 64 cases (39%) bail was unsubstantiated and/or inadequately grounded. Consequently, 25 bails with a guarantee of remand can be deemed as a "clandestine detention".

The issue of substantiation of bail is an acute problem. The prosecution rarely studies the solvency of defendants. In 88% of cases the prosecutor did not have any substantiation or proper arguments on the financial condition of defendants. Sometimes, the court asked the prosecutors how they determined the amount of the bail, but the prosecution failed to produce any convincing and sound arguments.

To illustrate the above mentioned, see the following example of an attempted theft, where the damage inflicted was negligent and the defendant was a socially vulnerable person. The prosecutor did not explore the financial state of the defendant and demanded bail. The example also demonstrates the court's failure to consider the defendant's social status. In the example below, the judge could have left the accused without any preventive measure due to the minor damage inflicted.

> In an attempted theft (Article 19, Article 177 (1) of the CCG), the prosecutor requested bail in the amount of 1000 GEL. According to the prosecutor statement, the defendant tried to steal a 15GEL item from the shop. The accused, who had never been convicted before, pleaded guilty.
>
> The judge used bail in the amount of 1000 GEL as a preventive measure and determined 30 days as the term for posting the bail amount.

There was one case when the prosecutor requested bail against a defendant charged with attempted robbery of food worth 18 GEL, which was incompatible with the financial status of the accused. In such occasions, it is problematic how the court should act when formal and factual circumstances for the application of a preventive measure are present and when it is impossible to enter into an agreement on not to leave and proper behavior (the punishment for the offense exceeds 1 year imprisonment) and personal surety is not available (if the defendant has not provided a personal guarantor). Imposing the bail when it is most likely that defendants are not able to pay the amount poses the risk that the preventive measure - bail - will be replaced with imprisonment of the defendant. In such case, the judge does not have the possibility to use a less severe measure in accordance with Article 199 of the CPCG, which prejudices the defendant's interests.

The defendant was charged with attempted robbery (Article 19, Article 177(3) (a) of the CCG). According to the prosecutor, the accused stole 2 pieces of meat tins and 1 ketchup bottle, which resulted in a loss of 18 GEL for the shop. The defendant lives on the street, does not have a house or family members.

The prosecutor declared that the defendant had been convicted for the crimes against property which became the reason for imposing a preventive measure and demanded the bail in the amount of 6000 GEL.

The defense lawyer noted that the damage was negligible (Article 7(2) of the CCG) and therefore, criminal liability should not have been imposed at all. The lawyer requested to release the accused without any preventive measure.

The judge examined the financial state of the accused, but imposed the bail in the amount of 1000 GEL.

To illustrate aforementioned, see the below example where the prosecutor and the court failed to pay attention to the financial status of the defendant; in particular the judge imposed on the defendant a bail with a guarantee of remand even though the defendant was incapable of making the payment. In such case bail with a guarantee of remand is equivalent to the "clandestine detention":

The defendant was accused of theft (Article 177(3) of the CCG). The prosecutor, without determining the financial status of the defendant, demanded bail in the amount of 6000 GEL with remand detention. The defendant announced at the court trial that he was a shepherd and could not pay the bail. The judge partially granted the prosecutor's motion and imposed 4000 GEL bail with a guarantee of remand.

Notwithstanding the above-mentioned negative cases, positive approaches of the judges were also observed. To illustrate, see the following examples when the court adequately and in a highly responsible manner evaluated the prosecutor's motion and delivered a fair and reasonable judgment:

» The defendant was charged with fraud, theft and illegal penetration into another person's computer system (Article 180(3)(b), Article 177(2)(a) and Article 284(1)). Without investigating the financial state of the defendant, the prosecutor requested the bail in the amount of 15 000 GEL.

The judge questioned the accused in details about her financial status, discovered that the defendant was a socially vulnerable person, and also learnt about the size of her salary etc.

The judge, after a thorough examination of the defendant's property status, imposed bail as a preventive measure in the amount of 2000 GEL, thus reducing the amount proposed in the prosecutor's motion by 13 000 GEL.

The Prosecutor remarked: "This amount is incompatible with the financial profit and the gravity of the committed crime". The judge replied: "If she cannot pay the bail, it means we doom her to an imprisonment."

» The defendant was charged with theft (Article 177(2)(a) of the CCG). The prosecutor requested bail in the amount of 2000 GEL.

The accused declared that he regularly showed up to all summons in the investigative body. He worked in two places and was the only breadwinner for his family. He had a mortgage loan and paid the taxes every month and had never been convicted.
The judge accepted the defendant's position and noted that there were no formal grounds for the use of a preventive measure and did not apply it.

There was a case when the judge incorrectly applied an agreement on not to leave and proper behaviour as a preventive measure,[23] as the charge against the defendant allowed imprisonment for up to two years. The judge's desire to apply an alternative preventive measure must be positively assessed, although the law did not allow him/her to do so:

23 An agreement on not to leave and to behave properly may be applied only for criminal offenses that impose imprisonment for not more than one year. (Article 202 of the CPCG)

The defendant was charged with the intentional less serious damage of bodily health. (Article 120 of the CCG). Although the prosecutor requested bail, the judge reckoned it was not necessary to impose bail and applied a more lenient preventive measure.

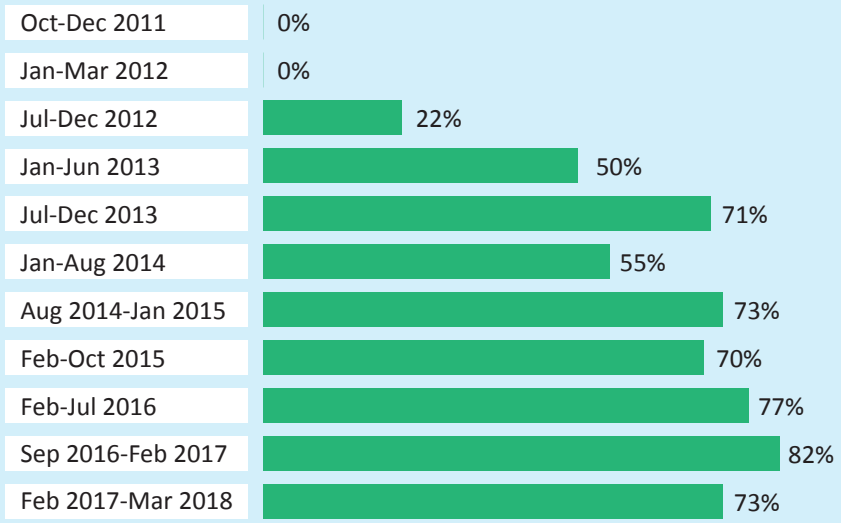
It is notable that the judge explained the charge under Article 120 of the CCG and the type and size of the possible sentence, imprisonment for up to one year, but the Article had been amended on June 24, 2016 and the sentence envisaged imprisonment for up to two years (with other measures).

The judge used the agreement on not to leave and proper behaviour. He noted that there was no need to consider the risk of continuation of criminal activities as the defendant had not been convicted and the expunged criminal record should not have been taken into consideration.

It is noteworthy that the court reduced the amount of bail requested by prosecutors in the majority of cases. In particular, with 73% of the defendants, the court granted the prosecutor's motion for the use of bail and at the same time reduced the amount of the bail. The fact that the court, in most cases, reduces the amount of bail requested by the prosecutor once again indicates that the Prosecutor's Office fails to properly examine the financial possibilities of defendants and requires from defendants payment of inadequately high amounts of money, which might become a larger burden than it is necessary to achieve a particular goal. However, while the court frequently reduced the amount of bail requested by the prosecutor, the bail amount imposed by the court was in some cases unsubstantiated, which has been confirmed by the above examples.

The chart below shows the trend of the court reducing the bail amount requested by the prosecutor during the entire period of the monitoring (from October 2011 to February 2018).

CHART N13 **THE COURT DECREASED AMOUNT OF BAIL DEMANDED BY PROSECUTORS**



IV. COURT SESSIONS ON REVIEWING OF PREVENTIVE MEASURES

1. ANALYSIS OF COURT SESSIONS

GYLA attended 116 pre-trial hearings which considered reviewing the orginally imposed preventive measures. In 108 cases the preventive measures were considered for revision under the initiative of the court, in 4 cases it was initiated by the defense counsel, and 4 cases were reviewed based on the motion of the prosecution.

It is noteworthy that the court left unchanged imprisonment as a preventive measure in 106 (91%) cases, in 69 (65%) of these cases the court did not substantiate or insufficiently substantiated why it was necessary to leave the imprisonment in

effect. In only 37 (35%) cases did the court fully explain the motives for leaving the imprisonment unchanged. In the cases above, the court argued that although evidence was obtained in the cases, there was a threat of committing of a new offense, threat to safety of victims, etc. (e.g. re-victimization of the victims of domestic violence) as the basis for continuing imprisonment.

In 5 (4%) of the 116 cases where the original preventive measure was reviewed, the court replaced the imprisonment with bail, and in 1 case the bail with a guarantee of remand was replaced with an agreement on not to leave and proper behavior. Such cases must be considered as the best practice of the court when the judge comprehensively considers the expediency of the detention and after a thorough examination replaces the imprisonment with a less severe preventive measure. However, it should be noted that in 2 cases out of 5, the judge did not substantiate the amount of the bail; the defendants declared that they were able to pay only a minimum amount of bail, but the court imposed the bail in the amount of 2000 GEL in one case, and 4000 GEL in the other. As a result, even though the preventive measure was changed from imprisonment, the defendant may have remained in jail.

There were 4 cases at the pre-trial sessions when the prosecutor filed a motion with the court to replace the preventive measure, bail, and requested imprisonment for non-posting of the bail amount. In 2 cases, the court granted the motions, but in two cases did not agree with the prosecutor and left the defendants without a preventive measure. In those 2 cases the court rejected the prosecutor's motions with clear arguments and indicated that there were objective circumstances why the defendants could not post the bail, namely the lack of sufficient funds.

In 1 case out of above mentioned 4, the judge had the possibility not to replace the preventive measure with a more severe measure. According to Article 200 of the CPCG, the judge must examine whether the bail was not paid deliberately or due to an objective reason and should also take into consideration the conduct of the defendant in the period after imposition of the bail as a preventive measure. During the period, the accused did not commit a new offense, did not go into hiding, showed up at the investigative authorities, expressed his readiness to sign a plea agreement, pleaded guilty:

The defendant was charged with the purchase and storage of drugs in a large quantity (Article 260(3)(a) of the CCG). Bail in the amount of 5,000 GEL was determined as a measure of restraint. According to the defense lawyer, the defendant did not post the bail as the plea agreement between the defense counsel and the prosecution was being prepared, which would determine the fine as a punishment and the defendant intended to pay the fine after the conclusion of the plea agreement.

The prosecutor presented a motion to change the bail and demanded imprisonment, which was granted by the court. The Court noted: "In case of non-payment of bail under Article 200 of the CPCG, the preventive measure shall be replaced with a more severe preventive measure. Consequently, based on the requirements of the law, the prosecutor's motion shall be granted and the existing measure of the restraint shall be changed with a more severe one.

GYLA attended 13 preventive measure court hearings, where court only discussed the issue of replacement the preventive measures. Specifically, in 10 cases the defense counsel demanded to change the preventive measure-imprisonment-with a less severe measure. In 2 cases, the prosecution requested prolongation of the detention and both of them were accepted by court. In one case, under the motion of the prosecutor, the preventive measure, bail, was replaced with a more severe measure, imprisonment. The court did not grant any motion by the defense counsel on replacement of the preventive measures and indicated that there were no grounds for changing the preventive measure and the threats identified during the initial appearance trial of the defendant were still present.

As regards the prosecutor's motions, the court granted both motions: postponement of the date of the pre-trial court hearing and prolongation of the detention.

To illustrate, see the following example. The court hearing for reviewing the preventive measure reviewed the prosecution's motion on changing bail imposed on the defendants with imprisonment:

The defendants were charged with fraud and forging documents (Article 362(1) and Article 180(2)(a)(b) and paragraph (3)(b) (episode 6)of the CCG). Both defendants were ordered bail as a preventive measure in the amount of 2500 GEL and 30 days was determined as the period for posting the bail, but the bail was not paid within this timeframe. It is noteworthy that at the initial appearance court trial, the defendants said that they would not be able to pay the sum and requested to decrease the bail to the minimum amount possible, but the judge did not accept this request.

The judge asked the defendants if they had tried to make the payment, and the defendants responded that they had no money and failed to make a timely payment. The judge also found out that the defendants had not applied in writing to the prosecutor for the reduction of the bail amount. The defense counsel said that the accused cooperated with the investigation, there was no danger of them fleeing, and they did not commit a new offense throughout the determined period. The prosecutor noted that if the defendants had paid at least the half of the bail amount, the prosecutor would not have submitted the motion on the replacement of the preventive measure.

The Court concluded that the defendants neglected the requirements of Article 200 (5) of the CPCG and the Court decided to change the defendants' preventive measure, bail, to the bail with a guarantee of remand.

Although the defendants were charged with intentional severe crime and had failed to pay the bail determined by the court, the Court could still have examined the financial status of the defendants in a more detailed manner, the reasons for non-posting the bail, could have taken into consideration their cooperation with the investigation, their past (none of them had been previously convicted) and the fact that at no stage of the criminal proceedings had they tried to go into hiding.

The Court did not specifically explain why it was unreasonable to leave them at liberty, did not substantiate any potential risks which would arise in case of leaving them at large, and only relied on the circumstance that the defendants failed to make the payment within the set timeframes.

According to the CPCG, the Court could leave the preventive measure unchanged and not aggravate the form of the preventive measure with imprisonment. For example, the court could apply bail with other additional preventive measures, increase the bail amount and extend the deadline for the bail posting.

V. PREVENTIVE MEASURES ON DRUG-RELATED CRIMES

1. BRIEF OVERVIEW OF THE LEGISLATION

During the reporting period, the chapter on drug-related crimes in the Criminal Code of Georgia was amended pursuant to the judgments of the Constitutional Court of Georgia. The following provisions were considered unconstitutional:

- The punishment envisaged in Article 260(1) of the CCG - deprivation of liberty for illegal purchase/storage of raw marijuana (up to 100 grams) for personal consumption.[24]
- The normative content of Article 260(3) of the CCG, which provides for deprivation of liberty as a preventive measure for manufacturing, purchase and storage of a desomorphine (0,00009 grams).[25]
- The normative content envisaged in Article 265(2) of the CCG, which provides for deprivation of liberty for illegal cultivation, breeding of cannabis (plant) (up to 10 grams) for personal consumption. [26]
- The normative content envisaged in Article 265 (2) of the CCG, which provides for deprivation of liberty for illegal cultivation, breeding of cannabis (plant) (up to 64 grams; up to 151 grams) for personal consumption. [27]
- The normative content envisaged in Article 265 (3) of the CCG, which provides for deprivation of liberty from 6-12 years for illegal cultivation, breeding of cannabis (plant) (up to 266 grams) for personal consumption.

On May 26, 2017, the Parliament of Georgia, in response to the judgments of the Constitutional Court of Georgia, added Article 273[1] to the Criminal Code of Georgia *(illegal purchase, storage, transfer, forward, sale and/or illegal consumption without medical prescription of plant cannabis or plant marijuana)*, which is a special norm and refers to the plant of cannabis or marijuana. The Article combines Article 273 and Article 260 of the Criminal Code of Georgia in the part of the plant cannabis/ marijuana and imposes a relatively lenient regulation on cannabis/marijuana in contrast to other drugs.

24 Judgment №3 / 1/855 of the Plenum of the Constitutional Court of Georgia of February 15, 2017- website, 21.02.2017.
25 Judgment №1/8/696 of the Constitutional Court of Georgia of July 13, 2017 - website, 20.07.2010.
26 Judgment №1/9 / 701,722,725 of the Constitutional Court of Georgia on July 14, 2017, 20.07.2010.
27 Judgment №1/9 / 701,722,725 of the Constitutional Court of Georgia of July 14, 2017, 20.07.2010.

On November 30, 2017, the Constitutional Court of Georgia rendered a precedential decision and considered imposition of criminal liability for consumption of marijuana as unconstitutional, in particular, with regards to Article 16 of the Constitution of Georgia.[28]

It is noteworthy that by November 30, 2017, Article 273[1] of the Criminal Code of Georgia already existed, which considered consumption of marijuana without medical prescription as a criminal offense. Therefore, the Criminal Code still retains the norm which the Constitutional Court of Georgia considered unconstitutional. Consequently, it is necessary to remove the provision "consumption of marijuana without medical prescription" as provided in Article 273[1](1) from the Code, as this normative content has already been recognized as unconstitutional.

The judgments of the Constitutional Court of Georgia clearly demonstrate that the norms envisaged by the Criminal Code in terms of drug related crimes are not properly regulated. Punishment measures are often incompatible with the degree of crime and presumably the Constitutional Court, in the case of application, may deem other normative content/provisions unconstitutional.

2. BRIEF ANALYSIS OF COURT SESSIONS

GYLA monitors attended 97 preventive measure sessions, which reviewed drug-related crimes. Of these, 31 (32%) court sessions discussed offenses under Articles 273 or 273[1] of the Criminal Code of Georgia. The preventive measures on drug-related crimes are unsubstantiated and/or insufficiently substantiated more often compared to other types of crimes. In the reporting period, we identified 92 (22%) unjustified decisions on preventive measures, and 31 of those 92 decisions (33%) were related to drug offenses. The Prosecutor's Office, in a formulaic manner, always indicates the danger of continuing criminal activities as well as the size of punishment imposed under a specific criminal article and points out the possibility of fleeing.

It should be noted that the amount of bail imposed by the court on drug-related offenses is higher than on other types of crimes.[29] During the reporting period, bail with a guarantee of remand was 2 times more frequently imposed on drug-related offenses than on other crimes.[30] In addition, the prosecutor demanded deprivation of liberty in 31 cases, and the court granted the motions in 29 (94%) cases, while in other crimes the court granted the prosecutor's motions in 75% of the cases.

28 Judgment № 1/13/732 of the First Board of the Constitutional Court of Georgia of November 30, 2017.

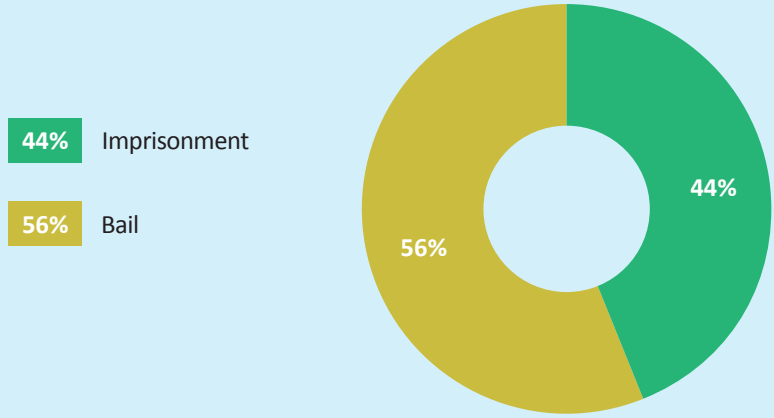
29 The average amount of the bail on drug-related crimes is 4700 GEL, which exceeds the total amount of the imposed bails by 1455 GEL.

30 In drug-related offenses, the bail with remand detention was imposed in 54% of the cases, while in total the so-called bail with remand detention as a preventive measure was imposed in 26% cases.

Against defendants who committed an offense under article 260 (6) (a) of the CCG (particularly large quantities of illegal, production, purchase, storage, transportation, or sale of drugs) the prosecutors in all 14 cases demanded imprisonment and uniformly formulated the motions, indicating the alleged/possible intention of selling of drugs, and the prosecution gave a substantiated reasoning only in one case, saying that the defendant might have had the drug for the purpose of selling.

See the charts N14, N15, N16 on the preventive measures imposed on drug-related crimes. The charts do not show calculations of preventive measures under Article 273 and Articles 273[1] of the Criminal Code of Georgia.[31]

CHART N14 **PREVENTIVE MEASURES IMPOSED ON DRUG-RELATED CRIMES (FEB 2017-MAR 2018)**



31 Most of the crimes envisaged by Articles 273 and 273[1] of the Criminal Code of Georgia do not envisage deprivation of liberty as a preventive measure, and therefore, could not have been used as a preventive measure for the acts referred to in these articles.

CHART N15 TYPES OF BAIL IMPOSED ON DRUG-RELATED CRIMES (FEB 2017-MAR 2018)

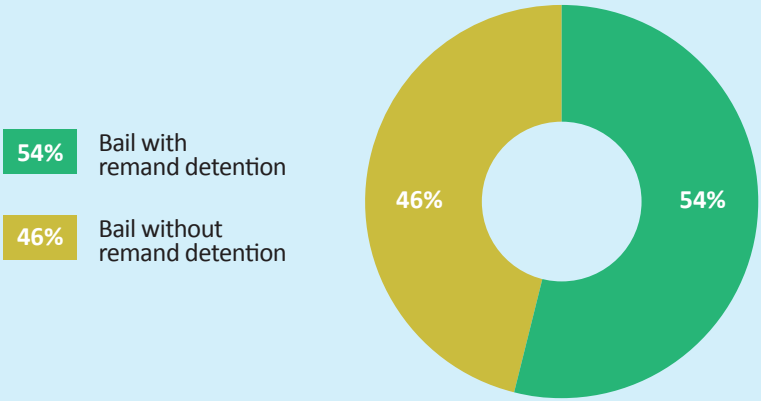
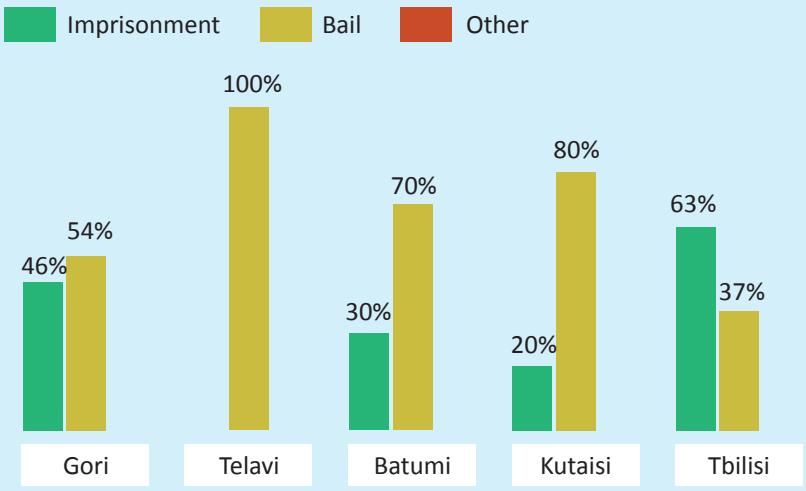


CHART N16 TYPES OF PREVENTIVE MEASURES IMPOSED ON DRUG-RELATED CRIMES ACCORDING TO THE CITIES (FEB 2017-MAR 2018)



In large majority of cases the court granted the motions on imposition of the so-called bail with a guarantee of remand submitted by the Prosecutor's Office. Often, neither the prosecutor had examined the financial situation of defendants, nor the court paid attention to the financial condition of defendants. Consequently, in such cases it can be concluded that the court used the so-called "clandestine detention" as a preventive measure.

To illustrate, see the examples of "clandestine detention":

» The Prosecutor's Office charged the defendant with the purchase/storage of large quantity of drugs (260(3)(a) of the CCG). The Prosecutor's Office demanded 5000 GEL bail with a guarantee of remand without examining the financial condition of the defendant. The defense counsel declared that the accused was a socially vulnerable person, had no real property and therefore, the lawyer requested imposition of the bail in the amount of 2000 GEL. In spite of this, the judge imposed bail in the amount of 4000 GEL with remand detention.

» The defendant was charged with the purchase and storage of narcotic substance (260(1) of the CCG). The defendant had not been previously convicted. As a preventive measure, the prosecutor requested bail with a guarantee of remand in the amount of 5 000 GEL, despite the fact that the accused was unemployed. The defense lawyer agreed with the prosecution's proposal on bail and did not even request for the decrease of the bail amount, and only offered posting 50% of the bail.

The judge granted the motion of the prosecutor for bail with a guarantee of remand in the amount of 5 000 GEL.

It is unclear why the defense lawyer did not request the reduction of the bail amount. Moreover, the judge could decrease the amount of the bail on his own initiative. It is also unclear why it was necessary to impose bail with a guarantee of remand.

» The defendant was charged with the purchase and storage of narcotic substance (260(1) of the CCG). The prosecutor requested bail in the amount of 5 000 GEL with remand detention, although the Prosecutor substantiated neither the amount of bail nor the necessity of imprisonment. The defendant declared that he had 80-year-old mother under his care, as he had no other family member to look after the parent.

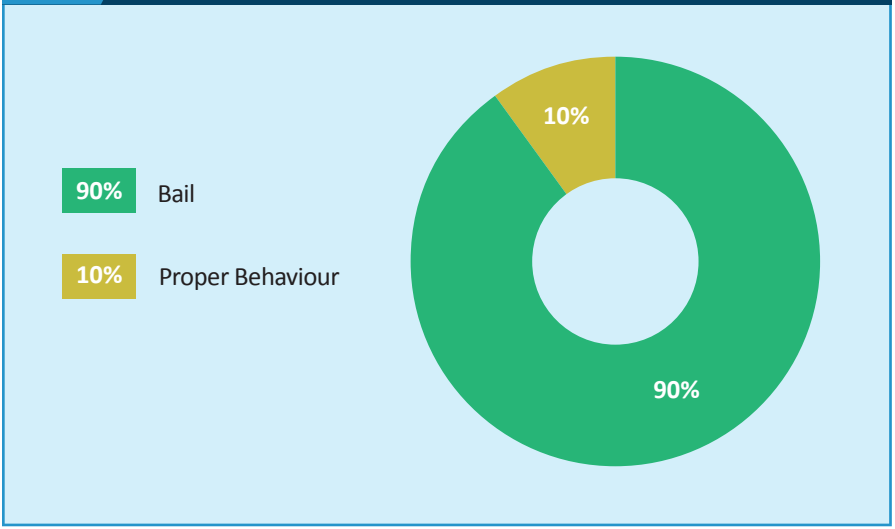
The judge imposed 3 000 GEL bail with a guarantee of remand as a preventive measure.

Article 273 and 273[1] of the Criminal Code of Georgia

During this reporting period, until the delivery of the judgment by the Constitutional Court of Georgia on November 30, 2017, we attended 29 court hearings concerning the above mentioned articles, and after the Court's decision we attended only 2 sessions, which reviewed illegal purchase, storage, transportation, transfer, sale and/or consumption without medical prescription of a small amount of plant cannabis or plant marijuana (Article 273[1] of the CCG).

See the statistics below on the preventive measures for the offenses envisaged under Article 273 and 273[1] of the Criminal Code of Georgia from February 2017 to February 2018.

CHART N17 **PREVENTIVE MEASURES IMPOSED ON OFFENSES ENVISAGED IN ARTICLES 273 AND 2731 OF THE CCG (FEB 2017-MAR 2018)**



In large amount of cases, the prosecutors did not examine the financial situation of the defendants and demanded imposition of bail. Notwithstanding that, mostly the Court examined the financial state of the defendants it still imposed bail rather than other more lenient measures of restraint irrespective of the defendant's inability to pay the bail amount. To illustrate the aforementioned, see the following example:

The Prosecutor's Office charged the defendant with the purchase/storage of a small amount of drugs (Article 273 of the CCG), which is a less severe offense and provides for imprisonment for not more than one year as a maximum sentence. The Prosecutor's Office demanded bail in the amount of 3 000 GEL as a preventive measure. The defendant said that he could not afford the bail as he had neither money nor land and was socially vulnerable. The accused requested the court to be left without any preventive measure.

The Judge imposed bail in the amount of 1000 GEL as a measure of restraint. The judge neither substantiated the decision, nor explained why it was unreasonable to use any less severe preventive measure and/or leave the person without a preventive measure.

The Prosecutor's Office demanded bail (min. 1,000 GEL – max. 8000 GEL) in all 31 cases involving offenses envisaged in Articles 273 and 273[1] of the Criminal Code of Georgia, and the Court did not grant the motions of the Prosecutor's Office only in 4 cases. In 3 of the 4 cases, the court imposed an agreement on not to leave and proper behavior, and left 1 case without a preventive measure.

VI. USE OF PREVENTIVE MEASURES IN THE CASES OF DOMESTIC VIOLENCE, DOMESTIC CRIME AND VIOLENCE AGAINST WOMEN

1. BRIEF OVERVIEW OF THE LEGISLATION

Criminal liability for domestic crimes is determined by Article 11^1 of the Criminal Code of Georgia.[32] According to Article 126^1 of the Criminal Code, battery, systematic insult, blackmail and humiliation of one member of the family against another member of the family, which caused physical pain, but did not result in intentional serious, less serious or light injury of bodily health shall be punishable.

If violence against a woman occurs, the investigation shall be launched from the perspective whether the crime might have been committed on the grounds of gender discrimination.[33] Examination of the motive of crime also has a preventive purpose. Identification of a motive of the offense is often a necessary prerequisite for determination of a correct article for the crime. Article 53^1 of the CCG obligates the court to take into account the motive and purpose of committing a crime.

At the same time, the existence of a major motive in the case, even if it is related to personal conflicts with other content, shall not be a sufficient ground to eliminate the doubt for the existence of another motive. Proper attention should be paid to determination of motive in order not to avoid the possibility of examining possible discriminatory motive in the case.

2. ANALYSIS OF COURT SESSIONS

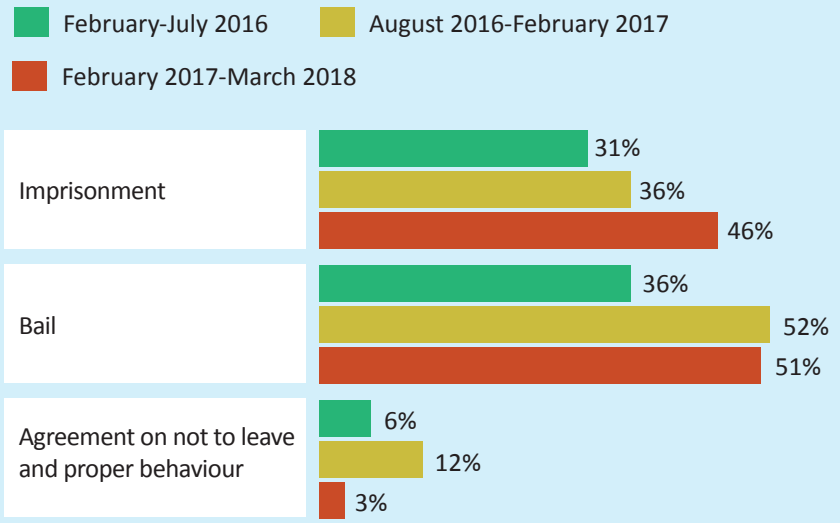
It is noteworthy that unlike the previous reporting period, prosecutors / judges more clearly assessed potential threats and judges rendered decisions aimed at protecting victims. Nevertheless, there were cases when the court did not demonstrate sufficient sensitivity to victims and failed to assess risks appropriately.

32 Domestic crime shall mean the commission by one family member against another family member of the offenses determined under Articles 108, 109, 115, 117, 118, 120, 126, 1331, 1332, 137, 141, 143, 144, 1443, 149, 1511, 160, 171, 187, 253, 255, 2551, 3811 and 3812 of the Code.

33 United Nations Special Rapporteur on UN Doc. A / HRC / 23/49 (May 14, 2013), §73; Also, IACtHR, Case of Gonzalez et al. ("Cotton Field") v. Mexico, Judgment of November 16, 2009, §455; See: T. Dekanosidze, Judgments of 2014 Femicide Cases, GYLA research, Tbilisi, 2016, 18-19. See also: Council of Europe Convention (Istanbul Convention) on Preventing and Combating Violence against Women. 11.05.2011, Istanbul, Article: 3 (a); See: T. Dekanosidze, Judgments of 2014 Femicide Cases, GYLA research, Tbilisi, 2016, 35.

The chart below shows the preventive measures imposed in the cases of domestic violence (the offenses envisaged in Article 11[1] of the CCG).

CHART N18 **TYPES OF PREVENTIVE MEASURES IMPOSED ON DRUG-RELATED CRIMES ACCORDING TO THE CITIES (FEB 2017-MAR 2018)**



The GYLA monitors attended 71 preventive measure hearings reviewing domestic violence cases. In all 71 cases, the victims were women: wives/ex-wives in 60 cases; minor children in 5 cases; mothers in 3 cases; in 2 cases grandmothers; in 1 case a daughter-in-law. 70 (99%) defendants were male.

The Prosecutor's Office requested imprisonment in 79% of the cases, and the court granted the motions in 57% of the cases. It is noteworthy that the prosecutor requested imprisonment for other types of crimes in 45% of cases and the Court upheld motions for detention for other types of offenses in 75% of cases. So while we are encouraged by the fact that the Prosecutor's Office seeks imprisonment as a preventative measure more often in domestic violence cases, it is discouraging that the courts actually impose that preventative measure less often in domestic violence cases than in other cases.

It is noteworthy that there are frequent cases when, at the court session reviewing the imposition of a preventive measure, the defense counsel produces a notarized letter where the victim (spouse) expresses no claim against her spouse. In total,

9 (13%) such cases were observed. In such occasions, the court should find out whether the letter was written by the victim under pressure. However, in the cases observed by GYLA, the court did not attempt to determine if the victim was pressured.

To illustrate the aforementioned, see the case below where the victim said she had no claims, but the authenticity of her allegations raised doubts.

> The defendant physically and verbally insulted his spouse (126[1](1) of the CCG). The victim's statement was presented before the court, according to which the victim no longer had any complaints and requested her spouse to be released from custody.
>
> The court imposed bail with a guarantee of remand as a preventive measure. The judge, while giving the substantiation of the measure, explained that the decision was based on the wife's statement otherwise the court would have imposed imprisonment.
>
> While the GYLA's monitor was leaving the courtroom, she/he heard the victim addressing her neighbours attending the court session: "You have turned up now, but where were you when he was killing me?"

In 16 (44%) cases of the bail imposed by the courts were unreasonably lenient measure that could not guarantee the behavior of the defendant, the safety of victims or prevent the recurrence of the offense.[34] In comparison with the previous reporting period, the rate of substantiation has slightly improved by 3 percentage points.[35]

To illustrate the aforementioned, see the cases where the prosecutor or the court requests/ imposes excessively lenient preventive measures:

34 For example, the prehistory of the violence act, the restraining orders into the case, the fact of coexistence of the victim and the alleged offender contains the risks that determine the expediency of the use of detention.

35 8 (47%) of the 17 cases of the bail imposed by the court during the previous reporting period were unjustifiably lenient.

» The defendants (father and son) were charged with domestic violence committed by a group (Article 126[1](2)(d) of the CCG). Namely: the father-in-law slapped his daughter-in-law in the face and his son extinguished a burning cigarette in the area of her eye and tried to strangle her with his hands. The prosecutor noted that the expert examination of the injuries had been commissioned and the degree of the damage was being determined. The Prosecutor's Office substantiated the necessity of imprisonment.

The court imposed bail on the defendants in the amount of 1000GEL eachand determined 20 days for posting the bail amount for both of them; in addition, they were prohibited to approach the victim.

Besides the fact that in the above case bail is a much too lenient measure, the defendants and the victim are living together and the court judgment on the prohibition to approach the victim will be difficult to execute. Moreover, there is also a danger of recurrence of physical and psychological violence against the victim. In such cases, the risk that the victims will be pressured by the defendants is much higher.

» The defendant was charged with violence against his ex-spouse in the presence of a minor child (Article 126[1](2)(b) of the CCG). The accused arrived in the garden of the victim's house and due to jealousy inflicted injuries on the person in the unregistered marriage in the presence of the minor child, namely he hit her in the head, pulled her hair and crashed her onto the gate. The prosecutor requested bail in the amount of 5 000 GEL with remand detention as a preventive measure, which the judge granted. It is unclear why the prosecutor did not demand imprisonment. In addition, the judge did not substantiate the amount of the bail and did not discuss the financial state of the defendant.

» The accused had been convicted for domestic violence (Article 126[1](1) of the CCG) in 2015, when the victim was his wife. The detainee, being under the alcohol intoxication, physically and verbally assaulted his ex-spouse. The accused admitted to the commission of the crime and requested the imposition of bail. The prosecutor requested imprisonment and substantiated the necessity of detention by a high risk of committing of a new offense.

The judge determined the bail in the amount of 3000 GEL as a preventive measure and failed to examine the financial state of the defendant.

The court hearing lasted only 15 minutes. The accused appeared before the court as a detainee. The judge did not fully inform the defendant of his rights, also did not explain the lawfulness of the detention, nor did he justify the imposition of bail as a preventive measure - whether the bail would diminish the risk of committing of a new offense, and did not examine the financial situation of the defendant.

» The defendant was accused of threatening a family member (Article 11^1,151(1) of the CCG).In particular, the defendant regularly insulted verbally the former spouse and permanently sent malicious text messages and threatened her with the destruction of her life.

The prosecutor requested bail in the amount of 3000 GEL, which the court partially granted and imposed 2000 GEL bail on the accused.

It is unclear why the prosecutor failed to request any additional preventive measure – e.g. prohibition to approach the victim. The prosecutor failed to respond properly and did not analyze possible threats, which not only makes the victim vulnerable, but may also provoke distrust of her and other victims towards the prosecution.

In 8 cases (11%) out of 71 preventive measure hearings involving domestic violence, the Prosecutor's Office submitted a delayed motion to the court, minimum 1 month and maximum 2 years after the occurrence of the domestic violence. In 5 out of 8 cases it was not clear why the initial appearance hearing of the accused was not held on time. We can only assume that victims appealed to the Prosecutor's Office in a delayed manner or the Prosecutor's Office delayed the investigation of the cases.

There were 3 of 8 alarming cases with a direct suspicion that the state authorities had failed to act adequately and timely, and the prosecutor appealed to the court with the request to impose preventive measures a few months after the incidents.

To illustrate the aforementioned, see the following example:

» The case concerned events of 2016 when the defendant carried out a violent act against his wife. The Prosecutor's Office filed a motion with the court for the imposition of preventive measure only in 2018. Therefore, the Court pointed out that there was no threat for committing of a new offense or exertion of pressure on the witness as two years passed since the incident and the prosecutor did not submit any evidence confirming that the defendant committed any further crime. The judge did not grant the prosecutor's motion and did not impose any preventive measure on the accused.

» The defendant was charged with less serious intentional damage of bodily health (Articles 111, 120 of the CCG). There is a reasonable assumption that the accused inflicted less serious physical damage on the person in unregistered marriage by beating her with his hands and legs, which caused the deterioration of the victim's health for a short period of time. The prosecutor indicated that imprisonment would be an appropriate preventive measure because of the nature of the crime.

The defense lawyer declared that the prosecutor's motion was unsubstantiated in the part of commission of a new offense and in terms of fleeing. The motion on a preventive measure was submitted 7 months after the incident. During that time, the defendant was living with the victim, and for 7 months law enforcement authorities did not receive any message concerning domestic violence in the family, the accused showed up voluntarily at the court hearing, no fact was reported of him avoiding the investigation, and the victim and the accused got married officially during that period.

The defense counsel declared that the threats that had existed 7 months ago, i.e. at the moment when the criminal act took place, according to the standard of reasonable assumption now were neutralized or reduced to the extent that it was no longer necessary to use custody. Consequently, the Prosecution's motion was delayed, unsubstantiated and lacked any legal grounds.

The judge imposed bail in the amount of 1500 GEL (40 days for posting it). As an additional measure, the defendant was obligated to appear before the investigator once every 10 days and was prohibited to approach the victim.

Victims/injured of domestic violence find it extremely difficult to disclose the fact of the violence and apply to law enforcement authorities. This is due to feeling of insecurity, fear of further violence against them, fear of criticism from the patriarchal society, and many other factors. Therefore, when victims submit a complaint to any law enforcement agency or the prosecutor's Office, state authorities should provide an immediate response in order to protect their safety. This right is guaranteed for

victims of domestic violence under Article 18 (1)[36] and Article 50 (1)[37] of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. The Prosecutor's Office shall be obliged to act very quickly and efficiently in such cases so that victims should not develop the feeling that the State does not care about them and they are left alone facing the violence.

3. TRENDS REGARDING THE CASES OF DOMESTIC CRIMES ACCORDING TO THE CITIES

It should be noted that the judges of the Gori, Telavi and Tbilisi courts most adequately evaluated alleged threats, and rendered judgments that were aimed at protecting victims. We have witnessed a different approach at Kutaisi City Court, which indicates an alarming and disturbing situation. The Kutaisi City Court did not use imprisonment and used just bail or other less severe measures in all domestic violence cases. During the reporting period in Kutaisi City Court bail was 2 times more frequently unsubstantiated in domestic violence cases (16 (70%) out of 23 offenses) than on other crimes, (29 (33%) out of 88 cases). In particular, in 12 (52%) of the Kutaisi domestic violence cases the bail was an unreasonably lenient measure, and in 4 (11%) cases the amount of the bail was incompatible with the financial state of the defendants. In the Batumi City Court, we identified only 4 cases related to domestic violence, accordingly, the four cases are insufficient to analyze court judgments (practice).

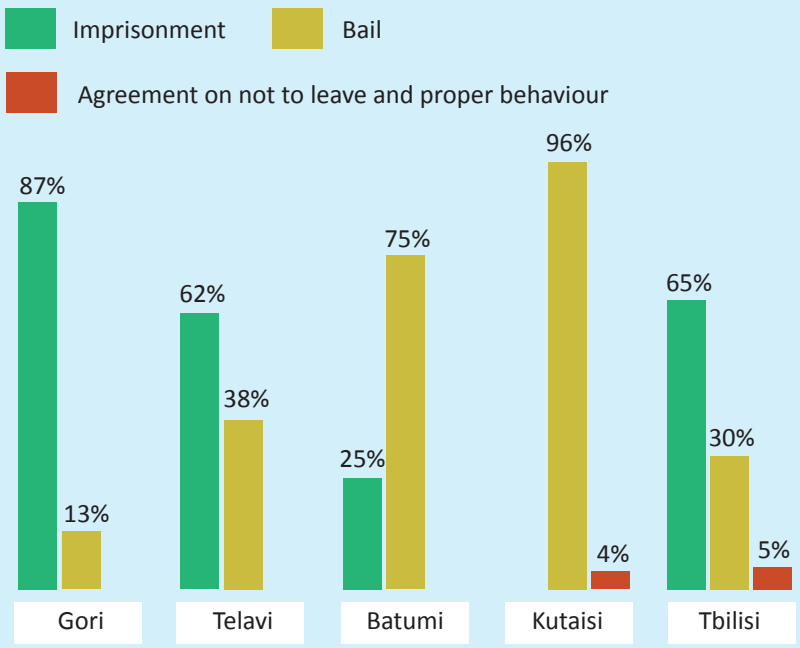
36 Parties shall take all the necessary legislative or other measures to ensure that victims of violence are protected against further violence acts.

37 The Parties shall take all the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.

See the following chart for preventive measures used in cases of domestic violence (the offenses envisaged in Article 11[1] of the CCG) by the cities from February 2017 to February 2018.

CHART N19

PREVENTIVE MEASURES IMPOSED ACCORDING TO THE CITIES (DOMESTIC CRIME CASES; ARTICLE 11[1] OF THE CCG) (FEB 2017-MAR.2018)



VII. THE FACTS OF ALLEGED ILL-TREATMENT IMPLEMENTED BY LAW ENFORCEMENT AGENCIES

1. BRIEF OVERVIEW OF THE LEGISLATION

Torture and ill-treatment is prohibited by the Constitution of Georgia[38], the European Convention of Human Rights[39] and the national legislation[40]. The prohibition guarantees protection of a person against torture and degrading treatment. For adequate realization of this right, a person must be aware of his/her rights. Logically, this imposes on the court an obligation to inform the defendant of his/her rights, that the accused has the right to file a claim (complaint) about torture or inhuman treatment in any case of torture of ill-treatment and at the same time, the judge shall enquire from the accused whether he/she intends to file any complaint or motion with regard to a violation of his / her rights.[41] This obligation is of particular importance when a person is detained or is held in custody and is therefore subject to full physical control by the state. Thus, it is important that the supervision of the judge should be effective and as a neutral observer, the judge should assist the defendant to properly carry out relevant procedures in case of violation of his/her rights. According to the law, the judge is only authorized to do the above and he/she does not have any additional tools to have an effective response to such facts.

Furthermore, when, in the course of the court trials, the Prosecution becomes aware that an accused or another person may be the victim of torture / ill-treatment, he / she is obliged to initiate an investigation.[42]

2. ANALYSIS OF COURT SESSIONS

As a result of the monitoring, GYLA once again observed legislative gaps in respect of insufficient role of the judge regarding alleged ill-treatment cases. According to the Criminal Procedure Code of Georgia, the judge is only authorized to inform the defendant of his/her rights against the prohibition of ill-treatment and to hear the alleged facts of ill-treatment. The law does not provide for the procedure with which the judge will have the right to carry out effective measures if there are any signs of alleged torture or inhuman treatment. The judge is only entitled to ask the accused whether he/she has been subject to ill-treatment, which is not an efficient mechanism and not sufficient to have an adequate response towards such facts.

38 The Constitution of Georgia, Article 17(2)
39 the European Convention on Human Rights and Fundamental Freedoms, Article 3
40 Criminal Code of Georgia, Article 144^1 ; 144^2; 144^3;
41 Criminal Procedure Code of Georgia, Article 197(1) (“c” and “g”).
42 Criminal Procedure Code of Georgia, Articles 100 and 101.

At various stages of the proceedings, defendants or participants to the proceedings reported that they had been the victims of torture and inhuman treatment from employees of the law enforcement authorities, but sometimes the response of judges and prosecutors were inefficient and inadequate. For instance, 11 cases of this kind were observed at the initial appearance court sessions, 4 at the pre-trial hearings and 5 at the hearings on the merits. In all instances the response of the court was inadequate because of legislation and the formal role of the judge.

To illustrate the aforementioned, see the following examples of alleged ill-treatment of the defendants as well as the formal, inadequate role of the Court towards such facts:

» To the judge's question whether there had been any inhuman treatment, battery or torture by the police or other officials, the defendant replied positively. The judge asked the defendant to provide more information thereupon, but before the accused could submit the information, the judge informed the accused that she/he could give the information to his defense lawyer who would take appropriate measures to protect his interests and file a complaint with relevant investigative authorities. Here, the defendant asked "*so, isn't my explanation necessary at this stage?"* and the judge again explained that the defendant had the right to make the explanation, but he had to inform the lawyer protecting his interests as well, who would appeal to any relevant official investigating authority, and that the court was not an investigative body so it could not take measures in that regard".

Finally, the defendant did not speak about the specific circumstances, and the judge ordered the prosecutor to take relevant measures.

» The defendant declared that he had been transferred to a clinic for an alcohol test. He was in handcuffs. Prior to the test, a police officer was not able to unlock one of the defendant's handcuffs. According to the accused, the policeman approached him and tried to take off the lock while swearing at him and saying that he would bring the so-called "angle grinder" and would cut off his hand. The judge explained to the defendant that he had the right to file a complaint thereupon, and also called on the prosecutor to investigate the case.

The case of Mikheill Mgaloblishvili and Giorgi Keburia. "Birja Mafia Case":

The GYLA monitors attended the court trial on imposition of a preventive measure on Mikheil Mgaloblishvili in the First Instance Court, as well as the court trial proceedings of both persons in the Court of Appeals Investigative Panel.

Mikheil Mgaloblishvili and Giorgi Keburia are musicians, rappers and run the project "Birja Mafia" within which they make fun of various professions.

In their last video, released on June 5, 2017, the police were ridiculed. Both musicians participating in the video were detained on June 8, 2017, the third day after the video release. The initial appearance of the defendants was held on June 9. Both of them were charged with the commission of the offense under Article 260(6) of the Criminal Code of Georgia, in particular, Mikheil Mgaloblishvili was accused of purchase-storage of 1.49 grams of the narcotic drug "MDMA" and Giorgi Keburia of purchase-storage of 2.33 grams of "MDMA". Both of them declared that they were the victims of drug planting carried out by law enforcers and they were also subjected to physical and psychological pressure.

At the initial appearance of Mikheil Mgaloblishvili, the defense counsel noted that the accused was the author and the participant of a number of videos where the police and the "bad boys" were ridiculed and as he believed the above video became the reason for drug planting by the police. According to the accused, he was detained and forced into a car, was not informed of his rights, he was made to sign unknown documents, and a detective hit him in his head. The defendant also said that there were the facts of verbal abuse.

The judge called on the prosecution to respond to the facts and asked the defendant if he could identify the persons who had insulted him. The defendant said that he would be able to identify them. According to the prosecutor, the accused had been informed of his rights at the moment of his detention, which was confirmed by the defendant's signature, though relevant measures were to be taken later, as the prosecutor said.

In the Court of Appeals both defendants spoke of the psychological and physical pressure they had been subjected to by the law enforcement officials during the arrest.

On December 18, 2017, the Prosecutor's Office terminated the criminal prosecution against both persons on the basis of lack of evidence.[43]

It is noteworthy that the investigation that was initiated against the law enforcement officers on the alleged abuse of official duties and falsification of evidence has not been completed yet and no relevant legal liability has been imposed so far.[44]

VIII. IMPLEMENTATION OF JUDICIAL CONTROL OVER THE LAWFULNESS OF DETENTION

1. BRIEF OVERVIEW OF THE LEGISLATION

Pursuant to the Criminal Procedure Code of Georgia, there are two forms of arrest: arrest of a person on the basis of a court ruling, or in urgent necessity when there are appropriate grounds. In order to obtain a court ruling to arrest a person, a prosecutor shall file a motion with the court, and the latter shall deliver a relevant ruling without oral hearing. The court ruling may not be appealed.[45] If there is an urgent necessity to arrest a person as provided for in the law, the person shall be detained without a court ruling and at the first appearance court hearing the court shall review the lawfulness of the arrest as well as the substantiation of the arrest carried out due to urgent necessity.[46]

The legislation of Georgia does not provide for any special mechanisms for appealing the lawfulness of arrest. Therefore, one of the purposes of the initial appearance hearing is for courts to examine the lawfulness of arrest. This obligation shall be imposed on a judge irrespective of whether the party disputes that issue or not. It is important that the arrest, carried out on the basis of a prior court ruling as well as on the grounds of urgent necessity, be reviewed at first appearance court sessions. This legal mechanism aims at minimization of the risks of making arbitrary decisions by law enforcement authorities.[47] Assuming that the judge applied the arrest incorrectly and during the first appearance hearing was not correctly reviewed, a

43 www.tabula.ge/ge/story/127757-prokuratura-birzha-mafias-orive-tsevris-mimart-sisxlissamartlebrivi-devna-shetskda

44 http://imtavroba.ge/new/7470-prokuraturam-birzha-mafias-tsevrebis-dakavebis-gamo-policielebis-tsinaaghmdeg-gamodzieba-daitsyo

45 Criminal Procedure Code of Georgia, Article 171(1).

46 Criminal Procedure Code of Georgia, Article 171(2 and 3).

47 Imprisonment as a measure for securing the bail, B. Niparishvili, journal "Justice and Law", 2016, №2, 53.

person may be imposed more severe measures due to such arrest.[48]As a result of the observation of initial appearance hearings, GYLA has identified legislative gaps in the protection of the rights of detainees. In particular, the law does not explicitly specify the role and powers of the judge in reviewing the lawfulness of arrests.

2. ANALYSIS OF COURT SESSIONS

The court monitoring showed that in majority of the cases the courts tend to avoid reviewing and assessing the lawfulness of arrests, and mainly limit themselves to selecting and deciding which preventive measures to apply.

This approach manifested by the courts poses a risk of arbitrariness by law enforcement bodies, especially if taking into account that it can be 48 hours after arrest before the accused first appears before the court, and the Georgian legislation does not provide another mechanism for evaluation of lawfulness of the person's arrest.[49]

An assessment by the judge regarding the lawfulness of an arrest is important for the proper mitigation of the damage incurred as a result of an unlawful and unjustified arrest of a person.[50] However, without exercising relevant judicial control over the necessity and legality of the arrest, the above mentioned right acquires only a formal character.

The legislation does not envisage a clear and explicit provision that the lawfulness of the arrest conducted on the basis of the court's prior ruling or due to urgent necessity shall be subject to further judicial review.

During this reporting period, 218 defendants (54%) out of 402 who appeared at the initial appearance hearing had the status of arrested defendants. In the majority of the cases -175 (80%) - neither the court reviewed the lawfulness of the arrests, nor did the parties raise this issue. As a result, we were unable to find out the procedure applied during the arrest: whether the arrests were carried out based on a court prior ruling or on the grounds of urgent necessity.[51]

In 4 (9%) out of the remaining 44 cases, the judge's ruling on the arrest of a person was present, but none of the initial appearance court sessions reviewed and evaluated the lawfulness of detentions. In the remaining 40 (91%) of the 44 cases, the persons were arrested on the basis of urgent necessity.[52] The lawfulness of the

48 For example, the arrest of a person allows imposition on him/her of a bail with remand detention

49 Bokhashvili B., Mshvenieradze, G., Kandashvili, I., The Procedural Rights of Suspects in Georgia, Tbilisi, 2016, 19

50 Criminal Procedure Code of Georgia, Article 176(5).

51 In the previous reporting period 140(48%) out of 290 defendants appeared as detainees before the court. In 116 (83%) cases, neither the court reviewed the lawfulness of the arrests, nor did the parties mention the issue at the court hearings.

52 In the previous reporting period, in 4 (17%) cases, there was a court ruling on the arrest of the persons, and in the remaining 20 (83%) cases, the persons were arrested under urgent necessity.

arrest was examined by the judge only in 2 cases out of the 40, and in both cases the court deemed the imprisonment legal, which confirms that the court's review of the lawfulness of an arrest based on urgent necessity rarely takes place, and that when it does take place (as shown below), the court's consideration is of only a formal character.

The example below shows that if there is a court ruling and the arrest carried out under the urgent necessity is declared lawful, the court does not further investigate the matter at the initial appearance court hearing of the defendant. The defense counsel lacks the legal tools to justify its claim.

> The defendant was arrested on the basis of urgent necessity. At the court hearing, the defense lawyer declared that the defendant had not been informed of his rights at the moment of the detention, was not allowed to have a lawyer, and only an hour later was informed verbally of his charge.
>
> The judge asked questions to the defendant and found that the arrest protocol was not signed by the accused as the latter had never seen it.
>
> Consequently, the Court did not accept the defense lawyer's argument or the motion of the lawyer for an immediate release of the accused as Articles 171 and 174 of the CPCG had been violated against the defendant.
>
> The judge noted: "I cannot accept the arguments of the defense counsel as the Court shall be guided by the standard of a reasonable assumption. As for the violation, I cannot accept them either as of today, since the court ruling was delivered and the investigative actions were recognized as lawful, the protocol of the investigative proceedings has been drawn up in full compliance with the procedural norms, both protocols are accompanied with the notes made by the investigator, and unless the opposite is confirmed, only verbal allegation shall not be considered reasonable. "

Thus, the frequent negative practice indicates that the State is not efficient in protecting the rights of detained persons due to the faulty legislation.

IX. PROCEEDINGS OF PLEA AGREEMENT

1. BRIEF OVERVIEW OF THE LEGISLATION

A plea agreement is a type of expedited proceedings at which the defendant pleads guilty to a particular charge and enters into an agreement with the prosecutor on the punishment, mitigation of conviction or its partial removal.

According to Article 213 of the Criminal Procedure Code of Georgia, if a judge considers that sufficient evidence has been provided to render a judgment without a main hearing and if the judge has received convincing answers from the defendant related to circumstances provided in the law, and the sentence requested by the prosecutor is lawful and fair, the judge may decide to render a judgment without a main hearing.

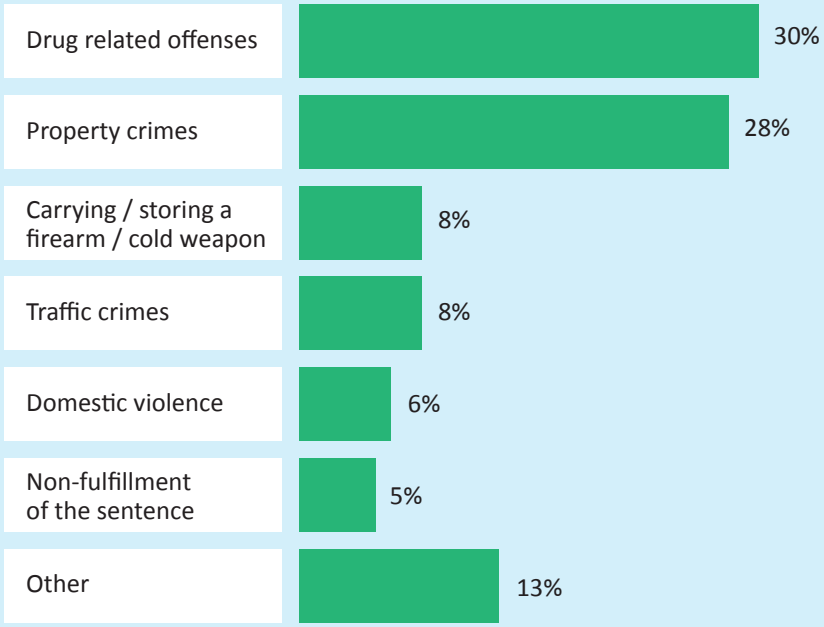
For the purpose of ensuring the fairness of the punishment, the judge shall review existing circumstances, individual characteristics of a defendant, the motives for committing the crime and agreed sentence. The law does not specify the method for ensuring the fairness of the punishment, however, according to the general principles of determining a sentence, there is a possibility to support the above mentioned criteria. For instance, while imposing a fine, the judge has the possibility to find out the following: the financial status of a defendant; his/her ability to pay the penalty; whether the amount of the penalty is adequate to the inflicted damage; the circumstances surrounding the commitment of a crime and the severity and size of the expected sentence. Apart from the mentioned, the judge has the right to make amendments to plea agreements upon the consent of both parties. Namely, in accordance with the legislation, if a judge considers that there is insufficient evidence to render a judgment without a main hearing or establishes that the plea agreement has been filed in violation of the requirements of the Criminal Procedure Code of Georgia, the judge should offer to the parties to alter the terms of the plea agreement, which shall be agreed with a chief prosecutor. If the court is not satisfied with the altered terms of the plea agreement, it shall refuse to approve it and return the case to the prosecutor.

Monitoring results

During the reporting period, GYLA attended 303 court sessions reviewing plea agreements. The court did not approve 5 (2%) plea agreements out of 303 court hearings. Out of the 298 plea agreements, 91 cases (30%) were related to drug offenses, 84 (28%) to property crimes (77 were cases of theft).

See the following chart showing the offenses upon which the plea agreements were signed from February 2017 to February 2018.

CHART N20 **OFFENSES ON WHICH PLEA AGREEMENTS WERE SIGNED (FEB. 2017-MAR. 2018)**



2. ANALYSIS OF COURT SESSIONS

2.1. INFORMING THE RIGHTS PROVIDED IN THE LAW, LENGTH OF COURT TRIALS

When entering into a plea agreement, the judge shall be obliged to inform the accused of his/her rights provided for in the law. The judge shall be obligated to inform all the rights envisaged in Article 212 of the CPCG in a non-technical language, so that the defendant can understand his/her rights. Another aspect of the law requiring from the judge to inform the defendant of his/her rights and obtain convincing answers to the questions asked is that the judge may refuse to approve a plea agreement unless he/she receives meaningful and convincing answers on the circumstances envisaged by the law.

Monitoring results

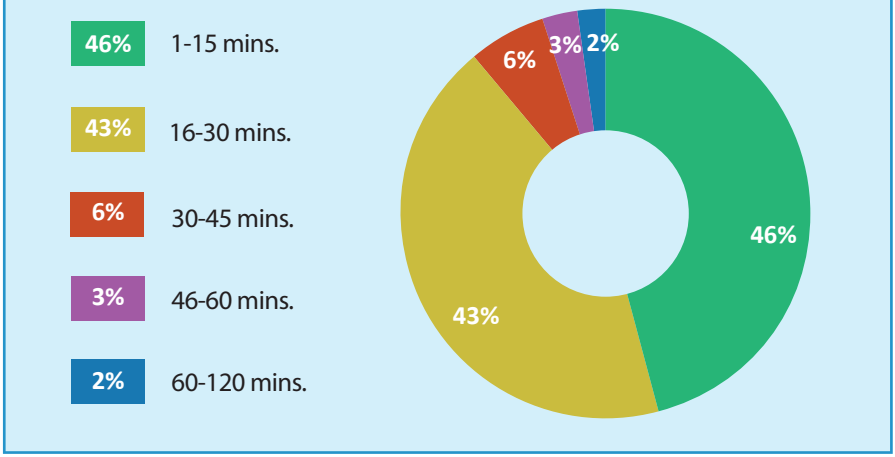
In comparison to the previous reporting period, the situation in terms of judges comprehensively informing the rights provided for in the legislation has significantly deteriorated. Specifically, in 60 (20%) cases, the judge did not inform the defendants that unless the court approves a plea agreement, it is inadmissible to use any information which the accused submits to the court hearing against him/her in the future. In the previous reporting period, this number was 16%. Moreover, in 44 (14%) cases, the judge did not inform the accused that his/her complaint of torture, inhuman or degrading treatment would not prevent the approval of a plea agreement concluded in accordance with the requirements of the law. In the previous reporting period, this right was not informed only in 5% cases.

In two cases, the defendants were charged with the offense envisaged under Article 273 of the Criminal Code of Georgia (possession of small amount of marijuana), and the judge made a mistake while giving the information regarding the rights. In particular, according to the law applicable at that moment, and pursuant to the Judgment №1/16/770 of the Constitutional Court of Georgia Plenum on December 22, 2016, imprisonment for smoking marijuana had been already abolished, but the judge informed the accused that he/she would be sentenced to imprisonment.

It is essential that the court should fully inform defendants of their rights, as with plea agreements it is a prerequisite that the court renders a ruling which will also reflect the will of the defendant. It should be noted that the average length of plea-agreement court hearings is either 5-15 or 15-30 minutes (89% of the court sessions).

See the following chart showing the duration of plea agreement court hearings from February 2017 to February 2018.

CHART N21 **DURATION OF PLEA AGREEMENT COURT HEARINGS (FEB 2017-MAR 2018)**



In 5-15 minutes, the court cannot fully inform defendants of the rights provided for in the Chapter XXI of the CPCG, become convinced that the defendant agrees with the terms of the plea agreement, review the proportionality of the size/type of the sentence envisaged in the plea agreement and eventually render a proper judgment.

Accordingly, it seems that in many cases the judges explain the rights only formally – defendants often do not understand information provided by the judges; the court hearings created the impression that the defendants did not frequently understand the judge's explanations, and there were few cases when the accused did not clearly express the willingness to conclusion of the plea agreement, but the judge did not investigate the issue at the court hearing.

To illustrate, see the following example:

The judge approved the plea agreement submitted by the prosecutor. During the court trial, the defendant was hesitating and declared "I am forced to agree with this agreement because of the prosecutor and I have to admit to the offense which I have not committed, OK, I agree with the motion". The defendant repeatedly expressed dissatisfaction at the court hearing, sometimes pleaded guilty and sometimes did not. Yet, the court approved the motion without any additional inquiry. After the court hearing, the defendant addressed to the prosecutor: "You will be held responsible for this action."

Rare and exemplary were the court sessions where the judges thoroughly examined the type/size of the sentences indicated in the plea agreements and obtained more detailed information from defendants at the court trial whether they agreed with the penalty or not. To illustrate, see the following example:

The defendant was charged with theft (Article 177(2)(a) of the CCG). The terms of the plea agreement were as follows: 1 year of imprisonment under Article 55 of the CCG was considered as a suspended sentence according to Article 63-64 of the CCG, 1 year of a probationary period and the fine in the amount of 2000 GEL as an additional measure.

The judge addressed the prosecutor and told him/her that the sentence seemed too severe as the theft occurred 4 years ago and the wires stolen by the defendants were worth 210 GEL, thus, 1 year suspended sentence and 2000 GEL fine was a strict punishment. The judge ordered the prosecutor to confirm the terms with the superior prosecutor. The break was announced at the court hearing. The prosecutor contacted the superior prosecutor and provided the revised terms, namely, the fine of 2000 GEL was completely removed from the motion.

2.2. COURT'S APPROACHES TO FAIRNESS AND LAWFULNESS OF PUNISHMENT

Pursuant to Article 212(5) of the Criminal Procedure Code of Georgia, the judge shall deliver a decision on a plea agreement based on the law and shall not be obliged to approve the agreement reached between the accused and the prosecutor. This right of the judge serves as an important tool for controlling the fairness and lawfulness of plea agreements and in case of abusing the institution, may be used by the judge for rejection of the agreement.

The legislation does not give the judge the right to independently alleviate or change the sentence, but this does not justify the judge's consent on imposition of excessively lenient or severe punishment if the prosecution submits the motion with such terms. One of the important components of the fair trial is imposition of a punishment and accordingly the judge shall closely observe the process of

determining the punishment and prevent the imposition of inadequate sanction.[53]

Monitoring results

Despite the fact that the legislation provides the judge with this significant right, in the reporting period, the judges in majority of the cases did not enquire whether the sentences determined by the parties were fair and lawful. Moreover, judges approved 298 (98%) plea agreements out of 303 motions submitted by the prosecutor and only in 7 (2%) cases the judge stated that he/she considered the imposed sentence fair and useful for the defendant, and in 2 cases the judge doubted the lawfulness of the sentence: in one case the prosecutor was ordered to change the terms of the plea agreement, and in the other the court did not approve the plea agreement as the prosecutor failed to take into consideration the court's instruction.

Despite the excessively negative practice, there were 5 cases when the court acted appropriately, informed parties that the proposed plea agreement was not approved due to inadequate qualification of the sentence and/or insufficient information provided to the defendant. To illustrate the aforementioned, see the following example:

» The defendant was charged with theft and consumption of narcotic substances (Article 177(2)(a) and Article 273 of the CCG).

The prosecutor submitted a plea agreement to the court hearing with the following terms: to sentence the defendant to imprisonment for up to 3 years, which shall be considered as a suspended sentence with the same probationary period and 200 hours of community labour, which had to be fully added to the previous outstanding sentence in the amount of 1000 GEL.

The judge addressed to the prosecutor: "The plea agreement, with the terms that the parties wish, may not be approved. The television set was mortgaged in a pawn's shop for 130 GEL, but 550 GEL is indicated as its value in the case files, which constitutes a serious damage and shall be subjected to the second paragraph. And this happens when the expert examination report has not been submitted yet. The value of the TV has been determined only based on the testimony, but other evidence is not available. There is a judgment delivered by the Supreme Court of Georgia (December 28, 2016) in this respect, according to which at least two items of evidence/ proofs shall be necessary to determine the value of an item. In addition, the Article of theft is doubtful, as the victim voluntarily handed the property to the accused. The Court considers that neither the sentence is adequate, nor the defendant provided fully convincing answers and the case shall be returned to the prosecutor."

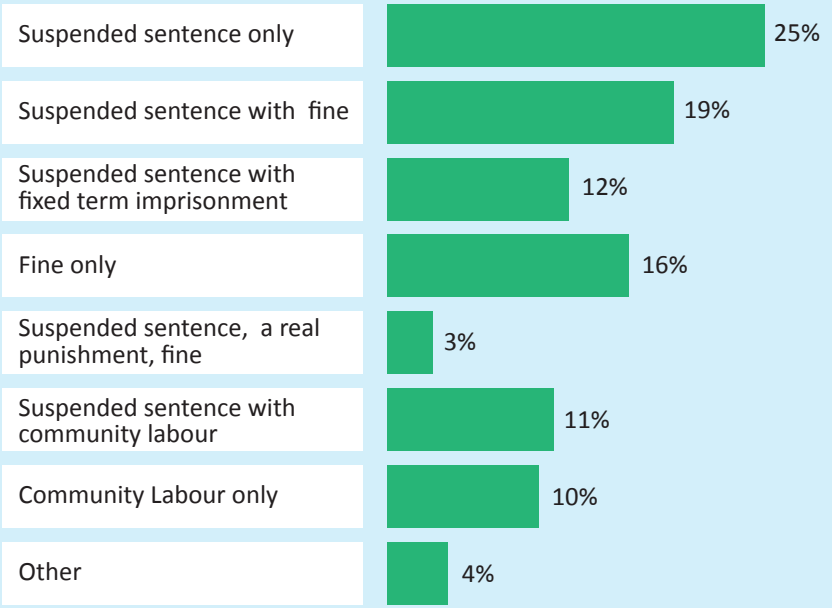
53 Guiding principles of the form of judgments in criminal law cases, its justification and functionality of the style of texts, Tbilisi, 2015, 63.

3. SENTENCES IMPOSED UNDER PLEA AGREEMENTS

The court monitoring has shown that upon entering into a plea agreement, imposition of a suspended sentence is rather frequent and is used independently or in combination with other punishments.

The chart below illustrates the percentage of the sentences imposed under plea agreements.

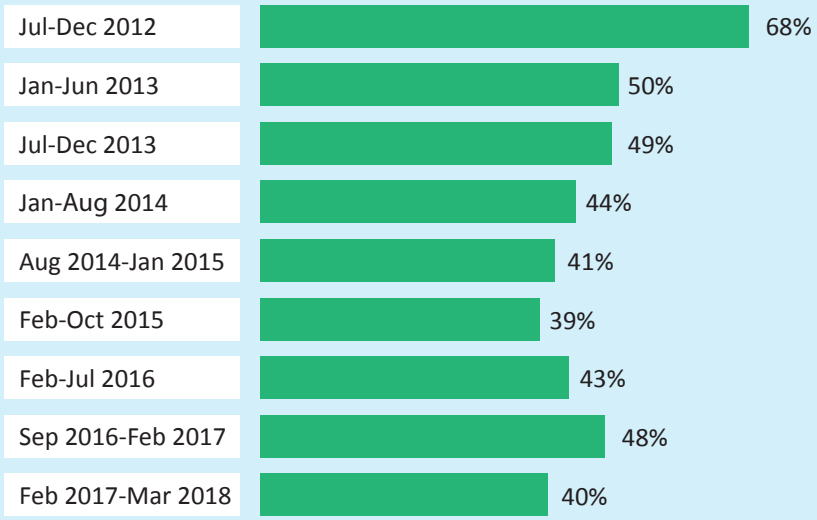
CHART N22 **SENTENCES IMPOSED UNDER PLEA AGREEMENTS (FEB. 2017-MAR. 2018)**



During this reporting period, the percentage of the defendants who were imposed a fine under plea agreements significantly decreased.

The chart below illustrates the frequency of imposing the fine in the GYLA monitoring period (from July 2012 to February 2018)

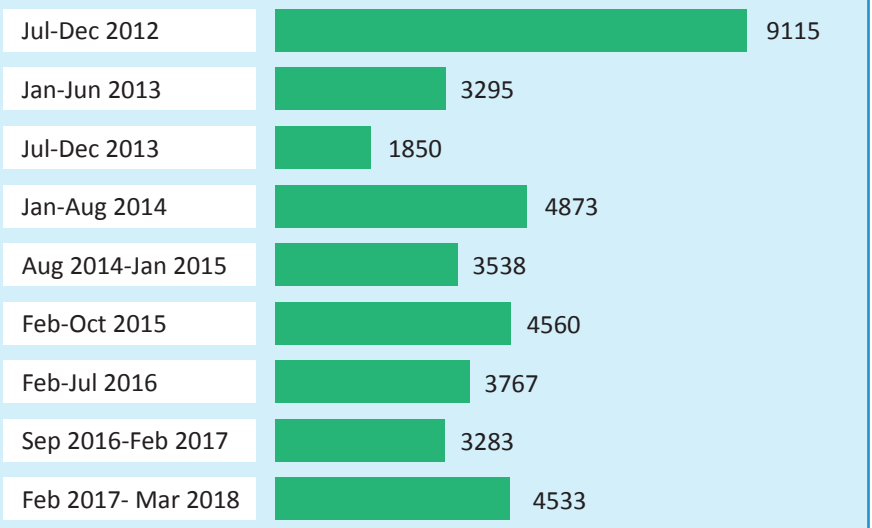
CHART N23 **PLEA AGREEMENTS IMPOSING FINES ON DEFENDANTS**



The average amount of the fines imposed under the plea agreement has increased and accounted for 4,533 GEL, while in the previous reporting period it was 3,283 GEL.

The chart below illustrates the average amount of the fines imposed under plea agreements from July 2012 to February 2018.

CHART N24 **AVERAGE AMOUNT OF FINE IMPOSED UNDER PLEA AGREEMENT (IN GEL)**



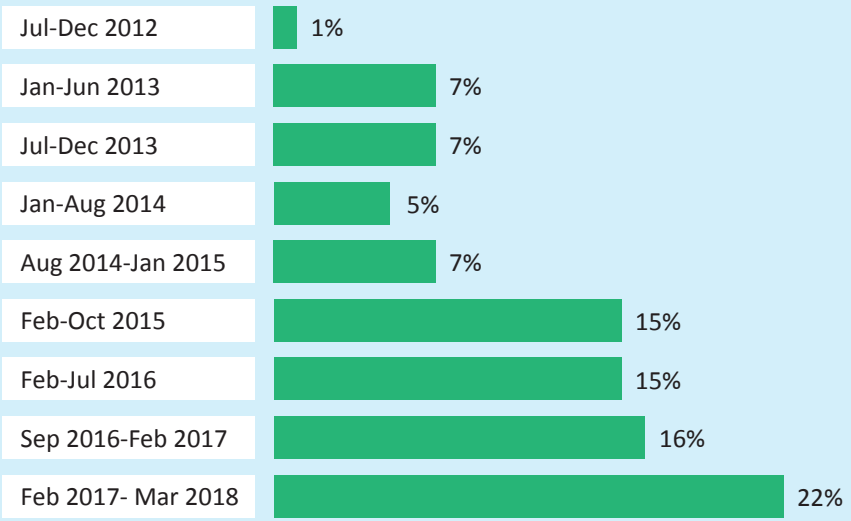
During the monitoring period, the amount of fines ranged from 1000 to 80 000 GEL, which has significantly increased in comparison with the previous reporting year.[54]

The percentage rate of imposition of community labour has also significantly increased. In the previous reporting period, the above measure was applied in 16% cases, whereas in this reporting period it was set at 22%. The 6 percentage points increase in imposition of community labour and 8 percentage points decrease in the percentage of defendants receiving fines is a welcoming fact.

54 In the previous reporting year, the amount of fines ranged from 500 GEL to 25 000 GEL.

The chart below illustrates the frequency of application of community labour under plea agreements during the GYLA monitoring period (from July 2012 to February 2018).

CHART N25 **PLEA AGREEMENTS IMPOSING COMMUNITY LABOUR ON DEFENDANTS**

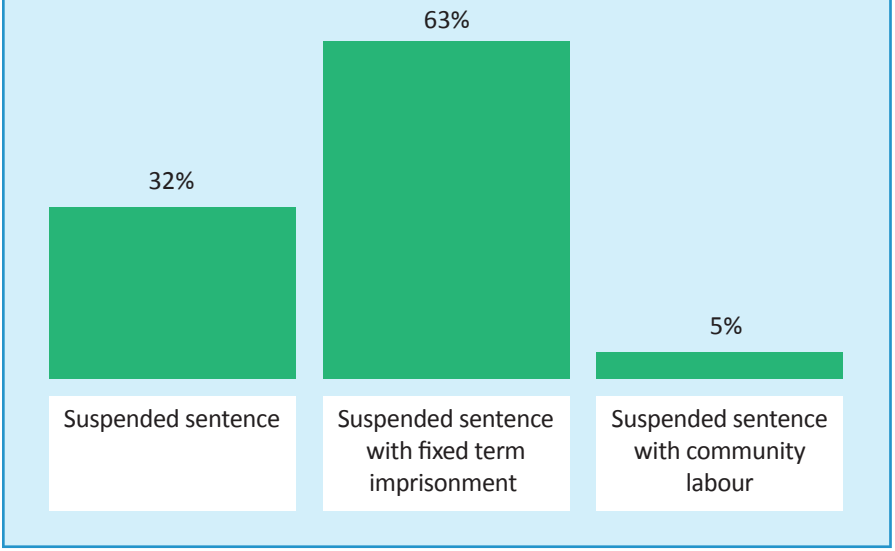


3.1. SENTENCES IMPOSED UNDER PLEA AGREEMENTS ON DOMESTIC CRIMES

As the monitoring has shown, the prosecutors entering plea agreements in domestic violence cases (Article 11[1] of the CCG) maintained an effective communication with only 3 of 19 victims, which was demonstrated by presenting the victim's opinion by the prosecutor at the court hearing.

See the chart N26 below showing the types of the sentence imposed for domestic crimes, from February 2017 to February 2018.

CHART N26 **SENTENCES IMPOSED UNDER PLEA AGREEMENTS FOR DOMESTIC CRIMES (FEB 2017-MAR 2018)**

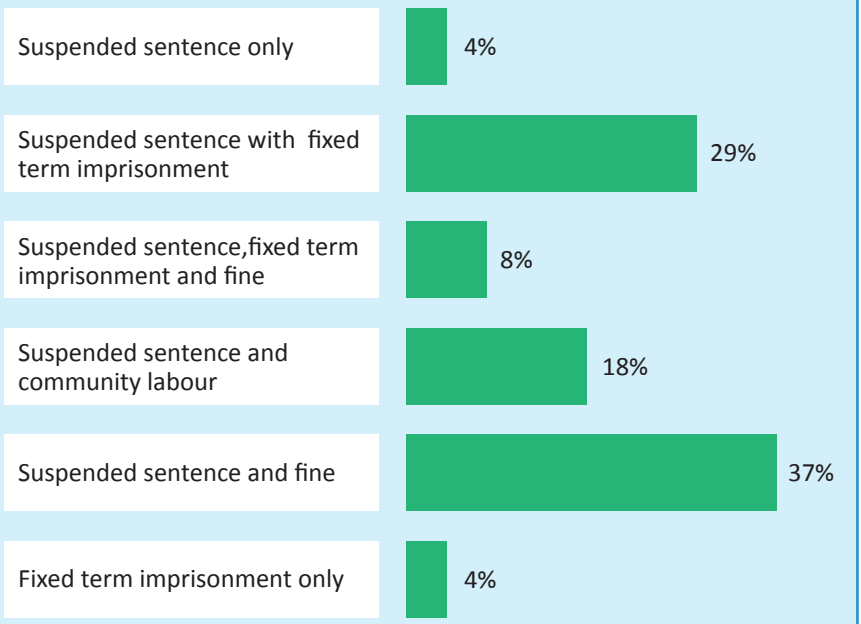


3.2. SENTENCES IMPOSED ON DRUG RELATED CRIMES

In total, 91 plea agreements were signed with defendants for drug-related crimes. Of these, 51 defendants were charged with committing the offense incriminated under Articles 260-272 (all drug-related crimes, that did not involve small quantities for personal consumption) of the CCG and the remaining 40 defendants under Article 273 and 273[1] (drug-related cases which involve small quantities for personal consumption) of the Criminal Code of Georgia. More than half of the accused persons for drug related crimes entered into plea agreements imposing a fine.

See the following chart which shows the types of the sentences used for drug related crimes under plea agreements (Note that the chart below does not reflect the types of sentences envisaged under Articles 273 and 273[1] of the CCG) from February 2017 to February 2018.

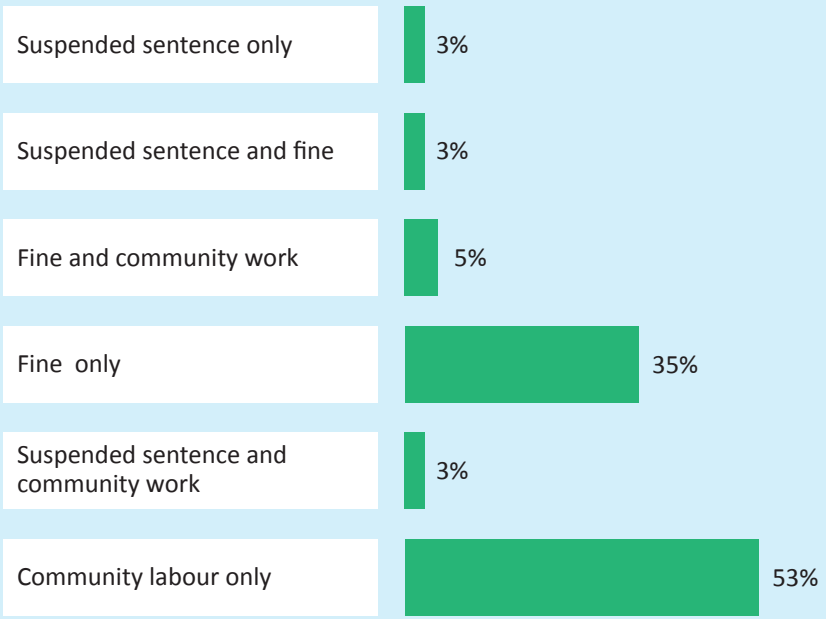
CHART N27 **SENTENCES IMPOSED UNDER PLEA AGREEMENTS ON DRUG- RELATED CRIMES (FEB 2017-MAR 2018)**



Prior to rendering the judgment of the Constitutional Court of Georgia of November 30, 2017, 38 cases had been reviewed on the crimes provided for in Article 273 and 273[1] of the Criminal Code of Georgia, and only 2 cases after delivering the above mentioned judgment.

See the following Chart N28, which shows the types of the sentences used after signing the plea agreements for the crimes provided in Articles 273 and 273[1] of the Criminal Code of Georgia from February 2017 to February 2018.

CHART N28 **SENTENCES IMPOSED UNDER PLEA AGREEMENTS ON OFFENSES PROVIDED IN ARTICLES 273 AND 2731 OF CCG (FEB 2017-MAR 2018)**



3.3. TRANSPORT RELATED CRIMES

Violation of traffic safety rules or rules for operating transport is provided for in Article 276 of the CCG. This is a negligent crime that is caused by a driver's imprudence/over-confidence. In the reporting period, plea agreements were signed with 25 defendants who were accused of committing the offense under Article 276 of the Criminal Code of Georgia.

Only in 2 transport related cases did the prosecutors present the victims' statement, which means that the prosecutor informed the victim upon the possibility of entering into plea agreement with the accused (Article 217 (1) of the CPCG).

8 cases out of 25 resulted in the loss of human life. In such occasions, it is even

more important to inform the victim's assignee that a plea agreement is planned to be signed with the defendant and the prosecutor shall take into account the position of the victim. However, GYLA's monitoring has shown that the position of victims' assignees were not voiced at any of the above mentioned court trials.

It should be noted that in one case the judge refused to approve the plea agreement as the court considered that the sentence proposed by the prosecution under the plea agreement exceeded the damage caused by the defendant's negligent act. The judge noted that the incident occurred nearly a year ago. In that time the accused have had a driving license and operated the vehicle. The judge stated that deprivation of the right to operate a vehicle was too severe and unjustified penalty for the accused.

Prosecutor's position is unclear, why the prosecutor did not submit the case on time, when all the evidences were obtained and the accused admitted the offense. By that time the accused operated the car and there was possibility that he would be drunk. Therefore, prosecutor's initial indifference and then the judge's decision to not approve plea agreement finally may cause in the accused the feeling of impunity.

To illustrate, see the following example:

The defendant was charged with committing a transport related offense, namely violation of traffic safety rules, the act committed in a drunken state, which resulted in a less serious health injury of the victim (Article 276(2) of the CCG).

The terms of the sentence proposed by the prosecution were as follows: imprisonment for up to 2 years, which would be considered as a suspended sentence for a probation period of 2 years and one year of deprivation of the right to operate a transport means.

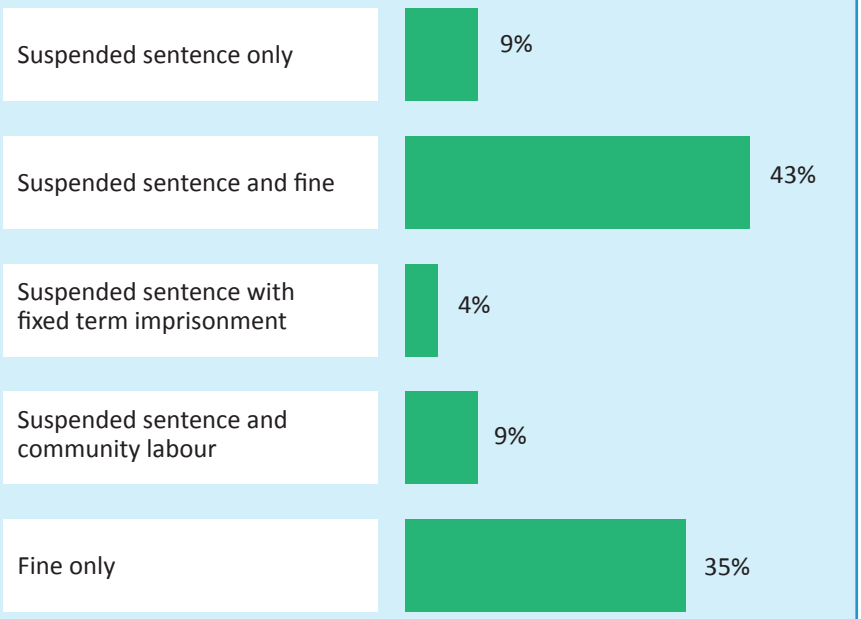
The judge thoroughly questioned the accused and found out that he worked for a private company as a driver and supported the family in that way.

The judge addressed the prosecutor: "The fact occurred nearly a year ago, and the accused still operates the vehicle as it is his official duty. Has any illegal acts been identified during this time?" The prosecutor said that no incidents had taken place. The judge declared that the terms proposed were too severe, specifically in the part of the right for operating the vehicle and returned them to the prosecutor for clarification in accordance with Article 213 § 1 of the CPCG.

The prosecutor did not alter the terms. The judge did not approve the plea agreement with the proposed terms and made the following statement: "According to the charge, almost a year has passed since the occurrence of the fact; the accused has been driving the car during this time and has not violated any traffic rules, and driving the vehicle is directly related to his official duties. Moreover, the prosecution delayed in filing the case. The Court considers that it will be too strict to use an additional measure and does not approve the plea agreement with the provided terms".

See the following Chart #N29 which shows the types of sentences used under plea agreements for transport related crimes from February 2017 to February 2018:

CHART N29 **SENTENCES IMPOSED UNDER PLEA AGREEMENTS ON TRANSPORT RELATED CRIMES (FEB 2017-MAR 2018)**



4. CONSIDERING THE INTERESTS OF VICTIMS IN THE CASES OF CRIMES AGAINST LIFE, BODILY HEALTH AND PROPERTY

Introduction

According to the law, the prosecutor shall be obligated to consult the victim before entering into a plea agreement and notify him/her of the conclusion of the plea agreement and the prosecutor shall prepare a relevant protocol/record.[55] The victim shall not be allowed to have any influence on the procedure of a plea agreement or to appeal against the agreement reached between parties, although the victim shall have the possibility to provide to the Court any written or oral information at the court session on the damage he/she has sustained as a result of crime.[56] Notwithstanding that the victim's refusal may not become an obstacle for signing a plea agreement, the prosecutor must actively cooperate with the victim and take into consideration his/her position.

Monitoring results

The interests of victims in the process of reviewing plea agreements at the court trials and involvement of the victims in the proceedings are usually neglected and/or fragmentary. In addition to the gap in the legislation, it is due to the faulty practice and less sensitive approach of prosecutors and judges. Of the plea agreement approved by the Court, 128 cases were related to life, health and property crimes, however, in 112 (87%) of those cases, plea agreements were approved so that the prosecutor did not speak about the position or interests of the victim, and therefore did not discuss them at the court session. Only in 16 (13%) cases, the prosecution submitted the protocol of consultation with the victims or voiced their positions regarding the punishment of a person, which is a halved number in comparison with the previous reporting period.[57] This indicates the trend that the victim's positions are not taken into account at court hearings.

Crimes that result in the loss of a human life require more sensitive approaches from the prosecutor and the court. In such cases, it is even more important to consider the position of the victim's assignees at the court trial. In the absolute majority of such cases, the prosecutor failed to indicate the position of victims' assignees at the court session, and this approach indicates the failure of the Prosecutor's Office to protect the best interests of victims.

55 Criminal Procedure Code of Georgia, Article 217(1).

56 Criminal Procedure Code of Georgia, Article 217(1^1 and 2).

57 During the previous reporting period, in 25% of the cases, the victim's position was examined at the court sessions or the Prosecutor presented the protocol of consultation with victims.

To illustrate, see the following example:

> The defendant was charged with the violation of construction rules that resulted in the death of 4 persons. (Article 240 (2) of the CCG).
>
> The plea agreement was signed as follows: deprivation of liberty for 2 years and the same probationary period according to Articles 63-64, deprivation of the right for supervising the safety of construction activities for a period of 1 year and 6 months as an additional punishment. The prosecutor did not present the position of the victim's assignee at the court session.

5. PARTICIPATION OF DEFENSE COUNSEL IN PLEA AGREEMENT HEARINGS

Introduction

Upon entering into a plea agreement, the legislation requires it mandatory for the accused to have a defense counsel because he/she is not able to properly oppose the prosecution.[58] From the moment of proposing a plea agreement, the main duty of the defense counsel is to provide qualified legal consultations for the accused. It is true that the defense lawyer is unable to prove the innocence of the person or propose more lenient terms for the accused, but the defense lawyer's support can be expressed in providing legal assistance and qualified counseling. The defense lawyer shall be obliged to timely and comprehensively inform the defendant of his/her rights, any anticipated risks, sentences and any legal procedures to be carried out.

Monitoring results

The problem of communication between defense counsel appointed at the expense of the state and defendants is still alarming. At 72 (48%) plea agreement hearings, communication was problematic between the defense counsel and the defendants. The lawyers were appointed at the expense of the state in 52% (150) cases. It is also noteworthy that the problems of communication between the lawyers hired by the accused and the defendants was minimal, namely there were 5 cases out of 147 where the defendant and the defense lawyer did not communicate efficiently.

The court trial monitoring revealed unethical, defective activities and dishonest attitude of defense lawyers towards protecting the best interests of defendants. Moreover, in few cases the defense counsel – appointed by the state together with the prosecutor placed the defendant under psychological pressure to enter into a plea agreement.

58 Criminal Procedure Code of Georgia, Article 45(f).

To illustrate the aforementioned, see the following example:

» There was a case when the prosecutor and the defense lawyer were coercing the defendant to sign a plea agreement.

The defendant did not understand Georgian well. Accordingly, the judge appointed an interpreter at the court trial and announced a break. The prosecutor and the defense lawyer talked with the accused and subjected him to psychological pressure by asking the following questions: "Do you know what a criminal offense means? Do you know what the right to silence is? The prosecutor and the lawyer knew that even Georgians could not answer the questions thoroughly. The prosecutor: ''You have found someone who has informed you about the investigative actions, right? For example, you gave a testimony to your lawyer and told him what had happened, and then you were read out this, right? And was there written exactly what you were told? "(The prosecutor knows very well that the defendant does not understand Georgian language). The defendant did not reply to the questions asked, and the defense lawyer addressed to him with a relatively demanding tone, "Speak out, why, are you ashamed? Answer, yes or no, so that the court becomes convinced".

The prosecutor and the defense counsel finally came to the consensus during the break time that the defendant would refuse the service of the interpreter.

The judge, having heard the request of the defendant, asked the interpreter to withdraw from the courtroom. The GYLA monitor got an impression that the defendant did not grasp the questions asked.

Based on the above mentioned, allegedly, it seems that during the investigative proceedings the accused did not enjoy the right to interpreter's service free of charge during interrogations and other investigative procedures, if the defendant does not have or has insufficient command of the language of trial or has any physical disability that does not allow him/her to communicate without an interpreter (Article 38(8) of the CPCG). Since the interpreter's service had not been used during the investigative actions, it is interesting how the defendant understood his rights when the accused did not even understand the meaning of the word silence. Based on the above, it is likely that the interpreter was deliberately withdrawn from the court proceedings or otherwise the issue of lawfulness of the investigative actions conducted would come out.

» The defendant was charged with hooliganism (Article 239(2) of the CCG). Prior to the start of the trial, the defendant changed his position and told the prosecutor that he was a shepherd and most of his time he spent with the sheep and he had to stay away from the city, therefore, he would not be able to turn up at the probation agency systematically throughout the year.

Having heard the statement, the intern-prosecutor got angry, and after communicating with the superior prosecutor, tried to put the accused under psychological pressure forcing him to sign a plea agreement.

The defense lawyer acted unethically towards the accused. Prior to the start of the court trial, the defendant declared that he did not want to be placed under a suspended sentence, which angered not only the prosecutor but also the defense counsel, who addressed the defendant in the following way: "Then why have you requested for my appointment? You were there and applied your signature, right? What do you mean you do not want it anymore?" The defense lawyer addressed the accused loudly: "Do not shout, no one is afraid of you here." Taking into consideration all this, the defense lawyer grossly violated the rights of the defendant and acted against his best interests.

X. ADMISSIBILITY OF EVIDENCE AT PRE-TRIAL SESSIONS

1. BRIEF OVERVIEW OF THE LEGISLATION

At pretrial hearings, the court examines the admissibility of evidence that will be reviewed at hearings on the merits. This stage is of vital importance as the court delivers a judgment at the main hearing based on the evidence which have been deemed admissible. In addition, at this stage the court renders a decision to terminate a criminal persecution or continue the proceeding at the main hearing.[59] It should be noted that the grounds for termination of prosecution can be not only insufficiency of evidence, but also substantial violation of the procedural law.

The court ruling rendered about a motion submitted at the pre-trial session shall be impartial and without prejudice to the interests of either party. The right of a defendant to impartial proceedings has been recognized by Article 84 of the Constitution of Georgia, Article 6 of the European Convention of Human Rights,

59 The court shall terminate a criminal proceeding if it discovers a high degree of likelihood that the evidence submitted by the Prosecutor's Office fails to confirm the commission of a crime by the accused.

and is guaranteed under the Criminal Procedure Code of Georgia.

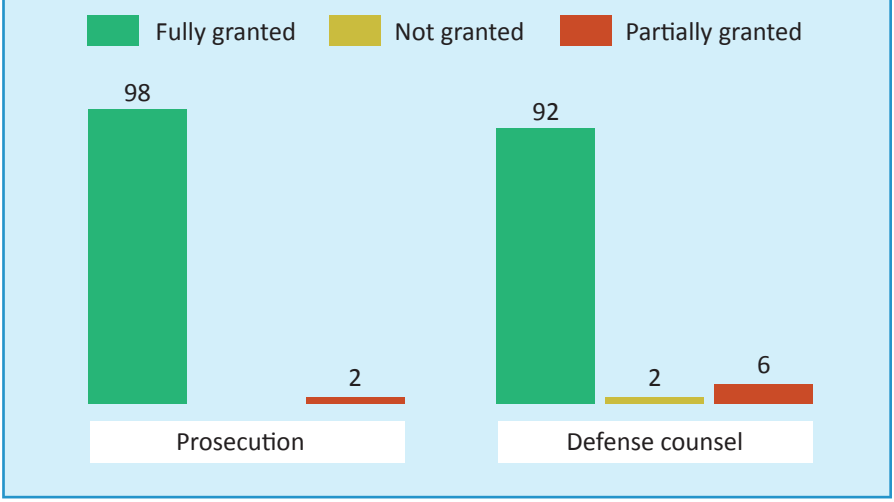
GYLA identified the trends at preliminary hearings which demonstrate the approach of the prosecution and defense counsel to admissibility of evidence.

2. ANALYSIS OF COURT SESSIONS

At the pre-trial hearings, in the part of admissibility of evidence, partiality or biased attitude of judges towards one of the parties has not been observed in the majority of cases. The courts, in general, equally granted motions of both the prosecution and defense counsel on the admissibility of evidence.

The chart below illustrates the percentage of the judgments delivered by the court on admissibility of evidence presented by the prosecution and the defense counsel in the monitoring period from February 2017 to February 2018.

CHART N30 **COURT JUDGMENTS ON ADMISSIBILITY OF EVIDENCE (FEB 2017 - MAR 2018)**



In few cases, the judges delivered decisions in favour of the defense and tried to protect the best interests of defendants. However, there was a case observed when the judge protected the defendant's rights, whereas the defense lawyer spoke contrary to the defendant's will.

To illustrate the aforementioned, see the following example:

> At the pre-trial session, the defense lawyer declared that accused did not challenge the evidence presented by the prosecutor. The judge asked the lawyer: "The accused does not plead guilty and how come that you do not challenge the evidence? So, let's ask the defendant himself. "
>
> The defendant declared: "it was not intentional" (the accused meant the charge); Having heard the abovementioned statement of the defendant, the judge announced the verdict:
>
> "... based on the position of the defendant he challenges all the evidence."

It is interesting that during the reporting period there was no case at the pre-trial hearing when the judge terminated the criminal persecution.

Two cases were reported where the court could have refrained from handing the case proceedings to the merits due to the minor damage inflicted but did not do so. The rationale for prosecutor's approach in these cases was also unclear i.e. when there is a little damage, the victim does not express a strong position, the person has not been previously convicted and has not committed a violent act, it should not be necessary to carry out a criminal proceeding, to file the case with the court and waste the time and resources

To illustrate the aforementioned, see the following example:

> The defendant was charged with the offense incriminated under Article 19, 177 (1) of the CCG (an attempt of theft). The accused had never been previously convicted. The alleged damage inflicted on the shop amounted to 20 GEL. The defendant did not have a defense counsel at the trial.
>
> The prosecutor presented the evidence and requested the case to be considered at the main hearing.
>
> The Court did not even discuss Article 7(2) of the Criminal Code of Georgia, which envisages release from criminal liability due to a minor damage. The court granted the prosecutor's motion and handed over the matter to be heard at merit.

Motions of the prosecution regarding the admissibility of evidence:

The prosecution, wherever it was possible,[60] submitted motions on the admissibility of evidence in 426 cases. 283 (66%) defendants out of 426 pre-trial hearings, which reviewed the issue of admissibility of evidence, had a defense counsel.

The position of the defense counsel concerning the prosecutor's motions on the admissibility of evidence:

- In 377 (89%) cases fully supported the admissibility of evidence;
- In 35 (8%) cases partially agreed with the prosecution on the admissibility of evidence;
- In 14 (3%) cases fully opposed with the prosecutor's motions.

In comparison with the previous reporting period, the defense counsel is significantly more active with respect to motions submitted by the prosecution on admissibility of evidence,[61] namely opposition to the motions has increased from 3% to 12%. However, the defense lawyers' activity is less efficient with regards to protecting the rights of defendants at court hearings. It is necessary that the defense lawyer and the defendant have a well thought and agreed position in order to guarantee the protection of the best interests of the defendants by the defense counsel.

Motions of the defense counsel regarding the admissibility of evidence:

The defense counsel submitted evidence before the courts only in 88 (21%) cases and requested recognition of its admissibility. Of these, the prosecution fully agreed with the defense counsel on the admissibility of the evidence in 68 cases (77%), partially agreed in 12 (13%) cases, and in 8 (10%) cases motioned for the inadmissibility of the evidence submitted by the defense. In comparison with the previous reporting period, defense counsel is slightly more active with respect to demanding the recognition of admissibility of evidence submitted by the prosecution.[62]

Preliminary court hearings, like in the previous reporting periods, were conducted without any incidents. The courts did not demonstrate any biased or unfair attitudes towards either party.

In one case, based on the motions presented by the defense counsel, the judge returned the case to the prosecutor for the purpose diversion for the accused.

60 From 444 pre-trial hearings 14 court sessions were postponed, and at 4 court sessions the prosecutor could not present the evidence as it was the second hearing of the pre-trial session.

61 During the previous reporting period, in 3% of the cases the defense counsel motioned for recognizing inadmissible the evidence submitted by the prosecutor.

62 During the previous reporting period, the defense counsel presented a motion on admissibility of evidence in 17% cases. Now this rate has increased up to 21%.

In accordance with the Code of Juvenile Justice of Georgia, for the purpose of diversion, the court may, on its own initiative or on the basis of a reasoned motion of a party, return the case to the prosecutor who will offer diversion to the accused minor and, in the event of the minor's consent, shall decide on diversion.[63] This regulation also applies to persons aged 18 to 21.[64]

The above case is the example of the decision rendered in favor of the best interests of the person, and deserves a positive assessment.

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

1. BRIEF OVERVIEW OF THE LEGISLATION

Searches and seizures represent a massive interference in the right to privacy of a person, on the basis of which items, documents, substances or other means containing information relevant to the case are searched, seized and applied to the case. Due to the above mentioned and in accordance with the law, searches and seizures are mainly conducted on the basis of a prior court ruling. However, if the situation of urgent necessity arises, when even a little delay of conducting search and seizure may result in irreversible consequences, the investigative actions may be performed without a prior court ruling, based on an order of a prosecutor or an investigator.[65] Thus, the legislator requires that searches and seizures under urgent necessity be carried out only in exceptional cases, and the main requirement prior to the start of investigative actions tobe a court ruling.

It is important that the prosecution bodies, before execution of a search or seizure, should follow the general rules of conducting the investigative actions and apply for a court ruling in all possible cases. The above mentioned investigative action without a court ruling shall be carried out in exceptional situations, when the delay may threaten the outcome of the search or seizure.[66] In addition, the prosecutor shall substantiate the urgent necessity and only hypothetical assumptions or unrelated suppositions are not sufficient to confirm the urgent necessity.

Besides the prosecution, the legislation also obliges the court, instead of giving abstract orders, to examine whether there was an urgent necessity and whether the prosecution authorities had the right to initiate investigative actions without

63 The Law of Georgia "On Juvenile Justice Code", Article 39(2).
64 The Law of Georgia "On Juvenile Justice Code", Article 2(1).
65 Criminal Procedure Code of Georgia, Article 112 (1 and 3).
66 Schwabe, I., Decisions of the German Federal Constitutional Court, Tbilisi, 2011, 238.

the prior ruling of the court. The liability of the justification applies not only to a court judgment, but also to any ruling of the court,[67] including judgments delivered concerning the search and seizure.

2. ANALYSIS OF COURT SESSIONS

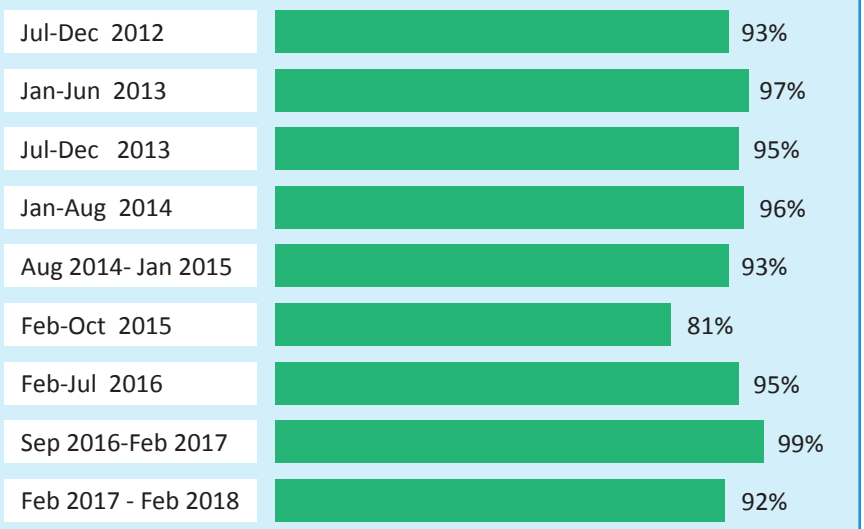
The monitoring has shown that the Prosecutor's Office still carries out searches and seizures without due observance of the general rules and often uses the rule of exception for conducting investigative actions. Compared to the previous reporting period, the number of searches and seizures on the ground of urgent necessity as well as the percentage of legalizing such cases has slightly decreased. However, the above mentioned requirement of the law on conducting searches and seizures in only exceptional cases on the ground of pressing necessity is not fulfilled.

In 245 cases out of 426 pretrial sessions, the prosecutor submitted a protocol of the search and seizure and requested its addition to the case as evidence. In 90 cases it is unknown how the searches and seizures were carried out.However, based on the motions of the prosecution and other circumstances presented at the sessions, it was confirmed that searches and seizures were carried out under a prior court ruling only in 13 (8%) cases out of the 155 cases where the basis for the search could be determined, and in 142 (92%) cases the basis for the search was on the ground of urgent necessity. In the reporting period, the court rejected to accept evidence and did not grant the motions of the prosecutors on the seizure in 2 (1%) cases.

67 Treksel, Sh, "Human Rights in Criminal Procedure," Tbilisi, 2009, 126.

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

CHART N31 **COURTS LEGALIZING SEARCHES AND SEIZURES CARRIED OUT UNDER URGENT NECESSITY**



It was impossible to determine if the legalization of searches and seizures conducted on the ground of urgent necessity was substantiated by the courts or not, since such cases are not generally reviewed at oral court hearings. However, the fact that 92% of the investigative actions were conducted in a exceptional manner and were only legalized after their completion raises questions whether law enforcement authorities and the courts performed their responsibilities properly, according to which they are not allowed to conduct or legalize any investigative actions which are not well grounded and are conducted on the basis of urgent necessity.

Thus, there are doubts that the frequent use of the rule of exception by the Prosecutor's Office and subsequently, legalization of almost all such cases by the court leads to abuse and dishonest application of the legislative provision. Rule of exception provided in the law became a frequently used norm in practice, which is obviously incompatible with the law.

XII. TRENDS IDENTIFIED DURING THE MAIN COURT HEARINGS

1. DELAYING OF COURT SESSIONS

1.1. BRIEF OVERVIEW OF THE LEGISLATION

The right to expedite justice within a reasonable timeframe is an important right stipulated in a number of international treaties or acts. This right is protected by the European Convention on the Protection of Human Rights and Fundamental Freedoms,[68] as well as the International Covenant on Civil and Political Rights[69] and the Universal Declaration of Human Rights.[70] In addition, the Decision of the Council of Ministers 5/06 is also important, under which "the states shall pay attention to [...] effective implementation of justice and to proper management of the judicial system."[71] The importance of implementing expedited justice is also highlighted by the United Nations Human Rights Committee.[72]

The issue of expedited justice has repeatedly become the subject of discussion of the European Court of Human Rights.[73] According to the case law, it has also been established that the local legislation shall ensure a separate trial that would be an effective means for avoiding the delay of the process and the absence of such protection would be in itself a violation of Article 13.[74]

According to the Criminal Procedure Code of Georgia, the accused has the right to the expediency of justice, which should be implemented within the time limits prescribed by the law. In addition, a person has the right to relinquish this right if so required for the proper preparation of the defense. The court is obliged to prioritize the review of the criminal case in which the accused has been remanded to custody.[75] According to the same Code, a court of first instance shall render a judgment not later than 24 months after the judge in the preliminary proceedings makes a decision to refer the case for a main hearing.[76]

There are cases when criminal cases are delayed for years, no specific judgments

68 The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 (1)
69 International Covenant on Civil and Political Rights, Article 14 (3) (c)
70 Universal Declaration of Human Rights, Article 10
71 Decision of the Council of Ministers 5/06, Fourteenth Meeting of the Council of Ministers in Brussels, (2006)(4).
72 General Comment No.32, the quote from the paper, Article 113, par. 27 and 35
73 ECHR , Philis v. Greece (no. 2) judgment of 27 June 1997, Portington v. Greece judgment of 23 September 1998, PANEK v. POLAND, Application no. 38663/97
74 ECHR, KUDŁA v. POLAND, Application no. 30210/96
75 Criminal Procedure Code of Georgia, Article 8 (2,3).
76 Criminal Procedure Code of Georgia, Article 185(6)

are delivered, and justice is not properly implemented. Reviewing the cases with complete ignorance of timeframes violates both the requirements in the Criminal Procedure Code of Georgia, as well as important international standards of expedient and effective justice.

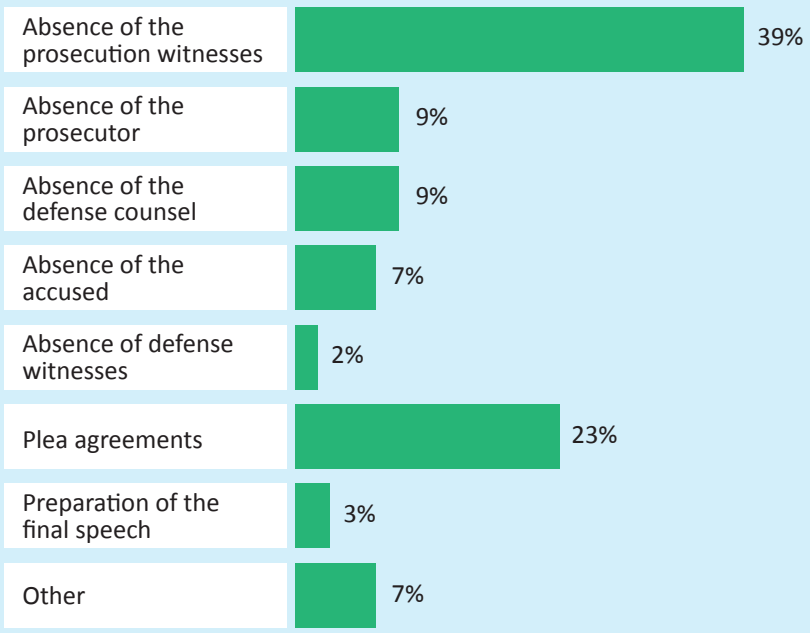
GYLA's monitoring has identified many cases of delaying and postponement of court hearings, which are the most serious factors for prolongation and delay of case deliberations.

1.2. POSTPONEMENT OF COURT TRIALS

During the reporting period, a number of case proceedings were postponed where the postponement was not sufficiently substantiated, and sometimes, we can say directly, served for the case delay. Of 982 main court hearings attended by the GYLA's monitors, 463 (47%) cases were adjourned immediately after their opening so that none of the procedures provided for in the law were carried out.

The chart below shows the reasons for postponement of court trials.

CHART N32 **REASONS FOR POSTPONEMENT OF COURT HEARINGS (FEB 2017-MAR 2018)**



- As regards the reasons for adjourning the hearings, frequently the objective reason for the same is the absence of the prosecution witnesses - 39% (181 court hearings). In majority of the cases, the prosecutor declared that he/she was not able to present the witnesses and did not add any further information. Several court hearings were adjourned due to the above reason. To illustrate the aforementioned, see the following example:

> In one case, GYLA's monitor attended 5 hearings on the merits, 4 of which were postponed, one due to the absence of the defense lawyer, and 3 court sessions were postponed due to the absence of the prosecutor's witnesses. The 4 postponements delayed the case 7 months.

According to the Criminal Procedure Code of Georgia, the parties shall be obliged to ensure the appearance of their witnesses before the court.[77] If a witness refuses to appear before the court, a party may file a motion requesting to summon its witness to a court session and if granted, the court shall summon the latter, and if the person summoned fails to appear in the court, he/she may be compelled to appear.[78]

Consequently, if the prosecutor fails to present his/her witnesses before the court, the judge shall use the mechanisms envisaged in the law in order to prevent the delay of proceedings. Besides this, it is often unknown whether the prosecutor summoned witnesses within a reasonable timeframe or whether the party showed indifference or negligence to presentation of witnesses.

- 23% (106 court hearings) of the court sessions were postponed for the reason of conclusion of plea agreements. In a number of cases, plea agreement discussions were named as the reason for adjourning the court hearings but it was not a real cause. It is true there were the cases when a plea agreement was the real reason, but the parties inadequately dealt with the issue and did not try to accelerate the negotiation process and conduct it without delay. To illustrate the aforementioned, see the following example:

77 Criminal Procedure Code of Georgia, Article 228 (1)
78 Criminal Procedure Code of Georgia, Article 149

In one case, the hearing on the merits was postponed five times in a three-month period, once due to the absence of the defense lawyer, the second time due to the absence of the prosecutor's witnesses and in three cases, the negotiations about plea agreements were named as an excuse. Within the three-month period, the defense counsel and the prosecutor could not reconcile their positions on the plea agreements, which eventually prevented the implementation of expedite justice.

• 18% of the court trials, in total 83, were adjourned due to non-appearance of the prosecutor (9%) or the defense counsel (9%). There were occasions when the parties to the proceedings did not notify the court and missed the court sessions, which undoubtedly hindered quick and effective implementation of justice. To illustrate the aforementioned, see the following example where the defense counsel missed the court sessions and failed to notify the court:

The defense counsel failed to turn up at the court session for the second time successively. The defendant said that a few days earlier the lawyer had informed him that he was going on holiday to the seaside and would not be able to appear at the trial. The defendant said that the attorney had told him/her that he would notify the court on the matter. The judge said that the court neither received a notification, nor the defense lawyer informed the court upon her non-appearance. The prosecutor requested imposition of a fine on the defense lawyer and to proceed with the court hearing, but the court adjourned the court session without penalizing the defense lawyer.

In accordance with Article 91(8) of the CPCG,[79] the judge is entitled to impose a fine on the defense counsel in the amount up to 100-500 GEL, and it is unclear why the court did not exercise the right.

• 7% (33 court hearings) of the court sessions were postponed due to the absence of defendants. The reason for the delay of three court hearings was the fact that the Penitentiary Department failed to arrange the transportation of the accused from the penitentiary establishment to the court due to the lack of necessary resources. The Penitentiary Department shall have the obligation to bring a defendant before the court, and insufficient resources cannot serve as an adequate excuse for the

79 In case of absence of a participant to a case proceeding at the court session without a good reason, the chairperson of the court hearing may impose a fine from 100 GEL to 500 GEL, which does not relieve the participant from the obligation to appear before the court. The amount of the fine shall be of a restraining nature, proportionate to the damage caused and shall be in compliance with the financial condition of the person.

non-fulfillment of the above responsibility.

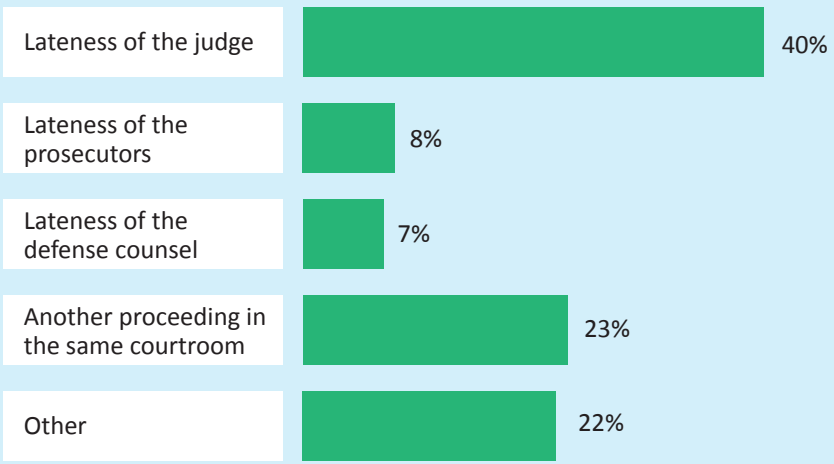
1.2.1. Delayed opening of court hearings

As regards the delay, the GYLA's court monitoring has shown that in 31% (306 court hearings) of the 982 cases, the deliberation of the cases started late. 37 court hearings were delayed for more than an hour.

It is noteworthy that the delay of court hearings is not usually discussed. Neither parties nor judges make any relevant explanations about the delay and generally tardiness is perceived as a less important matter. However, delaying the court hearings for more than one hour leads to a number of problems and ultimately contributes to prolongation of the process.

The following chart shows the reasons for delaying court hearings.

CHART N33 **REASONS FOR DELAYING COURT HEARINGS (FEB 2017-MAR2018)**



Consequently, we believe that late appearance of parties and postponement of court hearings impedes the implementation of expedient justice and creates a serious basis for delaying of court proceedings.

2. INTERFERENCE WITH THE EQUALITY OF ARMS AND ADVERSARIAL PROCESS

2.1. INTRODUCTION

Equality of arms and the adversarial process are the key principles reinforced by the Constitution of Georgia[80] and the provisions of the Criminal Procedure Code of Georgia.[81] The current Criminal Procedure Code of Georgia is based on the principles of equality of arms and the adversarial process, which means that collecting and presenting evidence is the responsibility of parties. A court shall be prohibited from independently obtaining and examining evidence.[82] In addition, the judge is not permitted to interrogate witnesses. In exceptional cases, a judge may ask clarifying questions if required for ensuring a fair trial and when consented to by a party. This is justified with the argument that the judge in the adversarial criminal proceedings shall play the role of a neutral arbitrator, and this contradicts the rule of interrogating a witness, since a question may serve the interests of either party.

2. 2. ANALYSIS OF COURT SESSIONS

The monitoring during the reporting period revealed that judges in the majority of cases do not exercise the right of asking questions. However, in few cases the judge asked questions without obtaining permission of the parties or otherwise interfered with the competence of the party.

The witnesses were interviewed at 339 court hearings, in 67 (20%) cases questions were asked by the judge. In 42 (63%) cases, the judge did not obtain the permission from the parties before asking the questions. To illustrate, see the following example, where the court asks the question despite the objection of the party:

> The defense lawyer objected to the judge questioning the witness, but the prosecutor said he did not mind. The judge, without any explanation and consideration of the defense counsel's position, asked the question to the witness.

14 (21%) questions in 67 cases were asked by judges not for the purpose of confirmation, but were completely of a new content, and actually the witnesses were re-interrogated. To illustrate the aforementioned, see the following example:

80 The Constitution of Georgia, Article 85(c)
81 Criminal Procedure Code of Georgia, Article 9
82 Criminal Procedure Code of Georgia, Article 25 (2)

» The judge asked the witness: "Do you walk from one room to another though the door? or is there another exit?" The judge also asked the witness whether he had been convicted and/or was under a suspended sentence.
» When interviewing the expert, the judge, in the middle of the interrogation, without obtaining the consent of the parties, asked the witness whether the damage inflicted with a stone could have been visible on the victim's body.

In few cases the court ironically and in an unceremonious manner addressed the party while interviewing the witness. (e.g. the case when the judge addressed ironically to the lawyer who was interviewing the witness: "*What will you get with this question*? *Are you wasting our time? Why can't you see, he won't answer.")*

There was a case when the judge insulted the defense lawyer:

The judge addressed to the defense counsel "Based on your leave certificate and your position, I will appoint the next court session within one week. I hope next time you will not appear like a **"low-grader"** child and announce you are unprepared. "

There were some cases of violation of the principles of adversariality and equality of arms at the court sessions, which was expressed by inadequate exercising of the right of asking questions by judges or interference within the competence of parties.

3. USE OF VISUALLY DEGRADING MEASURES AGAINST DEFENDANTS

One of the forms of violation of presumption of innocence is the use of visually degrading conditions against defendants, since the application of such security measures creates an impression that defendants are dangerous criminals from which the society needed to be protected, which harms the principle of presumption of innocence.[83] This issue has been pointed out in the OSCE/ODIHR Trial Monitoring Report. According to the United Nations Human Rights Committee, any person charged with a crime shall be treated in accordance with the principles of presumption of innocence, which implies that "defendants shall not be hand locked and placed in the enclosure during court proceedings or present before the court as dangerous criminals."[84]

The European Court of Human Rights refers in some of its decisions to issues of

83 OSCE/ODIHR, Trial Monitoring Report Georgia,(108)
84 General comments N.32, quote from the paper, Article 113,(30).

treatment of defendants during the proceedings, which could potentially contradict the presumption of innocence and cause degrading treatment towards a person. For instance, in one case it has been established that the use of iron cage in the court trial can lead "an average observer to believe that an extremely dangerous criminal is on trial"[85] and the Court concluded that such measure would never be justified by the provision of Article 3 of the European Court of Human Rights, because it amounted to the degrading treatment.[86"87]

During the reporting period, the use of visually degrading measures were observed in respect to detained defendants. The detained defendants were presented at court hearings on the merits in 350 cases, and in 40% of the cases (140 court hearings) glass box was used for placement of the accused.

Although in most cases the use of the above-mentioned measures against the defendants can be related to safety precautions, the proceedings still created the impression that the risks that could have been the basis for the use of such measures had not been adequately measured and assessed at the individual level. Namely, the behavior of the defendants was not inadequate or aggressive towards the court, nor were there any criminal background or other circumstances that would pose a potential threat.

> During the court hearing, the accused was placed in a cage. The reason for the use of the cage is unknown, the defendant was not aggressive, and there was only his mother, his spouse and several relatives in the courtroom. Due to the specific nature of the crime, the case did not have the victim (the accused was charged with illegal carrying of firearms under Article 236 of the CCG).

The above mentioned case raises the suspicion that degrading measures are used without assessment of the individual circumstances and threats. The above measure must be allowed only when there is an obvious and real threat that the defendant may attempt to escape or carry out any other unlawful act.

4. COURT JUDGMENTS

During the court monitoring, GYLA's monitors attended 982 hearings on the merits, and in 191 (20%) cases court rulings were delivered: 178 (93%) guilty verdicts, 3

85 Piruzyan v. Armenia,ECtHR, 26 June 2012, Article 73.

86 The above. Article 74 and Sviridenko and Slidenov v. Russia, ECtHR, 17 July 2014, Article 137-138. See Also, Ramishvili and Kokhreidze v. Georgia, ECtHR, 27 January 2009, Article 100-101 where the court criticized the metal enclosure of defendants' chairs and unjustified presence of "special security guards" at public hearings, and the Human Rights Committee No. 1405/2005, Mikhail Pustavoit v. Ukraine Article 9.2, 9.3 and 10 where the use of iron cage was deemed as the violation of Articles 7 and 14 (30 (b) with Article 14 (1) of ICCPR.

87 OSCE/ODIHR, Trial Monitoring Report Georgia, Article 99.

(2%) partial acquittal and 10 (5%) acquittal. In the previous reporting period, GYLA saw no acquittal verdicts, out of the 67 cases, where court decisions were revealed.

The chart below illustrates the types of the sentences imposed under guilty verdicts.

CHART N34 **TYPES OF SENTENCES IMPOSED BY MAIN COURT HEARINGS (FEB 2017-MAR2018)**

The GYLA monitors attended 10 court hearings on drug related crimes - Illegal manufacturing, production, purchase, storage, transfer or sale of drugs, (Article 260 of the CCG), where the judges rendered judgments. In 8 cases, the guilty verdicts with fixed term imprisonment were delivered against all defendants, and in 2 cases the accused were acquitted. As for offenses under Articles 273, 273[1] (drug-related crimes - small quantity for personal consumption) of the Criminal Code of Georgia, the verdict was delivered for 9 cases, and all nine defendants were imposed a fine.

5. TRENDS IDENTIFIED AT MAIN HEARINGS ON DOMESTIC VIOLENCE, DOMESTIC CRIMES AND VIOLENCE AGAINST WOMEN

5.1. MONITORING RESULTS RELATING TO EXAMINATION OF DISCRIMINATORY MOTIVES

Examination and assessment of gender-related crimes remains a significant challenge for the Prosecutor's Office and judicial authorities. The monitoring has revealed that, in some cases, there were grounds to be investigated whether the offense was motivated by gender inequality, opinion on women's gender role or stereotypical attitudes. The Prosecutor's Office as well as the judicial authorities failed to pay attention to such facts, and in only two cases did the prosecutor speak about the alleged discriminatory motives.

There were cases where the defendant explained that he insulted the victim (former wife) as she acted inappropriately after the divorce. A father physically assaulted his daughter because she posted a photo on a social network that, as he believed, did not fit a decent girl's behavior. There was a case when the defendant demonstrated possessive attitude towards his former spouse when the victim refused for the third time to reconcile with him, and the defendant beat her because of this. In such cases, the circumstances that indicate the gender discriminative motives are clearly manifested, however, the prosecution failed to focus on the aspect.

In one of the court hearings where the victim was a transgender woman, the defendant's defense counsel was unethical and discriminatory towards the victim:

> "The woman or excuse me, a man that is a woman as well, I don't know, it is called transgender, isn't it? I do not want to make a mistake, not to mess up the terms and become the object of blame". "… He is a man and is wearing a woman's dress."

It is true that the prosecutor referred to the allegation of intolerance on the grounds of gender identity (Article 53[1] of the CCG) in this case, but the attitude of the defense lawyer further strengthens the negative attitude of the society to vulnerable groups and supports the stereotypes.

5.2. SENTENCES IMPOSED BY THE COURT IN THE CASES OF DOMESTIC VIOLENCE AND DOMESTIC CRIMES

Often guilty verdicts are delivered on the cases of domestic violence and domestic crimes. The courts usually conclude that a crime has taken place, but the judicial activity is not effective at all since the court limits itself to imposition of inadequately lenient sentences.

During the reporting period, the GYLA monitors attended 73 case hearings on the merits in domestic violence and domestic crimes for which the judgments were rendered. In 69 (95%) of the cases, the judge delivered guilty verdicts.

Although guilty verdicts were delivered in 95% of cases, adequacy and effectiveness of the sentence is problematic. In 35 (51%) cases out of 69, the court sentenced the defendant to community labour, 14 defendants (20%) were imposed a suspended sentence and probation period, and 17 (25%) persons were imposed the fixed term imprisonment. Analysis of these 17 cases has shown that the fixed term imprisonment was used for the offenses where violence occurred repeatedly, for which a restraining order had been issued previously, and/or a person had been convicted in criminal proceedings for several times.

There were many cases, especially in Kutaisi City Court where only a term imprisonment could eliminate the threat of continuing violence, however the judge

considered otherwise. To illustrate the aforementioned, see the following example:

» The defendant was accused by the Prosecutor's Office of committing a domestic crime (Article 126[1](2), (e) of the CCG). The defendant hit his former spouse in her face, as a result of which she fell to the ground. The accused had been convicted multiple times for domestic violence and a restraining order had been issued against the defendant. The victim and the defendant did not reconcile and the victim had complaints against the defendant. The court imposed community labour as a type of punishment.

» The defendant physically and verbally abused his former spouse. On the same day, the defendant returned to his ex-wife's house and physically assaulted the former spouse's mother (Article 126[1] (two episodes) of the CCG). The court imposed community labour as a punishment.

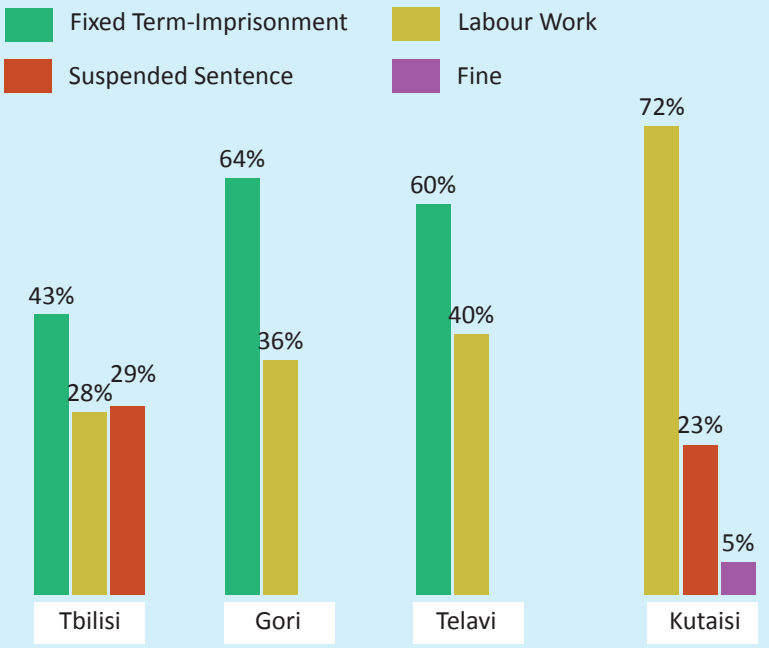
Acquittal verdicts were rendered in 4 domestic cases, which was due to the fact that the witness for the prosecution – the victim in the case - refused to testify against her husband. In such cases, prosecution and law enforcement authorities must work efficiently and seek other witnesses and evidence, and should not rely merely on the victim's testimony.

During this reporting period, the judge did not use imprisonmet in several cases and indicated this was because the defense did not challenge the admissibility of the evidence. Consequently, the recognition of evidence is one of the mitigating circumstances at the time of imposition of punishment by the courts. 47 (76%) accuseds charged with commission of a domestic crime admitted to the offense and the defense did not challenge the evidence presented.

It should be noted that in 45 out of 73 cases judgments were rendered by Kutaisi City Court. This is due to the fact that Kutaisi City Court is conducting only one hearing on the merits per case of domestic violence and renders a decision at the same hearing. In other cities such practice is not established. This is the reason why in other cities monitors attended a small number of hearings on the merits, where the judgments rendered: 15 judgments in Gori District Court; 7 – in Tbilisi City Court; 5 – in Telavi District Court and only one in Batumi.

See the following Chart #N35 which shows the types of sentences used on domestic crime cases according to the cities from February 2017 to February 2018:

CHART N35 **SENTENSES IMPOSED ON DOMESTIC CRIME CASES ACCORDING TO THE CITIES**



Kutaisi City Court did not use a term imprisonment as a punishment at all in domestic violence cases. This clearly indicates that the Kutaisi City Court does not deem serious the threats of domestic crimes and thus places victim's safety at risk. Generally, the Gori and Telavi District Courts, as well as the Tbilisi City Court clearly assess the threat coming from defendants and apply more adequate penalties compared with the Kutaisi City Court.

RECOMMENDATIONS

The analysis of the court sessions has revealed specific problems that the judicial system faces. The issues are complex and involve the court, prosecution and defense counsel. In addition, there are gaps in the criminal law, which should be revised by the legislature. Based on the recent and all the previous reporting periods, GYLA has prepared the following recommendations:

1. For Common Courts

- Courts should exercise their discretionary powers with respect to imposition of preventive measures. Judges should more often apply less severe measures (alternative measures vis-à-vis imprisonment and bail) where applicable and refrain from using such measures at all where the prosecution fails to substantiate the necessity of using a preventive measure. Courts must also demand that the prosecution submit adequately substantiated motions for preventive measures, and impose the burden of proof on the prosecution;

- Imprisonment as a preventive measure must be applied only as a measure of last resort when all other less severe preventive measures prove to be ineffective. Preference should be given to lenient forms of preventive measures when appropriate;

- Justice related to the cases of domestic violence and domestic crimes should be implemented from the gender perspective. The courts should take into consideration the specific nature of such offenses, adequately assess threats, and impose preventive measures of relevant severity, because cases of domestic violence are characterized by recurrence;

- In the cases of domestic crimes, if at the first appearance court sessions there are indications that an offense may have been committed on discriminatory grounds, the judge must take it into consideration when imposing a preventive measure;

- The courts should legalize searches and seizures on the grounds of urgent necessity only after a thorough examination of the motions;

- In all cases, judges should perform their duties with due observance during plea agreement court hearings. In all cases, judges should comprehensively inform defendants of their rights provided for in the legislation and examine the fairness and legitimacy of the sentence determined by the parties in order to eliminate any concerns about the proportionality of the sentence and the crime;

- In order to avoid delaying of court proceedings, the court should thoroughly examine the reasons of lateness or absence of either party at the hearing, and in case of unreasonable excuse impose the sanctions envisaged by law;

- The judge should observe the principles of neutrality and avoid the interference into the roles of the parties or exceed its powers. In addition, while exercising the right of interrogation of a witness, the judge must strictly follow the requirements of the law;

- Judges must inform defendant's of their rights in a comprehensive and comprehensible manner, particularly when accepting a plea agreement;

2. For the Prosecutor's Office of Georgia

- Prosecutors should better substantiate the necessity and expediency of application of a particular preventive measure. Simultaneously, prosecutors should explain why imposition of other more lenient measures cannot ensure the achievement of a specific goal;

- Prosecutors should substantiate the amount of requested bails and investigate the material and financial status of defendants;

- The Prosecutor's Office in all cases must initiate an investigation when it becomes aware of any alleged torture/ill-treatment;

- Investigative and prosecution authorities should carry out searches and seizures without a prior court ruling only in exceptional cases under urgent necessity;

- In case of domestic crimes, the Prosecutor's Office should act as quickly as possible and investigate the case in the shortest possible time from the moment of occurrence of the alleged crimes and file a motion with the court on imposition of a preventive measure;

- The Prosecutor's Office should examine all cases of violence against women in any possible way, whether the offense is committed on the grounds of gender or other intolerance, if it had taken place, prosecutor should talk at the court session about the discriminatory motivation of the crime.

3. For the Parliament of Georgia

- The types of major preventive measures provided for by Article 199(1) of the Criminal Procedure Code of Georgia are not sufficient. It is necessary to introduce a legislative amendment to Article 199(1) of the CPCG to increase

the types of preventive measures. This will enhance the judge's possibility to impose preventive measures other than bail and imprisonment;

- The Parliament of Georgia should pass a law aimed at increasing the role of the judge to combat any alleged torture/inhuman treatment. The judge should be entitled to demand that investigative authorities examine each case of ill-treatment, and this should be mandatory;

- It is necessary to set up an independent investigative body entitled to investigate and prosecute alleged torture and inhuman treatment cases by law enforcement officials. Moreover, the law should provide for the right of the judge to apply in writing to an investigative body upon learning that the trial participants allege they have been subjected to torture or degrading treatment;

- The law should regulate the mechanisms and procedures for the review of the lawfulness of arrests. The law should determine the obligation of judges to examine at the first appearance sessions the lawfulness of arrests both on the basis of a prior court ruling and on the ground of urgent necessity;

- Revise the Article of the Criminal Code of Georgia on drug related crimes and determine relevant penalties in accordance with the judgment of the Constitutional Court of Georgia.

4. For the Georgian Bar Association

- Lawyers should defend their clients in a qualified, active and credible manner at all stages of court proceedings. For this purpose, the Georgian Bar Association should ensure lawyers' permanent retraining and advanced professional training in different areas of criminal proceedings (for example, with respect to standards of application of preventive measures, the rules on obtaining and recognition of admissibility of evidence, etc.);

- Lawyers should exercise high ethical standart towards parties to proceedings, especially vulnerable groups. Their activities should not be stereotypical and stigmatizing.