OSCE
Office for Democratic Institutions and Human Rights

TRIAL MONITORING REPORT GEORGIA

Warsaw
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TABLE OF CONTENT

LIST OF ACRONYMS

CoE	Council of Europe
CoE-VC	Venice Commission of the Council of Europe
CPC/ "The Code"	Criminal Procedure Code of Georgia
CSD	Constitutional Security Department
ECHR	European Convention on Human Rights / Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council (of the United Nations)
ECtHR	European Court of Human Rights
GD	Georgian Dream (political party/ coalition)
GEL	Georgian Lari
HCOJ	High Council of Justice
HRIDC	Human Rights Center (Georgia)
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental organization
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNM	United National Movement (political party)
USD	United States Dollars

I. EXECUTIVE SUMMARY

1. Following a change of government in October 2012, a wave of arrests and prosecutions of high level officials from the previous administration put Georgia under domestic and international scrutiny, raising concerns that these and any subsequent trials might be politically motivated. In the light of its OSCE commitments, Georgia faced the challenge of handling these cases in a transparent manner, consistent with rule of law and fair trial standards. The manner in which these cases were dealt with by the Georgian judiciary, the prosecution, and other participants in the judicial process, are important indicators of the independence of the judiciary from the executive branch of power, as well as of the extent of implementation of the full range of commitments and international standards relating to fair trials and the rule of law.
2. In response to an invitation to ODIHR by the Georgian Ministry of Foreign Affairs to conduct monitoring of trials of persons who held high political office in the former government, ODIHR established a trial monitoring project and selected 14 cases for monitoring where one or more of the defendants met the definition of "official" under Article 2 of the *Georgian Law on Conflict of Interest and Corruption in the Public Service.*
3. ODIHR would like to express its appreciation for the good level of cooperation with the Georgian authorities throughout the implementation of the project and acknowledges the Georgian Government's ongoing efforts and commitment to further improve the delivery of criminal justice in Georgia through continuous reforms in law and practice, and thus to meet its OSCE commitments in the area of rule of law.
4. This report is aimed at identifying areas for improvement of the criminal justice system in Georgia, through the prism of the 14 cases monitored. In the interest of concision, the report only covers problematical fair trial issues, often of a systemic nature, as observed by the monitors, and offers recommendations on how to address these through changes in law and practice. Thus limited in scope, the report does not discuss all those aspects of Georgian criminal law and practice which were found to be in compliance with international standards and good practice.
5. Monitoring identified a number of shortcomings in various areas, including the right to be tried by an independent tribunal established by law, public trust in the criminal justice system, the right to a public hearing, the right to be presumed innocent, the right not to incriminate oneself and the right to remain silent, the right to liberty, equality of arms, the right to a trial within a reasonable time, the right to call and examine witnesses, the right to a reasoned judgement, the right to counsel, and witness protection. Within the chapters, the discussion of these fair trial rights is limited to those specific aspects of the fair trial right in question where problematical issues were identified.
6. Georgia's legal framework overall guarantees the right to an independent tribunal established by law. The Constitution and laws generally align with international

standards, and courts are established and regulated by law. However, some judicial practices cast doubt on whether the requirement of an independent tribunal established by law is fulfilled. Legitimate doubts by parties or the public as to the independence of tribunals may jeopardize the right to a fair trial, even where there is no proof of actual influence. Elements casting doubt on judicial independence, and affecting the perception thereof, relate to the practice of selecting and appointing judges in a manner that may fall short of guaranteeing the principle of irremovability. This includes transferring judges between courts, and allocating cases among judges without a fully transparent procedure, and in a manner that leaves room for manipulation and interference; and exchanging judges mid-way through on-going proceedings without explanation, in breach of national procedural law. These practices may not amount to violations of the defendants' right to an independent tribunal established by law, but they raised concerns as to the independence of the judiciary as a whole, and the public's perception of such independence.

7. Public trust in a judicial system is an essential component of its legitimacy. During the monitoring period, several issues arose that contributed to a further erosion of public trust in the criminal justice system. Public officials commented on proceedings in a manner that implied they had some control over, or ability to influence, the prosecution, potentially affecting the public perception of the prosecution service as impartial and politically neutral. Public doubts in relation to the appointment of the Chief Prosecutor were not conducive to furthering overall public trust in the criminal justice system, and guaranteeing its political neutrality. Finally, judges sometimes appeared either unwilling or unable to exercise control over proceedings and maintain order in the courtroom. Disruptive behaviour in the courtroom that remained mostly unsanctioned, and hearings that often lacked the required solemnity, demonstrated an overall weak respect for the justice system.

8. While the public was able to attend most hearings that were monitored, many concerns regarding access to hearings were observed. First, there was a recurring lack of accurate information about the date, time, and place of hearings, which failed to facilitate public access to hearings. Furthermore, most of the cases observed involved high-profile defendants, and allegations that generated significant public interest, but these hearings often took place in courtrooms too small to accommodate all interested persons. In addition, members of the public were prevented re-entering the courtroom. Such restrictions, coupled with the limited number of breaks during the long days of hearings, may have deterred the public from attending trials. Monitors also observed a number of circumstances where public access to proceedings was restricted, on the purported basis of national security. In these cases, the court restricted the right to a public hearing without making the necessary inquiries to determine whether this was strictly justified. In relation to the maintenance of order in the courtroom, monitors observed that judges often failed to explain properly or apply the full range of sanctions at their disposal. Courts took varying, and sometimes conflicting, approaches to the recording of hearings by the public and media, which could have limited the public's right to access hearings. Consequently, the observed

practices constituted violations, to varying degrees, of the defendants' right to a public hearing and thus limited the corresponding access by the public to these hearings.

9. Some practices observed raised concerns as to whether Georgian authorities fully complied with the presumption of innocence, and reflected a certain lack of understanding within the court, the parties to the proceedings, and the Georgian government, as to the wider implications of the principle. Holding detained defendants in a dock or glass enclosure during trial risked implying their guilt, limited their ability to consult with counsel, and violated their dignity. This is particularly problematic where there did not appear to be any security or risk assessment justifying such measures. Judges' permitting discussion of a defendant's prior convictions, although this can be valid in some instances and for sentencing purposes, appeared to have been done as a matter of routine, which may undermine the presumption of innocence, by creating the impression of the defendant as a criminal. Public officials also contributed to disregarding the presumption of innocence by making public statements attributing guilt to the defendant prior to conviction, pre-empting the judgement to be made by the court, and influencing public opinion as to the guilt of the defendant. Finally, the court's treatment of the indictment as evidence effectively transformed it into fact, thereby shifting the burden of proof onto the defendant.

10. The examples noted in this report regarding inadequate instruction by judges concerning fair trial rights, requests to defendants to respond to questions despite their refusal, and the calling of defendants as witnesses for the prosecution, resulted in defendants disclosing incriminating evidence and raised concern on possible infringements of the right not to incriminate oneself. The practices observed, together with a failure of defence counsel to intervene, reflected a lack of understanding of these fundamental principles by all parties to the proceedings.

11. Court practices observed regarding pre-trial detention largely complied with national legislation, but did not fully comply with international standards. Judges rejected defence motions concerning the imposition or continuation of detention, without publicly providing reasoning, which created an impression of arbitrariness and possible bias. Written decisions contained limited reasoning on issues such as the assessment of evidence, or the arguments of the parties, as required under established international standards. Such decisions are not only inconsistent with the right to liberty, but are also likely to nourish public distrust of the fairness and impartiality of the justice system itself. Furthermore, the fact that the Criminal Procedure Code (CPC) does not provide for periodic judicial review of detention shifted the burden of initiating a review of detention onto the defence, rather than requiring the detaining authorities to request continued detention. This contributed to a practice where prolongation of detention was automatic up to the legal limit of nine months, in violation of the presumption of liberty.

12. Several shortcomings were identified relative to the principle of equality of arms. Where defendants were not properly informed of their rights during court proceedings, their lack of knowledge placed them in a position that was effectively

unequal to that of the prosecution, which may have resulted in violations of this principle. In addition, the courts' failure to give defendants or defence counsel adequate time to prepare their cases, including adequate time to prepare for the cross-examination of prosecution witnesses, undermined the right to participate in the trial on an equal footing with the prosecution.

13. Trials *in absentia*, where courts presumed that defendants were avoiding trial, can hardly be described as fair. In addition, a criminal justice system that does not guarantee the right to a re-trial in such circumstances does not comply with international fair trial standards. The judicial system also violates the equality of arms principle by depriving a defendant against whom a summons was not served in due form, or one who could not appear for reasons beyond his or her control, of a "fresh determination of the merits" of his or her case. Finally, the right to an oral adversarial hearing, as established in international standards, where both parties are given the opportunity to be present and examine the evidence, is violated by the practice of *in absentia* trials.

14. Monitoring also identified shortcomings in a number of cases regarding the right to trial within a reasonable time, with hearings in these cases being postponed for long periods of time. Some delays involved defendants who were being held in pre-trial custody; some delays led to perceptions of political interference, in order to avoid the possibility of pardon by the then departing President. Delays caused by the prosecution in the weeks prior to elections also contributed to allegations of political motives in scheduling. A general lack of effective case-management was also observed, most notably a tendency on the part of the courts to defer to the prosecution's scheduling preferences. In addition, the practice of reading out lengthy lists of evidence seemed unnecessary and time-consuming. Taken together, these practices contributed to undermining the right to a trial within a reasonable time.

15. Monitoring identified problems in nearly all trials relative to the right to call and examine witnesses. Courts prohibited the reading of, or references to, out-of-court statements without the witnesses' permission, whereas the CPC only provides such evidentiary rules for defendants. Moreover, the rule subjecting the playing of audio or video recordings of witnesses' statements to the proponent's proof of either a "substantial contradiction" or improper compulsion of a witness unfairly limited cross-examination rights.

16. The existing normative framework falls short of providing clear rules of evidence, that is, the kinds of information that may be used to cross-examine a witness, and how such information may be used. For instance, there does not appear to be any procedure for proving a witness's character, nor any guidance as to what constitutes admissible character evidence. The practice of impeaching witnesses by referring to *on-going* criminal proceedings not only failed to comply with the requirements of the CPC, it also undermined the witnesses' right to the presumption of innocence with regard to their own pending cases. Finally, parties examining witnesses through statements of those who had not yet testified was problematic, especially where parties had no ability to challenge them.

17. Laying out clearly the reasons supporting a judgement constitutes a key method to alleviate perceptions of arbitrariness in judicial proceedings, and it is therefore crucial that judgements are well reasoned. Monitoring found that numerous judgements neglected to thoroughly assess the evidence presented, and to provide an adequate level of legal analysis to explain how the facts established amounted to a criminal offence, and how they led to a specific sentence. These practices undermined the defendants' right to a reasoned judgement.

18. While it is difficult to assess the quality of legal representation from the mere observation of court hearings, defence counsel's acts or omissions revealed a professional standard that fell far below that required to protect defendants' fair trial rights. On numerous occasions, defence counsel failed to appear at trial. Often, even when present, their actions and omissions raised questions as to their independence, competence, and effectiveness. In addition, defendants often faced difficulties in engaging in confidential communication with defence counsel during trial, in particular defendants detained in glass enclosures. There were also concerns about whether defence counsel selected by the families of defendants tried *in absentia* could truly represent the best interests of their clients. This also resulted in improper examination or cross-examination of witnesses by the prosecution; inadequate time and facilities to ensure confidential and privileged communications between defence counsel and clients; and mandatorily-imposed defence counsel, in particular in the context of trials conducted *in absentia*.

19. Court practices observed reflected a consistent lack of respect by all participants for the rights of witnesses and victims. The cooperation of victims and witnesses is essential to address crime within a society, but without ensuring their rights to safety, and to compassionate treatment and information, their effective participation in proceedings may not be assured. A fair criminal justice system not only ensures the defendant's right to a fair trial, it also balances the defendant's rights with those of witnesses and victims. Judges' failure to properly instruct witnesses, including victims and experts, on their rights and obligations; the overly aggressive and often intimidating treatment to which some witnesses and victims were subjected by the parties; and practices jeopardizing the safety of witnesses and victims, such as requiring addresses to be provided in open court, and not assessing their need for physical protection, resulted in grave shortcomings regarding the protection of their rights. The absence of a sufficient legal or institutional framework in Georgia to ensure holistic access to justice for victims further contributed to this lack of protection.

20. Based on the above observations regarding specific fair trial rights difficulties – often of a systemic nature – it can be concluded that the respect of fair trial rights in the monitored cases was not fully guaranteed by the Georgian criminal justice system. While many of the shortcomings identified in individual hearings may not alone amount to a violation of the right to a fair trial, it is the combination of these individual shortcomings, certain shortcomings in national legislation, as well as generally problematic court practices that overall jeopardized the full respect of fair trial rights in accordance with international standards and applicable human rights law.

II. CONSOLIDATED LIST OF RECOMMENDATIONS

A. To the Legislature[1]

1. The legislature should reconsider the provision of the Law on Common Courts, which authorizes the court chairperson to *de-facto* deviate from the automatic case assignment rule at his or her discretion. At a minimum, the discretion of the court chairs should be limited to certain clearly-specified situations, and court chairs should be required by law to reason any decision that affects the assignment of judges to concrete cases. Such decisions should also be made available to the public.
2. The legislature should consider clarifying the CPC regarding the criteria and procedure for replacing an excluded judge with an alternate / reserve judge, and include in the Code a definition of alternate / reserve judge.
3. The legislature should consider amending the law on prosecution to provide a secure tenure for the Chief Prosecutor, permanently or for a relatively long period without the possibility of renewal. Such tenure should not be tied to parliamentary or presidential terms. Criteria and procedures for dismissal of the Chief Prosecutor prior to the end of this tenure should also be provided for in this law. The provisions should also provide sufficient safeguards against partiality or political influence.
4. The legislature should amend Article 182(2) of the CPC to ensure that all cases of closed sessions are limited to the examination of evidence for which they were ordered.
5. The legislature should outline in the CPC, the procedure and criteria for imposing security measures during trial taking into account the principle of proportionality and the presumption of innocence.
6. The legislature should consider widening the scope of Article 238 of the CPC relative to the use of criminal records, to apply to all trials and not only jury trials.
7. The legislature should consider amending the CPC so as to sanction statements made by public officials and individuals that may interfere with the presumption of innocence of a defendant pending trial, in line with the requirements set forth in international standards.
8. The legislature should amend the CPC to provide for a clear distinction between the status of a defendant's testimony and that of a witness with regards to the specific rights and obligations of defendants and witnesses.
9. The legislature should include a provision in the CPC requiring that decisions concerning preventive measures such as pre-trial detention are reasoned, and that at least a summary of the reasoning is presented orally in open court.

1 See also OSCE/ODIHR – Council of Europe Joint Opinion on the Criminal Procedure Code of Georgia, 22 August 2014.

10. The legislature should amend the CPC to include a mechanism for automatic and periodic judicial review of the conditions for prolonged detention on remand. This review should take place at regular intervals, and should require the prosecution to file a motion to justify the extension of detention for the period until the next judicial review.
11. The legislature should consider amending the provisions of the CPC regarding the calling of witnesses, to the effect that that the party calling a witness is obliged to inform the opposing party of the order and timing of appearance of witnesses.
12. The legislature should amend the CPC to specify the procedure and criteria that must be satisfied to unequivocally prove that a defendant is avoiding justice and can thus be tried *in absentia*. This should include the obligation for the Court to verify that the defendant has been effectively summoned, and that he or she has unequivocally waived the right to appear, before proceeding to hold the trial *in absentia*.
13. The legislature should consider whether to abolish the institution of trials *in absentia* altogether.
14. If the legislature decides to maintain the institution of trials *in absentia*, then it should foresee the right to have the judgement annulled, and the case re-tried, where the summons was not served in due and proper form. The legislature should also foresee the right to retrial, even where effective summoning has occurred, if the failure to appear was due to reasons beyond a defendant's control.
15. To help ensure the court's control over the length of trials, the legislature should amend Article 219(4)(a) of the CPC to indicate that the court's examination of parties' motions on admissibility of evidence should take into account the relevance, prejudice, and probative value of evidence.
16. The legislature should consider amending the provisions of the CPC regarding the calling of witnesses so that the party calling a witness is obliged to inform the opposing party of the order and timing of appearance of witnesses.
17. The legislature should amend the wording of Article 243(2) of the CPC to allow for impeachment of witnesses with contradictory statements, without the need to establish probable cause that the witness was forced, threatened, intimidated, or bribed.
18. The legislature should elaborate clear rules of evidence. This would include *inter alia* information that may be used to cross-examine a witness, and how to use such information. In particular, the legislature should clarify procedures as to what constitutes admissible character evidence, and how to use character evidence to impeach a witness. When developing such rules of evidence, the right to cross-examine witnesses, relevance, probative value, prejudice, and witness protection should be taken into consideration.
19. The legislature should make amendments to the CPC to clarify that judges should first provide information on witness's obligations and the meaning of any oath, and only subsequently request that they take an oath.

20. The legislature should ensure that the CPC and related legislation provide for victims' views to be taken into account at the various stages of proceedings, and that victims are afforded psychological and legal support.

B. To the Judiciary

21. Judges should use the full range of their powers of maintaining order in the courtroom, to ensure an environment that is conducive to protecting fair trial rights, and enhancing public trust in the criminal justice system.
22. Courts should maintain and continuously update a website or telephone hotline where the public can anonymously obtain information as to the date and place of hearings, in order to enhance transparent and accurate information concerning court hearings.
23. Courts should ensure better communication between judicial officers and court staff attending the information desk, to enable the latter to communicate to the public the most accurate information concerning hearing schedules.
24. Courts should ensure that any changes to scheduling are announced clearly and immediately, and should leave sufficient time for the public to adjust to the changed scheduling.
25. Courts should hold hearings in larger courtrooms when a large number of people are expected to attend. If larger courtrooms are not available, court staff should consider finding other means to ensure that the public can access the proceedings, such as live-link transmissions of proceedings onto big screens in other parts of the court building.
26. Courts should permit individuals to re-enter the courtroom, subject to the approval of court security officers.
27. Courts should elaborate procedures for the expeditious official verification of state secret classifications. These procedures should include a requirement to provide reasoning, and include guidelines for availing defendants of their rights to challenge the classification.
28. Courts should apply the full range of existing measures to restore courtroom order in a fair and proportionate manner, with those that fully restrict the right to a public hearing applied as a last resort. Warnings, fines, increased fines, exclusion, and detention of individual members of the public should be considered prior to taking any decision to generally restrict the right to a public hearing on the basis of public order. Additionally, it is recommended that at the commencement of proceedings, judges refer to the general requirement to maintain court decorum, and courts should ensure that full information, including judicial powers and possible sanctions, is visible in the building's public areas, and at the entrance of courtrooms.
29. Courts should refrain from holding detained defendants in separate enclosures in the courtroom unless there is, in accordance with established criteria, a specific and identifiable security risk related to an individual defendant. In the event that a court deems such measures necessary, it must ensure the

defendant's right to privileged and confidential communication with counsel and that the measure used is proportionate to the security risk identified.

30. Courts should not ask defendants about their previous convictions as a matter of routine.

31. Courts should consider assessing the admissibility of criminal records at the pre-trial stage, taking into consideration any possible implications regarding the presumption of innocence.

32. Courts should not admit the indictment as part of the evidence.

33. Courts should as a matter of procedure inform defendants of their right not to incriminate themselves and to remain silent, and ensure that these principles are understood. To this end, a standard instruction complying with international standards could be developed and distributed to judges.

34. Courts should ensure that the above principles are respected, and bar further questioning when defendants exercise their right to remain silent and refuse to answer questions.

35. Courts should duly consider the defence's objection to the prosecution calling a defendant to the stand, and provide a reasoned decision as to why it is upheld or otherwise.

36. Courts should determine the existence of grounds justifying prolonged detention at every extension and review of custody, taking into consideration that the burden to establish the need for preventive measures rests on the prosecution. They should also address the main arguments presented by the defence against imposing detention, and indicate what other restrictive measures have been considered, and why they are deemed insufficient.

37. Judges should ensure that defendants understand their rights concerning pre-trial detention, by providing clear instructions, and explaining the relevant provisions of the CPC.

38. When making decisions as to whether to grant reasonable requests of the parties for additional time to prepare, judges should not reject such requests solely on the basis that a pre-trial detention period is reaching its legal limit.

39. Courts should grant reasonable requests of the defence for adequate time to prepare their case, even when this appears to conflict with the defendant's right to a trial within a reasonable time, which may be suspended for that specific purpose.

40. When making decisions concerning the adjournment or postponement of hearings, judges should take into consideration the impact of any such delay upon the defendant's right to a timely hearing.

41. Judges should use their powers to control the presentation of trial evidence by restricting irrelevant answers, controlling repetitive, inappropriate or abusive questioning, and maintaining courtroom order.

42. Courts should abandon the practice of reading lists of evidence in main trial hearings, and rather fully examine in open court all admitted evidence that the parties present in support of their case.

43. Courts should refrain from considering witnesses' consent as a necessary requirement for the parties to read and refer to out-of-court statements of witnesses during the trial.

44. Courts should focus on the individual elements of the crime in their legal reasoning, and tie the established facts to each element of the crime. Additionally, courts should address each charge alleged against each defendant with reference to the evidence. Courts should also include in judgements an explanation as to why evidence was accepted or rejected. Relative to sentencing, courts must list mitigating and aggravating factors, if any, in their judgement, and explain how those factors were considered in determining sentences.

45. Appellate courts should clearly indicate in their judgements what elements of the first-instance judgement's reasoning were insufficient, or improperly addressed, in order to comply with the requirements of the right to a reasoned judgement.

46. Court chairs should allocate adequate space to ensure confidential lawyer-client communications. They should instruct court security as to the importance of confidential communications, and prohibit any eavesdropping.

47. Courts should ensure the use of larger courtrooms for cases with multiple defendants, and defendants should preferably be seated in a place where they can easily communicate with their counsel.

48. Courts should give serious consideration to defence motions for breaks, in particular where courtroom space does not allow for defendants to be seated in a place where they can easily instruct their representatives.

49. Judges and court officials should ensure that microphones are switched on only when a party is ready to make a submission. No recording of private communications between counsel and defendants should be allowed.

50. Courts should ensure that legal representation selected by the defendant's family represents the genuine interests of the defendant in *in absentia* trials.

51. Judges should properly instruct witnesses, including victims and experts, as to their rights and obligations.

52. Information on witnesses' and victims' rights in criminal proceedings should be provided on the websites of the courts, and/ or distributed in pamphlets.

53. Judges should pay close attention when witnesses provide testimony that may subject them to criminal liability, to ensure that witnesses have understood their rights, and to raise the possibility of engaging defence counsel in such cases.

54. Judges should be proactive in ensuring that witnesses and victims are treated with appropriate respect of their dignity and safety, and use the wide range

of available means to react to violations in this regard, including considering the provision of security measures where necessary.

55. Courts should abolish the practice of requiring information to be provided in open court concerning the addresses of witnesses and victims, or any other sensitive information.

C. To the High Council of Justice (HCOJ)

56. The HCOJ should develop regulations to complement provisions on monitoring and evaluation of judges on probation in the Law on Common Courts, should the probation period be retained in the law, taking into consideration recommendations on performance evaluation as established by international standards on judicial independence and accountability.

57. The HCOJ should adopt key criteria and uniform procedures concerning the selection and appointment of judges, regardless of whether the probationary period is retained, including procedures for deciding on permanent appointments at the end of the probationary period. Those procedures should include a requirement that proper reasoning in writing be part of all such decisions.

58. The HCOJ should ensure full transparency of their sessions and decisions, by scheduling sessions sufficiently in advance, and informing the public of the agenda of the respective session.

59. The HCOJ should interpret the General Administrative Code as requiring them to provide reasoning for any decisions concerning the transfer of judges.

60. The HCOJ should consider developing a standard instruction on rights that is given to each defendant.

61. The HCOJ should consider developing a standard instruction on the rights of witnesses and victims, to be circulated to judges.

D. To the Prosecutor's Office

62. The Chief Prosecutor should consider issuing standard guidance to prosecutors to ensure that indictments are not included or treated as evidence.

63. The prosecution should refrain from calling the defendant to testify as a witness for the prosecution, and the Chief Prosecutor should consider issuing standard guidelines or instructions to that effect.

64. Prosecutors should refrain from considering witnesses' consent as a necessary requirement for the parties to read and refer to out-of-court statements of witnesses during the trial.

65. Prosecutors should conduct themselves in such a manner that ensures that witnesses and victims are examined in a way that does not violate their basic right to be treated with humanity, dignity, and respect.

E. To Defence Counsel

66. Defence counsel should pro-actively ensure that the defendant's right to remain silent is respected, and object to repeated questioning when the defendant has made it clear that he or she does not wish to answer.

67. If defendants are called by prosecutors to testify, defence counsel should consider objecting on the basis that it undermines their right to remain silent or the defendant's prerogative to choose whether to testify.

68. Defence counsel should be present throughout all the stages of the proceedings, or ensure effective replacement, without hindering the defendant's right to independent, effective, and competent legal representation.

69. Defence counsel should actively instruct defendants who personally examine witnesses, in particular to avoid self-incriminating statements. Represented defendants and their counsel should carefully consider the risks associated with defendants engaging in witness examination.

70. Defence counsel should refrain from considering witnesses' consent as a necessary requirement for the parties to read and refer to out-of-court statements of witnesses during the trial.

71. The Bar Association Ethics Commission should consider disciplinary action in cases where defence counsel breach their professional duties.

72. Defence counsel should zealously defend their clients' rights, and refrain from representing multiple defendants in the same case.

73. Defence counsel should move to request regular breaks during hearings, to allow for communication with their clients in a space that ensures full confidentiality.

74. Defence counsel should conduct themselves in such a manner that ensures that witnesses and victims are examined in a way that does not violate their basic right to be treated with humanity, dignity, and respect.

F. To the Executive

75. When commenting on judicial processes, and particularly on-going criminal investigations, public officials should carefully balance their statements to avoid politicizing the judiciary or the Office of the Chief Prosecutor.

76. Before any future appointment of a Chief Prosecutor, the Prime Minister, in close coordination with the Minister of Justice, should conduct a transparent and consultative selection procedure, in full compliance with the letter and the spirit of the law that requires that the candidate is nominated by the Minister of Justice. In selecting nominees, the Minister of Justice should adopt the recommendations of the Council of Europe's Venice Commission in its *Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service*. This provides for the establishment of an appointment commission comprised of persons with professional, non-

political expertise, who would be respected by the public and trusted by the government, with advice from relevant persons such as representatives of the legal community and civil society.

77. Public officials should respect the presumption of innocence when commenting on potential or on-going criminal proceedings.

G. To Judicial Training Providers

78. Judicial training bodies should develop programmes to support judges in implementing their role of maintaining order in the courtroom while remaining impartial in adversarial proceedings.

79. Training bodies for judges, prosecutors, and defence counsel should provide further training on the right not to incriminate oneself, as well as the right to remain silent, and their implications in an adversarial model of criminal proceedings.

80. Training institutions for judges, prosecutors, and defence counsel should provide training on procedural requirements and safeguards regarding the use of preventive measures, including training for judges on providing reasoning for detention orders, in line with international standards.

81. Judges should be trained on the importance and practical application of the principle of providing adequate time and facilities to prepare a case, which includes the responsibility of judges to ensure that parties disclose information in due time about the evidence to be presented.

82. The High School of Justice should conduct extensive training courses on legal drafting of judgements and other court decisions, both as part of the initial training for judges and for their continuing legal education or in-service training.

83. Judicial training bodies should place greater emphasis in their training programmes as to how judges can ensure the respect and protection of the rights of witnesses and victims, including through efficient and effective court management skills.

III. BACKGROUND

1. Following a change of government in October 2012, a wave of arrests and prosecutions of high-level officials from the previous administration placed Georgia under domestic and international scrutiny, raising concerns that these and any subsequent trials might be politically motivated. In the light of its OSCE commitments, Georgia faced the challenge of handling these cases in a transparent manner, consistent with rule of law and fair trial standards. The manner in which the cases are dealt with by the Georgian judiciary, the prosecution, and other participants in the judicial process, are important indicators of the independence of the judiciary from the executive branch of power, as well as of the extent of implementation of the full range of commitments and international standards relating to fair trials and the rule of law.
2. Pursuant to an exchange of letters between ODIHR and the Ministry of Foreign Affairs in January 2013, and in response to a 29 January 2013 invitation of the Georgian Ministry of Foreign Affairs to ODIHR to conduct monitoring of trials of persons who held high political office in the former government, ODIHR undertook a familiarisation visit to Tbilisi from 6 to 10 February 2013, and met with representatives from the Ministry of Foreign Affairs, the Minister of Justice, the Chairperson of the Supreme Court of Georgia, the Chief Prosecutor of Georgia, the Chairperson of the Tbilisi City Court, and the Public Defender of Georgia. ODIHR also met with a number of national and international civil society representatives monitoring the human rights situation and the judicial process in Georgia, and conducted meetings with the Delegation of the European Union and diplomatic representations in Georgia. As a result of this visit, ODIHR established a trial monitoring activity, which commenced on 20 February 2013.
3. ODIHR selected 14 cases for monitoring where one or more of the defendants met the definition of "official" under Article 2 of the Law on Conflict of Interest and Corruption in the Public Service.
4. Since the inception of ODIHR's trial monitoring activity in Georgia, the Office of the Chief Prosecutor, the Tbilisi City Court, the Tbilisi Court of Appeals, the Kutaisi Court of Appeals, and the Supreme Court of Georgia appointed focal points to facilitate access to court proceedings for ODIHR's trial monitors and have, upon request, provided ODIHR with indictments and, where applicable, judgements related to the monitored trials.
5. The trial monitoring activity was managed from ODIHR's office in Warsaw, and implemented in Georgia by a non-permanent international Team Leader and a rotating team of 42 international trial monitors who monitored trials in pairs. Trial monitors were drawn from an externally recruited pool of experts with experience in criminal trial practice or trial monitoring, as well as from staff experienced in conducting trial monitoring in ODIHR and OSCE Field Operations.
6. An interim report was published on 12 March 2014.[2] Between the start of monitoring on 20 February 2013 and 31 October 2014, ODIHR monitored 327

2 See ODIHR Interim Report – Trial Monitoring Project Georgia, 12 March 2014.

hearings in 14 selected cases, outlined in Annex I to this Report.[3] Of the 14 monitored cases, as of 31 October 2014, four remained at the first instance; two were on appeal at the second instance; three appeals had been, or were expected to be, submitted to the Supreme Court; and five cases had been finally disposed: two via presidential pardons, and three through a final decision by the Supreme Court.

7. ODIHR would like to express its appreciation for the good level of cooperation with the Georgian authorities throughout the implementation of the project and acknowledges the Georgian Government's ongoing efforts and commitment to further improve the delivery of criminal justice in Georgia through continuous reforms in law and practice and thus to meet its OSCE commitments in the area of rule of law.

IV. ODIHR TRIAL MONITORING METHODOLOGY

8. OSCE participating States have undertaken a number of significant commitments on fair trial standards, the rule of law, independence of the judiciary, administration of criminal justice and, more broadly, on human rights.[4] Foremost among these is the commitment to ensuring the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal. In addition to OSCE commitments on fair trial rights, OSCE participating States have "accept[ed] as a confidence building measure the presence of observers […] at proceedings before the courts."[5]

9. Based on these commitments, ODIHR developed a trial monitoring methodology as outlined in the *Trial Monitoring: A Reference Manual for Practitioners*[6] and the *Legal Digest of International Fair Trial Rights*.[7] The methodology aims to assess compliance of monitored trials and relevant domestic law with international fair trial standards, identify possible shortcomings in the criminal justice system, and present the national authorities with concrete recommendations aimed at enhancing the administration of criminal justice in the light of OSCE commitments.

10. ODIHR's trial monitoring methodology is based on strict adherence to the principles of objectivity and non-intervention in judicial processes. In terms of its non-partisan stance, ODIHR monitors trials for procedural fairness and due process, rather than substantive outcomes, in line with international standards, good practices, and OSCE commitments.

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3 During the monitoring period (20 February 2013 to 31 October 2014), a total of 12 hearings related to the monitored cases could not be monitored by ODIHR due to late scheduling or similar logistical challenges.

4 "Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe", Vienna, 1989; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 5 to 29 June 1990; Charter of Paris for a New Europe, Paris 19 to 21 November 1990, Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE, Moscow, 10 September to 4 October 1991.

5 Document of the Copenhagen Meeting, *op. cit.*, note 4, para. 12.

6 *Trial Monitoring: A Reference Manual for Practitioners*, revised edition 2012, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2012).

7 *Legal Digest of International Fair Trial Rights*, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2012).

11. Within this framework, ODIHR deployed international monitors bound by a Trial Monitoring Code of Conduct, which sets forth the principles of non-intervention, impartiality, and professionalism.[8] Monitors were bound by confidentiality, and did not communicate with the courts, parties, media, or others.

12. ODIHR assessed the Georgian legal and judicial framework related to fair trial rights and rule of law with regard to their compatibility with international standards and OSCE commitments, as pertaining to the cases monitored.[9] This assessment, together with the findings from monitoring the court proceedings, forms the basis for this report. A comprehensive description of past and current criminal justice reforms in Georgia is beyond the purpose and scope of this report.[10]

13. This report is aimed at identifying areas for improvement of the criminal justice system in Georgia, through the prism of the 14 cases monitored. In the interest of concision, the report only covers problematical fair trial issues, often of a systemic nature, as observed by the monitors, and offers recommendations on how to address these through changes in law and practice. Thus limited in scope, the report does not discuss all those aspects of Georgian criminal law and practice which were found to be in compliance with international standards and good practice.

14. Each chapter of the report begins with an introductory paragraph explaining what the right in question entails, followed by a description of the international standards and national legal framework, as relevant to the issues analysed. The chapters then proceed with a description and an analysis of selected shortcomings identified. The chapters end with a conclusion as to the scope of protection of a specific fair trial right. Within the chapters, the discussion of these fair trial rights is limited to those specific aspects of the right to a fair trial where problematical issues were identified. Finally, recommendations are presented that aim to support the Georgian authorities and other stakeholders within the on-going criminal justice and judicial reform processes, to bring Georgian legislation and judicial practice fully in line with international standards on fair trials.

15. In line with the principles of non-intervention, objectivity, and impartiality, and to pay due consideration to the independence of the judiciary, this report discloses information about the conduct of the proceedings and related findings only for those monitored cases which have been concluded at the second instance or have been otherwise finally concluded. Observations made in cases that were not concluded at appellate stage at the time of publishing this report have been used as basis for the overall assessment of fair trial rights in this report, but are as a rule not referred to individually.

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8 See the ODIHR *Trial Monitoring Manual*, *op. cit.*, note 6, for more information on these principles and examples of codes of conduct.

9 See also ODIHR/CoE joint opinion on the CPC of Georgia, *op. cit.*, note 1.

10 For more information on justice reforms in Georgia, see for example, "Georgia in Transition", Thomas Hammarberg, EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, September 2013.

V. RIGHT TO BE TRIED BY AN INDEPENDENT TRIBUNAL ESTABLISHED BY LAW

16. The right to a hearing before an independent tribunal established by law is one of the fundamental guarantees of a fair trial.[11] As a necessary precondition for the fairness of a trial, it requires that hearings are conducted by judges who are unbiased, and free of any improper influence.

17. This chapter examines whether judges were appointed and transferred in a fair and transparent manner that is in keeping with standards protecting their independence. It also looks at the procedures for assigning cases to judges, and whether tribunals were composed in accordance with national law. To guarantee a fair trial, these procedures must provide safeguards against any form of manipulation by court chairs, and they must ensure that individual cases are not directed to or away from particular judges, in a manner that may influence their outcome. These elements are important to examine, as they may have a direct impact on the manner in which, and by whom, cases are processed, and therefore on the independence and impartiality of the respective judges.[12]

A. International standards

18. Under the United Nations Basic Principles on the Independence of the Judiciary, states must ensure that judicial proceedings are conducted fairly and in accordance with the principle of independence of the judiciary.[13] OSCE participating States are also committed to upholding standards on independence of the judiciary, as set out in various international instruments.[14] These instruments include standards related to the appointment, tenure and transfer of judges, the assignment of cases to individual judges within a court, and the requirement that tribunals be established in accordance with national law.

19. The process of appointing judges must be fair, merit-based, and transparent.[15] When a probationary period is imposed on newly appointed judges, the decision to retain them should be based on pre-established legal criteria as well as on "merit, having regard to the qualifications, skills, and capacity required to adjudicate cases by applying the law while respecting human

11 ICCPR, Article 14(1); ECHR, Article 6(1).

12 *Legal Digest of International Fair Trial Standards*, *op. cit.*, note 7, page 59.

13 See "Basic Principles on the Independence of the Judiciary", adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principles 1 and 2.

14 See OSCE Human Dimension Commitments, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 3rd edition, 2011), pages 97-100.

15 "Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency, and responsibilities", Council of Europe, 17 November 2010, para 44; see also OSCE ODIHR, "Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia", Kyiv, 23–25 June 2010, paras 21- 23.

dignity."[16] The European Commission for Democracy through Law of the Council of Europe (hereinafter Venice Commission) repeatedly warned that "probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way."[17] Where probationary appointments are nevertheless introduced, the Venice Commission recommends that a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office."[18] The European Charter on the Statute for Judges also makes reference to concerns regarding the practice of subjecting judges to probationary periods, stating that it "presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed."[19]

20. Regarding transfers, judges should not be "moved to another judicial office without consenting to it" unless the transfer is the result of a disciplinary proceeding or the reorganization of the justice system.[20] Furthermore, any decision concerning the career of judges, including transfer, should follow a merit-based, fair and transparent selection process or competition.[21] Judges who are denied promotion must be entitled to learn the reasons, and to lodge a complaint before an independent judicial administration authority.[22] Regardless of whether a decision on transferring a judge follows a fair and open competition, it should be published as a matter of judicial administration.[23] In general, any decisions of councils for the judiciary should be reasoned.[24]

21. International standards and reference documents also contain some guidance on systems for the allocation or assignment of cases to individual judges within courts. According to the *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, the assignment of a judge to a particular case should be random, or based on predetermined, clear, and objective criteria, and the distribution system should be free from interference.[25] The Council of Europe Committee of Ministers similarly recommends that the assignment of cases should follow objective pre-established criteria, and more specifically that it "should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case."[26]

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16 Recommendation CM/Rec(2010)12, *op. cit.*, note 15, paras 51 and 44.
17 Judicial Appointments: Report adopted by the Venice Commission at its 70 Plenary Session (Venice, 16-17 March 2007), Venice Commission, CDL-AD(2007)028, 22 June 2007, para 40; Report on the Independence of the Judicial System Part I: The Independence of Judges Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), Venice Commission, CDL-AD(2010)004, 16 March 2010, para 37.
18 *Ibid.*
19 Explanatory Memorandum of the *European Charter on the Statute for Judges*, Strasbourg, 8-10 July 1998, para 3.3.
20 Recommendation CM/Rec(2010)12 of the Committee of Ministers, *op. cit.*, note 15, para 52.
21 Ibid., paras 44 and 48; Kyiv Recommendations, *op. cit.*, note 15, para 21.
22 Recommendation CM/Rec(2010)12 of the Committee of Ministers, *op. cit.*, note 15, para 48; *European Charter on the Statute for Judges*, *op. cit.*, note 19, para 4.1.
23 Kyiv Recommendations, *op. cit.*, note 15, paras 1 and 10.
24 Recommendation CM/Rec(2010)12 of the Committee of Ministers, *op. cit.*, note 15, para 28.
25 Kyiv Recommendations, *op. cit.*, note 15, para 12.
26 Recommendation CM/Rec(2010)12 of the Committee of Ministers, *op. cit.*, note 15, para 24.

22. Two requirements comprise the right to a trial before a tribunal established by law: (1) the judicial system should be constituted and sufficiently regulated by law, and (2) each individual tribunal should be formed in accordance with the legal requirements for its establishment.[27] Moreover, the European Court of Human Rights (ECtHR) has ruled that a failure to explain the replacement of judges on the bench during the course of a trial is arbitrary, and does not comply with international standards on the composition of a court established by law, and also casts doubt as to the independence and impartiality of the court.[28]

B. National legal framework

23. Georgia's Constitution enshrines the principle of an independent judiciary, and a number of legal provisions reiterate the principle in both general and specific terms.[29] The Organic Law on Common Courts echoes the Constitution with its statement on judicial independence.[30] It also regulates the appointment and dismissal of judges and the composition of courts.[31] In 2010, constitutional amendments introduced lifetime appointment for judges following a probation period of three years. This constitutional provision entered into force after the President elected in 2013 took the oath of office, and was implemented by introducing lifetime appointment and a probation system for judges in the Law on Common Courts in October 2013.[32] Further details regarding the evaluation procedure and criteria, based on which judges would be evaluated during their probation period, were provided in the August 2014 amendments to the Law on Common Courts.[33]

24. The High Council of Justice (HCOJ) may transfer a judge to another court of the same instance, or to a higher or lower court, for the duration of her or his term of office; the affected judge must consent to the transfer.[34] The law does not specify what reasons may justify transferring a judge to another court, other than that there be a vacancy. The law also expressly exempts such transfers from the requirement of a competitive selection process.[35] Chapter III of the General Administrative Code guarantees public access to the deliberations of the HCOJ, and obliges the HCOJ to publish decisions on its official website.[36] There is no specific obligation for the HCOJ to reason its decisions, nor is there a provision subjecting its decisions to judicial scrutiny,

27 *Posokhov v Russia*, ECtHR, 4 March 2003, para 39.
28 *Moiseyev v Russia*, ECtHR, 6 April 2009, para 181, 184-185.
29 The Constitution of Georgia, Articles 82(3) and 85.
30 Organic Law of Georgia on Common Law Courts, Article 1(1).
31 See Organic Law of Georgia on Common Law Courts.
32 Organic Law of Georgia amending the Organic Law of Georgia on Common Courts, November 2013, Article 36 (4^1 - 4^2).
33 Law on amendments to the Organic Law of Georgia on Common Courts, Nr 2647, 1 August 2014, Article 361-8.
34 Organic Law of Georgia amending the Organic Law of Georgia on Common Courts, November 2013, Article 37.
35 *Ibid.*
36 The General Administrative Code of Georgia, 1 September 2013, Articles 27, 28 and 32 (Chapter III). Article 3 of the General Administrative Code specifies that its Chapter III applies to judicial bodies, even though the remainder of the General Administrative Code does not apply to them.

but it may be argued that the relevant provisions of the General Administrative Code apply to those decisions of the HCOJ that constitute administrative acts.[37]

25. The Law on Case Assignment regulates the distribution of individual cases to judges within a court.[38] Court chairs draw up an alphabetical roster of judges, and incoming cases are assigned to the judges going down that list, as they are filed in court. Article 30 (5) of the Law on Common Courts authorizes the court chairperson to assign a particular judge to a case, and to change the composition of panels to avoid hindrances in the administration of justice, thereby *de-facto* deviating from the case assignment rule at his or her discretion, and without providing reasons.[39]

26. Concerning the replacement of judges, the Code stipulates as a rule that if a judge is unable to participate in a hearing of a case he or she is involved in trying, then a substitute judge shall be appointed and the case shall start anew.[40] By way of an exception, the case can only continue upon the decision of the court chairperson to replace an excluded judge by an alternate (or reserve) judge. The law does not further define alternate (or reserve) judges.[41]

C. Analysis

1. Selection and appointment of judges

27. Judicial independence may be questioned "if the practice of appointing judges is as a whole unsatisfactory."[42] In Georgia, the introduction of lifetime tenure for judges by a constitutional amendment adopted in 2010, which replaced the 10-year fixed-term, was widely seen as a step towards strengthening judicial independence. However, the three-year probation period, which all, not only newly-appointed, judges must undergo before they are appointed for life, raises concerns about judicial independence. Organisations such as Transparency International Georgia, and many others allied under the "Coalition for an Independent and Transparent Judiciary" (including the Georgian Young Lawyers' Association, the NGO "Article 42", Georgia Bar Association, and the Civil Society Institute Open Society Georgia Foundation), as well as the Chairperson of the Georgian Supreme Court, criticized the

37 The General Administrative Code of Georgia, 1 September 2013, Article 53, paras 1 and 4 and Article 178 para 3. The High Judicial Council functions that entail issuing administrative acts as specified in Article 2 para 1(d) are subject to debate.

38 Law on Case Assignment and Imposition of the Duty to Another Judge in Common Courts of Georgia, 1998, Articles 4 and 5.

39 Organic Law of Georgia amending the Organic Law of Georgia on Common Courts, November 2013, Article 30(5). ODIHR takes note of the fact that 2014 draft amendments to this law envisage the abolition of the described rule.

40 Article 183 CPC.

41 *Ibid*., Article 184.

42 *Zand v Austria*, European Commission of Human Rights, 12 October 1978, para 78; *Posokhov v Russia*, ECtHR, 4 March 2003, para 39.

probationary period and the related annual evaluation of probationary judges by the HCOJ as creating risks of undermining judicial independence.[43]

28. In its opinion regarding the draft constitutional amendments of 2010, the Council of Europe Venice Commission expressed concern about the introduction of the three-year probationary period for judges, warning that it could jeopardize judicial independence, since judges may feel "under pressure to decide cases in a particular way".[44] The Venice Commission further cautions that the annual evaluation of probationary judges should exclude factors that could challenge the impartiality of judges. It continues that "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value."[45]

29. The Council of Europe's Committee of Ministers clarifies that judges must also be free from influence from within the judiciary, and that a hierarchy within the judiciary should not undermine the independence of individual judges.[46] Read in the context of probationary judges' performance evaluation, this principle requires careful scrutiny of the effects of any measure that may unduly influence them in their decision-making, even where such measures are administered exclusively by judicial authorities. Further elaborating this principle, the Venice Commission states that "the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination in their judicial decision-making activity."[47] Therefore any scheme for evaluation that also includes judges' decision-making must be strictly limited.

2. Transfer of judges between courts and allocation of cases to judges

30. When an individual judge is transferred at short notice to another court and assigned a high-profile case, this may raise concerns regarding judicial independence or perceived independence. The practices of transferring judges between courts, and assigning cases to individual judges within a court, therefore merit some attention.

31. At the beginning of three of the monitored cases, the HCOJ transferred three judges from other courts to the Tbilisi City Court on the same day, with each

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43 *See* "Overview of the Second Part of the Judiciary Reform", Transparency International Georgia, 20 November 2013, page 10; "Coalition for an Independent and Transparent Judiciary calls Georgian Parliament for suspension of making amendments to the Law on General Courts", Transparency International Georgia, 3 October 2013; "Konstantine Kublashvili criticizes the parliamentary majority", 1 Channel News, 7 October 2013.

44 Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, Venice Commission of the Council of Europe, adopted at its 84th Plenary Session (Venice, 15-16 October 2010), Opinion no. 543/2009, CDL-AD(2010)028, para 90.

45 Draft Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, Venice Commission, CDL(2010)062, 31 July 2010, paras 71-74.

46 Recommendation CM/Rec(2010)12 of the Committee of Ministers, *op. cit.*, note 15, para 22.

47 Report on the Independence of the Judicial System Part I: The Independence of Judges Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), *op. cit.*, note 17, para 72.

then presiding over cases involving a high profile defendant.[48] No public explanation accompanied these transfers, and in general HCOJ decisions are not reasoned, apart from referencing the relevant provisions of the law.[49] According to Georgian law, the HCOJ is authorized to make such transfers without a competitive selection process, in circumvention of the general rule of competitive recruitment and career decisions. Although the HCOJ's sessions are public and decisions must be published, it is not clear from the law whether they have to be reasoned.[50] Regarding the transparency of the HCOJ, Georgian non-governmental organizations monitoring its work have noted shortcomings in practice, such as not publishing advance information regarding matters on the agenda, or not systematically publishing the minutes of sessions.[51]

32. The unlimited discretion of the HCOJ in relation to the transfer of judges, combined with the occasional lack of transparency in its work, and the absence of full reasoning in its decisions, have led to criticism and allegations by civil society of manipulation that limited the independence of judges in these three cases.[52] Full transparency in the making and reasoning of these decisions could have dispelled perceptions that the judges were transferred because they were more likely to render partisan judgements. In the light of the international standards described above, it is therefore important that the HCOJ does not interpret the General Administrative Code restrictively, but in a manner that effectively guarantees the protection of rights, by applying the Code to the HCOJ, and requiring it to provide reasons for any transfer decision. If this goes beyond the permissible limits of interpretation, the law should be amended to clarify that the HCOJ must provide reasoned decisions. As a minimum, the transfer of judges to certain positions should be fair, merit-based, and transparent. This does not necessarily require a fully competitive selection procedure in every case, but it suggests that it is necessary that transfer decisions be properly reasoned, and subject to review.

33. The provision permitting court chairs to assign other judges to a particular case, thereby de-facto deviating from the rule on automatic case assignment when necessary, to avoid interrupting the administration of justice, leaves wide discretion to court chairs, and, in the absence of properly reasoned decisions, negatively impacts the public perception of the independence of the judiciary. In reference to the assignment of newly transferred judges to cases against Bachana Akhalaia, the Public Defender of Georgia expressed concern that the regulations regarding case assignment fall short of

48 Akhalaia I, Akhalaia II, and Akhalaia III. See reference to the decisions on transfer of three judges on 6 February 2013 in Monitoring Trials of Former Government Officials (January 15 - December 15 2013), Human Rights Center (HRIDC), Tbilisi, 2013, page 26. Official Documents (Decisions of the HCOJ) regarding transfer of relevant judges are available here: transfer of Judge Darakhvelidze; appointment of Judge Darakhvelidze; transfer of Judge Mgeliashvili; appointment of Judge Mgeliashvili; appointment of Judge Chkikvadze.

49 "The High Council of Justice Monitoring Report No 2", Georgian Young Lawyers Association (GYLA) and Transparency International Georgia, Tbilisi, 2014, page 10.

50 As described above, the relevant provisions of Chapter III of the General Administrative Code of Georgia fully apply to the work of the HCOJ, in particular Article 3 paragraph 2.

51 *Ibid*., page 8.

52 Monitoring Trials of Former Government Officials (January 15 - December 15 2013), *op. cit*., note 48, page 26.

guaranteeing transparency.[53] International standards require case assignment to be random, or based on pre-defined objective criteria, thereby limiting the possibility of interference by court chairs or administration.[54] Concretely, this would require that a predefined system exists, and is only departed from in exceptional and justifiable circumstances. Exceptions should be clearly defined, and the discretion of the court chair limited, in order to avoid interference or perceived interference, with judicial independence.

3. Establishment of individual tribunals

34. Observed practices of establishing specific compositions of courts in individual cases may give rise to doubts with regard to the right to be tried by a tribunal established by law. As mentioned above, the notion "established by law" in international standards not only covers the legal basis for the existence of a "tribunal", but also the composition of the bench in each case, requiring that each individual tribunal be formed in accordance with the legal requirements for its establishment.[55] Despite the presence of rules regulating the composition of the bench, including the circumstances under which a judge should be removed or recused, monitoring identified court practice that did not comply with the CPC.

35. In one case, a judge was replaced mid-trial, reportedly because he was too busy to continue. There was no explanation as to how the new judge was appointed, nor did the parties move to re-start the trial.[56] As a rule, the CPC requires that, where the composition of the court changes because one judge is unable to participate in a court session, the trial must recommence *de novo*, with another judge substituting the previous judge. An exception to this rule only applies when the court chairperson has appointed an alternate/ reserve judge.[57]

36. While it may be necessary to replace judges under certain circumstances to ensure the rights of an accused, doing so in the course of a trial, without starting the trial anew or without an alternate having already being appointed, does not comply with domestic standards regarding court composition.[58] National legislation does not specify in which cases, and under what circumstances, the court chair can appoint an alternate or reserve judge to replace an existing judge, so that the trial can continue.[59] The CPC does not define the term "alternate / reserve judge", but it can be argued that reserve judges must be appointed at the outset of the trial, and attend all court hearings and deliberations, as is required for reserve jurors.[60] If interpreted

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53 *Annual Report of the Public Defender of Georgia: The Situation of Human Rights and Freedoms in Georgia*, The Public Defender of Georgia, page 249 (Georgian version only).
54 Kyiv Recommendations, *op. cit.*, note 15, para 12; Recommendation CM/Rec(2010)12 of the Committee of Ministers, *op. cit.*, note 15, para 24.
55 *Posokhov v Russia*, ECtHR, 4 March 2003, para 39.
56 Dzimtseishvili, 29 May 2013.
57 Articles 183 and 184 CPC.
58 *Ibid.*
59 *Ibid.*
60 *Ibid*., Articles 27(1), 224(1)-(2), 232(1) and 236(1)(a).

in a manner that a Court Chair can appoint any other judge as replacement for the excluded judge at any time thereby avoiding that the trial has to start anew, the exception would deprive of its essence the rule contained in the preceding provision, which states that the composition of the panel should stay the same and if a judge needs to be replaced mid-trial, the trial should start anew. In short, it is not clear in the logic of the law what would justify an exception. In the example given above, the judge was replaced by one who had not attended previous court hearings, and who therefore had no direct and immediate knowledge of the proceedings, including witness testimony. Given the lacunae in domestic legislation for reserve judges, as described above, the discretionary powers available are overly broad, and thus do not comply with international standards concerning the composition of a court established by law.[61]

D. Conclusion

37. Georgia's legal framework generally guarantees the right to an independent tribunal established by law. The Constitution and laws align overall with international standards, and courts are legally established and regulated. However, some judicial practices cast doubt on whether this requirement is fully met. Legitimate doubts by parties or the public as to the independence of tribunals may jeopardize the right to a fair trial, even when there is no proof of actual influence. Elements casting doubt on judicial independence, and affecting perceptions of such independence, relate to the practices of: selecting and appointing judges in a way that may fall short of guaranteeing the principle of irremovability; transferring judges between courts and allocating cases among judges without a fully transparent procedure and in a manner that leaves room for manipulation and interference; and exchanging judges mid-way through on-going proceedings without explanation, in breach of national procedural law. These practices may not in themselves amount to violations of the defendants' right to an independent tribunal established by law, but they raised concerns as to the independence of the judiciary and the public's perception of such independence. It remains to be seen whether the system of appointing judges with the newly introduced probationary regime, once established in practice, will be able to effectively protect the independence of individual judges.

E. Recommendations

- The HCOJ should develop regulations to complement provisions on monitoring and evaluation of judges on probation in the Law on Common Courts, should the probation period be retained in the law, taking into consideration recommendations on performance evaluation as established by international standards on judicial independence and accountability.

61 See *Moiseyev v Russia*, ECtHR, 6 April 2009, para 181.

- The HCOJ should adopt key criteria and uniform procedures concerning the selection and appointment of judges, regardless of whether the probationary period is retained, including procedures for deciding on permanent appointments at the end of the probationary period. Those procedures should include a requirement that proper reasoning in writing be part of all such decisions.
- The HCOJ should ensure full transparency of its sessions and decisions, by scheduling sessions sufficiently in advance, and informing the public of the agenda of the respective session.
- The HCOJ should interpret the General Administrative Code as requiring it provide reasons for its decisions concerning the transfer of judges.
- The legislature should reconsider the provision of the Law on Common Courts, which authorizes the court chairperson to *de-facto* deviate from the automatic case assignment rule at his or her discretion. At a minimum, the discretion of the court chairs should be limited to certain clearly-specified situations, and court chairs should be required by law to reason any decision that affects the assignment of judges to concrete cases. Such decisions should also be made available to the public.
- The legislature should consider clarifying the CPC regarding the criteria and procedure for replacing an excluded judge with an alternate / reserve judge, and include in the Code a definition of the alternate / reserve judge.

VI. PUBLIC TRUST IN THE CRIMINAL JUSTICE SYSTEM

38. Even in a criminal justice system where fair trial rights are widely respected, perceptions of bias, undue influence and arbitrariness can negatively affect the system's functioning, and undermine the principles and purpose of the rule of law. Individuals may resort to non-judicial means to resolve disputes. Witnesses or victims may not come forward. Court rulings may not be respected and enforced. It is therefore imperative that the authority and dignity of the court, and other criminal justice institutions, are maintained to ensure, not only fairness of the trial, but also the integrity of the judicial process, and thereby avoid jeopardizing the public's trust in the judiciary and prosecution service.[62]

39. This chapter examines concerns involving comments made by public officials regarding on-going and potential prosecutions against former high-level officials in the monitored cases; the appointment of the Chief Prosecutor; and the maintenance of the authority and dignity of the court. In addition to the findings from monitoring hearings, the analysis in this chapter is also based on public information about certain facts and developments outside the courtroom, which are of immediate relevance to the fair conduct of criminal proceedings.

62 Public trust in the courts and the independence of the judiciary have been examined in in-depth surveys and focus group discussions conducted by the Caucasus Research Resource Centers and the USAID-funded Judicial Independence and Legal Empowerment Project, see the report "Attitudes Towards the Judicial System in Georgia" of January 2012.

A. International standards

40. International standards recognize a plurality of models concerning the autonomy or independence of prosecution services from the executive branch of government. Whereas in some countries the prosecution is part of the executive branch of power, there is a "tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive."[63] Although international law does not explicitly protect the institutional independence of the prosecution, international bodies emphasize the importance of a prosecution free from undue influence, interference and outside pressure in carrying out its duties, in particular in relation to individual cases.[64] The UN Commission on Crime Prevention and Criminal Justice, in its Resolution on Strengthening the Rule of Law through Improved Integrity and Capacity of Prosecution Services, states that "the use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference."[65] The same principle is echoed in the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, as adopted by the International Association of Prosecutors.[66]

41. In relation to a Chief Prosecutor's tenure, the Venice Commission Report on European Standards as Regards the Independence of the Judicial System (Venice Commission Report) recommends permanent or long-term appointments, which do not coincide with the Parliament's term in office. It also warns against the possibility of reappointment, to avoid actual or perceived influence from the appointing authority.[67]

42. International standards on appointing prosecutors focus on providing safeguards against appointments based on bias and special interests.[68] At a minimum, the process must be conducted in a transparent fashion and in conformity with the law.[69] Regarding the method of selecting the general prosecutor, the Venice Commission Report states that it "should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession."[70] Public confidence and respect can be achieved

63 Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), Venice Commission, CDL-AD(2010)040, 3 January 2011, para 26.

64 *Ibid.*, para 32.

65 Strengthening the Rule of Law Through Improved Integrity and Capacity of Prosecution Services Resolution 17/2, Report of the Secretary General, Commission on Crime Prevention and Criminal Justice, 20th Session, E/CN.15/2011/8, 24 June 2011.

66 Standards of professional responsibility and statement of the essential duties and rights of prosecutors," International Association of Prosecutors, adopted 23 April 1999, para 2.1.

67 *Ibid.*, para 37.

68 "Guidelines on the role of prosecutors", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, para 2(a); and "Recommendation No. R(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system," Council of Europe, 6 October 2000, para 5(1) ,

69 Recommendation No. R(2000)19, *op. cit.*, note 68, para 13. *See also* "Bordeaux Declaration: Judges and Prosecutors in a Democratic Society", Council of Europe, CM(2009)192, 15 December 2009, para 8.

70 Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, *op. cit.*, note 63, para 34.

through a transparent selection process involving "professional, non-political experience", ideally through a "commission of appointment comprised of persons who would be respected by the public and trusted by the Government."[71] At the very least, the Venice Commission Report recommends, "Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society."[72]

43. Regarding the dignity and authority of courts, judges have both the authority and the duty to ensure the proper functioning of court proceedings by maintaining order and ensuring all parties and attending persons behave with decorum in the courtroom.[73] Judges must be equipped with sufficient powers to carry out those duties, and maintain the authority and dignity of the court.[74] The power to prevent and punish conduct that may hinder or obstruct proceedings, or lessen the authority or dignity of the court, is an inherent aspect of judges' authority to control the proceedings before them, by taking appropriate steps to ensure that the administration of justice is not impeded.[75]

44. Beyond maintaining order, judges are expected to interact with parties, jurors, witnesses, lawyers, and others with whom they deal in an official capacity, in a patient, respectful and courteous manner. Judges shall require similar conduct of legal representatives, court staff, and others subject to their influence, direction, or control.[76] International instruments also contain reference to lawyers' respect for the court, and prosecutors' respect of the dignity of their own profession, requiring professional behaviour in line with respective rules of professional ethics.[77]

B. National legal framework

45. Under Georgian law, prosecutors are bound in their activities by the general principles of legality, objectivity and impartiality, and political neutrality.[78] The Minister of Justice is explicitly banned from interfering in the investigation and prosecution of individual criminal cases.[79]

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71 *Ibid.*
72 *Ibid.*, para 35.
73 *The Bangalore Principles of Judicial Conduct*, UN ECOSOC, UN Doc E/CN.4/2003/65, para 6.6.
74 "Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency, and responsibilities", *op. cit*., note 15, para 6.
75 *Ravnsborg v Sweden*, ECtHR, 23 March 1994, para 34.
76 *The Bangalore Principles of Judicial Conduct*, *op. cit.*, note 73, para 6.6. See also, Recommendation CM/Rec(2010)12 of the Committee of Ministers, *op. cit*, note 15, para 6; and *European Charter on the Statute for Judges*, *op. cit*, note 19, para 1.5.
77 "Recommendation No. R (2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer", Council of Europe, 25 October 2000, Principle III(4); Standards of professional responsibility and statement of the essential duties and rights of prosecutors, *op. cit.*, note 66, para 2.1.
78 Law on the Prosecution Service, Article 4.
79 *Ibid.*, Article 8 para 2.

46. In light of the constitutional provision placing the prosecution service under the authority of the Ministry of Justice,[80] the Law on the Prosecution Service stipulates that the Chief Prosecutor is appointed and dismissed by the Prime Minister of Georgia upon the nomination of the Minister of Justice.[81] The law also sets out limited selection criteria for prosecutors generally, including the possession of a legal education, "a hard-working and moral character", and a level of health that enables him or her to fulfil prosecutorial duties.[82]

47. Aside from prohibiting overt political affiliation or commercial interests, the selection criteria for prosecutors are mostly limited to the candidates' professional qualifications, and do not provide any safeguard against partiality or political influence. The law also does not provide a framework or minimum requirements for a formal consultation of the nominating and appointing authority with other relevant stakeholders when selecting a candidate as Chief Prosecutor. Length of tenure, and criteria or procedures for dismissal of the Chief Prosecutor, are also not defined.

48. Under Georgian law, the judge, prosecutor, and other participants in criminal proceedings, must respect the dignity of the participants in criminal proceedings.[83] Judges are required "to maintain order in court, and ensure that other persons attending the hearing show proper respect to the court."[84] They should inform parties and the public concerning the maintenance of order, and the sanctions applicable for violating that order.[85] Further, judges have the power to fine or remove from the courtroom a person "in case of violation of court order, non-compliance with the order of a presiding judge, or expression of disrespect towards the court", and even have the power to order detention "if an action of a person at the court is aimed at obstructing the court session or if it expresses obvious and/ or gross disrespect towards the court, a participant, or a party to proceedings."[86]

C. Analysis

1. Autonomy of the Prosecution

49. Statements by public officials calling for the prosecution of members of the former Government, and declaring the guilt of defendants in the monitored cases, may have led to public speculation that politics played a role in the process of filing criminal charges, and that the outcome of certain cases may have been predetermined. Such statements undermine the judicial system, and erode public trust. Regarding the autonomy of the prosecution service,

80 The Constitution of Georgia, Article 81[4], "Prosecution bodies are included in the system of the Ministry of Justice, and the Minister of Justice provides overall supervision of them. The authority of the Prosecution and the procedure for its activities are determined by law."
81 Law on the Prosecution Service, Article 9(1).
82 *Ibid.*, Article 31(9)-(10).
83 Article 4(1) CPC; *See also* Norms of Judicial Ethics of Georgia, Article 9.
84 Norms of Judicial Ethics of Georgia, Articles 9-12, see also Article 23 CPC in particular for the presiding judge.
85 Article 228(4) CPC.
86 *Ibid.*, Article 85.

the Venice Commission considers that "the appearance of intervention can be as damaging as real interference."[87]

50. During the period of ODIHR's trial monitoring, the media reported a number of public statements by high-ranking Georgian officials regarding potential prosecutions against the former President and other members of the political opposition, with some statements being possibly perceived as direct calls for prosecution. When asked about Bachana Akhalaia during an interview, then-Prime Minister's advisor Gia Khukhashvili was quoted as saying "He must be given his due for his misdeeds and unspeakable offences". In reference to Mikheil Saakashvili and other former high-ranking officials, the same article quotes Khukhashvili as saying that he believed "all these criminals will reap what they have sown."[88] Also in an interview, Vice-Speaker of Parliament Manana Kobakhidze referred to one accused as a criminal, and assured the public that "our prosecutor's office is strongly determined to give all criminals their due."[89] Numerous comments also followed the prosecutor's summons for questioning of former President Saakashvili. For example, on 22 March 2014, five days before the 27 March summons date, Prime Minister Irakli Gharibashvili reportedly said that the prosecutor's office would declare the former President "wanted" if he failed to appear, suggesting that the Prime Minister had some authority over the prosecutor's office in the matter.[90]

51. Statements from political contestants regarding prosecutions of their opponents are not surprising during periods of heightened political tension, such as the tension surrounding the October 2013 presidential elections and the June 2014 local elections, as well as following the dramatic change in political power after the October 2012 parliamentary elections. However, statements by members of the legislative and executive branches calling for prosecutions may put undue pressure on the prosecution service, or be publicly perceived as doing so. Similarly, statements promising prosecutions, or otherwise anticipating the results of investigations, cast a shadow over the perceived autonomy of the prosecution service, by suggesting that it is government officials, rather than prosecutors, who ultimately decide who is to be charged with a crime. It is imperative that officials refrain from making public statements that might create doubt as to the integrity of the judicial system, and that might suggest that they possess any authority over prosecutorial decision-making.

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87 Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, *op. cit.*, note 63, para 26.

88 "Press Digest: Irresistible temptation - the burden of power on 31-year-old PM's young shoulders", InterPressNews (IPN), 4 November 2013.

89 "Press Digest: Russia wants to set visa-free travel with Georgia sooner than Europe", InterPressNews (IPN), 24 December 2013.

90 "Politics: Irakli Gharibashvili – If Saakashvili doesn't arrive, prosecutor's office will act in accordance with law and declare him wanted" InterPressNews (IPN), 23 March 2014.

2. Appointment of the Chief Prosecutor

52. Since monitoring began in February 2013, three Chief Prosecutors have led the prosecution service.[91] The appointment procedure of the current and previous Chief Prosecutors presents another issue that may have also tainted public trust in the autonomy of the prosecution service.

53. Firstly, when the highest official of the prosecution service is changed or resigns at a time when major changes are occurring in the political landscape of a country, it sends a public message of close proximity of the office to politics, and projects an image of institutional instability and weakness. This perception of close proximity is reinforced by the Georgian legal framework, which does not provide security of tenure to the Chief Prosecutor, or a fixed-term appointment not coinciding with the Parliament's term in office. During the trial-monitoring period, former Chief Prosecutor Archil Kbilashvili resigned on 7 November 2013, citing disagreements over the pace of reforms with both the outgoing and incoming Prime Minister.[92] His successor Otar Partskhaladze resigned on 30 December 2013, followed by the appointment of Giorgi Badashvili. The frequent change of Chief Prosecutors in such a short time may have supported perceptions of political affiliation or attempts at influence peddling, which can damage overall public trust in the criminal justice system. For this reason, international standards recommend that chief prosecutors be given permanent or long-term appointments, which do not coincide with the Parliament's term in office.[93] Georgian law does not however provide for a set tenure, or regulate the process of dismissal. Lack of security of the Chief Prosecutor's tenure raises concerns as to the perception of impartiality and political neutrality of the prosecution service.

54. Secondly, when there are doubts as to the full respect for, and transparency of, the legal procedures for selecting and appointing a Chief Prosecutor, this casts a shadow over the public perception of the particular official as politically neutral, impartial and autonomous. The latest appointment process, following the 30 December 2013 resignation of Kbilashvili successor Otar Partskhaladze, raised doubts in the media and public sphere whether it was done entirely in accordance with the law.

55. Although Georgian law does not provide a set procedure for the selection of the Chief Prosecutor, it requires that the Prime Minister appoint the candidate upon a proposal of the Minister of Justice.[94] This requirement can be reasonably interpreted as allowing the Justice Minister's substantive involvement, if not the lead role, in selecting the candidate for appointment as Chief Prosecutor. This interpretation is also reflected in the positions of a number of civil society

91 For the resignation of Archil Kbilashvili, see "Chief Prosecutor to Step Down" Civil.ge, 7 November 2013; for the resignation of Otar Partskhaladze, see "Chief Prosecutor Resigns" Civil.ge, 30 December 2013; for the appointment of Giorgi Badashvili, see, "New Chief Prosecutor Appointed" Civil.ge, 21 January 2014.

92 See Chief Prosecutor to Step Down, *op. cit.*, note 91. Archil Kbilashvili had also been appointed relatively recently, by the incoming government, on 30 October 2012.

93 See Report on the Independence of the Judicial System Part I, *op. cit.*, note 17, para 37.

94 Article 9 para 1 Law on Prosecution Service.

organizations.[95] When interpreting national law in the light of international standards, there should be a minimum level of transparency surrounding the selection procedure, and advice on the candidate's professional qualifications should be obtained from representatives of the legal community and civil society. Based on discussions in the media about the appointment of the current Chief Prosecutor, the public perception of the process was that there was minimal, if any, involvement of the Minister of Justice in the selection of the candidate, even though the Minister ultimately nominated the candidate for appointment, as provided by law. The Prime Minister made reference to an on-going consultation process on 16 January 2014, and the Minister of Justice stated on the same day that she was not aware of any candidate names.[96] A number of civil society organisations issued a statement the following day, expressing concern about the procedure of selecting a new Chief Prosecutor.[97] Among other things, they recalled that in the case of the previous Chief Prosecutor, "questions regarding his criminal record and legal education clearly showed the significance of the selection process, and underlined the responsibility of relevant authorities involved in this process, in particular the Minister of Justice and the Prime Minister." The organizations further warned that criminal justice in general, and public trust in the Office of the Chief Prosecutor in particular, would suffer unless the candidate for the post satisfied high moral and professional standards. This, according to the organizations, is supposed to be guaranteed by the joint selection by the Prime Minister and the Minister of Justice. The statement also stated that "it is important for society to be aware of the principles and values applied" in selecting a new Chief Prosecutor.[98]

56. Only a few days after she was quoted in the media as saying she was not aware of candidate names, the Minister of Justice formally nominated Giorgi Badashvili for appointment as the new Chief Prosecutor.[99] There had been media reports and public speculation about a number of candidates, but the Prime Minister did not inform the public about any of these.[100] ODIHR is also not aware of any public information regarding the participants involved in the consultation, the criteria applied, or how and by whom the nomination decision was made. When announcing his appointment of Giorgi Badashvili as the new Chief Prosecutor on 21 January 2014, Prime Minister Irakli Gharibashvili explained this choice by the candidate's "qualifications, professionalism, and good reputation."[101]

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95 See "NGOs urge the Minister of Justice and the Prime Minister to direct the process of appointing the General Prosecutor of Georgia in a responsible way" Georgian Young Lawyers' Association (GYLA), 17 January 2014.

96 "Justice Minister Says not Involved in Selecting New Chief Prosecutor" Civil.ge, 17 January 2014.

97 See "NGOs urge the Minister of Justice and the Prime Minister to direct the process of appointing the General Prosecutor of Georgia in a responsible way", *op. cit.*, note 95.

98 NGOs urge the Minister of Justice and the Prime Minister to direct the process of appointing the General Prosecutor of Georgia in a responsible way, *op. cit.*, note 95.

99 Minister of Justice Tsulukiani presented Chief Prosecutor Giorgi Badashvili to the Prime Minister for approval. See "Georgia appoints new chief prosecutor", Democracy & Freedom Watch, 22 January 2014.

100 *Ibid.*

101 New Chief Prosecutor Appointed, *op. cit.*, note 91.

57. Although the legal authority of the Minister of Justice concerning the nomination process does not guarantee a separation from the executive, it does create a separation from the Prime Minister, and leaves room for the possibility of a formal consultation process within the justice ministry. Significantly, the lack of transparency in the January 2014 selection process had already raised concerns from civil society that the Prime Minister unilaterally conducted the selection process.[102] This gave the impression that the new Chief Prosecutor may have been appointed on the basis of political convenience, undermining any legislative guarantees of political neutrality and impartiality on the part of the prosecution service. During this selection process, an opportunity was missed to build trust in this crucial institution by conducting a fully transparent appointment procedure, involving and consulting with all relevant actors.

3. Dignity and Authority of the Court

58. In all the observed cases, monitors witnessed many examples of a lack of consideration for court order and the solemnity of court proceedings, followed either by an absence of reaction by presiding judges, or ineffective attempts to restore order. In cases with a high number of defence counsel, the judge regularly failed to apply measures to prevent defence counsel from shouting over the prosecutor or one another.[103] Presiding judges allowed parties, particularly the defence, to harass, threaten, or humiliate witnesses beyond the limits of permissible, assertive examination,[104] and rarely reacted when noise and laughter from the gallery made the conduct of dignified proceedings difficult.[105] When faced with lengthy political speeches from defendants, judges admonished them repeatedly, but did not enforce court order, and did not insist on the respect of proceedings among defendants' raucous supporters in the gallery.[106]

59. Monitors also observed instances of presiding judges displaying a passive attitude, rather than actively ensuring respectful behaviour towards the court, the prosecutor, defendants and witnesses.[107] In some incidents, judges did little to protect the dignity of prosecutors in particular, allowing derision from defendants' supporters, despite the prosecutors' objections.[108] Equally, the judge in one hearing gave no reaction when, rather than answering the prosecution's questions during examination, a witness made repeated assertions that political considerations were motivating the prosecutor's actions.[109]

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102 NGOs urge the Minister of Justice and the Prime Minister to direct the process of appointing the General Prosecutor of Georgia in a responsible way, *op. cit.*, note 95.

103 For example, the Akhalaia II trial, 23 May and 24 July 2013.

104 Akhalaia I trial, 4 April 2013; *See also* Merabishvili/Tchiaberashvili trial, 6 December 2013; Akhalaia II trial, 23 May 2013 and 28 June 2013. See Chapter XVI for more analysis of the treatment of witnesses.

105 Akhalaia II trial, 23 May 2013, 14 June and 3 July 2013; Merabishvili/ Tchiaberashvili trial, 6 December 2013; Akhalaia II trial, 14 June 2013 and 3 July 2013.

106 E.g. Merabishvili/Tchiaberashvili trial, 7 October 2013 and 25 September 2013; Akhalaia II trial, 14 February 2014; See also, Merabishvili trial, 14 May 2014, 16 June 2014, Merabishvili appeal 27 July 2014.

107 Akhalaia II trial, 23 May 2013; Merabishvili/Tchiaberashvili trial, 25 September 2013; Merabishvili trial, 16 January 2014.

108 Merabishvili/Tchiaberashvili trial, 25 September 2013.

109 Akhalaia I trial, 25 June 2013.

60. The passive attitude of some judges may be influenced by misunderstandings of the role of an independent and impartial judge in adversarial proceedings. It is clear that judges are required to be impartial, and should avoid being perceived as politically biased, which means that they must treat parties equally, and pay attention to the effects of contempt of court and other rulings on the principle of equality of arms. Nevertheless, international and national standards concerning the judge's responsibility to uphold court order and respect are clear, and it is therefore incumbent on presiding judges to issue rulings to restore order where necessary.

61. While the examples described above suggest that judges are often hesitant to ensure order in the courtroom by imposing sanctions for contempt of court, in one case the judge gave a warning that further hearings would be closed to the public if the gallery did not quieten.[110] This example, though not representing a general trend, is also relevant to the right of the defendant to a public hearing. Closing hearings is permitted only in exceptional circumstances described in the law, and excluding the general public from a hearing as a measure to counter contempt of court, and ensure order and respect in the courtroom should only be applied as a last resort. Instead, judges should apply the existing warnings and sanctions for contempt of court to the specific individuals or groups who disrupt proceedings.[111]

62. While any one of the above observations would not necessarily amount to a violation of the defendants' right to a fair trial, the totality of these incidents raised particular concern relative to public perception of the criminal justice system. The fact that such unsanctioned behaviour occurred during all monitored cases demonstrates an absence of respect for the justice system as a vehicle for determining the truth about crimes, and establishing justice for perpetrators, victims, and society as a whole. Hearings often lacked the solemn character that one would expect, particularly given that individual liberty and victims' rights were at stake. Lack of order and respect for the basic rules of conduct during the trial undermine the integrity of the judicial process and the fairness and efficiency of the administration of justice. While in some instances judges issued warnings, generally they did not make effective use of their power to sanction misconduct with fines or detention, which may have been more effective in restoring order in the courtroom, and thus reinforcing public trust in judicial proceedings.

D. Conclusion

63. Public trust in a judicial system is an essential component of its legitimacy. During the monitoring period, several issues arose that contributed to a further erosion of public trust in the criminal justice system. Public officials commented on proceedings in a manner that implied they had some control over or ability to influence the prosecution, potentially affecting the public perception of the prosecution service as impartial and politically neutral.

110 Khizanishvili trial, 6 November 2013.

111 All aspects regarding the right to a public hearing are analysed in more detail in Chapter VII.

Public doubts in relation to the appointment of the Chief Prosecutor were not conducive to building public trust in the criminal justice system, and the guarantee of its political neutrality. Finally, judges sometimes appeared either unwilling or unable to exercise control over proceedings, and maintain order in the courtroom. The fact that disruptive behaviour in the courtroom mostly remained unsanctioned, and hearings often lacked the required solemnity, demonstrates generally weak respect for the justice system.

E. Recommendations

- When commenting on judicial processes, and particularly on-going criminal investigations, public officials should carefully balance their statements to avoid politicizing the judiciary or the Office of the Chief Prosecutor.
- Before any future appointment of a Chief Prosecutor, the Prime Minister, in close coordination with the Minister of Justice, should conduct a transparent and consultative selection procedure, in full compliance with the letter and the spirit of the law that requires that the candidate is nominated by the Minister of Justice. In selecting nominees, the Minister of Justice should adopt the recommendations of the Council of Europe's Venice Commission in its *Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service*. This provides for the establishment of an appointment commission comprised of persons with professional, non-political expertise, who would be respected by the public and trusted by the government, with advice from relevant persons such as representatives of the legal community and civil society.
- The legislature should consider amending the law on prosecution to provide a secure tenure for the Chief Prosecutor, permanently or for a relatively long period without the possibility of renewal. Such tenure should not be tied to parliamentary or presidential terms. Criteria and procedures for dismissal of the Chief Prosecutor prior to the end of this tenure should also be provided for in this law. The provisions should also provide sufficient safeguards against partiality or political influence.
- Judges should use the full range of their powers of maintaining order in the courtroom, to ensure an environment that is conducive to protecting fair trial rights and enhancing public trust in the criminal justice system.
- Judicial training bodies should develop programmes to support judges in implementing their role of maintaining order in the courtroom while remaining impartial in adversarial proceedings.

VII. RIGHT TO A PUBLIC HEARING

64. The right to a public hearing is a vital safeguard for the interests of defendants and society as a whole. Access to hearings ensures public scrutiny of individual proceedings, protecting the defendant from the concealed denial of rights. It also allows for greater transparency of the justice process, which contributes to greater public trust, greater accountability, and a wider debate on the justice system.

65. This chapter examines observed practices which raised concerns, relative to a lack of information concerning the date and place of hearings; small courtroom size; exceptionally long hearings; restrictions on re-entering the courtroom; inconsistent application of rules on excluding the public, based on state secret and public order concerns; and unclear and inconsistent practices related to the media and public's right to record hearings under national law.

A. International standards

66. The Universal Declaration of Human Rights (hereinafter UDHR), the International Covenant on Civil and Political Rights (hereinafter ICCPR), and the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) set out the right to a public hearing.[112] The Human Rights Committee emphasizes the importance of this right, stating that "the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large."[113] Its importance is equally recognised by OSCE participating States.[114]

67. The right to a public hearing is not absolute. The ICCPR and the ECHR outline the grounds on which it may be restricted, such as morals, public order, or national security, the protection of private lives of the parties, or in exceptional case the interests of justice as determined by the court.[115] However, the principle of proportionality inherent in any lawful limitation to human rights dictates that such restrictions must "be strictly required by the circumstances of the case."[116] Moreover, measures must be applied equally, and cannot target a particular category of persons.[117] Concerning exclusion of the press and public in the interest of national security, the ECtHR has made it clear that the existence of classified information does not automatically justify closure of the trial, and that in order for exclusion to take place, courts must find that closure is necessary to protect a compelling governmental

112 UDHR, Articles 10 and 11(1); ICCPR, Article 14(1); ECHR, Article 6(1).

113 See "General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial", United Nations Human Rights Committee, UN Doc CCPR/C/GC/32, 9 to 27 July 2007, para 28.

114 *Concluding Document of the Vienna Meeting*, *op. cit*., note 4, Principle 13.9; Document of the Copenhagen Meeting, *op. cit.*, note 4, para 5.16; Kyiv Recommendations, *op. cit.*, note 15, para 32.

115 ICCPR, Article 14(1); *see also*, ECHR, Article 6(1).

116 *Olujić v Croatia*, ECtHR, 5 May 2009, para 71.

117 See General Comment No.32, *op. cit.*, note 113, para 29, which cites that "[…] a hearing must be open to the general public […] and must not, for instance, be limited to a particular category of persons."

interest, and that closure should be ordered only to the extent necessary to preserve such an interest.[118]

68. The right to a public hearing belongs not only to defendants in criminal proceedings, but also to the public, which has the right to a transparent and accountable system of justice.[119] With regard to courtroom space, courts should conduct hearings in courtrooms that are able to accommodate the expected number of persons, depending on the foreseeable level of public interest.[120]

69. Further, as for all human rights protected by the ECHR, the right to a public hearing must be guaranteed in a practical and effective manner.[121]

B. National legal framework

70. The Constitution, CPC, and the Law on Common Courts explicitly set out the requirements concerning the public nature of court proceedings.[122] According to the CPC, "the trial shall, as a rule, be oral and public."[123]

71. As an exception to the right to a public hearing, Georgian legislation foresees the possibility of holding closed hearings, such as in cases involving state secrets or the need to maintain court order.[124] If one party disagrees with another's motion to close a hearing, arguments on the motion take place during a closed session.[125] Nevertheless, the judge must publicly announce the grounds for closing a hearing.[126]

72. The Law on State Secrets sets out the procedure for classifying information as a state secret. The National Security Council makes recommendations to the President on what information should be considered secret[127], and the law outlines what information may and may not be defined as a state secret.[128] Crucially, "[t]he state body or the enterprise, institution, or organization that has developed or received for consideration or for safekeeping the information of interest shall be bound to justify the necessity of defining it as a state secret."[129] Such a classification may be appealed.[130]

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118 *Welke and Białek v. Poland,* ECtHR, 15 September 2011, para 77, and *Belashev v. Russia*, ECtHR, 04 May 2009, para 83.
119 See General Comment No.32, *op. cit.*, note 113, para 28.
120 See *Marinich v Belarus*, HRC Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010), para 10.5.
121 See *Hummatov v Azerbaijan*, ECtHR, 29 February 2008, para 144; *Airey v Ireland*, ECtHR, 9 October 1979, para 24; *Artico v Italy*, ECtHR, 13 May 1980, para 33, where the Court established that the ECHR "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."
122 The Constitution of Georgia, Article 85(1); Articles 10 and 13(1) CPC; Law on Common Courts, Article 6(1).
123 Article 10(1) CPC.
124 Article 182 CPC. *See also Ibid.*, Article 85(1) and Law on Common Courts, Article 131 (2).
125 Article 182(5) CPC.
126 *Ibid.*, Article 182(6).
127 Law on State Secrets, Articles 4(2) and (3).
128 Law on State Secrets, Articles 7 and 8.
129 Law on State Secrets, Article 9(1).
130 *Ibid.*, Article 16(2).

73. The CPC places the primary responsibility for maintaining court order on the presiding judge.[131] To this end, the Code authorises the judge to close the hearing entirely or partially upon his or her own initiative.[132] Courts may apply a range of sanctions for the violation of courtroom order or the expression of disrespect towards the court, such as fines, expulsion from the courtroom, and arrest.[133] In addition, judges may immediately increase a fine or remove the person from the courtroom if a person previously fined continues to misbehave.[134] Moreover, in the event that an individual behaves in an obstructive manner, or seriously disrespects the court, a party or a participant to the proceedings, the court can order the individual's detention.[135] Once a person is removed from the hearing by order of the judge, he or she is considered removed from the court hearing until the trial is completed, though a party may move for the person's re-admittance.[136]

74. Further reinforcing the guarantee of a public hearing, Georgian law allows the public attending the trial to take photos and audio and/or video record the hearing upon a "reasoned request".[137] The law gives an automatic right to video record public hearings to the public broadcaster, which upon request is obliged to disseminate it to other media broadcasters.[138] If the public broadcaster elects not to record a proceeding, another entity with a general broadcasting license may submit a written application to record a hearing; the law does not mention any deadlines or mechanisms for implementation of this provision.[139] Additionally, the court must record the trial and upon request it must provide available audio/ video recording to the parties who, in cases of the recording of a closed session, must sign a non-disclosure agreement.[140]

C. Analysis

1. Hearing information and courtroom size

75. The right to a public hearing can only be realised if the public has effective access to court hearings. The availability of prior information on hearings, and of adequate courtroom space, is essential for public attendance.

76. In both the Tbilisi and Kutaisi city courts, information on individual hearings was not always included on the courthouse information screens, nor was

131 Article 85(1) CPC.
132 *Ibid.*, Article 182(4).
133 *Ibid.*, Articles 85(2) and 85 (7).
134 *Ibid.*, Articles 85 (2) and 85 (6).
135 *Ibid.*, Article 85(7).
136 *Ibid.*, Article 85(5).
137 Law on Common Courts, art. 131 (4).
138 *Ibid.*, Article 131 (2) and (3).
139 *Ibid.*, Article 131 (3).
140 *Ibid.*, Article 131 (1).

the information always updated to reflect schedule or location changes.[141] On occasion, the courtroom number or time of hearing was inaccurate.[142] Information could sometimes be obtained from the information desk, but those attending it did not always have complete or accurate information.[143] Occasionally, changes in the courtroom number were announced through a loudspeaker system.[144] The lack of accurate information about the date, time, and place of hearings makes the criminal justice process – often daunting and convoluted to the ordinary public – difficult to access. This is particularly so when courts do not make information concerning court sittings available via internet or other systems of communication.

77. In addition, all of the cases observed involved high-profile defendants, with allegations that generated significant public interest. However, courtrooms were often too small to accommodate a reasonable number of people wishing to attend.[145] As a result, there was frequent and vigorous competition for access at the entrances to courtrooms.[146] At other times courtrooms were overcrowded; in one case a bench bearing too many people literally collapsed.[147] Alternate means to ensure public access, such as video links, were not used.

78. Although the law cannot reasonably guarantee a place at every hearing for every interested person, it is important that courts use existing resources appropriately and efficiently, with the objective of ensuring that proceedings are effectively public. In particular, for hearings that are expected to generate significant public interest, alternative means to guarantee public scrutiny of the trial should be utilized, such as larger courtrooms, or live-link transmissions of proceedings onto large screens for viewing in other parts of the court building. Scheduling hearings in small courtrooms for cases that can be expected to stimulate considerable public interest not only prevents reasonable public attendance, but also may deter the public from attending future hearings, limiting the right to a public trial.

79. The observed practices therefore raised concerns as to possible violations of the right to a public hearing, since the public is often deprived of effective access to the court hearing due to inaccurate or missing information on case schedules, and to a lack of sufficient courtroom space.

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141 Akhalaia I trial, 28 June 2013 and 2 July 2013; Dzimtseishvili trial, 22 March 2013, 17 May 2013 and 11 June 2013; Gunava trial, 1 July 2013 and 12 July 2013; Khetaguri/Gvaramia trial, 27 May 2013 and 26 June 2013; Merabishvili/Tchiaberashvili trial, 8 November 2013 and 27 December 2013.

142 Akhalaia II trial, 23 May 2013 (incorrect courtroom listing); Akhalaia I trial, 9 July 2013 (hearing listed for 13:00, but started at 11:00); Akhalaia II trial, 20 June 2013 (incorrect time listed on electronic screen).

143 Akhalaia I trial, 2 July 2013.

144 For example, the Akhalaia II trial, 27 May 2013.

145 Akhalaia I trial, 20 February 2013, 28 February 2013, 1 March 2013, 5 March 2013, 14 June 2013 and 1 August 2013; Akhalaia II trial, 17 April 2013, 30 April 2013, 12 June 2013 and 12 August 2013; Akhalaia III trial, 9 September 2013 and 17 September 2013; Khetaguri/Gvaramia trial, 19 March 2013.

146 Akhalaia II trial, 17 April 2013 and 12 August 2013.

147 Akhalaia II trial, 16 May 2013 (when an overcrowded bench broke in the middle of a hearing).

2. Prohibition on leaving and returning to the courtroom

80. On several occasions, parties and members of the gallery were not permitted to leave and return to the courtroom, a situation that, combined with the fact that hearings could last over 10 hours with only a limited number of breaks, rendered it difficult for the public to follow the trial.[148]

81. The right to a public trial includes the public's ability to attend a hearing, in order to allow open scrutiny of court proceedings. This right should be guaranteed in an effective and practical manner. There may exist legitimate reasons for restricting the entry to and exit from courtrooms, such as the need to maintain courtroom order, however, certain members of the public may need more frequent access to public restrooms, or may not be able to sit for long periods of time. Prohibiting individuals from leaving and returning to courtrooms may disproportionately affect certain groups, and may even be discriminatory in effect, particularly where order can be maintained through less stringent measures, such as informing the public in advance of the need to leave and return to the courtroom in a discreet manner.

3. Exclusion of the press and public in the interest of national security

82. Monitors observed cases where public access to proceedings was restricted on the alleged basis of national security.[149] In all such cases, it was claimed by the parties, lawyers, or witnesses that the evidence in question amounted to a state secret.[150] Decisions to exclude the public from the hearing raised concerns, since restrictions of the right to public hearing on the basis of secrecy were poorly justified or reasoned, and decisions were overly broad in scope.

83. With regard to decisions that were poorly justified or reasoned, monitoring revealed that occasionally witnesses were examined in closed session, without a clear explanation for excluding the public.[151] This practice contradicts the court's obligation pursuant to Article 182 of the CPC to publicly announce the grounds for closing a court session, and could be seen as arbitrary and lacking transparency.

84. Furthermore, in several cases, the court did not properly assess whether a party's claim to state secret privilege was substantiated.[152] For instance, in the course of cross-examining a witness in one case, the prosecutor objected

148 See Merabishvili/Tchiaberashvili trial, 29 January 2014; Akhalaia I trial, 23 July 2013, where court hearings exceeded 10 hours per day, albeit with short breaks. Monitors did not receive an explanation as to the rationale for restricting exit and return to the courtroom, and could only presume that it was due to the need to maintain courtroom order.

149 ODIHR monitors did not have access to closed hearings. ODIHR submitted a request to the Supreme Court Chairperson requesting such access, but it was denied on the basis that trial judges' discretion to permit ODIHR access "is limited by the confidentiality requirement of the parties of the case proceedings." Letter to ODIHR from Chairperson of the Supreme Court of Georgia, 11 June 2013.

150 Akhalaia I trial, 7 June 2013 and 10 June 2013; Akhalaia II trial, 17 April 2013 and 5 June 2013; Gunava trial, 18 June 2013; Merabishvili/Tchiaberashvili trial, 8 January 2014.

151 Merabishvili/Tchiaberashvili trial, 25 December 2013 and 27 December 2013.

152 See for instance, Gunava trial, 18 June 2013; Akhalaia I trial, 7 June 2013 and 10 June 2013.

to a defence question relating to the alleged physical abuse of recruits from the Ministry of Internal Affairs during a training programme, stating that the answer would be subject to state secrecy privilege.[153] The judge requested the prosecutor to refrain from answering on behalf of the witness; however, the witness subsequently repeated the prosecutor's statement, and refused to answer the question. There was no further discussion as to the admissibility of this information, and to what extent it would indeed constitute a state secret. According to Georgian law, neither witnesses, nor parties to the proceedings, nor their representatives, have the authority to designate information as a state secret, since any claim of state secret privilege must be made by the state body holding that information.[154] If a party disputes the designation, it should then be verified with the appropriate authorities.[155] While these cases did not lead to the closure of the hearing, it is a matter for concern that the court excludes potential information from evidence without an adequate assessment as to whether the information in fact justifies classification as a state secret. This could potentially unjustly exclude certain information from the public, and hence possibly deprive the defendant of the right to a public hearing.

85. Finally, the closure of some hearings went beyond the stated purpose of protecting state secrets. In one case, the judge closed a hearing to discuss grounds for excluding the public during the testimony of a representative of the Ministry of Internal Affairs, and then later closed the session for the duration of the testimony of another witness representing the state body maintaining classified information, stating that, during the testimony, classified documents would be presented.[156] While the prosecutor asked to exclude the public only during the part of the testimony in which the witness would present the classified documents, the judge decided to close the session during the witness' entire testimony. She reasoned her decision on the grounds that she was not in the position to control whether the witness would answer questions by referring to or citing the documents in question. If a witness' evidence contains both public information and state secrets, the judge should, to the extent possible, ensure an open hearing of the public information, and any closed session is limited to evidence designated as a state secret. In particular, attention should be paid to distinguishing between expert witnesses, who are familiar with protecting classified information in a courtroom setting, and lay witnesses who may not have this experience.

86. Considered together, observed practices concerning the unjustified exclusion of state secrets from evidence and the public from courtrooms risked depriving the defendant of the right to a public hearing.

153 Akhalaia I trial, 7 June 2013.
154 See Law on State Secrets, Article 9(1).
155 See as an example of good practice, Akhalaia II trial, 5 June 2013, where the judge forwarded to the Ministry of Defence a party's request for information that possibly contained state secrets, asking it to clarify which information was restricted.
156 Merabishvili/Tchiaberashvili trial, 8 January 2014.

4. Exclusion of the press or the public in the interest of public order

87. In most monitored cases, judges opened court sessions by asking the public and parties to maintain order or risk sanction, and on some occasions, the court closed the session on these grounds. The court however often failed to apply the sanctions at its disposal in an appropriate, proportional or consistent manner.

88. When courtroom order was disturbed, judges often decided to exclude the public altogether, rather than using less restrictive measures, pursuant to the principle of proportionality. In one instance, an order excluded the entire public for the remainder of a session, in response to the heckling of a witness by a few members of the public.[157] At other times, judges failed to apply any sanctions whatsoever, despite a clear need to restore courtroom order.[158] Restricting public access to proceedings for certain members of the public to restore order in the courtroom is lawful, but should only be exercised as a measure of last resort. Excluding the entire public, when a fine or the exclusion of individual members of the public could have sufficed, is neither proportionate nor consistent with the right to a public trial, since it also punishes innocent members of the public. Warnings, fines, increased fines, exclusion, and detention of individual members of the public should be considered, in that order, prior to taking a decision to restrict the right to a public hearing.

89. When other measures were applied in lieu of closing the hearing, courts did not apply them in a consistent manner. For example, whereas some members of the public who had been expelled at previous sessions were banned from attending all subsequent hearings in the same case, judges allowed other expelled members of the public into subsequent hearings in the same case.[159] Allowing some previously excluded members of the public back into the courtroom, while permanently excluding others, created the perception that the judge acted in a partial and arbitrary manner, and therefore potentially undermined the public's trust.

90. Where the public is excluded in the interest of maintaining courtroom order, courts should ensure the fulfilment of the right to a public hearing by making the audio/ video recording of the closed hearing available to the public. Such a measure would mitigate the effects of public exclusion, since such closures are not ordered to prevent disclosure of state secrets, or other confidential information.

91. The practices observed revealed that courts may have, on occasion, improperly applied legal provisions concerning the exclusion of the public to preserve courtroom order, thus precluding the public from playing its role as a monitor of the proceedings. These practices therefore constituted restrictions of the defendant's right to a public hearing and thus limited the corresponding access by the public to these hearings.

157 Akhalaia I trial, 29 April 2013; see also Akhalaia II trial, 30 May 2013.
158 Merabishvili/Tchiaberashvili trial, 12 September 2013.
159 Akhalaia I trial, 29 April 2013.

5. Recording of hearings

92. One manner of ensuring the right to a public hearing in Georgia is the possibility of the public and media recording court hearings. Such recordings can then be partially aired by broadcasters, thereby making trials accessible to the public.

93. With regard to public and media broadcasters, monitors observed varying, and sometimes conflicting, approaches to the recording of hearings, which could limit the general public's right to access hearings, and the defendant's right to a public hearing. While public broadcasters were consistently given the right to video and audio record hearings, private broadcasters were subject to inconsistent court practices, often resulting in them not being authorized to record hearings.[160] Private individuals were generally allowed to make audio recordings of hearings, although the courts' interpretation varied as to the manner in which this right was to be exercised.[161] For instance, ODIHR monitors were sometimes requested to submit a written or oral request to audio-record hearings.[162]

94. The right to a public hearing is based on various mechanisms ensuring public scrutiny of the administration of justice. These mechanisms, such as recording of public hearings, must be implemented in an effective way to guarantee that this right is fulfilled. The obstacles that were identified concerning the public's right to record and disseminate recordings therefore contributed to undermining the right to a public hearing.

D. Conclusion

95. While the public was able to attend most monitored hearings, many concerns regarding access to hearings were noted. Firstly, there was a recurring lack of accurate information about the date, time, and place of hearings, which failed to facilitate public access to hearings. Furthermore, most of the cases observed involved high-profile defendants and allegations, which generated significant public interest, however these hearings often took place in courtrooms that were too small to accommodate a reasonable number of interested persons. In addition, members of the public were prevented from re-entering the courtroom. Such restrictions, coupled with the limited number of breaks throughout the long hearings, may have deterred the public from attending trials. Monitors also observed a number of instances where public access to proceedings was restricted on the alleged basis of national security. In these

160 See Merabishvili/Tchiaberashvili trial, 19 September 2013, 7 October 2013 and 21 October. In these pre-trial and trial hearings, the judges made contradictory decisions concerning private broadcasters' right to film: on one occasion, the judge ruled that the private broadcasters' filming authorization was subject to the submission of a request 24 hours prior to the hearing. On another occasion, private broadcasters were not allowed to film at all, due to the presence of a public broadcaster. In yet another instance, the private broadcaster was allowed to film, without any prior request, due to the sudden departure of the public broadcaster.

161 For example, Akhalaia II trial, 24 June 2013, 1 July 2013 and 3 July 2013; Akhalaia I trial, 10 May 2013.

162 See Akhalaia III trial, 14 February 2014; Khetaguri/Gvaramia trial, 6 March 2014.

cases, the court restricted the right to a public hearing without making the necessary inquiries to determine whether this was strictly necessary due to security interests. Monitors also observed that judges often failed to explain adequately or apply a full range of available sanctions to maintain courtroom order. Courts took varying, and sometimes conflicting, approaches to the recording of hearings by the public and media, which could have limited the public's right to access hearings. Consequently, the observed practices constituted violations, to varying degrees, of the defendant's right to a public hearing and thus limited the corresponding access by the public to these hearings.

E. Recommendations

- Courts should maintain and continuously update a website or telephone hotline where the public can anonymously obtain information as to the date and place of hearings, in order to enhance transparent and accurate information concerning court hearings.
- Courts should ensure better communication between judicial officers and court staff attending the information desk, to enable the latter to communicate to the public the most accurate information concerning hearing schedules.
- Courts should ensure that any changes to scheduling are announced clearly and immediately, and should leave sufficient time for the public to adjust to the changed scheduling.
- Courts should hold hearings in larger courtrooms when a large number of people are expected to attend. If larger courtrooms are not available, court staff should consider finding other means to ensure that the public can access court proceedings, such as live-link transmissions of proceedings onto big screens in other parts of the court building.
- Courts should permit individuals to re-enter the courtroom, subject to the approval of court security officers.
- Courts should elaborate procedures for the expeditious official verification of state secret classifications. The procedures should include a requirement to provide reasoning, and include guidelines for availing defendants of their rights to challenge the classification.
- The legislature should amend Article 182(2) of the CPC to ensure that all cases of closed sessions are limited to the examination of evidence for which they were ordered.
- Courts should apply the full range of measures to restore courtroom order in a fair and proportionate manner, with those that fully restrict the right to a public hearing applied as a last resort. Warnings, fines, increased fines, exclusion, and detention of individual members of the public should be considered, prior to taking any decision to generally restrict the right to a public hearing on the basis of public order. Additionally, it is recommended

that at the commencement of proceedings, judges refer to the general requirement to maintain court decorum, and courts should ensure that full information, including judicial powers and possible sanctions, is visible in the building's public areas, and at the entrance of court-rooms.

VIII. RIGHT TO BE PRESUMED INNOCENT

96. The requirement that a criminal defendant be presumed innocent until his or her guilt has been proven beyond reasonable doubt prevents an accused from suffering the stigma of a criminal conviction, and the potential deprivation of liberty.[163] Respecting the presumption of innocence means that public authorities, as well as certain external actors, in positions of influence at any stage of criminal proceedings, must refrain from statements that prejudge the outcome of a trial.

97. This chapter will examine concerns that were raised during observation relative to the presumption of innocence, such as holding detained defendants in a separate enclosure during trial; disclosing the defendant's criminal record during trial; public figures making statements suggesting the guilt of a defendant; and admitting the indictment as evidence.

A. International standards

98. International human rights instruments, such as the UDHR[164], the ICCPR[165] and the ECHR[166], require that once charged with a crime, every person "has the right to be presumed innocent until proved guilty according to the law".[167] OSCE participating States have included the principle in OSCE commitments as one of the elements of justice "[that] are essential to the full expression of the inherent dignity of all human beings."[168]

99. According to the UN Human Rights Committee, anyone accused of a crime should be treated in accordance with the presumption of innocence, which entails that "defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals."[169] Moreover, the Committee emphasizes that "treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule", which should be applied to all accused without distinction of any kind.[170] The ECtHR in several decisions has also dealt with treatment of the accused

163 *Legal Digest of International Fair Trial Standards*, *op. cit.*, note 7, pages 89-98.
164 UDHR, Article 11(1).
165 ICCPR, Article 14(2).
166 ECHR, Article 6(2).
167 UDHR, Article 11(1).
168 Document of the Copenhagen Meeting, *op. cit.*, note 4, paras 5.19 and 23.
169 General Comment No.32, *op. cit.*, note 113, para 30.
170 "General Comment No.21, Article 10: Humane Treatment of Persons Deprived of Their Liberty", United Nations Human Rights Committee, UN Doc CCPR/C/GC/21, 10 April 1992, para 4.

during trial that may adversely affect the presumption of innocence, and amount to degrading treatment. For instance, it has stated in one case that the use of metal cages for holding defendants during the proceedings "could lead an average observer to believe that an extremely dangerous criminal was on trial".[171] In another case, the Court concluded that imposing such a measure can never be justified under article 3 of ECHR, since it amounts to degrading treatment.[172]

100. Although approaches to the disclosure of a defendant's prior criminal record vary between jurisdictions, adversarial models tend to weigh the probative value of disclosing a defendant's antecedents against its prejudicial effect on the presumption of innocence. An application to present this information before the tribunal of fact is made by the prosecution to the tribunal of law, which assesses its admissibility. This method is consistent with the adversarial nature of proceedings, and protects the trier of fact, including juries, from being influenced by irrelevant or unduly prejudicial information, which may affect the tribunal's subjective impartiality. Use of a defendant's previous criminal record would be valid, for instance, for sentencing purposes, for the assessment of the risk of potential future criminal activity, and where it has probative value for the specific crime being tried.

101. With regards to statements made concerning the defendant's possible guilt prior to a final judgement, the UN Human Rights Committee states that public authorities should "refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused", and that the media should avoid covering news of investigations and trials in a way that potentially undermines the presumption of innocence.[173] The Council of Europe's Committee of Ministers issued a Recommendation to its Member States on the provision of information through the media in relation to criminal proceedings, where it emphasizes that "opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused."[174] The ECtHR has underlined that the ECHR aims to prevent "the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings."[175] The European Court has further noted that the presumption of innocence covers not only statements made by the court or the participants themselves, but also other public officials if they may contribute to the public believing that the suspect is guilty, and hence

171 *Piruzyan v Armenia*, ECtHR, 26 June 2012, para 73.

172 *Ibid.*, para 74, and *Svinarenko and Slyadnev v. Russia*, ECtHR, 17 July 2014, para 137-138. See also, *Ramishvili and Kokhreidze v Georgia*, ECtHR, 27 January 2009, paras 100–101 where the Court criticized the use of caged docks and the presence of "special forces" during public hearings without sufficient justification, and Human Rights Committee Communication No. 1405/2005, Mikhail Pustovoit against Ukraine, see para 9.2, 9.3 and 10, where it found that the use of a metal cage was a violation of Articles 7 and 14 (3) (b), and Article 7 together with Article 14 (1) of the ICCPR.

173 General Comment No.32, *op. cit.*, note 113, para 30.

174 "Recommendation Rec(2003)13 of the Committee of Ministers Concerning the Provision of Information through the Media", Council of Europe, 10 July 2003, Appendix, principle 2.

175 *Fatullayev v Azerbaijan*, ECtHR, 22 April 2010, paras 159-160.

lead to a prejudgement of the assessment of the facts which is to be done by the competent judicial authority.[176] If a public official's statement suggests that a defendant is guilty before a court has made such a determination, this constitutes a violation of the presumption of innocence.[177]

102. This being said, authorities are not prevented from informing the public about on-going criminal investigations and proceedings, but are required to do so with "all the discretion and circumspection necessary" if the presumption of innocence is to be respected. The European Court also specified that "whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made".[178]

B. National legal framework

103. Georgia's Constitution provides for the presumption of innocence, and states that an individual shall be presumed innocent until he or she is found guilty of an offence in a final conviction following the procedure prescribed by law.[179] It furthermore specifies that the burden of proof lies with the prosecution, that no one is responsible for proving his or her innocence, and that any doubt regarding evidence shall be interpreted in favour of the defendant.[180] The CPC reiterates these principles and states that general principles concerning the respect for human dignity and the presumption of innocence shall apply to all aspects of the proceedings.[181]

104. With respect to previous criminal records, the CPC accepts prior convictions as evidence without examination.[182] It does not provide for a direct inquiry about previous convictions by pre-trial or trial judges in bench trials, nor does it mention the relevance, prejudice, or probative value of a previous conviction. However, the Code does limit the admission of information regarding a prior conviction in jury trials to when the information "constitutes one of the qualifying elements of the filed charges, and/ or is intended to verify reliability of the defendant's statements"; it also suggests the information must be probative of guilt.[183]

105. With respect to statements concerning a defendant's guilt prior to conviction, the CPC states that the judge should not express an opinion on the issue, however it does not contain any provisions on statements made by other persons.[184]

176 *Ibid.*
177 *Ibid.*, paras 159-160.
178 *Ibid.*
179 The Constitution of Georgia, Article 40(1).
180 *Ibid.*, Articles 40(2) and 40(3)
181 *Ibid.*, Articles 4(1), 5(1), 5(2) and 5(3).
182 *Ibid.*, Article 73(1)(b).
183 *Ibid.*, Article 238.
184 *Ibid.*, Article 25(3).

106. Concerning the indictment as evidence, the CPC stipulates that the indictment should include, *inter alia*, charges against the accused with reference to the relevant legal provisions, and the evidence obtained during the investigation which provides for probable cause that a person has committed a crime.[185] Furthermore, the Code requires that the indictment be presented to the accused, who shall confirm that he or she is familiarized with its content.[186] The Code describes evidence as information "based on which the parties in the court prove or refute facts […]"[187] It also provides that a document can be used as evidence "if it contains information necessary for establishing the factual and legal circumstances of a criminal case."[188]

C. Analysis

1. Treatment of detained defendants

107. Monitors observed that detained defendants were being held in a separate enclosure during trial. In courtrooms where they were available, courts placed detained defendants in a glass box during the entire proceedings. In courtrooms without a box, detained defendants would sit in an area circumscribed by a small, approximately one-meter wall. Additionally, all detained defendants were surrounded by two to five security officers.[189] In contrast, where the defendants were not detained, there were two to three security officers providing security for the entire courtroom.

108. Consistent with the standards mentioned above, courts must avoid any adverse or prejudicial treatment of the accused that may contradict the presumption of innocence, such as segregating detained defendants in confining enclosures. Imposing such extensive security measures left the impression that the defendants were dangerous criminals from which society must be protected, and may violate the presumption of innocence. Restrictive measures should only be imposed when required by security considerations, such as when there is a danger that the accused may attempt to flee, or cause injury or damage, when appearing in court. Many detained defendants in the monitored proceedings were public figures with no prior convictions, and who mostly behaved appropriately during the proceedings. From what was observed, there did not appear to be any formal or individual assessment of the potential risk that the defendants posed in the courtroom.

109. As the hearings were televised and widely covered by various media outlets, there was a real risk that this differential treatment of detained defendants would contribute to an assumption of guilt on the part of the general public, regardless of the evidence presented at court.

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185 *Ibid.*, Articles 169(3)(b), 169(3)(c) and 169(3)(d).
186 *Ibid.*, Article 169(5).
187 *Ibid.*, Article 3(23).
188 *Ibid.*
189 Defendants were held in pre-trial detention in the following 7 cases: Akhalaia I, Akhalaia II, Akhalaia III, D. Akhalaia, Merabishvili/Tchiaberashvili, Merabishvili, and Khizanishvili.

110. The practice of keeping defendants in such enclosures also impaired their ability to engage in continuous and confidential communication with counsel, who were seated outside the enclosures.[190]

111. In conclusion, the observed practice of holding detained defendants in enclosures during trial, without apparent security or risk considerations, raised concerns *vis-à-vis* the principle of the presumption of innocence.

2. Disclosing information about a defendant's criminal record during trial

112. Monitoring identified a practice of judges allowing the discussion of a defendant's criminal record during trial, without stating the purpose of such discussion. When identifying defendants at pre-trial and trial proceedings, most judges asked defendants about their criminal records as a matter of procedure.[191]

113. Permitting discussion of a defendant's prior convictions can give the impression that the defendant is a criminal, which may not correspond to the facts of the case at hand, and may furthermore create a perception of prejudice on the part of the judge. To be consistent with the adversarial nature of proceedings, information about criminal history should be proposed as evidence at the pre-trial stage. Although a prior conviction may not need to be examined, the prosecution should still be required to prove its admissibility in support of an element of the crime charged or to verify the reliability of the defendant's statements. Such information should in any event not be presented during the main hearing where the pre-trial judge determines that its prejudicial effect outweighs its probative value.

114. The presentation of the defendant's criminal record, and discussion of prior convictions, without such information being relevant or probative for the pending charge may undermine the presumption of innocence.

3. Statements made by public figures

115. Before judgement was rendered, it was observed that certain public officials made statements referring to the criminal culpability of individuals under investigation or before trial. Following the police's discovery of videotapes, in a cache of unregistered arms and explosives, which purportedly depicted the abuse of unidentified individuals by law enforcement officers, then-Interior Minister Irakli Gharibashvili met with and briefed diplomatic foreign missions about these videotapes.[192] After the meeting, he stated that the abuse depicted in the videos was not an isolated case, but rather "a systemic problem" stemming from the policies of the previous authorities.[193] He added that "society should know who was behind it. I want to remind everyone that Vano Merabishvili was the [interior] minister at the time; all those high ranking

190 This issue is discussed in more detail in the chapter on the Right to Counsel.
191 For example in the Akhalaia II trial, 20 April 2013.
192 "Interior Ministry Says Five Arrested over Torture Videos Found in Arms Cache", Civil.ge, 19 June 2013.
193 *Ibid.*

officials should be held responsible during whose tenure such terrible things were happening."[194] At the time of this statement, Mr Merabishvili faced two indictments relating to alleged criminal conduct while holding an official position under the previous government.[195]

116. In another instance, responding to questions concerning a particular case, Mr Gharibashvili stated that a video leaked on the internet could serve as a basis to initiate additional investigations.[196] He further noted that Mr Merabishvili's order in the video for "two dead bodies" was followed by the death of one person, and the severe wounding of another, implying a link between Mr Merabishvili and the aforementioned incidents in the circumstances.[197]

117. Prejudicial statements by public authorities negatively impact on the presumption of innocence. Public officials should respect the presumption of innocence, and exercise their right to inform the public with the requisite discretion and circumspection.[198] The choice of words by public officials in statements is of the utmost importance. The monitored proceedings involved former officials who are known public figures, and statements amounting to declarations concerning the guilt of the accused may influence and form public opinion, and may appear to prejudge the outcome of the assessment of the facts, a responsibility which falls exclusively within the powers of a competent judicial authority.

4. Burden of proof

118. Monitoring observed that there exists a practice in Georgia of admitting the indictment as evidence. In all monitored cases, the list of evidence read out by the prosecution at the beginning of the trial included the indictment. The defence in one case attempted to exclude the indictment as an item of evidence but did not succeed.[199]

119. The purpose of the indictment is to inform the defendant of the charges, and to serve not only as a basis for the preparation of the accused's defence, but also of the prosecution's case and the Court's hearing and adjudication of the case. The indictment represents the result of the prosecution's investigation, and its interpretation of those results formulated as probable cause to bring charges against the defendant. The document itself is not of probative value, and contains an opinion that must be subsequently proved at trial through the presentation of facts. The indictment cannot therefore be considered as "fact" or "evidence." Although no cases were observed in which the indictment was used as evidence to convict, entering an indictment into evidence gives it the appearance of a fact that the defence must disprove, which would run counter to the fundamental principle of the presumption of innocence.

194 *Ibid.*
195 Indictments related to the Merabishvili and Merabishvili/Tchiaberashvili trials.
196 "PM Garibashvili opens up on former president, justice, prisons and foreign partners" Agenda.ge, 12 February 2014.
197 *Ibid.*
198 Recommendation Rec(2003)13, *op. cit.*, note 182, appendix, principles 1 and 2.
199 Akhalaia III trial, 10 July 2013.

D. Conclusion

120. Holding detained defendants in a dock during trial imbued them with an air of guilt, limited their ability to consult with their counsel, and adversely affected the dignity of the defendant. This is particularly problematic when there does not appear to be any security or risk assessment justifying such measures. Permitting discussion of a defendant's prior convictions, although this may be valid in some instances and for sentencing purposes, appeared to be done as a matter of routine, which may have unjustly left the impression of the defendant as a criminal. Public officials contributed to undermining the presumption of innocence when they made public statements attributing guilt to the defendant prior to conviction, pre-empting the assessment to be made by the court, and influencing public opinion as to the culpability of the defendant. Finally, considering the indictment as evidence effectively transformed it into fact, shifting the burden of proof onto the defendant to establish its falsity.

121. All the aforementioned practices raised concerns as to whether Georgian authorities fully complied with the presumption of innocence, and reflected a certain lack of understanding within the court, the parties to the proceedings and the Georgian government as to the wider implications of the principle.

E. Recommendations

- The legislature should outline the procedure and criteria for imposing security measures during trial in the CPC, taking into account the principle of proportionality and the presumption of innocence.
- Courts should refrain from holding detained defendants in separate enclosures in the courtroom unless there is, in accordance with established criteria, a specific and identifiable security risk related to an individual defendant. In the event that a court deems such measures necessary, it must ensure the defendant's right to privileged and confidential communication with counsel, and that the measure used is proportionate to the security risk identified.
- Courts should not question defendants about their previous convictions as a matter of routine.
- The legislature should consider widening the scope of Article 238 of the CPC, which pertains to the use of criminal records, to apply to all trials and not only jury trials.
- Courts should consider assessing the admissibility of criminal records at the pre-trial stage, taking into consideration any possible implications regarding the presumption of innocence.
- Courts should not admit the indictment as part of the evidence.
- The Chief Prosecutor should consider issuing guidance to prosecutors to ensure that indictments are not included or treated as evidence.

- Public officials should respect the presumption of innocence when commenting on potential or on-going criminal proceedings.
- The legislature should consider amending the CPC to regulate statements made by public officials regarding the guilt of a defendant pending trial, in line with the requirements set forth in international standards.

IX. THE RIGHT NOT TO INCRIMINATE ONESELF AND THE RIGHT TO REMAIN SILENT

122. The right not to incriminate oneself consists of two elements: the right to remain silent and the right not to be compelled to admit guilt.[200] While not explicitly mentioned in some international frameworks, the right not to incriminate oneself and the right to remain silent are recognised international standards, which lie at the core of the notion of a fair procedure.[201] The right entails that once accused, measures to compel the accused to give testimony cannot be used, the accused has the right to remain silent, and there is a limited possibility to draw inferences from the exercise of this right. By providing the accused with protection against undue compulsion by the authorities, these immunities contribute not only to avoid potential miscarriages of justice, but may also prevent the use of improper measures to solicit confessions and incriminating evidence, as such evidence will be considered as unlawfully obtained and have limited value, if any.
123. This chapter examines observed practices of concern related to the defendant's testimony at trial, and prosecutors calling upon defendants to testify.

A. International standards

124. The right not to give evidence against oneself or confess guilt is an essential protection closely linked to the principle of the presumption of innocence. It is understood as implied in the ECHR's requirement of a fair trial,[202] and explicitly set out in the ICCPR,[203] which provides that an accused must not "be compelled to testify against himself or to confess guilt." Under international standards, the right not to incriminate oneself rests on the principle that in a criminal case, the prosecution must seek to prove their case against the accused without using evidence obtained through methods of coercion, deception or oppression of the will of the accused.[204] It prohibits any form of coercion, direct or indirect, physical or psychological.[205]

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200 As explained, for example, in the Commission of the European Communities, *Green Paper: The Presumption of Innocence*, EC Doc COM (2006) 174 final, page 7.
201 *Saunders v United Kingdom*, ECtHR, 17 December 1996, para 68.
202 ECHR, Article 6; *see also John Murray v United Kingdom*, ECtHR, 8 February 1996, para 45.
203 ICCPR, Article 14(3)(g).
204 *Saunders v United Kingdom*, ECtHR, 17 December 1996, para 68. The exception here applies to material that can be obtained from the accused and that exists without his or her will such as DNA or fingerprints. See for example *P.G and J.H v United Kingdom*, ECtHR, 25 September 2001, para 80.
205 *Fair Trial Manual*, 2nd edition (London: Amnesty International Publications, 2014), page 129.

125. Besides committing to ensure fair trial rights in general, OSCE participating States have also entered into commitments to respect the right not to incriminate oneself, namely to adopt effective measures to ensure that "law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person."[206]

126. The right not to incriminate oneself and the right to remain silent apply both before the investigative authorities and the court.[207]

B. National legal framework

127. The Constitution stipulates that "no one shall be obliged to testify against him- or herself or against those relatives whose circle shall be determined by law."[208] The right not to incriminate oneself and the right to remain silent are also both enshrined in the Georgian CPC, and these provisions apply at all stages of criminal proceedings.[209] The law specifies that "giving testimony shall be the right of the defendants"[210], and further stipulates that exercising the right to remain silent, refusing to testify, or providing false evidence, cannot be considered evidence proving a defendant's guilt.[211]

128. A defendant's testimony is governed by the legal regime relative to witnesses, and defendants "enjoy the status and exercise the rights and obligations of a witness when testifying at trial."[212] This means that the defendant must take an oath and must tell the truth, as they may otherwise face perjury charges. The Code however clearly states that this should not "prevent him or her from exercising the right not to testify against him- or herself or against a close relative", and that refusal to testify cannot be considered as implying guilt.[213] Defendants have the additional right to decide not to answer individual questions when they are already on the witness stand.[214]

129. The Code contains a number of stipulations concerning provision of information to the defendant on his or her rights, both at the investigative stage in relation to arrest[215] and detention[216], as well as under the main hearing.[217] Before giving testimony at the main hearing, a defendant must be informed of his or her rights, including that the defendant has the right "to testify on the filed charges as a witness" and is not required to answer the

206 Document of the Moscow Meeting, *op. cit.* note 4, para 23.1(vii).
207 *Ibid.*
208 The Constitution of Georgia, Article 42(8).
209 Articles 15 and 38(4) CPC.
210 *Ibid.*, Article 74(2).
211 *Ibid.*, Articles 38(4), 48(7) and 74(3).
212 *Ibid.*, Article 47.
213 *Ibid.*, Article 48(7) *inter alia*.
214 *Ibid.*, Article 38(4), "A defendant may exercise his or her right to remain silent at any time."
215 *Ibid.*, Article 38(2).
216 *Ibid.*, Article 197(1)(c).
217 *Ibid.*, Articles 230(1) and 230(2).

questions asked, and that any refusal to answer cannot be used against him or her."[218] If such an instruction is not provided, the Code contains a provision stipulating that evidence obtained through a substantial violation of the Code will be rendered inadmissible and without legal force if it adversely affects the defendant's status.[219]

C. Analysis

1. Defendant's testimony at trial

130. Two particular aspects pertaining to the defendant's testimony at trial are examined here, namely practices observed concerning the provision of information on the rights of the defendant when giving testimony[220], and the respect of the defendant's choice to refuse to respond to questions.

131. In many of the cases monitored, the defendants chose to testify as witnesses in their own defence, as well as to make statements during opening and closing and in pre-trial sessions.[221] On some occasions, judges informed defendants, prior to giving testimony, of their right to refuse to testify, and the fact that such refusal cannot be interpreted as confirmation of guilt; on other occasions they failed to do so.[222] It was also observed that defendants were sometimes unable to communicate with their counsel and obtain further guidance on their rights when testifying, either because they were held in the dock or otherwise not seated next to their counsel.[223]

132. In some cases when defendants testified, they chose to give general statements, occasionally of no relevance to the case, and at times disclosing potentially incriminating facts.[224] They often attempted to justify actions or decisions that formed part of the alleged criminal conduct, thereby admitting that such actions or decisions took place.[225] In making a statement at a pre-trial hearing, one defendant said that the actions alleged by the prosecution did not amount to torture, one of the crimes with which he was charged. The way in which the defendant made this statement could have been interpreted as admitting the facts, meaning the defendant in essence provided testimony and evidence against himself, thus facilitating the prosecution's case.[226] When defendants ventured into providing incriminating testimony, their counsel rarely intervened to ask for a break to consult with their clients, in order to assure that the defendant understood that he or she was in fact providing incriminating evidence, and had the right to not provide such information.

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218 *Ibid.*
219 *Ibid.*, Article 72 (1)
220 *See also* Chapter XI under Instruction concerning rights, where this issue is also addressed.
221 For example, the Akhalaia I, Akhalaia II, Merabishvili/Tchiaberashvili, Merabishvili and Khetaguri/Gvaramia trials.
222 For example in the Akhalaia I trial, 11 July 2013 and in the Khetaguri/Gvaramia trial, 17 July 2013.
223 For example in the Akhalaia I trial, 11 July 2013, but also in Merabishvili/Tchiaberashvili, Akhalaia II and Akhalaia III trials.
224 For example in the Gunava trial, 1 July 2013.
225 For example, Akhalaia I, Akhalaia II and Gunava.
226 Akhalaia I trial, 1 March 2013.

133. During defendants' testimonies, prosecutors often posed the same question multiple times, even when a defendant had expressed a wish not to answer.[227] The judge in one case responded that questions or references to the defendant's prior statements were not allowed, but he insisted that the defendant answer questions related to co-defendants. Defence counsel objected, arguing that although the prosecutor's question may have been referring to another defendant, all defendants were charged in relation to the same set of facts. The defence counsel also stressed the defendant's right to remain silent. The judge overruled the objection.[228] In another case, a testifying defendant declined to answer a question posed by the prosecutor, however, the judge demanded that he answer the question since defence counsel had made no formal objection.[229]

134. Permitting defendants to give testimony without being provided with comprehensive information concerning their rights, such as the right not to incriminate oneself and to remain silent, and the implications of giving testimony, resulted in defendants giving incriminating testimony, thereby adversely affecting their case. Furthermore, the prosecutors' and judges' failure to respect defendants' choice not to respond to questions, imposed some, at least perceived, pressure on the part of the defendants to reveal incriminating information, as the only other option would have been to respond falsely and thereby face potential perjury charges. Defence counsel's failure to intervene on occasions to protect their clients' right to remain silent and not to incriminate themselves left defendants in a position where they unknowingly and/or unintentionally incriminated themselves when providing testimony at trial.

135. Monitoring did not uncover to what extent these incriminating statements were in fact used against the defendants in deciding the case, and although one cannot conclude that the incidents observed amounted to defendants being "compelled" to give testimony as specified under international standards, the practices observed raised concerns, and may under certain circumstances have led to violations of the defendant's fair trial rights, depending inter alia on the defendant's familiarity with, and ability to navigate, the justice system, and to what extent any legal advice has been provided.

2. Prosecutors calling defendants to the witness stand

136. In some cases, it was observed that the prosecution called defendants to testify in support of the prosecution's case.[230] Permitting the prosecution to call the defendant to testify amounts to the state asking the defendant to provide evidence against him- or herself. By calling the defendant to the stand, the prosecution is asking the defendant to provide testimony in support of the prosecution's position, a position asserting that the defendant is guilty.

227 Akhalaia I trial, 11 July 2013, Akhalaia II trial, 26 July 2013.
228 Akhalaia I trial, 11 July 2013.
229 Akhalaia II trial, 29 July 2013.
230 For example in the Khetaguri/Gvaramia trial, 13 August 2013.

137. Furthermore, as mentioned above, national law establishes that giving testimony is the "right of the defendant", and the defendant has the right to "not testify against him/herself", which would imply that it is within the prerogative of the defendant to choose whether he or she takes the stand and provides testimony. Calling the defendant to the stand as a witness puts the defendant in the difficult position of either having to challenge the request of the prosecutor, or refusing to respond to questions when on the stand. Although the law precludes drawing any adverse inference from a refusal, defendants may nevertheless feel obliged to meet such a request, as they may feel that refusing to testify, or in particular responding to certain questions, may leave a negative impression with the court, particularly in jury trials. Taking into account the authority that prosecutors have traditionally had in Georgia, some defendants may feel very uncomfortable challenging a request from such a powerful institution.

138. Taking all this into consideration, the observed practice of permitting the prosecution to call a defendant to the stand as a witness in their own case, though not per se a violation of the right not to incriminate oneself or the right to remain silent, reflects a certain lack of understanding of these rights, and prevents their effective application.

D. Conclusion

139. The examples noted in this report regarding insufficient instruction on rights, requests to defendants to respond to questions despite their refusal, and the calling of defendants to the stand as witnesses for the prosecution case, fell short of the criteria of compulsion. They nevertheless frequently resulted in defendants disclosing incriminating evidence, and created obstacles to ensuring that the right not to incriminate oneself and the right to remain silent were effectively applied. The practices observed, together with the absence of any intervention on the part of defence counsel, also reflected a lack of understanding of the principles by the parties to the proceedings, which raised concern about possible violations of this essential fair trial right.

E. Recommendations

- Courts should as a matter of procedure inform defendants of their right not to incriminate themselves and to remain silent, and ensure that these principles are understood. To this end, a standard instruction complying with international standards could be developed and distributed to judges.
- Courts should ensure that the above principles are respected, and bar further questioning when defendants exercise their right to remain silent and refuse to answer questions.
- Defence counsel should pro-actively ensure that the defendant's right to remain silent is respected, and object to repeated questioning once the defendant has made it clear that he or she does not wish to answer.

- The prosecution should refrain from calling the defendant to testify as a witness for the prosecution, and the Chief Prosecutor should consider issuing guidelines or instructions to this effect.
- If defendants are called by prosecutors to testify, defence counsel should consider objecting on the basis that this undermines the right to remain silent or the defendant's prerogative to choose whether to testify.
- Courts should duly consider the defence's objection to the prosecution calling a defendant to the stand, and provide a reasoned decision as to why it is upheld or not.
- The legislature should amend the CPC, to provide for a clear distinction between the status of the defendant's testimony and that of the witness.
- Training bodies for judges, prosecutors, and defence counsel should provide further training on the right not to incriminate oneself, as well as the right to remain silent, and their implications in an adversarial model of criminal proceedings.

X. RIGHT TO LIBERTY

140. International human rights standards guarantee the protection of individual liberty of every person as a fundamental right, from which states can only derogate in exceptional circumstances where objective reasons justify the deprivation of liberty.[231] This presumption of liberty applies to cases of detention imposed on accused persons pending trial, and therefore any assessment of arrest and detention as a preventive measure must be measured against this standard.

141. Eight of the fourteen monitored cases involved defendants held in pre-trial detention.[232] The scope of monitoring did not encompass detention hearings, however monitors observed pre-trial and trial hearings during which the defence filed motions to revoke detention or replace this with less severe measures. This chapter examines observed practices of concern related to the procedure and criteria for assessing the need for detention, as well as the reasoning of decisions regarding detention.

A. International standards

142. Human rights instruments set forth a presumption of liberty, and aim to ensure that no one is deprived of the right to liberty in an arbitrary fashion, or without due justification.[233] The term "arbitrary" should be interpreted broadly to include "elements of inappropriateness, injustice and lack of predictability."[234]

231 UDHR Article 3, ICCPR, Article 9 and ECHR, Article 5.
232 Some defendants were held in detention for indictments pertaining to the monitored trials, other defendants were held in detention on indictments relating to other cases that were not monitored. See Annex of Cases for further information.
233 UDHR, Article 9, ICCPR, Article 9(1) and ECHR 5(1).
234 *Fair Trial Manual*, *op. cit*., note 205, page 34.

In order to ensure predictability, there needs to be a legal basis establishing criteria and a set procedure for imposing measures depriving a person of this right. The prohibition of arbitrariness extends beyond the lack of conformity with national law, which means that an imposed measure to deprive liberty may be lawful in terms of domestic law, but it may still be deemed arbitrary and thus contrary to international human rights standards.[235] The requirements of necessity and proportionality mean that less restrictive measures should be applied whenever possible, and that detention should be applied for as short a period as possible.[236]

143. In the context of criminal proceedings, a person can be detained for the purpose of bringing him or her before a competent legal authority on reasonable suspicion of having committed an offence.[237] The State is obliged to ex-officio ensure prompt judicial review following police or administrative detention[238], and detainees have the right to an effective remedy to challenge the lawfulness of their detention.[239] The European Court has also established that "judicial control of detention must be automatic. It cannot be made to depend on a previous application by the detained person".[240]

144. It is incumbent upon prosecutorial authorities to prove that it is necessary and proportionate to impose detention.[241] A reasonable suspicion of having committed a criminal offence is a *sine qua non* condition for the lawfulness of a detention.[242] Additionally, the UN Human Rights Committee has accepted at least three permissible grounds for pre-trial detention, namely where "the likelihood exists that the accused would abscond or destroy evidence, influence witnesses, or flee from the jurisdiction of the State party."[243]

145. In decisions on pre-trial detention, courts must provide individual reasoning, and explain how the requirements for imposing detention are fulfilled in the particular case. Standard citation of legal provisions on custody, without explaining and applying the law to the specific facts of the case, is not considered sufficient.[244] The European Court has in that respect found violations when decisions are issued in a perfunctory fashion, using standardized justifications, without taking into account the arguments of the parties, or the particularities of the case.[245]

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235 *Creangă v Romania*, ECtHR, 23 February 2012, para 84; *A. and Others v United Kingdom*, ECtHR, 19 February 2009, para 164.

236 ICCPR, Article 9 and ECHR, Article 5. For a thorough review of international standards on the imposition of preventive measures, see *The Law and the Practice of Restrictive Measures: The Justification of Custody in Bosnia and Herzegovina*, OSCE Mission to Bosnia and Herzegovina, August 2008.

237 ECHR, Article 5(1)(c).

238 *Ibid.*, Article 5(4) and ICCPR Article 9(4).

239 ECHR, Article 5(3).

240 *T.W. v Malta*, ECtHR, 26 April 1999, para 43.

241 *Ilijkov v Bulgaria*, ECtHR, 26 July 2001, para 84; *Patsuria v Georgia*, ECtHR, 6 February 2008, paras 73-75.

242 *Punzelt v The Czech Republic*, ECtHR, 25 July 2000, para 73.

243 ECHR, Article 5(1) c and "General Comment No. 27, Article 12: Freedom of Movement", United Nations Human Rights Committee, UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1999, para 14.

244 *McKay v United Kingdom*, ECtHR, 3 October 2006, para 43, and *Giorgi Nikolaishvili v Georgia*, ECtHR, 13 April 2009, para 76.

245 *Svipsta v Latvia*, ECtHR, 9 March 2006, paras 130-134.

146. Finally, the requirement of a legal basis for detention on remand extends to the entire period of detention, and prolongations need to take into consideration the right to a trial within reasonable time. Those deprived of their liberty have the right to judicial review of the lawfulness of their detention at reasonable intervals.[246] Courts must continuously review the on-going detention of persons pending a verdict, with a view to ensuring release when circumstances no longer justify the deprivation of liberty.[247] Circumstances can change and, while grounds for detention may exist in the early stages of an investigation, these may no longer be relevant at a later stage. Also, the longer detention continues, the stronger must be the grounds that justify the detention.

147. OSCE participating States have also made commitments related to the right to liberty, highlighting several safeguards that States must put in place if any measure depriving an individual of this right is imposed, such as the right to be brought promptly before a judge, and the right to notify persons of one's choice about the arrest or detention.[248]

B. National legal framework

148. The Constitution and the CPC provide for the protection of the right to liberty, and stipulate that deprivation in the form of detention is permissible only if provided for by court order.[249]

149. The CPC creates four permissible grounds for detention, namely to prevent a defendant from absconding; prevent a defendant from interfering or tampering with evidence (including exerting pressure on witnesses or potentially destroying evidence); prevent a defendant from engagement in further criminal activity; and where there is a danger of non-execution of a judgement.[250] In order to impose detention, or any other preventive measure, probable cause for the existence of the aforementioned grounds must be established,[251] and the CPC also provides a definition of probable cause, linking it to the commitment of the crime.[252] The Code requires an assessment of proportionality, and stipulates that detention can be ordered only when the purpose of applying the measure cannot be achieved by imposing less restrictive measures.[253]

150. When filing a motion for detention, prosecutors must substantiate that the measure is reasonable, and that the application of less severe measures is

246 *Assenov and Others v Bulgaria*, ECtHR, 28 October 1998, para 162; *Herczegfalvy v Austria*, ECtHR, 24 September 1992, para 75.
247 *I.A. v France*, ECtHR, 23 September 1998, para 111.
248 Document of the Moscow Meeting, *op. cit.* note 4, paras 23.1(i)-(iv) and (vi).
249 The Constitution of Georgia, Articles 18(1) and 18(2) and Article 5(4) CPC.
250 Article 205 CPC; See also Articles 38(12) and 198(1).
251 *Ibid.*, Article 198(2).
252 *Ibid.*, Article 3(11).
253 *Ibid.*, Articles 198(1) and 198(4).

insufficient.[254] Courts must give the defence the opportunity to respond.[255] The CPC also allows for the defendant to file a motion for release or the imposition of less restrictive measures, however, such motion must specify "what new circumstances became known which were unknown at the time the initial preventive measure was decided", which makes it incumbent upon the defendant to demonstrate the existence of reasons to warrant his or her release.[256]

151. The issue of applying, revoking or replacing a preventive measure should be examined at an oral hearing.[257] The Code stipulates the requirements for the content of a ruling on preventive measures[258], however it does not explicitly require courts to provide reasons for decisions concerning detention, or to address the arguments made by the parties. A copy of the written decision should be provided to the parties[259], however courts are not required to publish the decision and need only to "announce the operative part of the ruling."[260]

152. Both the Constitution and the CPC provide for a maximum period of pre-trial detention, after which the defendant should be released.[261] Georgian legislation does not provide for a mechanism for an automatic, continuous and periodic review of the grounds for detention.

C. Analysis

153. In several monitored cases, judges upheld detention as a preventive measure, with little or no explanation.[262] Judges rejected defence motions to revoke detention, or replace it with another preventive measure, allowing the prosecution's requests for extension, without giving any justification in open court as to its necessity, and merely referring in abstract terms to the grounds established in the initial detention order. In many of these instances, judges did not address defence arguments against the continuation of detention, and did not explain why a less severe measure would be insufficient. It may be that the available evidence supported continued detention, in line with the requirements of the CPC, but without providing sufficient reasoning, these decisions appeared arbitrary, and raised doubts as to the impartiality of the court.

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254 *Ibid.*, Article 198(3).
255 *Ibid.*, Article 206(3).
256 *Ibid.*, Article 206(8).
257 Article 206(3) CPC.
258 *Ibid.*, Article 206(6) which stipulates that it should contain: "the date and location of the ruling; the identity of the judge, prosecutor, defendant and his/her counsel; the content of the charges; and the decision on the application, replacement or rejection of the preventive measure. In addition, the ruling should precisely indicate its purpose and the person it applies to; the official person or body required to fulfil the order; the procedure for appealing the ruling; and the judge's signature."
259 *Ibid.*, Article 206(7).
260 *Ibid.*, Article 206(11). However, public access to court documents, including detention orders, can be inferred from Articles 2(1)(i), 3(2)(d) and 28 Administrative Code of Georgia .
261 The Constitution of Georgia, Articles 18(6) and 205(2) CPC.
262 Akhalaia II trial, 17 April 2013; Merabishvili trial, 27 November 2013; and Merabishvili/Tchiaberashvili trial, 19 September 2013, 25 September 2013 and 7 October 2013.

154. Written decisions on motions concerning detention contained reasoning for some monitored cases[263], but fell short of addressing arguments put forward by the parties, and lacked an assessment as to whether continued detention was justified; whether it was proportionate, particularly given the possibility of less severe measures; and whether probable cause for the crime itself had been addressed.

155. The trial observations appeared to indicate that once a court order for detention was issued during the pre-trial stage, this court order was continued throughout the criminal proceedings, up to the maximum legal limit of nine months, and it was therefore left to the defence to initiate and substantiate motions for its revocation or the imposition of less restrictive measures. While it is acceptable to set a maximum possible length of detention on remand, this should naturally not be understood as automatically justifying detention for the entire period. The absence of a periodic review mechanism in Georgian law means that detention under the current system can only be revoked or replaced with another measure upon a motion of the defence. Such a motion under Georgian law must substantiate "new circumstances" which represents a restriction of this safeguard. In addition, the duty to justify any deprivation of the right to liberty always rests on the state authorities, who must substantiate that the detention is necessary, proportionate and justified throughout the entire period of detention.[264]

156. The ECtHR has repeatedly pointed out that Georgian authorities must "establish convincingly the existence of concrete facts justifying continued detention", and assess whether detention or a less severe measure meets the proportionality requirement.[265] This, in addition to what was observed during the trial monitoring, reflects that there is not only a need to revise the CPC, but also to improve practice in this area. Providing reasoning in decisions concerning detention is essential for the defendant to understand why this measure has been imposed, and to make effective use of his or her right to an appeal. If limited reasoning is provided in the first instance decision, this also impedes an effective review of this decision by a higher instance court.

157. Providing reasoning in decisions is also essential to enable public scrutiny as to the lawfulness of detention. The European Court has highlighted the importance of this, and stated that it is "only by giving a reasoned decision that there can be public scrutiny of the administration of justice."[266] A further consequence of this is that the decisions on preventive measures and their

263 ODIHR did not monitor detention hearings, and has only examined decisions on revocation or replacement following motions from defence. The following decisions have been made available to ODIHR: Tbilisi City Court decisions related to the cases Akhalaia II (14 February 2013, 17 April 2013, 8 July 2013 and 22 July 2013), D. Akhalaia (29 October 2013) and Merabishvili (27 November 2013 and 11 December 2013); Kutaisi City Court decisions related to the case Merabishvili/Tchiaberashvili (22 May 2013 and 7 October 2013); Kutaisi Court of Appeals decision related to the case Merabishvili/Tchiaberashvili (25 May 2013).

264 *Giorgi Nikolaishvili v Georgia*, ECtHR, 28 October 1998, para 75, and *Bykov v Russia*, ECtHR, 10 March 2009, paras 64-67.

265 *Giorgi Nikolaishvili v Georgia*, ECtHR, 28 October 1998, paras 76-79, and *Patsuria v Georgia*, ECtHR, 6 February 2008, paras 74-77.

266 *Tase v Romania*, ECtHR, 10 September 2008, para 41.

reasoning should be made accessible to the public, including providing proper reasoning in the oral decision that is announced by the judge in the course of a public hearing.

D. Conclusion

158. In conclusion, although the observed practices regarding detention largely complied with national legislation, they did not fully comply with international standards. Judges rejected defence motions without publicly providing reasoning for the necessity of continued detention, which created an impression of arbitrariness and possible bias. Written decisions contained limited reasoning on issues such as the assessment of evidence, or the arguments of the parties, as required by international standards.

159. Imposing or prolonging detention without providing sufficient reasoning, and not making decisions public, is not only inconsistent with the right to liberty, but is also likely to nourish public distrust in relation to the fairness and impartiality of the justice system. In addition, the absence of provisions for periodic judicial review in Georgian law contributed to a practice whereby continuation of detention was automatic up to the legal limit of nine months, thereby infringing the presumption of liberty.

E. Recommendations

- The legislature should include a provision in the CPC requiring that decisions on preventive measures are reasoned, and that at least a summary of the reasoning is presented orally in open court.
- The legislature should consider amending the CPC to add a mechanism for automatic and periodic judicial review of the conditions for prolonged detention on remand. This review should take place at regular intervals, and should require the prosecution to file a motion to justify the extension of detention for the period until the next judicial review.
- Training institutions for judges, prosecutors, and defence counsel should provide training on procedural requirements and safeguards regarding the use of preventive measures, including training for judges on reasoning of detention orders in line with international standards.
- Courts should determine the existence of grounds justifying prolonged detention at every extension and review of custody, recalling that the burden to establish the need for preventive measures rests on the prosecution. They should also address the main arguments presented by the defence against imposing detention, and reflect that less restrictive measures have been considered and why they are deemed insufficient.

XI. EQUALITY OF ARMS

160. The equality of arms principle requires a reasonable opportunity for each party to present their case under conditions that do not subject any of them to a substantial disadvantage vis-à-vis the other party.[267] This translates into a number of requirements, whose practical applications will be examined in this chapter, including instructions concerning rights during trial, adequate time and facilities to prepare a case, as well as the right to be present at trial.

161. Equality of arms also concerns the right to counsel, and the right to call and examine witnesses.[268]

A. International standards

162. The ECtHR emphasizes that "it is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and the defence."[269] International law recognizes the principle of equality of arms by requiring all parties to a case to have the same procedural rights.[270] This principle is intertwined with the overall adversarial nature of criminal proceedings, which is also required for a trial to be fair.[271]

163. To ensure equality, defendants must be fully aware of their rights, since a party who is fully aware of his or her rights is in the best position to exercise them; "it should be clear, for example, that a person understands that he or she has the right to legal representation and what options might be available for the appointment of legal counsel where the person cannot afford to pay; and that a person giving evidence understands that he or she has the right not to incriminate herself or himself."[272] Ensuring that defendants are fully apprised of their rights is particularly crucial when it comes to instructions pertaining to the right to remain silent and the right not to incriminate oneself.[273]

164. International standards consider the right to adequate time to prepare a case as part of the right to a fair trial and equality of arms at all stages of the proceedings.[274] Adequate time and facilities includes "the disclosure

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267 General Comment No.32, *op. cit.* note 113, para 13. *Dombo Beheer B.V. v The Netherlands*, ECtHR, 27 October 1993, para 33. See also, *Werner v Austria*, ECtHR, 24 November 1997, para 63; *Ankerl v Switzerland*, ECtHR, 23 October 1996, para 38. See also, *Krcmar and Others v the Czech Republic*, ECtHR, 3 June 2000, para 39; *Steel and Morris v United Kingdom*, ECtHR, 15 May 2005, para 62; *Van Orshoven v Belgium*, ECtHR, 25 June 1997, para 41.

268 Both are examined respectively under the chapters on the Right to Counsel and Calling and Examining Witnesses.

269 *Dowsett v United Kingdom*, ECtHR, 24 June 2003, para 41.

270 *See*, ICCPR, Article 14(3)(d); ECHR, Article 6; *Coëme and Others v Belgium*, ECtHR, 18 October 2000, para 102; *G. B. v France*, ECtHR, 2 January 2002, para 58.

271 *Ruiz-Mateos v Spain*, ECtHR, 23 June 1993, para 63. See also, *Brandstetter v Austria*, ECtHR, 28 August 1991, para 66.

272 *Legal Digest of International Fair Trial Standards*, *op. cit.*, note 7, page 114.

273 See also chapter on The Right not to Incriminate Oneself.

274 ICCPR, Article 14(3)b; ECHR, Article 6(3)b. See also, *Smith v Jamaica*, HRC Communication 282/1988, UN Doc CCPR/C/47/D/282/1988 (1993), para 10.4.

by the prosecution of material information."[275] Furthermore, it requires that the defendant be informed about the identity of the witnesses that will appear in court sufficiently in advance of each hearing in order to allow the defence sufficient time to effectively prepare for cross-examination.[276] The determination of what constitutes adequate time to prepare one's case requires an assessment of the circumstances of each case, including the nature and complexity of the proceeding, the stage that it has reached, as well as the obligation to conduct the trial within a reasonable time.[277] Thus parties may request an adjournment of proceedings when they believe that the time allowed for preparation is insufficient, and "courts are under an obligation to grant reasonable requests for adjournment, particularly when an accused is charged with a serious criminal offence"[278], and this notwithstanding "the right of an accused in detention to have his case examined with particular expedition."[279]

165. The ICCPR explicitly mentions the right of the defendant "to be tried in his [or her] presence."[280] The ECtHR has held that the object and purpose of Article 6 ECHR as a whole demonstrates that a person "charged with a criminal offence" is entitled to take part in the hearing.[281] The European Court considers the duty to guarantee the right of a criminal defendant to be present in the courtroom as one of the essential requirements of a fair trial.[282] Trials *in absentia* can only be conducted "exceptionally for justified reasons", in the event of which "strict observance of the rights of the defence is all the more necessary".[283] Trials *in absentia* are permissible only upon condition that "a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance."[284] The right to a re-trial is also an important safeguard where trials *in absentia* are nonetheless conducted, as the defendant who

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275 *Fair Trial Manual*, *op. cit.*, note 205, page 119; See also, "General Comment No. 13, Article 14: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law" United Nations Human Right Committee, UN Doc HRI/GEN/1/Rev.1, 13 April 1984, para 9.

276 General Comment No.32, *op. cit.* note 113, paras 32 and 33.

277 See *Albert and Le Compte v Belgium*, ECtHR, 10 February 1983, para 41; *Hibbert v Jamaica*, HRC Communication 293/1988, UN Doc CCPR/C/45/D/293/1988, 27 August 1992, para 7.4; *Nathaniel Williams v Jamaica*, HRC Communication 561/1993, UN Doc CCPR/C/59/D/561/1993, 4 November 1997, para 9.3.

278 General Comment No.32, *op. cit.*, note 113, para 32.

279 *W. v Switzerland*, ECtHR, 26 January 1993, para 42. See also, chapter on Right to a Trial Within a Reasonable Time.

280 ICCPR, Article 14(3)(d); See also, Thilo Marauhn, "The Right of the Accused to be Tried in his or her Presence," in David Weissbrodt and Rudiger Wolfrum, eds., *The Right to a Fair Trial* (Berlin: Springer 1998) page 763.

281 *Legal Digest of International Fair Trial Standards*, *op. cit.*, note 7, page 134. *Colozza v Italy*, ECtHR, 12 February 1985, para 27, *Belziuk v Poland*, ECtHR, 25 March 1998, para 37(ii).

282 *Stoichkov v Bulgaria*, ECtHR, 24 June 2005, para 56.

283 General Comment No. 13 *op. cit.*, note 275, para 11 in fine.

284 *Sejdovic v Italy*, ECtHR, 1 March 2006, para 86. "Resolution 75(11) on the criteria governing proceedings held in the absence of the accused", Council of Europe, 21 May 1975, prescribes a number of criteria with regard to the conduct of trials *in absentia*. The accused must be effectively summoned (para 1), and the trial should be adjourned if there are reasons to believe that the accused was prevented from appearing (para 3). In addition, a person tried *in absentia* upon whom a summons was not served should be entitled to have any judgement against her or him annulled (para 8). Finally, the defendant tried *in absentia* has the right to a full retrial, if the non-appearance was due to reasons beyond his or her control (para 9).

"becomes aware of the proceedings, [must] be able to obtain, […] a fresh determination of the merits of the charge", provided the defendant was not effectively informed of the proceedings, and had not unequivocally waived the right to appear. [285]

B. National legal framework

166. Under the Constitution, "the equality of the parties and the adversarial nature of the proceedings" underpin the conduct of criminal trials.[286] Courts must ensure equality of arms by providing parties "with equal opportunities to protect their rights and legitimate interests, without granting preference to any of them."[287] One way to achieve that goal is to ensure that defendants are informed of their rights. Accordingly, before any questioning, a defendant must be informed of his or her rights, including the right to counsel, the right to remain silent and the right not to incriminate oneself, the right to testify in one's defence, and rights related to jury trials.[288]

167. The CPC says "a defendant shall have reasonable time and means for preparation of his or her defence."[289] It also permits parties "to determine the order and volume in which evidence shall be presented for examination."[290] The Code ascribes a general case-management role to the court, requiring pre-trial judges to approve the list of evidence to be presented, and principal trial judges to lead the main hearing of the case.[291] The right to adequate time and facilities is further protected by the CPC, which authorizes a defendant to waive the right to trial within a reasonable time "if it is necessary for the proper preparation of a defence."[292]

168. The CPC recognizes the defendant's "right to participate in the investigation of his charges, and also directly or remotely, with the support of technical facilities […] in the trial".[293] Trials *in absentia* are permitted as an exception to this general rule "only if the defendant is avoiding appearing before the court. In this case defence counsel's participation shall be mandatory."[294] The Code is silent on the issue of the defendant's consent for the trial to continue in his or her absence. Similarly, the Code does not grant a right to retrial in the event that the defendant becomes aware of the proceeding at a later time, and where the failure to appear was due to reasons beyond his or her control. It does grant, however, the right of the defendant tried *in absentia* to appeal the first instance judgement.[295]

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285 See *Sejdovic v Italy*, ECtHR, 1 March 2006, para 109; *Colozza v Italy*, ECtHR, 12 February 1985, para 29.
286 The Constitution of Georgia, Articles 85(3) and 42(6).
287 Articles 25(1) and 9(1) CPC.
288 *Ibid.*, Articles 38(2), 219(3), 229(2), 230(1) and 230(2).
289 *Ibid.*, Article 38(5).
290 *Ibid.*, Articles 242(2) and 242(3).
291 *Ibid.*, Articles 220(c) and 227.
292 *Ibid.*, Article 8(2). See also, chapter on Right to a Trial within a Reasonable time.
293 *Ibid.*, Article 38(14.).
294 *Ibid.*, Article 189(1).
295 *Ibid.*, Article 292(3).

C. Analysis

1. Instruction concerning rights during trial

169. Monitoring identified frequent situations in which courts neglected their role to ensure that defendants were fully aware of their rights. In a number of cases, judges did not ensure that defendants understood their right to remain silent, in particular when defendants testified as witnesses. In many of the observed cases, judges merely asked defendants whether they wished to testify, and neglected to explain that defendants may refuse to testify, and that such refusal could not be used as evidence against them.[296] In other instances where defendants testified, judges advised defendants by simply paraphrasing the law. Judges also asked defendants if they wished to waive their right to have the case tried by a jury, but failed to provide any explanation as to the nature and effect of the provisions relating to jury trial.[297] Judges occasionally did not instruct the parties on their right to appeal.[298] Only on rare occasions would a judge enquire whether a defendant had understood his or her rights.[299]

170. Lack of or inadequate instructions undermined the fulfilment of the equality of arms principle, and affected defendants' rights not only when deciding whether and how to testify in their own case, but also relative to other fair trial standards, such as the right to counsel and the right to trial within a reasonable time.

2. Right to adequate time and facilities

171. Monitoring identified concerns regarding the right to adequate time and facilities, such as a failure by the prosecution to inform the defence about which witnesses would be called to a particular hearing, and the rejection by judges of reasonable defence requests for additional time to prepare. In most of the monitored cases, judges stated that they did not have the power, upon request of the defence, to order the prosecution to say in advance which witnesses will be called in individual hearings. Although this power is not explicitly foreseen in the law, its existence can be inferred from a number of legal provisions, for example the duty of the court to ensure the equality of arms.[300] It is also an obligation of the court to ensure that the defence has adequate time to prepare for an effective cross-examination of the prosecution's witnesses.[301] Moreover, the CPC ascribes a general case-management role to the court, requiring pre-trial judges to approve the list of evidence to be presented, and principal trial judges to lead the main hearing

296 Akhalaia II trial, 26 July 2013 and 29 July 2013; Gunava trial, 1 July 2013.
297 For example, the Akhalaia III trial, 17 July 2013; Merabishvili/Tchiaberashvili trial, 12 September 2013.
298 For example, the Merabishvili/Tchiaberashvili trial, 25 September 2013.
299 See also the chapter on the Right not to Incriminate Oneself and the Right to Remain Silent.
300 See under the current chapter the above paragraph on national legal framework, and particularly Article 25(1) CPC.
301 Articles 38(13) and (14) CPC.

of the case.[302] Thus, while it is the prerogative of the parties to determine the order and volume in which evidence shall be presented for examination,[303] this does not prevent judges from obliging the prosecution to disclose this information in advance of each hearing, in order to provide adequate time and facilities for preparation of the defence.

172. On numerous occasions in the observed trials, the defence complained that it did not have sufficient time to prepare its case, in particular to prepare for the cross examination of witnesses.[304] This was particularly problematic in cases involving a significant number of witnesses.[305] For example, in a case where the prosecution said that it would call approximately 4,000 witnesses, the defence requested the prosecution to inform them in advance of the names of witnesses to be summoned for each session. The judge rejected the defence's request. The prosecution eventually agreed, as a measure of goodwill, to notify the defence of the regions from which the witnesses would come.[306] Monitors also observed situations where judges claimed that they had no legal authority to address defence complaints about having been given misleading information by the prosecution as to which of its witnesses would testify.[307]

173. The failure of the opposing party to inform the other party in advance as to which witnesses it would call to a particular hearing limited the ability of the defence to adequately prepare for cross-examination. While the length of advance notice required by international standards depends on the circumstances and degree of complexity of each case, the more witnesses there are in a case, the more important it becomes for the defendant to know the order and timing of appearance of prosecution witnesses.[308]

174. During one hearing, the judge rejected the defendant's request for more time to communicate with his counsel in order to prepare for cross-examination.[309] The judge further rejected a defence motion for a two-week adjournment in order for newly appointed counsel to review the case material. Instead, the judge granted four days for the preparation of the defence, regardless of the fact that dozens of witnesses had already testified in a number of hearings that had taken place over the previous two months.[310] The judge reasoned that such an adjournment would delay the trial, which he said needed to conclude before the end of the nine-month time limit for pre-trial detention (two of the defendants were in pre-trial detention).

175. While conducting proceedings, courts are often required to strike a balance between the need to ensure adequate time to prepare the defence, and the

302 *Ibid.*, Articles 220(c) and 227.
303 *Ibid.*, Articles 242(2) and 242(3).
304 For example, the Akhalaia I trial, 6 June 2013.
305 Merabishvili/Tchiaberashvili trial in which approximately 4,000 witnesses were listed by the prosecution.
306 Merabishvili/Tchiaberashvili trial, 7 October 2013 and 17 October 2013. See also for similar observations, Khetaguri/Gvaramia trial, 19 March 2013; Akhalaia I trial, 22 March 2013, 7 May 2013 and 7 June 2013.
307 For example, the Merabishvili/Tchiaberashvili trial, 12 December 2013.
308 *Albert and Le Compte v Belgium*, ECtHR, 10 February 1983, para 41.
309 Akhalaia I trial, 4 April 2013.
310 Akhalaia I trial, 3 June 2013.

obligation to conduct the trial within a reasonable time.[311] However, the right to trial in a reasonable time cannot be used to justify limiting the right to adequate preparation of the defence, especially since the former can be waived to ensure respect of the latter under Georgian law.[312] Similarly, the denial of additional time to prepare a case on the grounds that the nine-month term for detention on remand will expire raised concerns, since the time-limit does not set a bar for prosecution of the case, but only for the application of the most restrictive form of preventive measures, while less severe measures remain available. The need to forcibly ensure the presence of the defendant during the trial through detention on remand cannot be used to curtail his or her right to prepare an adequate defence.[313]

3. The right to be present – trials in absentia

176. In none of the nine monitored cases involving defendants being tried *in absentia* did courts unequivocally establish the defendant's intention to avoid trial, raising concerns about violations of the right to be present. It seems that this intention is presumed where defendants do not respond to warrants or summonses, though there was never evidence presented that defendants were aware of their existence. Prosecutors tended to merely assert that a summons was not answered, without going into detail as to how service was attempted.[314]

177. The right to be present at trial stands at the core of the equality of arms principle, and it is difficult to reconcile trials *in absentia* with the adversarial nature of proceedings enshrined in the Georgian Constitution.[315] Trials *in absentia* are permitted according to Georgian law only if the defendant is clearly avoiding appearance before the court.[316]

178. The CPC does not set out the procedure or the criteria that must be satisfied in order to establish that a defendant is purposefully avoiding trial, or conversely, that the defendant has put forward a good cause for his or her absence. In particular, the Code does not require the court to verify that the defendant has been effectively summoned, and that he or she has unequivocally waived the right to appear, before proceeding to hold the trial *in absentia*.[317] As a result, the requirement that "[n]o one may be tried without having first been effectively served with a summons […] unless it is established that he [she] has deliberately sought to evade justice" is not met.[318] The Code preserves the right of the defendant tried *in absentia* to appeal the first instance

311 *W. v Switzerland*, ECtHR, 26 January 1993, para 42. See also, chapter on Right to a Trial within a Reasonable Time.
312 Article 8(2) CPC.
313 See also, chapter on Right to Liberty.
314 Akhalaia I, Akhalaia II, Akhalaia III, Dzimtseishvili, Khetaguri/Gvaramia.
315 See above in this chapter, under National legal framework; The Constitution of Georgia, Article 85(3).
316 Article 189(1) CPC. See, also ODIHR/CoE Joint Opinion, *op. cit.*, note 1.
317 *Maleky v Italy*, HRC Communication 699/1996 , UN Doc CCPR/C/66/D/699/1996 (1996), para 9.4; *Colozza v Italy*, ECtHR, 12 February 1985, para 28.
318 See Resolution 75(11) on the criteria governing proceedings held in the absence of the accused, *op. cit.*, note 293, para I 1.

judgement.[319] Although Article 292 (3) and 297 (f) of the CPC appears to allow for a fresh review of the facts in such cases, providing the person convicted *in absentia* merely with the right to appeal, as opposed to an actual re-trial, would essentially deprive the individual with the first-instance hearings that are accorded to other defendants. Furthermore, the Code does not foresee the right to have the judgement annulled when the summons was not served in due and proper form[320], nor does it recognize the right to be retried, even where effective summoning occurred, where the failure of the defendant to appear was due to reasons beyond his or her control.[321]

D. Conclusion

179. Several shortcomings were identified related to the equality of arms. When defendants were not properly informed of their rights during the proceedings, their lack of knowledge put them in a position that was effectively unequal to that of the prosecution, which may have resulted in violations of the principle of equality of arms. In addition, courts' failure to give defendants or defence counsel adequate time to prepare their cases, including adequate time to prepare for the cross-examination of prosecution witnesses, undermined the right to participate in the trial on an equal footing with the prosecution. Further, trials *in absentia* raised serious concerns about fairness, since courts presumed that defendants were avoiding trial. In addition, a criminal justice system that does not guarantee the right to a re-trial is not consistent with international fair trial standards. The judicial system in Georgia violates the equality of arms principle, since a defendant against whom a summons was not served in due form, or who could not appear for reasons beyond his or her control, is deprived of a "fresh determination of the merit" of his or her criminal case. Finally, trials conducted *in absentia* are contrary to the right to an oral adversarial hearing, where both parties are given the chance to be present and examine the evidence.

E. Recommendations

- Judges should ensure that defendants understand their rights, by providing clear instructions on relevant rights, and explaining relevant provisions of the CPC.
- The HCOJ should consider developing a standard instruction on rights, which is to be provided to each criminal defendant.
- Judges should be trained on the importance and practical application of the principle of providing adequate time and facilities to prepare a case, which includes judges' responsibility to ensure that parties disclose information in due time about the evidence to be presented.

319 Article 292(3) CPC.

320 See Resolution 75(11) on the criteria governing proceedings held in the absence of the accused, *op. cit.*, note 293, para 8. See also, *Sejdovic v Italy*, ECtHR, 1 March 2006, para 109.

321 See Resolution 75(11) on the criteria governing proceedings held in the absence of the accused, *op. cit.*, note 293, para 9.

- The legislature should consider amending the provisions of the CPC regarding the calling of witnesses, to the effect that the party calling a witness is obliged to inform the opposing party of the order and timing of appearance of witnesses.
- When making decisions as to whether to grant reasonable requests of the parties for additional time to prepare, judges should not reject such requests solely on the basis that a pre-trial detention period is reaching its legal limit.
- Courts should grant reasonable requests of the defence for adequate time to prepare their case, even when this appears to conflict with the defendant's right to a trial within a reasonable time, which can be suspended for that specific purpose.
- The legislature should amend the CPC to specify the procedure and criteria that must be satisfied to unequivocally prove that a defendant is avoiding justice and can thus be tried *in absentia*. This should include the obligation for the Court to verify that the defendant has been effectively summoned, and that he or she has unequivocally waived the right to appear, before proceeding to hold the trial *in absentia*.
- The legislature should consider whether to abolish the institution of trials *in absentia* altogether.
- If the legislature decides to maintain the institution of trials *in absentia*, then it should foresee the right to have the judgement annulled and the case re-tried where the summons was not served in due and proper form. The legislature should also foresee the right to retrial, even in case of effective summoning, where the failure to appear was due to reasons beyond a defendant's control.

XII. RIGHT TO A TRIAL WITHIN A REASONABLE TIME

180. The right to a trial within a reasonable time aims to ensure that those facing legal proceedings are not kept in a state of prolonged uncertainty. In addition, this right is supported by the requirement to limit measures restricting the defendant's liberty to the time necessary for the completion of the trial.

181. This Chapter will examine practices observed that raised concerns relative to delays and adjournments of proceedings, effectiveness of case management, and the reading of lists of evidence.

A. International standards

182. The ICCPR and ECHR provide all defendants with the right to a trial within a reasonable time.[322] OSCE participating States have agreed "to pay due attention to […] the efficient administration of justice and proper management

322 ICCPR, Article 9(3) and ECHR, Article 5(3) guarantee that every arrested or detained person has a right to "trial within a reasonable time or to release" pending trial. ICCPR, Article 14(3)(c) guarantees that every person under a criminal charge has the right to "be tried without undue delay"; and similarly ECHR, Article 6(1) guarantees that every person has a right to "a fair and public hearing within a reasonable time".

of the court system."[323] According to the UN Human Rights Committee, "[a]n important aspect of the fairness of a hearing is its expeditiousness" which applies to all stages of proceedings.[324] Expeditiousness is particularly important when the defendant is in custody.[325] As for what constitutes reasonable time, the European Human Rights Court has considered factors such as the complexity of the case, the applicant's conduct, and the conduct of the relevant administrative and judicial authorities, as important criteria.[326] While there is no established rule as to what constitutes reasonable time, the Court has considered those cases to have surpassed reasonable time which last more than three years at one instance, five years at two instances, and six years at three levels of jurisdiction.[327]

B. National legal framework

183. The CPC sets forth a defendant's right to expeditious proceedings, though the right may be waived in order to properly prepare a defence.[328] It also obliges courts to prioritise criminal cases where a defendant is in detention.[329]

184. Parties may move the court to re-set a hearing with a "substantiated request", and courts review such motions without an oral hearing; decisions on the motion are not subject to appeal.[330]

185. In addition, parties must publicly read out their written evidence,[331] the origins of which must be disclosed to the court,[332] and they may decide about the order and volume in which evidence is to be presented for examination.[333] Nevertheless, judges have the power to control proceedings, as well as the authority to decide on the admissibility of evidence.[334] Rules on direct and cross-examination oblige judges to "impose a reasonable time limit for the posing of question(s), as well as set a reasonable time to answer questions."[335]

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323 Ministerial Council Decision 5/06, Fourteenth Meeting of the Ministerial Council, Brussels (2006), para 4.
324 General Comment No.32, *op. cit.*, note 113, paras 27 and 35.
325 See *Barroso v Panama*, HRC Communication 473/199, UN Doc CCPR/C/49/D/473/1991 (1995), para 8.5; *Sextus v Trinidad and Tobago*, HRC Communication 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001), para 7.2.
326 *Pretto and Others v Italy*, ECtHR, 8 December 1983, para 31-37 and *Pedersen and Baadsgaard v Denmark*, ECtHR, 17 December 2004, para 45. See also General Comment No.32, *op. cit.*, note 113, para 35.
327 Dovydas Vitkauskas and Grigoriy Dikov, Council of Europe, "Protecting the right to a fair trial under the European Convention on Human Rights", February 2012, p. 74.
328 Article 8(2) CPC.
329 *Ibid.*, Article 8(3).
330 *Ibid.*, Article 185(4).
331 *Ibid.*, Article 248 (2).
332 *Ibid.*, Article 72(4).
333 *Ibid.*, Article 242(2).
334 *Ibid.*, Articles 72(5) and 219(4).
335 *Ibid.*, Articles 244 and 245.

C. Analysis

1. Procedural delays and postponements of hearings

186. Numerous delays and postponements were noted throughout the monitoring period, some of which resulted from acts or omissions on the part of the prosecution, and others where courts postponed hearings at their own initiative, often for undisclosed reasons.

187. With regard to delays and postponements caused by the prosecution, on several occasions prosecutors failed to appear, resulting in adjournments.[336] An explanation for the absence was rarely publicly announced in advance, or at the time of the hearing.[337] In the weeks up to the 27 October 2013 presidential elections, prosecutors in three cases were unavailable to try their cases.[338] In one of these cases, the prosecutor did not appear at the hearing where he was to make his closing statement, and only later informed the court that he was sick. A new prosecutor appeared at a subsequent hearing, and was given ten days to prepare her closing statement. At the hearing ten days later, she requested, and was given, additional time to prepare. She later moved to recuse herself citing "psychological pressure", due to her alleged personal connections with the wife of one of the defendants.[339] The replacement prosecutor was allowed a further ten days to prepare.[340] The occurrence of such delays at the prosecutors' initiative could have led to a public perception that some trials were deliberately delayed by the prosecution to ensure that judgement was rendered only after the elections.

188. Proceedings were also delayed at the court's own initiative, or for undisclosed reasons. Some postponements were reasoned, for example on account of the holiday season[341], however the reasons for other delays were not specified.[342] In one case, there was an almost six-month delay between hearings, from 25 July 2013 to 10 January 2014.[343] In another case, there was a nine-month break between hearings, from 11 July 2013 to 14 April 2014.[344] Neither delay was explained. The pronouncement of verdicts in some cases was also delayed for prolonged periods, without explanation.[345]

189. The practices described above potentially infringed upon the right to a trial within a reasonable time, since successive delays and postponements of a trial contribute to its prolongation. It is unclear how other adjournments were

336 For example, Akhalaia III trial, 17 September 2013.
337 For example, Akhalaia III trial, 17 September 2013.
338 Akhalaia III and Khetaguri/Gvaramia trials.
339 The fact that the prosecutor's personal connections were not raised as a ground for recusal earlier in the proceedings created public doubts as to whether this was merely an orchestrated attempt by the prosecution to delay the proceedings. See Monitoring Trials of Former Government Officials (January 15 - December 15 2013), *op. cit.*, note 48.
340 Akhalaia III trial, 17 September 2013, 19 September 2013, 30 September 2013, and 7 October 2013.
341 Ugulava/Kezerashvili trial, 16 July 2013.
342 Merabishvili/Tchiaberashvili trial.
343 Kezerashvili.
344 Adeishvili II.
345 Akhalaia II and Akhalaia III trials.

decided, as they did not take place in open court; decisions in these cases therefore lacked transparency. Since adjournments are neither subject to appeal, nor required to be justified in writing, judges must carefully consider motions for adjournments, and provide the opposing party with an adequate opportunity to respond. In cases where defendants were remanded in pre-trial custody, the delays constituted a serious infringement of their right to an expeditious trial, as well as their right to liberty, and, given the impossibility of appeal, also of their right to an effective remedy. In addition, certain delays caused by the prosecution in the weeks prior to elections resulted in perceptions of political interference, in order to avoid the possibility of a pardon by the departing President.[346] Consequently, these procedural delays and postponements of hearings may have adversely affected the right to trial within a reasonable time in some cases.

2. Case management

190. Monitors observed numerous instances where a lack of effective case management on the part of the courts led to unnecessary delays in proceedings. These related to the court's reluctance to limit parties' evidentiary submissions, its consistent acquiescence to the prosecution's scheduling preferences, and its failure to effectively address repetitive and seemingly irrelevant questioning of witnesses by the parties.

191. Effective case management was hampered by judges demonstrating reluctance to limit the parties' evidentiary submissions, through a comprehensive examination of admissibility and relevance at pre-trial and trial. As indicated earlier, in one case the prosecution suggested it would call nearly 4,000 witnesses. Despite concerns that the vast bulk of the testimony of these witnesses would be repetitive, which was indeed confirmed during the trial, the pre-trial judge refused to assess the relevance and necessity of the witnesses, or discuss the defendants' right to a timely hearing.[347] Similar issues arose in other cases with large numbers of prosecution witnesses.[348]

192. Furthermore, courts consistently acquiesced to the prosecution's scheduling preferences, even where the latter's inefficiency contributed to a delay in proceedings. Some prosecutors regularly called only one or two witnesses, for what was intended to be a full day's hearing[349], and judges were reluctant to order the prosecution to call more witnesses per session.[350] Judges also agreed to schedule large intervals between hearings, in accordance with the prosecution's scheduling preferences.[351] In one case, the prosecution requested, and obtained, an adjournment to prepare closing arguments, despite the fact that they had already benefited from a ten-day adjournment

346 See for instance Monitoring Trials of Former Government Officials (January 15 - December 15 2013), *op. cit.*, note 48.
347 Merabishvili/Tchiaberashvili trial, 19 September 2013.
348 For example, the Merabishvili trial.
349 For example, Khetaguri/Gvaramia trial, 1 April 2013.
350 For example Khetaguri/Gvaramia trial, 11 April 2013. For the opposite approach, see Akhalaia II trial, 24 June 2013, where the judge requested that the prosecution call at least six witnesses per hearing.
351 For example in the Akhalaia II and Khetaguri/Gvaramia trials.

for their preparation, and no new evidence had been introduced in the interim.[352]

193. Effective case management was further hampered as a result of judges' reluctance to deter parties from asking repetitive, irrelevant, or in other ways inappropriate questions[353], or to restrict the admission of apparently irrelevant evidence.[354] There was a general unwillingness to impose any concrete time limits for parties' submissions and examination of witnesses.[355]

194. Proper and efficient case management, which is directly linked to defendants' right to trial within a reasonable time, falls under the responsibility of the court. The discretion of the parties to decide on the order and volume of their evidence, as set forth in the Code of Criminal Procedure, does not remove the court's obligation to ensure the expedient administration of justice. Judges neglected to use existing provisions to comply with their case management duties. Pre-trial judges did not undertake a thorough examination of admissibility of evidence, including assessing relevance, prejudice, and probative value, nor did they encourage parties to reduce lengthy evidence lists. Judges also failed to take control of scheduling, and to consider the defendant's right to expeditious justice instead of deferring to the prosecution's preferences. During trial, judges neglected to use their powers to impose reasonable limits on questioning, deter advocates from asking inappropriate and repetitive questions, and maintain control of the courtroom through the appropriate use of sanctions. Consequently, poor case management contributed to delays that negatively affected defendants' right to trial within a reasonable time.

3. Reading lists of evidence

195. Also of concern regarding to the right to a trial within a reasonable time was the practice of reading out of the entire evidence list in open court during pre-trial proceedings and during the main trial. This information is very basic, consisting of the names of witnesses, and titles of documents, without any further explanation of their content, or how they related to the case. In cases with a large volume of evidence, the reading of the evidence list lasted several full court days, and thus delayed proceedings.[356]

196. The reading of evidence lists is not in itself contrary to international standards, however, the unnecessary delay caused by this formulaic and superfluous procedure does not contribute to ensuring the defendant's right to a timely hearing, particularly in cases with a substantial amount of evidence, particularly given that Georgian law and procedure do not explicitly require the reading of an evidence list. The provision that "a party shall publicly read out the written

352 Khetaguri/Gvaramia trial, 24 September 2013.
353 Akhalaia I trial, 7 June 2013, Merabishvili/Tchiaberashvili, 27 December 2013, and Merabishvili trial, 30 December 2013.
354 For example, Akhalaia II trial, 19 June 2013, and Merabishvili/Tchiaberashvili trial, 27 December 2013.
355 For example, Akhalaia I trial, 4 April 2013.
356 For example, Merabishvili/Tchiaberashvili trial, 12 September 2013, 15 January 2014, 17 January 2014, 22 January 2014 and 23 January 2014.

evidence", which is sometimes relied upon to justify the practice, appears instead to refer to the reading of the contents of documentary evidence referred to during trial.[357] Furthermore, the Code obliges parties "to provide the court with information on the origins of its evidence"[358], however the reading of names and titles of documents fails to satisfy this provision.

197. There appears to be limited value in reading the entire list of admitted evidence at the main trial. This practice does not constitute an effective use of the court's time and resources, and undermines the defendant's right to be tried without undue delay.

D. Conclusion

198. Monitoring identified shortcomings regarding the right to trial within a reasonable time, with hearings in a number of cases being postponed for long periods of time, and with some of the delayed hearings involving defendants who were remanded in pre-trial custody. Some delays have led to perceptions of political interference to avoid the possibility of a pardon by the then-departing President. Delays caused by the prosecution in the weeks prior to elections also contributed to allegations of political considerations in scheduling. A general lack of effective case management was also observed, most notably a tendency on the part of the courts to defer to the prosecution's scheduling preferences. The practice of reading out lengthy lists of evidence appeared unnecessary, time-consuming, and contrary to the right to a timely hearing. Taken together, these practices contributed to undermining the right to a trial within a reasonable time.

E. Recommendations

- When making decisions concerning the adjournment or postponement of decisions, judges should weigh the consequences of any delays against the defendant's right to a timely hearing.
- To help ensure the court's control over the length of trials, the legislature should amend Article 219(4)(a) of the CPC to indicate that the court's examination of parties' motions on admissibility of evidence should take into account the relevance, prejudice, and probative value of evidence.
- Judges should use their powers to control the presentation of trial evidence, by restricting irrelevant answers, controlling repetitive, inappropriate or abusive questioning, and maintaining courtroom order.
- Courts should abandon the practice of reading lists of evidence in main trial hearings, and rather fully examine in open court all admitted evidence that the parties present in support of their case.

357 Article 248(2) CPC.
358 *Ibid.*, Article 72(4).

XIII. CALLING AND EXAMINING WITNESSES

199. Witness testimony often constitutes primary evidence in a criminal case. In order for the principle of equality of arms to be ensured, all parties must have an equal opportunity to call and examine their own witnesses and the witnesses against them. This chapter will look into observed practices related to summoning procedures, and impeaching witnesses with statements made at investigation and other information.

A. International standards

200. The ICCPR and ECHR guarantee to all persons charged with a criminal offence the right "[t]o examine, or have examined, the witnesses against him [or her] and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him [or her]."[359] This right represents a fundamental guarantee for a fair trial, in that it counterbalances the prerogatives and the powers of the prosecutor,[360] and therefore, "as an application of the principle of equality of arms, the right to call and examine witnesses guarantees the effectiveness of the defence."[361] This guarantee is reinforced by affording the accused with "the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."[362] The right to cross-examine witnesses should be read in the light of the more general guarantee of adversarial proceedings, enshrined in the concept of a fair trial[363], and it "requires, in principle, that the applicant should have an opportunity to challenge any aspect of the witness' statement or testimony during a confrontation or an examination."[364] Also, the principle of immediacy of evidence, which requires the court's direct contact with persons giving evidence in the trial, calls for "the accused to be confronted with the witness in the presence of the judge who ultimately decides the case", so as to ensure the careful observation of the demeanour and credibility of witnesses.[365]

B. National legal framework

201. In line with international standards, the Constitution sets forth the right of a defendant to call witnesses: "The defendant shall have the right to request summoning and interrogation of his/her witnesses under the same conditions as witnesses of the prosecution."[366] Calling witnesses is primarily the role of the parties, who shall ensure the appearance of their own witnesses. Only if

359 ICCPR, Article 14(3)(e); ECHR, Article 6(3)(d).
360 *Legal Digest of International Fair Trial Standards*, *op. cit.*, note 7, page 150.
361 General Comment No.32, *op. cit.* note 113, para 39.
362 *Ibid.*
363 See *Matytsina v. Russia*, ECtHR, 27 March 2014, para 153.
364 *Bricmont v Belgium*, ECtHR, 7 July 1989, para 81.
365 *P.K. v Finland*, ECtHR (decision on admissibility), 9 July 2002. See also, same quote in *Matytsina v. Russia*, ECtHR, 27 March 2014, para 153.
366 The Constitution of Georgia, Article 42 (6). See also Article 14(2) CPC.

a witness fails to appear voluntarily, and upon the motion of a party, can the judge issue a subpoena to summon a witness.[367]

202. The CPC grants parties a general right to impeach a witness where there is a substantial contradiction in their testimony or statements.[368] As an exception to the general rule that witnesses must testify in person in court,[369] the Code permits parties to submit a motion to play the audio or video recording made by the witness during the investigation, if the "provided statements include substantially contradicting statements, and there is probable cause that the witness was forced, threatened, intimidated or bribed."[370]

203. Parties have a more general right during an examination "to present to the witness any object, document, or other item from the case file that contains information."[371] This provision is subject to exceptions, for example, information in an audio or video recording made prior to the main trial by a defendant, who is called as a witness, cannot be publicly disclosed without his or her consent, much less used as evidence. [372] No such exception exists for witnesses other than the defendant. The CPC allows the counsel to ask witnesses about their "previous criminal convictions" in order to establish their credibility.[373]

C. Analysis

1. Summoning procedures

204. In all cases monitored, it was apparently the responsibility of the parties to informally call witnesses to court, however on occasion, parties said they were unable to contact witnesses and inform them of the need to appear.[374]

205. In practice, the court does not appear to have any information until after a hearing begins as to whether a witness has been called. This has implications for effective case management, since in some cases a session starts with a party's statement that they were unable to trace witnesses, and thus the hearing is adjourned. While the Code permits a court to fine a participant who fails to appear, it is difficult to justify the fining of a witness who was called by a party with no legal power to compel appearance.[375] Leaving the calling of witnesses to the control of the parties does not ensure witnesses' attendance, and makes the calling of hostile witnesses challenging, potentially infringing on the parties' right to present evidence.

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367 Article 149(1)-(3) CPC.
368 *Ibid.*, Article 75(2).
369 *Ibid.*, Article 49(2)(a)-(b).
370 *Ibid.*, Article 243(1)-(2).
371 *Ibid.*, Article 115(8).
372 *Ibid.*, Article 247.
373 *Ibid.*, Article 115(4).
374 For example, the Akhalaia I trial, 17 June 2013.
375 Article 240 CPC.

2. Impeaching witnesses with statements made at investigation

206. The parties' ability to use a witness statement made during the investigation stage for impeachment purposes appeared to be hampered by the practice of requesting the witnesses' consent to refer to their out-of-court statements. Judging by the list of read-out evidence, it appears that statements made at the investigation stage are included in the court's case file. When witnesses testified, most courts prohibited the reading of, and sometimes even a substantive reference to, the out-of-court statements without the witnesses' permission.[376] Counsel appeared to consider it obligatory to obtain witnesses' consent before referring to their out-of-court statements.[377]

207. This practice fails to comply with the CPC, which explicitly allows parties to present witnesses with documents from the case file; it does not restrict which documents can be presented or the purposes for using them.[378] The Code establishes an exception to this rule only with regard to the pre-trial statements provided by the defendant, which cannot be disclosed at the trial without the defendant's consent.[379] No such exception exists with regard to other witnesses. If out-of-court statements are included in the case file, and thus available for the judge to use in making a decision, it is critical for the opposing party to have the opportunity to either contest their reliability, or use the statements to contest the credibility of a witness's in-court testimony. Without such a possibility, the right to impeach a witness, and the broader right to cross-examine witnesses, would lose their meaning.

208. Finally, the rule in the CPC permitting the playback of audio or video recordings of witness questioning unfairly limits cross examination rights, by requiring the proponent to prove both that "substantially contradicting"[380] statements exist, and that there is "a probable cause that the witness was forced, threatened, intimidated or bribed."[381]

3. Cross-examining witnesses with other information

209. Monitoring identified concerns regarding approaches to confronting witnesses, suggesting a need to introduce rules on the kinds of information that may be used for such purposes, and how it may be used. Information about prior convictions, and documents not admitted as evidence, were improperly used to cross-examine witnesses. Regarding a witness's prior convictions, one defence counsel attempted to impeach a prosecution witness by accusing the witness of lying, substantiating her accusation with allegations that the witness had faced criminal prosecution in the past. No formal record of the witness' antecedents was entered into evidence and no particular test was

376 For example, the Akhalaia I trial, 10 April 2013, 10 May 2013, 7 June 2013, 14 June 2013; Akhalaia II trial, 23 May 2013; Khetaguri/Gvaramia trial, 23 May 2013 and 19 June 2013.
377 For example, Merabishvili/Tchiaberashvili trial, 31 October 2013.
378 Article 115(8) CPC.
379 *Ibid.*, Article 247.
380 *Ibid.*, Article 243(2).
381 *Ibid.*, Article 243(2). See also ODIHR/CoE joint opinion, *op. cit.*, note 1, para 57 - Recommendation Z.

invoked for this application.[382] On another occasion, a prosecutor used on-going criminal proceedings against a witness to undermine the witness's credibility.[383] In several instances, advocates confronted witnesses with investigation statements of other witnesses who had not yet testified.[384]

210. In one instance, a cross-examining counsel presented a document to the witness to confirm that he had signed it, although the document did not appear to be part of the case file.[385] In another case, the defence sought to challenge a witness who had purportedly identified a defendant as a perpetrator; the prosecutor then countered that the identification means used were legal, and that there is no provision requiring a witness who identified the alleged perpetrator of a crime through the use of photos to be questioned in connection with that identification.[386]

211. The existing normative framework falls short of providing clear rules of evidence, that is, rules governing what type of information may be used to cross-examine a witness, and how such information may be used. For instance, there does not appear to be any procedure for proving witness character, nor any test concerning admissible character evidence. Also, while "previous criminal convictions" can be relevant to assess witness credibility, the party seeking to admit such information should be asked to justify its evidentiary value. However, such a requirement is not explicitly foreseen in the CPC.[387] The reference to on-going criminal proceedings against a witness is not in line with the Code, which only allows witnesses to be asked about their *previous* criminal convictions for the purpose of challenging their credibility.[388] Not only does this constitute a questionable means of impeaching a witness, it also undermines the witnesses' right to the presumption of innocence with regard to their own pending cases.

212. A defendant should have an opportunity to challenge "any aspect of a witness' statement or testimony during a confrontation or an examination"[389], which also includes the person's demeanour. In one case, the defence moved to question a witness who had purportedly identified a defendant as a perpetrator at the investigation stage of the proceeding. The prosecutor objected to the motion, highlighting that there is no provision requiring a witness who identified the alleged perpetrator of a crime through the use of photos to be questioned in open hearing. The interpretation that a positive identification through legal means is beyond dispute is questionable, as there are many visual, social, contextual and psychological factors that may affect a witness' ability to identify a perpetrator, and the defence must have the right to test these factors on cross-examination.[390]

382 Akhalaia I trial, 7 May 2013.
383 Akhalaia I trial, 27 June 2013.
384 Akhalaia I trial, 2 April 2013 and 4 April 2013.
385 Akhalaia I trial, 7 June 2013.
386 Akhalaia I trial, 28 February 2013.
387 Article 115(4) CPC.
388 *Ibid.*, Article 115(4).
389 *Bricmont v Belgium*, ECtHR, 7 July 1989, para 81.
390 Akhalaia I trial, 28 February 2013.

213. Clear evidentiary rules would harmonize court practice, protecting defendants from inconsistencies in judicial approaches to cross-examination. Issues such as the right to confront witnesses, relevance, probative value, prejudice, and witness protection should be taken into consideration in the development of such rules.

214. Finally, in cases with a large number of defendants where hearings took place in smaller courtrooms, some defendants were often unable to see the faces of the witnesses testifying against them. Defendants must be able to see witnesses when they testify, in order to be able to challenge the entirety of their evidence, including their demeanour.

D. Conclusion

215. Monitoring identified problems in connection with the right to call and examine witnesses in nearly all trials. The fact that calling witnesses is the primary duty of parties often created obstacles to effective case management when witnesses did not voluntarily appear. Courts prohibited the reading of, and the reference to, out-of-court statements without the witnesses' permission, although the CPC only foresees such a requirement for defendants.[391] Moreover, the rule subjecting the playback of audio or video recordings of witness' investigation statements to the proponent's proof of "substantial contradiction"[392] and of improper compulsion of a witness, unfairly limited cross-examination rights.[393]

216. The existing normative framework falls short of providing clear rules of evidence, that is, what type of information may be used to cross-examine a witness, and how such information may be used. For instance, there does not appear to be any procedure for proving a witness's character, nor any test for what constitutes admissible character evidence. The practice of impeaching a witness with reference to *on-going* criminal proceedings not only did not comply with the requirement of the Code,[394] it also undermined the witnesses' right to presumption of innocence with regard to their own pending cases. Finally, parties confronting witnesses with statements of those who have not yet testified before court was problematic, especially where parties had no ability to challenge them during the remainder of the trial.

E. Recommendations

- The legislature should consider amending the provisions of the CPC regarding the calling of witnesses, to the effect that the party calling a witness is obliged to inform the opposing party of the order and timing of the appearance of witnesses.

391 Article 247 CPC.
392 *Ibid.*, Article 243 (2).
393 See also ODIHR/CoE joint opinion, *op. cit.*, note 1, para 56 - recommendation JJ.
394 Article 115 (4) CPC.

- The legislature should amend the wording of article 243(2) of the CPC to allow for impeachment of witnesses with conflicting statements, without the need to establish probable cause that the witness was forced, threatened, intimidated, or bribed.
- Courts, prosecutors and counsels should refrain from considering witness' consent as a necessary requirement for the parties to read and refer to out-of-court statements of witnesses during the trial.
- The legislature should elaborate clear rules of evidence. This includes information that may be used to cross-examine a witness, and how to use such information. Particularly, the legislature should clarify procedures as to what constitutes admissible character evidence and how this may be used. When developing such rules of evidence, the right to confront witnesses, relevance, probative value, prejudice, and witness protection should be taken into consideration.

XIV. RIGHT TO A REASONED JUDGEMENT

217. Criminal defendants have the right to a publicly pronounced[395] and reasoned judgement.[396] This right is based on the importance of the public character of proceedings, which protects individuals from the secret and arbitrary administration of justice, and helps maintain confidence in the courts by ensuring that the parties and the public can be acquainted with the reasons supporting courts' judgements. This in turn contributes to the respect of the right to a fair trial.[397]

218. This Chapter examines practices of concern regarding the reasoning of judgements.

A. International standards

219. As a safeguard against arbitrariness in judicial proceedings, courts are required to adequately state the reasons upon which they base their judgements, although this should not be interpreted as obliging courts to provide a detailed answer to each argument raised.[398] The extent to which the duty to provide reasons applies may vary according to the nature of the decision,

395 ICCPR, Article 14(1); ECHR, Article 6(1); The Constitution of Georgia, Article 85(1). *See also Sutter v Switzerland*, ECtHR, 22 February 1984, para. 33; *Werner v Austria*, ECtHR, 24 November 1997, paras 52-60; *Pretto and Others v Italy*, ECtHR, 8 December 1983, paras 21-28.

396 *Concluding Document of the Vienna Meeting*, *op. cit.*, note 4, Principle 13.9. See also *Ruiz Torija v Spain*, ECtHR, 9 December 1994, para 29.

397 See *Ryakib Biryukov v Russia*, ECtHR, 7 July 2008, para 30.

398 *Suominen v Finland*, ECtHR, 24 July 2003, para 34; *Ruiz Torija v Spain*, ECtHR, 9 December 1994, para 29; *Van de Hurk v the Netherlands*, ECtHR, 19 April 1994, para. 61; *Hiro Balani v Spain*, ECtHR, 9 December 1994, para 27; *Grădinar v Moldova*, ECtHR, 8 July 2008, para. 107; *Karakasis v Greece*, ECtHR, 17 January 2001, para 27; *Tatishvili v Russia*, ECtHR, 9 July 2007, para 58; *Boldea v Romania*, ECtHR, 15 May 2007, para 29, available in French only; *Taxquet v Belgium*, ECtHR, 16 November 2010, para 91.

the diversity of arguments presented, the legal particularities of an individual jurisdiction, customary rules, legal opinions, the presentation and drafting of judgements and, finally, the circumstances of the case.[399] In proceedings carried out before judges that result in a conviction, the requirement for legal reasoning is stricter, since judgements must indicate with sufficient clarity the grounds on which the conviction is based.[400] Reasoned judgements also demonstrate to the parties that they have been heard, thereby contributing to a more willing acceptance of the judgement on their part.[401] Furthermore, only a judgement indicating with clarity the grounds on which it is based permits the effective and useful exercise by an accused of his or her right to appeal[402]; this demonstrates that poor reasoning in judgements may violate fair trial rights beyond the first instance hearing.

B. National legal framework

220. Although the right to a reasoned judgement is not set forth explicitly in the CPC, it does state that "a court judgement shall be legitimate, substantiated, and fair."[403] Judgements meet the "substantiated" criterion if they are founded on the body of evidence examined at trial, and in the absence of any doubt.[404] Fairness is determined by whether the sentence is "proportionate to the convicted person's character and the gravity of the crime committed by him or her."[405] Judgements cannot be "based on assumptions".[406]

221. The Code also outlines what should be included in the reasoning of the judgement. Judgements of conviction must contain "a description of the criminal action which was found to have taken place by the court", and "the evidence on which the conclusion of the court is based as well as the reasons why the court considered this evidence and rejected other evidence."[407] Additionally, in judgements of conviction courts must "substantiate the type and severity of the sentence", or any decision to impose a lesser sentence.[408] Judgements of acquittal must contain the "circumstances and evidence established and examined by the court, which support the court's conclusion that the defendant is innocent; the reason why the court regards the evidence, upon which the filed charges were based, as insufficient or not trustworthy; and/ or why the court believes that no crime occurred or why the action committed by the defendant is not a crime."[409]

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399 *Ruiz Torija v Spain*, ECtHR, 9 December 1994, para 29; *Suominen v Finland*, ECtHR, 24 July 2003, para 34; *Hiro Balani v Spain*, ECtHR, 9 December 1994, para 27.
400 *Taxquet v Belgium*, ECtHR, 16 November 2010, para 91.
401 *Ibid.*
402 *Hadjianastassiou v. Greece*, ECtHR, 16 December 1992, para 33; General Comment No.32, *op. cit.*, note 113, para 49. *See also*, *Concluding Document of the Vienna Meeting*, *op. cit.*, note 4, Principle 13.9.
403 *Ibid.*, Article 259(1); For requirements for the reasoning of both conviction or acquittal judgements, see Articles 273 and 275 CPC.
404 *Ibid.*, Article 259(3); For requirements for the reasoning of both conviction or acquittal judgements, see Articles 273 and 275 CPC.
405 *Ibid.*, Article 259(4).
406 *Ibid.*, Article 269(2).
407 *Ibid.*, Articles 273(1) and 260.
408 *Ibid.*, Articles 273(2) and 269.
409 *Ibid.*, Articles 275(1) and 260.

C. Analysis

222. In addition to the monitoring of hearings, the following analysis is based on a review of twelve judgements, including nine first-instance judgements and three second-instance judgements.

223. Three main concerns were identified in relation to the reviewed judgements: an insufficient or inadequate assessment of evidence; lack of adequate legal analysis; and a lack of assessment of factors used to determine sentencing.[410]

224. With regard to assessment of evidence, judgements in several cases merely re-stated evidence presented at trial, but neglected to explain why that evidence was or was not found credible.[411] For example, in one judgement of conviction the only evidence linking the defendant to the criminal act was the testimony of one witness, who stated that the defendant gave an illegal order over the phone. Given that the conviction was based mainly on this testimony, the court should have explained in its factual findings how that evidence was found to be reliable beyond any reasonable doubt. Instead, the judgement gave a brief account of the content of the testimony, and failed to assess the credibility of the witness and consistency of his testimony.[412]

225. In another judgement[413], the convictions of four defendants were based exclusively on witnesses' statements given at the investigation stage. The witnesses were not examined during trial because the defence moved to accept the victims' statements as "undisputed" under Article 73(1)(d) of the CPC. The judgement did not give an account of the content of the statements given by the witnesses, nor did it explain how the court's findings were based on the evidence, that is, how the relevant facts were established. The reasoning only stated that "the aforementioned facts were established by a body of evidence agreed and accepted without examination, in particular testimonies given by victims and witnesses, expertise findings, authentication/ identification protocol and other evidence available in the case file." In one acquitting judgement,[414] the court attempted to reason its dismissal of the prosecution's allegations. However, the court did not address each allegation with regard to each defendant individually. Although the court made an attempt to explain why some witnesses were "unconvincing'", or why some allegations were not established beyond reasonable doubt, the court only in a few instances provided the reasons for finding a witness' testimony credible, relevant, and probative. These practices therefore failed to meet the requirements of the CPC that judgements must "indicate the evidence on which the court opinion is based and the reason why the court admitted this evidence and rejected

410 For a discussion on reasoning of pre-trial detention orders, see the chapter on the Right to Liberty. See also Monitoring Trials of Former Government Officials (January 15 - December 15 2013), *op. cit.*, note 48, page 20-24. In addition, for an example of a comparatively well-reasoned judgement, see Tbilisi City Court judgement of 27 February 2014 in the case against Ivane Merabishvili.

411 For example, Merabishvili, Akhalaia II, and Akhalaia III.

412 Dzimtseishvili; See also, Merabishvili/Tchiaberashvili.

413 Akhalaia III.

414 Akhalaia II.

other evidence."[415] An adequate assessment of evidence is a crucial element of a reasoned decision, and helps to show that the parties were heard in a fair and equitable manner. Moreover, neglecting to mention why important evidence was not considered is contrary to fair trial guarantees.[416]

226. Courts also often failed to adequately assess parties' arguments in their judgements. In a case on appeal by the prosecution, the judgement laboriously details the prosecution's arguments, yet makes no mention of the defence position.[417] The judge's unequal consideration of the parties' arguments also called into question the fairness of proceedings.

227. Concerning legal analysis, judgements frequently did not include an explanation of the elements of the crime, or how the facts established proved each element beyond a reasonable doubt.[418] Judgements often concluded with a statement saying effectively, "given the above facts, the defendants are found guilty."[419] In a case where the defendant was convicted of exceeding official powers, the court failed to say what the limits of the defendant's powers were, and how the defendant exceeded those limits, aside from noting that the defendant did not have the authority to commit illegal acts. In order to assess whether and how a defendant exceeded official powers, the limits of those powers must first be established.[420] The lack of adequate reasoning of judgements resulted in a failure to assess how the facts amounted to a criminal offence. Merely establishing facts, and stating the defendant's guilt or innocence, without an intermediate analytical step, could amount to a breach of the requirement of reasoned judgement. In addition, the failure of a criminal court to set out the elements of the offence, together with the facts supporting each of those elements, calls into question the fairness of a trial.

228. Regarding the lack of assessment of factors used to determine sentencing, judges often neglected to sufficiently reason decisions, instead simply reciting the principles of sentencing, and avoiding the analysis of factors relevant to a particular case.[421] In one judgement, the court merely stated, "the Court took into consideration the extenuating and aggravating circumstances of criminal liability of the defendants […], the motive and purpose of the crime, illegal will demonstrated in the action, manner of implementing the action, method employed and illegal consequence, and the personalities", without further explaining how these factors influenced the final decision on sentencing.[422] These practices did not comply with the requirement that courts "substantiate the type and severity of the sentence", or any decision to impose a lesser sentence.[423] Additionally, the principle of fairness as defined in the CPC requires that a sentence is proportionate to the convicted person's

415 Article 273 CPC.
416 *Kuznetsov and Others v Russia*, ECtHR, 11 April 2007, paras 84-85.
417 Akhalaia I.
418 For example, Merabishvili and Akhalaia III.
419 For example, the Akhalaia I trial.
420 Merabishvili.
421 Merabishvili/Tchiaberashvili. *See also* Gunava and Akhalaia I.
422 Merabishvili/Tchiaberashvili.
423 Article 273(2) CPC; see also Article 269 CPC.

character and the gravity of the crime.[424] In another judgement,[425] the court explained that "[t]here are no mitigating and aggravating circumstances for [the defendant's] responsibility", without making a single reference to the defendant's previous convictions or his character. It would therefore be difficult to assess whether the fairness principle was adhered to, or to appeal the sentence, if the judgement did not explain on which grounds the decision on sentencing was based.

229. Consequently, the insufficient and inadequate assessment of evidence, the lack of adequate legal analysis, and a lack of substantiated assessment of factors used for sentencing, in judgements of the observed trials, contributed to undermining the right to a reasoned judgement, and hindered the effective exercise of the right to appeal.

D. Conclusion

230. It is crucial that judgements are well reasoned, since this constitutes the only way to dismiss perceptions of arbitrariness in judicial proceedings. As discussed above, monitoring found that numerous judgements neglected to thoroughly assess presented evidence, and to present an adequate level of legal analysis to explain how the facts established amounted to a criminal offence, and thus led to a specific sentence. These practices undermined the defendants' right to a reasoned judgement.

E. Recommendations

- Courts should focus on the individual elements of the crime in their legal reasoning, and tie the established facts to each element of the crime. Additionally, courts should address each charge alleged against each defendant with reference to the evidence. Courts should also include in judgements an explanation as to why evidence was accepted or rejected. Relative to sentencing, courts must list mitigating and aggravating factors, if any, in their judgement, and explain how those factors were considered in determining sentences.
- Appellate courts should clearly indicate in their judgements what elements of the first-instance judgement's reasoning were insufficient, or improperly addressed, in order to comply with the requirements of the right to a reasoned judgement.
- The High School of Justice should conduct extensive training courses on legal drafting of judgements and other court decisions, both as part of the initial training for judges and for their continuing legal education or in-service training.

424 *Ibid.*, Article 259(4).
425 Gunava.

XV. RIGHT TO COUNSEL

231. The right to counsel stands at the core of the notion of due process, since the defence lawyer is responsible for zealously protecting the defendant's right to a fair trial. This chapter will examine practices observed in relation to competent and effective legal representation; confidential and privileged communications with counsel; and the right to be assisted by a counsel of one's choice or by a state-appointed lawyer.

A. International standards

232. The right to counsel serves to counter the natural inequality of resources between a prosecuting state and an individual defendant, by guaranteeing access to a competent and independent legal representative of one's choice, and the freedom to communicate with that representative fully and in confidence.[426] In this respect, the right to counsel represents one of the most crucial requirements of the equality of arms principle.[427] In the context of criminal proceedings, OSCE participating States have committed to ensuring that any prosecuted person will have the right to defend her/ himself in person or through prompt legal assistance of his or her own choosing.[428] The right to counsel consists of the right to be represented by counsel of one's choice and to be informed of this right, the right to seek and give instructions from and to counsel in confidence, and the right to receive free legal assistance.[429]

233. International standards do not impose a responsibility on states to guarantee that a privately retained defence lawyer is always present, "the conduct of the defence [being] essentially a matter between the defendant and his representatives."[430] However, the absence of legal assistance may prevent the defendant from participating in the trial in a "meaningful way".[431] Therefore, courts must ensure that all defendants are informed of their right to retain a lawyer, and allow them to freely exercise this right, including the right to obtain a replacement if their lawyer fails to appear.[432] Where a defendant chooses not to retain a lawyer, "the interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial."[433]

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426 ICCPR, Article 14(3)(d) and ECHR, Article 6(3)(c).
427 See also the chapter on Equality of Arms.
428 Document of the Copenhagen Meeting, *op. cit.* note 4, para 5.17.
429 See *Legal Digest of International Fair Trial Standards*, *op. cit.*, note 7, page 138.
430 See *Sannino v Italy*, ECtHR, 13 September 2006, para 49; *Stanford v. the United Kingdom*, ECtHR, 23 February1994, para 28; *Cuscani v the United Kingdom*, ECtHR, 24 December 2002, para 39.
431 General Comment No.32, *op. cit.* note 113, para 10.
432 See *Daud v Portugal*, ECtHR, 21 April 1998, para 42; *see also*, especially with regard to state appointed counsel, *Artico v Italy*, ECtHR, 13 May 1980, para 33; *Stanford v the United Kingdom*, *op. cit.*, note 456, para 28.
433 General Comment No.32, *op. cit.* note 113, para 37.

234. Ethical duties imposed on lawyers require them to "be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure, or undue interference from any quarter."[434] While "a State party is not to be held responsible for the conduct of a defence lawyer,"[435] domestic courts should not remain passive vis-à-vis instances of lack of effective legal representation.[436] The ECtHR has consistently held that the right to legal assistance must be "practical and effective" in order to provide an adequate defence,[437] a fact that is to be assessed in the specific circumstances of each case, considering the proceedings as a whole.[438]

235. In accordance with the UN Basic Principles on the Role of Lawyers, defence lawyers "must advise their clients of their legal rights and obligations, and about the legal system. They must aid their clients in every appropriate way, taking such action as is necessary to protect their clients' rights and interests, and assist their clients before the courts."[439] Along the same lines, the Code of Conduct for European Lawyers requires that "a lawyer must always act in the best interests of his client […]"[440] and that "if there is a conflict or a significant risk of conflict of interest a lawyer may not advise, represent or act on behalf of two or more clients in the same matter."[441]

236. The right to confidential and privileged communication with counsel is not spelled out as such in both ICCPR and the ECHR. However, as the UN Human Rights Council recognizes, the special nature of the lawyer-client relationship calls for "counsel [to] be able to meet their clients in private and in conditions that fully respect the confidentiality of their communications."[442] In addition, the ECtHR has repeatedly confirmed that the right to confidential and privileged communication with counsel forms an essential component of the right to a fair trial.[443] If the right to a fair trial is to be "practical and effective," then conditions for confidential and privileged communication with counsel must indeed be provided, short of which counsel's assistance would lose much of its usefulness.[444]

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434 *Ibid.*, para 34.
435 *Ibid.*, para 32.
436 Legal Digest of International Fair Trial Standards, *op. cit.*, note 7, page 142-143. *Hendricks v Guyana*, HRC Communication 838/1998, UN Doc CCPR/C/76/D/838/1998 (2002), para 6.4 and *Christopher Brown v Jamaica*, HRC Communication 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999), para 6.6.
437 *Artico v Italy*, ECtHR, 13 May 1980, para 33; *Imbrioscia v Switzerland*, ECtHR, 24 November 1993, para 38; *Daud v Portugal*, ECtHR, 21 April 1998, para 38.
438 *Kulikowski v Poland*, ECtHR, 19 August 2009, para 57.
439 See "Basic Principles on the Role of Lawyers", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), Principles 13 and 14.
440 *Charter of Core Principles of the European Legal Profession And Code of Conduct for European Lawyers*, Council of Bars and Law Societies of Europe (CCBE), 2013, para 2.7.
441 *Ibid.*, para 3.2.1.
442 General Comment No.32, *op. cit.* note 113, 34.
443 In line with the consolidated ECtHR jurisprudence in this regard. See *S. v Switzerland*, ECtHR, 28 November 1991, para 48; *Campbell v the United Kingdom*, ECtHR, 25 March 1992, para 46.
444 See also, *Öcalan v Turkey*, ECtHR, 12 May 2005, para 133; *Khodorkovskiy and Lebedev v Russia*, ECtHR 25 October 2013, para 627; *Sakhnovskiy v. Russia*, ECtHR, 2 November 2010, para 97.

237. The ICCPR and ECHR also guarantee the right to free legal assistance for those who cannot afford to pay for their own legal representation, where this is in the interest of justice.[445] According to the UN Human Rights Committee, "[t]he gravity of the offence is important in deciding whether counsel should be assigned 'in the interest of justice' as is the existence of some objective chance of success at the appeals stage."[446] OSCE participating States have also agreed to uphold the right to free legal assistance as one of the human dimension commitments in the area of fair trials.[447]

B. National legal framework

238. The Georgian Constitution recognizes the right to defence.[448] Under the CPC, all defendants have the right "to a counsel and the right to choose the counsel, as well as the right to substitute the counsel of his or her choice at any time."[449] This right is reinforced by procedural measures that allow the court to appoint replacement counsel, at state expense, and to postpone proceedings for up to fifteen days if the defence counsel fails to appear at a court hearing.[450] Courts may continue the hearing of a co-defendant's case in the absence of the other's counsel "unless it interferes with the interests of that defendant and has an effect upon the full and objective examination of evidence."[451]

239. In cases where there is no valid reason for the absence of counsel, or where there is a valid reason, but the delay obstructs the right to a fair trial, the Code allows for the appointment of defence counsel by the court.[452] Defence counsel is mandatory, inter alia, if "a defendant is in the process of negotiating a plea agreement, […] the criminal case is considered by a jury, […] a defendant evades appearance before the investigative bodies",[453] or where the defendant absconds and the trial is conducted *in absentia*.[454] In cases where defence is mandatory and the defendant is not represented, "the State shall bear the costs of the defence."[455]

240. The CPC explicitly prohibits defence lawyers from acting in cases where their interests are in conflict, for example where counsel "is providing or has provided legal assistance to a person whose interests conflict with those of the defendant he or she represents."[456] Similarly, the Georgian Code of Professional Ethics for Lawyers requires counsel to always "put the client's

445 ICCPR, Article 14(3)(d); ECHR, Article 6(3)(c).
446 General Comment No.32, *op. cit.* note 113, para 38.
447 Document of the Copenhagen Meeting, *op. cit.* note 4, para 5.17.
448 The Constitution of Georgia, Articles 42(3).
449 Article 38(5) CPC.
450 *Ibid.*, Article 190(1).
451 *Ibid.*, Article 190(2).
452 *Ibid.*, Article 42(3).
453 *Ibid.*, Article 45(f)-(h).
454 *Ibid.*, Article 189(1). See also, under the chapter on Equality of Arms, The right to be present – trial *in absentia*.
455 *Ibid.*, Article 46(1)(b).
456 *Ibid.*, Article 60 (b).

interests before his/ her own or another person's interests […]."[457] Failure to comply can result in disciplinary proceedings.[458] The Code recognizes the principle of independence of the legal profession: lawyers must be "free from any influence or pressure."[459] It further states that defence lawyers have an ethical duty, backed by the threat of disciplinary action, to refrain from advising two or more clients in the same matter if there is a conflict of interest,[460] or if there is a significant risk of occurrence of such conflict.[461] The Ethics Code also lists "trust, […] priority of clients' interests, [and] inadmissibility of conflicts of interest" among the basic principles with which lawyers should comply.[462] The CPC guarantees that both the relations[463] and the communication[464] between defence lawyers and defendants be confidential and not subject to restriction.

241. The legal representation of defendants tried *in absentia* is mandatory.[465] The CPC allows for a close relative or another person, "acting in accordance with the defendant's will", to select an absent defendant's counsel.[466] Georgian legislation guarantees the right to counsel at state's expense for indigent defendants.[467] The CPC also provides for a state-appointed counsel in cases of mandatory defence, where the defendant does not already have counsel.[468]

C. Analysis

1. Competent and effective legal representation

242. Lawyers' lack of legal knowledge, lack of active participation in the case, as well as a lack of respect for the role of the defence, infringe the right to competent and effective legal representation. In nearly all monitored cases, the defence failed to challenge improper indirect testimony, and the prosecution's tendency to ask leading and compound questions.[469] In a number of instances, defence counsel failed to challenge the introduction of evidence likely to be detrimental to their client's case.[470] Lawyers often appeared to have failed to advise clients or witnesses who were testifying as to

457 Code of Professional Ethics for Lawyers, Article 5.
458 Law on Advocates, Article 32(1)(b).
459 Code of Professional Ethics for Lawyers, Article 2(1).
460 *Ibid.*, Article 6(1).
461 Code of Professional Ethics for Lawyers, Article 6(2)(a). See also, Law on Advocates, Article 8, "2. An advocate shall be obligated not to carry out such activities, or establish such relationship, which poses a danger to a client's interests, professional activities of an advocate or his or her independence. An advocate shall be prohibited from carrying out professional functions, if s/he has already served as an advocate to the adverse party on the same case [...]".
462 Code of Professional Ethics for Lawyers, Article 1.
463 Article 38(5) CPC.
464 *Ibid.*, Article 43(1).
465 *Ibid.*, Article 189(1).
466 *Ibid.*, Article 41.
467 *Ibid.*, Article 38(5).
468 *Ibid.*, Article 46(1)(b).
469 The one noted exception to this trend was the defence team in Merabishvili/Tchiaberashvili.
470 For example, the Dzimtseishvili trial, 13 June 2013, the Akhalaia I trial, 27 July 2013 and the Khetaguri/ Gvaramia trial, 24 September 2013.

the potential for self-incrimination[471], resulting in situations where defendants phrased questions in such a way as to effectively admit facts linking them to the crime in question.[472] Defendants sometimes "questioned" witnesses by making statements rather than posing questions, and in doing so sometimes admitted the allegations of criminal conduct made by the prosecution.[473]

243. In some instances, it became apparent that defence counsel were not aware of the law, procedural rules, or the facts of their case.[474] Some lawyers visibly failed to fulfil their duty to zealously represent their clients' interests. One lawyer agreed to forgo cross-examining a witness when the judge informed the parties that the session would have to be adjourned as the courtroom was needed for another case.[475]

244. Though each observation must be assessed within the specific context of each case, a general trend of failing to effectively introduce or challenge evidence, cross-examine witnesses, advise clients, zealously defend clients' interests, as well as the lacunae in defence counsel's knowledge of the law, increases the likelihood of manifest violations of the right to a fair trial. Certain situations of conflict of interest in joint representation, as well as failure to attend hearings, either wholly or in part, can also impact upon the right to effective and competent legal representation. In this context, judges must be particularly attentive to the fair trial rights of defendants, and must intervene to ensure that these rights are effectively protected, but shall be mindful not to undermine counsel's legitimate efforts to defend their clients' interests.

245. It is difficult to assess competence and effectiveness of legal representation, without being privy to a defence lawyer's strategic approach and to the client's instructions. However, there were a number of instances where defence lawyers' acts or omissions revealed a professional standard that fell far below that required to protect defendants' fair trial rights. The systematic nature of certain actions and omissions observed may amount to "manifest" violations of the right to competent and effective legal representation, as well as the ethical duties of counsel under Georgian law.[476]

2. Confidential and privileged communications with counsel

246. The right to confidential and privileged communication between counsel and client is at the core of a fair trial. Impediments to confidential client-counsel communications were noted in most cases. The practice of clients sitting apart from their defence counsel negatively impacted the right to confidential and privileged communications with counsel, and in proceedings involving multiple co-defendants, defendants rarely sat next to their lawyers.[477] Though limited courtroom space coupled with a large number of co-defendants

471 See also the chapter on the Right not to Incriminate Oneself.
472 For example, the Akhalaia II trial, 27 May 2013 and 30 May 2013; Akhalaia I trial, 7 June 2013.
473 For example, the Akhalaia II trial, 23 May 2013, 27 May 2013, 5 June 2013 and 12 June 2013.
474 Merabishvili/Tchiaberashvili trial, 21 October 2013.
475 Dzimtseishvili trial, 22 March 2013.
476 General Comment No.32, *op. cit.*, note 113, para 32; *See also*, Law on Advocates, Articles 5 and 6.
477 Akhalaia I and Akhalaia II.

makes it difficult to guarantee a seat adjacent to counsel for every defendant, access to counsel should be facilitated wherever possible. Notwithstanding the court responsibility in this regard, defence counsel should also actively request the court to provide appropriate facilities for such communication.

247. Similarly, the placement of detained defendants in glass docks during hearings,[478] as well as the difficulties encountered in holding consultations during the breaks,[479] such as failure to ensure an adequate space and without surveillance,[480] impeded the effective implementation of the right to confidential and privileged communication with counsel. In addition, microphones should only be switched on when the party is about to make a submission; every effort should be made to re-balance any inequality between defendants who are in custody, and those who are remanded on bail; judges should display a more pro-active attitude towards ensuring an adequate environment for consultations between defendants and their counsel; and counsel should promptly notify the court if they face impediments in this regard.

3. Right to be assisted by counsel of one's choice or by a state-appointed lawyer

248. The right to be represented by a privately retained or state-appointed lawyer at each stage of the court proceedings is one of the most important elements of the equality of arms principle. It was not always clear how counsel had been retained on behalf of defendants being tried *in absentia*.[481] In some situations, the absent defendant's family reportedly hired the counsel.[482] While a close relative or other person acting in accordance with the defendant's will may select counsel on behalf of the latter,[483] courts must be careful to ensure that other person is in fact acting in accordance with the defendant's will. Without express guarantees in this regard, such as a power of attorney signed by the defendant, defendant's close relatives should not be given legal authority to select a defendant's counsel.

249. In some cases, courts did not appear to have assessed whether unrepresented defendants qualified for legal aid, especially when their retained counsel failed to appear during important stages of the proceedings.[484] In cases of mandatory defence, and especially in cases where a defendant is tried *in absentia*, courts must ensure that counsel is assigned in accordance with the legal framework.

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478 For example, Akhalaia II trial; Merabishvili/Tchiaberashvili trial, 24 October 2013 and 8 November 2013; Akhalaia III trial, 5 February 2014.
479 Merabishvili/Tchiaberashvili trial, 7 October 2013; Akhalaia III trial, 5 February 2014.
480 Akhalaia III trial, 5 February 2014; Merabishvili/Tchiaberashvili trial, 8 November 2013.
481 See also the section in the chapter on Equality of Arms on The right to be present – trial in absentia.
482 Dzimtseishvili.
483 Article 41 CPC.
484 For example, Khetaguri/Gvaramia trial, 12 November 2013; Akhalaia I trial, 7 June 2013.

D. Conclusion

250. While it is difficult to assess the quality of legal representation from the mere observation of court hearings, defence counsel's acts or omissions revealed professional standards that fell far below that required to protect defendants' fair trial rights. On numerous occasions, defence counsel failed to appear at trial. Often, when they were present, their acts and omissions raised questions as to their independence, competence, and effectiveness. In addition, defendants often faced difficulties in engaging in confidential communication with counsel during trial, in particular detained defendants held in glass enclosures. There were concerns about whether defence counsel selected by the families of defendants tried *in absentia* truly represented the will of their clients. This raised issues of concern regarding improper conduct of examination or cross-examination of witnesses by the prosecution; inadequate time and facilities to ensure confidential and privileged communications between defence counsel and clients; and mandatory defence, especially in the context of trials conducted *in absentia*.

E. Recommendations

- Defence counsel should be present throughout all the stages of the proceedings, or ensure effective replacement, without hindering the defendant's right to independent, effective, and competent legal representation.
- Defence counsel should actively instruct defendants who personally examine witnesses, in particular to avoid self-incriminating statements. Represented defendants and their counsel should carefully consider the risks associated with defendants engaging in witness examination.
- The Bar Association Ethics Commission should consider disciplinary action in cases where defence counsel breach their professional duties.
- Defence counsel should zealously defend their clients' rights, and refrain from representing multiple defendants in the same case.
- Court chairs should allocate space to ensure confidential lawyer-client communications. They should instruct court security as to the importance of confidential communications, and prohibit any eavesdropping.
- Courts should ensure the use of larger courtrooms for cases with multiple defendants, and defendants should preferably be seated in a place where they can easily communicate with their counsel.
- Defence counsel should move to request regular breaks during hearings, to allow for communication with their clients in a space that ensures full confidentiality.
- Courts should give serious consideration to defence motions for breaks, in particular where courtroom space does not allow for defendants to be seated in a place where they can easily instruct their representatives.

- Judges and court officials should ensure that microphones are switched on only when the party is ready to make a submission. No recording of private communications between counsel and defendants should be allowed.
- Courts should ensure that legal representation selected by the defendant's family represents the genuine interests of the defendant in *in absentia* trials.

XVI. PARTICIPATION AND PROTECTION OF VICTIMS AND WITNESSES

251. Despite the fact that the provisions in international frameworks dealing with fair trial rights do not explicitly refer to the rights of witnesses or victims, there is growing acknowledgement by human rights bodies and the ECtHR that states and courts have a duty to ensure that the basic human rights of witnesses and victims, such as right to life, the right not to be subjected to inhuman or degrading treatment, and the right to respect for private and family life,[485] are upheld at all stages of criminal proceedings.[486]

252. The participation of victims and witnesses in criminal proceedings is crucial to achieving successful prosecutions of criminal acts, and individuals in most jurisdictions have a legal and civic duty to testify in criminal proceedings. International standards require that states take measures, and organize the proceedings, so as to avoid infringing upon the rights of witnesses and victims, and ensure their safety, well-being and right to privacy,[487] all the while balancing these rights against the defendant's right to a fair hearing.[488]

253. This chapter examines observed practices of concern pertaining to instructions given to witnesses (including expert witnesses unless otherwise expressly stated) and victims on their specific rights and obligations, the treatment of witnesses and victims during the proceedings, and out-of-court protection measures for witnesses and victims. The chapter also looks at the existing legal and institutional framework to ensure access to justice for victims, since this is essential for their participation and protection.

A. International standards

254. Instruments adopted by the UN General Assembly and the Council of Europe set forth a number of recommendations on measures that states should adopt in order to ensure the participation and protection of witnesses and

485 *See* ICCPR, Article 6, 7 and 17(1) and ECHR, Articles 3, 5(1) and 8(1)

486 *Legal Digest of International Fair Trial Standards*, *op. cit.*, note 7, page 176; Amnesty International, *Fair Trial Manual*, op. cit., note 205, page 166.

487 See "Recommendation No. R (97)13 of the Committee of Ministers to member states concerning Intimidation of Witnesses and the Rights of the Defence", Council of Europe, 10 September 1997, Preamble, paras 7-8; Procedural Protective Measures for Witnesses: Training Manual for Law Enforcement Agencies and the Judiciary, Council of Europe Publishing, September 2006, pages 16, 36 ff, and *Doorson v The Netherlands*, ECtHR, 26 March 1996, para 70.

488 *Bocos-Cuesta v the Netherlands*, ECtHR, 10 February 2006, para 69, and *SN v Sweden*, ECtHR, 2 October 2002, para 47.

victims in criminal proceedings.[489] This includes recommendations on the provision of information on the rights of victims and witnesses, protection against inhuman or degrading treatment in and out of the courtroom, the implementation of various means for protection such as witness protection programmes, and access to justice related measures including psychosocial support, legal advice, and full and effective reparation and restitution.

255. The Council of Europe has in particular put emphasis on two principles, namely that states should ensure that witnesses and victims are questioned in a manner that gives due consideration to their personal situation, rights and dignity,[490] and that they adopt necessary legislation and measures to protect and support witnesses so they can testify freely and without intimidation.[491] The UN Special Rapporteur on the Independence of Judges and Lawyers has stated that witness protection "is not a favour granted to the witness but a duty of States under international law."[492] In addition to physical support, there should also be provisions for psychological support before, during, and after proceedings.

256. In relation to victims of sexual crimes, torture or other degrading treatment or punishment, international case law also requires that all efforts be made to avoid re-traumatisation, and that courts should consider the use of special means for presenting the victim's testimony. Such means could be video-link, exclusion of the public and/or media, or reading aloud the witness's statement without the witness being present, provided the overall fairness of the procedure can be assured.[493]

257. OSCE participating States have entered into commitments towards ensuring access to justice and fair treatment of victims, particularly highlighting the need to provide protection and support measures for victims of crime.[494]

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489 *See* "UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", United Nations, 1985; "Recommendation No. R (85)11 of the Committee of Ministers to member states on the position of the victim in the framework of criminal law and procedure", Council of Europe, 28 June 1985; "Recommendation No. R(97)13, *op. cit.*, note 487; "Recommendation Rec(2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice", Council of Europe, 20 April 2005; Convention on the Compensation of Victims of Violent Crimes 1983; "Recommendation R(87) 21 of the Committee of Ministers to member states on assistance to victims and the prevention of victimization", Council of Europe, 17 September 1987; "Recommendation Rec(2006) 8 of the Committee of Ministers to member states on assistance to victims", Council of Europe, 14 June 2006.

490 See Recommendation No. R (85)11, *op. cit.*, note 489, para 8.

491 Recommendation Rec(2005) 9, *op. cit.*, note 489, para 1; Recommendation No. R(97)13, *op. cit.*, note 487, para 1.

492 "Report of the Special Rapporteur on the independence of judges and lawyers", Human Rights Council, seventeenth session, 29 April 2011, para 62, referencing inter alia the obligation in Article 13 of the UN Convention against Torture, and Article 12(1) of the International Convention for the Protection of all Persons from Enforced Disappearance.

493 The ECtHR recognizes that such victims have heightened need for privacy, because of the stigma attached to their injuries. *See Bocos-Cuesta v the Netherlands*, ECtHR, 10 February 2006, para 69, and *Kovač v Croatia*, ECtHR, 12 October 2007, para 27.

494 OSCE Ministerial Council, Decision No. 15/05, "Preventing and Combating Violence Against Women", within OSCE Ministerial Council Document, Thirteenth Meeting of the Ministerial Council, Ljubljana, 5–6 December 2005, para 4 (i) and (ii).

B. National legal framework

258. Witnesses, victims and expert witnesses have distinct roles, rights and obligations at the different stages of criminal proceedings.[495] For the purpose of providing testimony in court, the Georgian CPC grants them the same status, by establishing that the rights and obligations that apply to witnesses also apply to victims and expert witnesses.[496] The rules for witnesses include the right to know for which case they are summoned,[497] the right to refuse to provide information on potential criminal activity committed by themselves or by close relatives,[498] the right to request protective measures,[499] and the right to be instructed on the range of their rights and obligations,[500] including on the implications of taking an oath.[501] All witnesses must take an oath before testifying, but may choose to take one that is religious or non-religious.[502] The CPC also demands that all participants in the proceedings "respect the dignity and inviolability of the personal life of the participants in criminal proceedings at all stages of the proceedings", and that the use of any unlawful means to "influence the freedom of the will of a person", including but not limited to threat or promise of an advantage, is impermissible.[503] The Constitution also incorporates these standards.[504]

259. Additional provisions pertain to victims and experts only.[505] This entails for expert witnesses *inter alia* the right to refuse to provide an opinion if "questions posed for the examination fall beyond his or her expertise, or if the submitted materials are insufficient for providing an opinion".[506]

260. Prosecutors have the authority to grant a person victim status.[507] In addition to their rights as witnesses, victims have the right to know the essence of the charge against the defendant, to testify regarding damages incurred, to obtain copies of court documents, to be informed in advance regarding a variety of procedural actions, and to be informed in the event of a plea agreement.[508] Victims may also request compensation for any costs incurred by virtue of participating in the proceedings.[509] However, there appear to be no provisions allowing victims to submit claims for compensation for damages resulting from a crime. Nonetheless, victims may file a civil lawsuit to claim compensation for moral or non-pecuniary physical or material damages.[510]

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495 Article 3 (20) - (22) CPC.
496 *Ibid.*, Articles 47, 51(1) and 56 (1).
497 *Ibid.*, Article 49 (a).
498 *Ibid.*, Article 49 (d).
499 *Ibid.*, Article 49 (f).
500 *Ibid.*, Article 115 (1).
501 *Ibid.*, Article 48 (2).
502 *Ibid.*, Article 48 (1).
503 *Ibid.*, Articles 4 (1) and (2).
504 The Constitution of Georgia, Article 39.
505 Articles 56 - 58 CPC (victims) and Articles 51-52 CPC (experts).
506 *Ibid.*, 52 (1) c.
507 *Ibid.*, Article 56 (5).
508 *Ibid.*, Articles 57(a) – (c), 58(1) and 58 (3).
509 *Ibid.*, Article 57(d).
510 See Civil Code, Article 18 (2) and (5), 408, 409, 413 (1) and (2), as well as Civil Procedure Code, Chapter XXXIV3.

261. The CPC holds the judge responsible for maintaining order in the courtroom. Judges may impose fines or detention on those causing disruption as well as, if necessary and proportionate, the full or partial closure of a session, as means of maintaining order in the courtroom.[511] These powers enable judges to protect the interests of participants in the proceedings, including from behaviour or other actions that may contravene the rights of the witnesses or victims, in particular their right to dignity and to be free from threats and intimidation. In this respect, the judge is also provided with the authority to exclude the defendant from the courtroom during the testimony of a victim or witness, if necessary.[512]

262. The Norms of Judicial Ethics of Georgia also demand that a judge be respectful and polite in relation to the parties and the public, maintain order in court, ensure that all parties receive equal treatment and react to any violation of norms of professional ethics made by court officials, the parties, or their representatives.[513]

263. The Code of Professional Ethics for Lawyers also contains provisions concerning behaviour towards witnesses and victims, and obliges lawyers appearing before a court to comply with and respect the rules of conduct.[514] The Law on Advocates further requires counsel to respect orders of the court, and to refrain from infringing upon the rights of other parties to the proceedings.[515] Similarly, the Law on the Prosecution Service requires prosecutors to protect and respect individual rights and freedoms, and to uphold the principles of professionalism and competence.[516]

264. With respect to the protection of witnesses and victims, the CPC provides for a number of special protective measures for participants in criminal proceedings whose life, health, or property would be under significant threat if their identity or whereabouts were known.[517] Such measures can include placement in a witness protection programme.[518]

C. Analysis

1. Instruction concerning rights

265. In many cases, judges failed to properly instruct witnesses as to their rights and obligations. In a number of instances, the instruction consisted merely of instructing witnesses to tell the truth;[519] in other instances only parts of the

511 *Ibid.*, Articles 23, 85(1), 85(2), 182 (3) (c and f), 182 (4) and 228 (3).
512 Article 40 (1) CPC.
513 Norms of Judicial Ethics of Georgia, Articles 9, 10 and 12.
514 Code of Professional Ethics for Lawyers, Article 9.
515 Law on Advocates, Article 5.
516 Law on the Prosecution Service, Article 4(b) and (c).
517 Chapter XI CPC.
518 Article 68(1) CPC.
519 *See* Khetaguri/Gvaramia trial, 1 April 2013.

rights and duties were explained;[520] and on some occasions no instruction was given at all.[521] Judges also in a number of instances failed to clarify whether the witnesses properly understood their rights and obligations.[522] The court sometimes required witnesses to first sign a written oath, and only subsequently informed them of the obligations of such an oath.[523] It was also observed that the court on several occasions did not inquire which type of oath witnesses wished to take.[524] In some instances, witnesses continued to reply to questions, despite the adverse party objecting, highlighting the failure of judges to intervene and properly inform witnesses of the obligation not to reply to such questions until the court has ruled on the objection or motion.[525]

266. Judges who did instruct witnesses often read very quickly the provisions on the rights and obligations of witnesses contained in the CPC, without providing any explanation, or ensuring that the witness had indeed understood their content.[526] While court proceedings might appear to be common knowledge, persons with no previous court or legal experience may have difficulty understanding rights and duties conveyed to them rapidly, and using unfamiliar legal terms.

267. The CPC does not explicitly oblige the court to ascertain whether witnesses have understood their rights and obligations, but its provisions specifically state that the court and other judicial officials shall at a minimum explain them to witnesses, as well as the meaning of taking an oath. Failure of courts to properly instruct participants concerning rights and obligations pertaining to their status undermines their effectiveness. Rights should not be theoretical and illusory, but practical and effective,[527] and this requires that courts and judicial officers undertake the necessary effort in apprising witnesses of their rights and obligations, beyond merely listing them aloud.

268. In several cases, there was no distinction made as to whether the witnesses called to testify in the main trial also formally held the status of a victim, which had an impact on the content of the instruction. In a number of cases, judges confirmed that those called before the court had the status of a victim, but they were treated as regular witnesses, and hence only informed of their rights and duties as a witness and not their additional rights as victims.[528] Other victims in contrast were informed of their full rights, sometimes even by judges who had failed to do so in other cases.[529]

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520 Dzimtseishvili trial, 6 June 2013; Khetaguri/Gvaramia trial, 16 April 2013, 17 April 2013, 19 June 2013; Khetaguri/Gvaramia trial, 16 April 2013; Dzimtseishvili trial, 6 June 2013, 13 June 2013.

521 Khetaguri/Gvaramia trial, 26 June 2013.

522 Dzimtseishvili trial, 13 June 2013; Akhalaia I trial, 28 June 2013, 1 July 2013.

523 Akhalaia I trial, 28 June 2013; Akhalaia II trial, 8 July 2013.

524 Akhalaia II trial, 1 July 2013; Khetaguri/Gvaramia trial, 19 June 2013.

525 *E.g.*, Akhalaia I trial, 13 May 2013.

526 Akhalaia II trial, 12 June 2013; Akhalaia I trial, 1 July 2013.

527 *E.g.*, *Airey v Ireland*, ECtHR, 9 October 1979, para 24.

528 *E.g.*, Akhalaia II trial, 14 May 2013, 23 May 2013 and 27 May 2013; Merabishvili/Tchiaberashvili trial, 21 October 2013; Akhalaia I trial, 10 April 2013.

529 Akhalaia I; Akhalaia II trial, 23 May 2013.

269. Failure to inform victims of their additional rights and obligations could impair the full enjoyment of their rights. Uninformed, victims may not know, and therefore not be able to exercise, such important rights as the right to be informed of the progress of the proceedings, to testify regarding the damages incurred both at the main hearing and sentencing hearing, to benefit from special protective measures, to obtain copies of court documents, and to be given the right to be compensated for their participation. While it is primarily the duty of the prosecution to inform victims of their rights, courts should supplement this by reminding victims of their rights when they testify at trial.

270. Expert witnesses were also commonly instructed as regular witnesses, if instructed at all, and were not informed of the specific rights and duties of expert witnesses.[530] In one case, an expert on medical issues was not informed of his right to refuse to give an opinion on matters beyond his expertise.[531] The expert was repeatedly questioned by the defence counsel on the nature of the weapon that caused the injury, and the trajectory of the bullet. While the witness was indeed a medical expert, the specific questions seemed to clearly fall outside his realm of expertise; he nevertheless responded to a number of these questions until the judge finally intervened.[532]

271. Of special concern is the fact that many witnesses were either not informed of their right to refuse to testify if this would entail providing information on potential criminal activity committed by themselves, or they were informed in a cursory manner.[533] No witnesses appeared to be represented by counsel. When specific questions were asked that could lead to the witness providing incriminating information, there was no attempt by the judges to at least remind the witnesses of their right not to incriminate themselves prior to answering.[534] In several hearings, witnesses made statements that could subject them to criminal liability.[535] For instance, one witness admitted to collecting money from schoolchildren, and delivering it to persons in prison.[536] In these instances, neither the judges nor the parties intervened in order to ensure that these witnesses understood that they could refuse to provide information that may incriminate them.

272. The failure to properly instruct witnesses, victims, and experts as to their rights and obligations undermined the effectiveness of those rights and obligations, since individuals who are not fully aware of their rights are not in a position to properly exercise or protect them.

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530 Akhalaia I trial, 6 June 2013, 11 June 2013; Khetaguri/Gvaramia trial, 11 June 2013.
531 *See* Articles 51 and 52 CPC, especially Article 51(1)(c).
532 Gunava trial, 1 May 2013.
533 Akhalaia I trial, 2 April 2013; Khetaguri/Gvaramia, trial 11 June 2013; Gunava trial, 26 March 2013.
534 *E.g.*, Merabishvili/Tchiaberashvili trial, 27 December 2013.
535 *E.g.*, Dzimtseishvili trial, 22 March 2013; Akhalaia III trial, 10 September 2013.
536 Akhalaia III trial, 10 September 2013.

2. Treatment of witnesses during the proceedings

273. Monitoring identified several instances where witnesses and victims were harassed, intimidated or threatened, while in many of these cases there was no reaction on the part of the judge, or the parties who called the witnesses.

274. Defence counsel frequently raised their voices, and demonstrated an overtly hostile attitude towards witnesses.[537] The prosecution rarely objected, and judges regularly failed to intervene.[538] In one hearing, a defendant attempted to physically attack a witness during his testimony. In response to this, the court issued only a verbal warning to the defendant.[539] When one witness testified to having been sexually abused with a stick, defence counsel asked from which tree the wood came; it was only when the witness asked whether counsel was making fun of him that the prosecutor objected to the inappropriateness of the question, and this motion was sustained by the judge.[540] In another case, where the victim said that he had suffered torture, the defence laughed; the victim countered that his testimony was not funny and that he would not laugh if he had been in the victim's place. Only following the victim's reaction did the judge intervene and issue a general warning as to the inappropriateness of such behaviour.[541]

275. Defence counsel and defendants also repeatedly and aggressively accused witnesses of lying, without substantiating those assertions.[542] Although there should naturally be room for vigorous cross-examination, including concerning a witness's credibility, repeated assertions, without any supporting evidence, have no evidentiary value and serve no function other than to insult and harass witnesses, and as such represent unreasonable and unfounded attacks upon a witness's honour and reputation. For vulnerable victims in particular, such as those allegedly having suffered sexual abuse, torture or other kinds of cruel or degrading treatment involving physical violence, such repeated and aggressive questioning can cause severe distress, and result in re-traumatization. It is therefore essential that the court takes measures to balance the rights of the defendant and the rights of witnesses and victims in such instances.

276. In some cases, the prosecution intervened, demanding that defence counsel and/or defendants allow witnesses to speak freely, and refrain from insulting them, with judges often sustaining the prosecution's objections. In one hearing, however repeated objections were succeeded by a lengthy and heated debate about who had insulted whom, without the intervention of the judge.[543]

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537 Akhalaia I; Akhalaia II, Akhalaia III; Gunava.
538 *E.g.*, Akhalaia I, Akhalaia II, Gunava.
539 Akhalaia II trial, 28 June 2013.
540 Akhalaia II trial, 23 May 2013.
541 Akhalaia I trial, 10 April 2013.
542 *E.g.*, Akhalaia II trial, 23 May 2013, 3 July 2013; Akhalaia I trial, 10 June 2013, 7 May 2013.
543 Akhalaia II trial, 19 June 2013.

277. Members of the public, who in most cases appeared to support the defence, frequently displayed disrespectful behaviour towards witnesses, for example laughing at a victim who testified to being sexually abused.[544] In another case, a member of the public sitting in the gallery loudly and sarcastically addressed a witness exiting the room after providing testimony, saying: "good job", without any reaction from the judge.[545]

278. Insults, intimidation, and otherwise inappropriate behaviour by parties and the public towards witnesses and victims deter their participation in criminal proceedings. Allowing such conduct in court may deter victims from cooperating with prosecutorial authorities, and from seeking redress through criminal proceedings, since the way these are conducted are perceived as subjecting them to undignified and degrading treatment, potentially causing re-traumatization and impeding recovery.

279. Although vigorous cross-examination may be permitted, the conduct of certain parties clearly fell outside the scope of professionalism in numerous instances, and the courts failed to strike a reasonable balance between the rights of the defendant and those of witnesses and victims. In addition to the active breach of legal and professional standards by certain actors, it is highly concerning that prosecutors, judges, and defence counsel all contributed to the situation by their apparent lack of empathy, or their delayed or inadequate intervention. More specifically, judges demonstrated poor court-management skills, and an inability or lack of awareness as to how to effectively ensure that the examination of witnesses and victims and the overall hearing proceeded in a dignified and professional manner. Available sanctions, such as the issuance of warnings and fines, or the exclusion of members of the public or even the defendant, were not adequately applied. This allowed many of the hearings to become tense, aggressive or chaotic, and hostile to witnesses and victims.[546]

280. The failure of the parties to the proceedings to take the necessary measures to ensure that witnesses and victims are examined in a manner that does not violate their basic rights of being treated with humanity, dignity, and respect, contravenes not only the ethical standards set forth for the respective legal professions, but also the national and international standards on the rights of witnesses and victims that participate in criminal proceedings.

3. Ensuring safety and protection of witnesses and victims

281. Monitoring revealed practices that could jeopardize the personal safety of witnesses or victims and their families, as well as situations where they were supposedly subjected or left vulnerable to intimidation or pressure by the parties or members of the public.

282. In several cases, the courts, as a matter of procedure, required witnesses and victims to publicly state their place of residence when asked about their

544 Akhalaia II trial, 23 May 2013.
545 Merabishvili/Tchiaberashvili trial, 24 October 2013.
546 For further details on this, see the chapter on Public Trust in the Criminal Justice System.

identification details at the beginning of their examination. Many replied by giving the precise address, or the name of the villages or towns where they reside.[547] In one instance, the defence asked a witness her address and occupation. The witness hesitated to answer the question, but the judge instructed her to do so. The prosecutor objected to this, stating that the witness did not wish to provide the information publicly for security reasons.[548] In another hearing, following a similar question, the witness appeared clearly uncomfortable and finally replied that he could not remember.[549]

283. While the CPC requires the establishment of the identity of a witness prior to giving testimony, this does not necessarily entail witnesses providing their addresses in open court. The practice of publicly asking witnesses and victims for their place of residence jeopardizes the security not only of these individuals, but also of their families, and may render them more vulnerable to retaliation. Judges must balance the rights of witnesses with the rights of the defence and the public. The essential right of the defence in this regard is to be given adequate and proper opportunity to challenge and question a witness or victim; not to have knowledge of his or her address. It is highly doubtful that making public the residence of witnesses or victims, particularly in instances where this may jeopardize their safety, is necessary or proportionate in the interest of the defence.

284. Concerning protective measures, it is unclear whether witnesses were fully informed of available protective measures, and to what extent, if any, these measures were applied. The authority to decide on such measures lies with the Chief Prosecutor, and hence did not fall within the ambit of the monitoring.[550]

285. In the context of the hearings observed, it appeared that police provided security escorts to the court for the prosecution's witnesses,[551] but they were rarely accompanied by any security officers when entering and exiting the courtroom. In nearly all cases, witnesses waited in the hall outside the courtroom before testifying, and monitors did not observe any security measures in place to protect witnesses. On occasion it was observed that witnesses were followed by individuals when leaving the courtroom. For instance, in one occurrence, two persons from the public gallery, who had appeared hostile to the prosecution, followed a prosecution witness, and even waited for some moments outside the courtroom where the witness had been seated.[552] In a different case, members of the public were hostile and threatening to a witness as he left the courtroom, and several individuals followed him outside the courtroom, without any reaction from the security officers.[553] Although it was not observed whether any of these witnesses were subjected to retaliatory acts immediately following the observed incidents, it

547 *See* Merabishvili/Tchiaberashvili trial, 19 September 2013, 24 October 2013, and 25 December 2013; Akhalaia I trial, 2 April 2013 and 29 April 2013; Dzimtseishvili trial, 6 June 2013.
548 Akhalaia I trial, 7 May 2013.
549 Merabishvili/Tchiaberashvili trial, 22 November 2013.
550 Article 68 (2) CPC.
551 This was mentioned during the Akhalaia II, 23 May 2013 hearing.
552 Akhalaia II trial, 23 May 2013.
553 Merabishvili/Tchiaberashvili trial, 12 December 2013.

is of some concern that there did not seem to be any assessment on the part of the judge or the security officers as to the risk posed to the witnesses in relation to their testimony. In other cases, it was observed that parties were not asked to express their views as to the need for protective measures in court.[554] These practices leave witnesses vulnerable to intimidation and retaliation, and indicate an inability of courts to proactively ensure the safety and protection of witnesses within the trial setting, and to ensure their rights to protective measures are effective and accessible.

286. Both the practice of revealing the address of witnesses, and of not providing protective measures within the trial setting, left witnesses exposed to intimidation, threats and retaliation and hence undermined their rights.

4. Access to justice for victims

287. Access to justice for victims encompasses the right to an effective remedy, the right to participate in the judicial process, the right to be treated with respect and dignity, the right to protection, the right to reparation, and the right to assistance and support, including legal assistance and psychosocial support.

288. Existing legal provisions in the CPC do not sufficiently facilitate victim participation in the proceedings, by ensuring that the victim's views and special needs are taken into account at all stages of proceedings. This was aggravated, as mentioned earlier, by the fact that victims were not duly apprised of even those existing procedural rights. The legal framework also does not establish any structure for psychosocial and legal support of victims. There is limited availability of such assistance in Georgia, with the exception of some programmes targeting victims of gender-based violence and trafficking. The Code also does not foresee a victim's claim for reparation as part of the criminal proceedings, although victims can file a civil lawsuit for compensation. However, such recourse would entail engaging legal counsel, time, and financial resources, as well as having to endure yet another legal process, including giving testimony, thereby prolonging any possible redress. As the current framework and practices stand, access to justice for victims of crime in Georgia falls short of international standards.[555]

D. Conclusion

289. Court practices observed reflected a consistent lack of respect for the rights of witnesses and victims in criminal proceedings. The cooperation of victims and witnesses is essential to efficiently address crime in a society, but without ensuring their rights to safety, compassionate treatment and information, victim and witness participation in proceedings may not be assured. A fair criminal justice system does not only ensure the defendant's right to a fair trial,

554 Merabishvili/Tchiaberashvili trial, 12 September 2013, 19 September 2013.

555 ODIHR takes note of the substantive amendments to the Criminal Procedure Code of Georgia in July 2014, aiming at further enhancing the rights of victims.

it also balances the defendant's rights with those of witnesses and victims. The failure to properly instruct witnesses, including victims and experts, concerning their rights and obligations; the overly aggressive and often intimidating treatment to which some witnesses and victims were subjected by parties during observed hearings; and observed practices jeopardizing the safety of witnesses and victims, such as demanding information on addresses and not assessing the need for protection, resulted in grave shortcomings regarding the protection of the rights of witnesses and victims. The absence in Georgia of a sufficient legal or institutional framework to holistically ensure access to justice for victims further contributed to this lack of protection.

E. Recommendations

- Judges should properly instruct witnesses, including victims and experts, as to their rights and obligations.
- The High Council of Justice should consider developing a standard instruction on rights of witnesses and victims, to be circulated to judges.
- The legislature should make amendments to the CPC to clarify that judges should first provide information on witness's obligations and the meaning of the oath, and only subsequently request that they take the oath.
- Information on witnesses' and victims' rights in criminal proceedings should be provided on the websites of the courts and/ or distributed in pamphlets.
- Judges should pay close attention when witnesses provide testimony that may subject them to criminal liability, so as to ensure that they have understood their rights, and raise the possibility of hiring defence counsel in such cases.
- Judges should be proactive in ensuring that witnesses and victims are treated with the appropriate respect for their dignity and safety, and use the wide range of available sanctions to react to infringements in this regard, including considering the need for security measures for witnesses and victims in relation to providing testimony.
- Defence counsel and prosecutors should conduct themselves in such a manner that ensures that witnesses and victims are examined in a way that does not violate their basic right to be treated with humanity, dignity, and respect.
- Judicial training bodies should place more emphasis in their training programmes on how judges can ensure the respect and protection of the rights of witnesses and victims, including through efficient and effective court management skills.
- Courts should abolish the practice of requiring information on the address of witnesses and victims, or other sensitive information, to be provided in open court.
- The legislature should ensure that the CPC and related legislation provide for victims' views to be taken into account at the various stages of proceedings, and that victims are afforded psychological and legal support.

XVII. ANNEX 1: INFORMATION ON CASES MONITORED

As of 31 October 2014

1. **Adeishvili, Chakua** (Short form: Adeishvili I[556])

   3 hearings monitored

   According to the prosecution, in October 2012 the defendants orchestrated prisoner abuse, video-recorded it, and blamed it on individuals affiliated with the "Georgian Dream" (GD) coalition in order to cover up on-going abuse of prisoners, and to decrease the chances of GD's success in the October 2012 elections. They are charged with abuse of official authority, torture, provocation of crime, and fabrication of evidence. No hearings took place between the first main trial hearing on 11 July 2013 and the second main trial hearing on 14 April 2014. The case remains at the first instance.

   - Adeishvili, Zurab, *in absentia*. Former Minister of Justice, Prosecutor General, Head of President's Administration, Minister for State Security, and Member of Parliament.
   - Chakua, Davit, *in absentia*. Former Head of Penitentiary Department.

2. **Adeishvili, Antadze, Chigogidze, Chocheli, Ebanoidze, Gatchava, Giorgadze, Gumbatashvili, Kapanadze, Kodua, Kubaneishvili, Melia, Morchiladze, Sajaia, Sakvarelidze, Tskhenosanidze** (Short form: Adeishvili II)

   16 hearings monitored

   The defendants allegedly attempted to force Cartu Bank into bankruptcy. They are variously charged with illicit practices relating to bankruptcy, and forging or use of credit or settlement cards. Adeishvili is also charged with abuse of official position. The case is still at the first instance.

   - Adeishvili, Zurab, *in absentia*. Former Minister of Justice, Prosecutor General, Head of President's Administration, Minister for State Security, and Member of Parliament.
   - Antadze, Ilia. Director of a company.
   - Chigogidze, Vasil. Director of Arc Ltd.
   - Chocheli, Tsezar. Head of the supervisory board of beverage company Natakhtari.
   - Ebanoidze, Jambul. Executive director of Tegeta motor car company.
   - Gatchava, Laura. Director of a company.
   - Giorgadze, Davit. Former Deputy Minister of Economy.
   - Gumbatashvili, Irakli. Director of CDM Co.
   - Kapanadze, Lukhum, *in absentia.*
   - Kodua, Davit. Director of a company.

556 The short forms that follow each case name are used to cite the cases in the body of this report.

- Kubaneishvili, Nika. Director of Interplast or Kplast.
- Melia, Nika. Former Governor of Mtatsminda District in Tbilisi.
- Morchiladze, Grigol. Head of a company.
- Sajaia, Nugzar. Director of Planex Co.
- Sakvarelidze, Levan. Director of a company.
- Tskhenosanidze, Gocha. Director of a company.

3. **Akhalaia, Daraselia, Gorgadze, Kalandadze, Kikabidze, Kintsurashvili, Mkurnalidze, Shamatava** (Short form: Akhalaia I)

45 hearings monitored

The case relates to three incidents: (1) Akhalaia, Kalandadze, and Shamatava abused interior ministry drivers who refused to participate in morning training; (2) assault and imprisonment of Zviad Abegadze in retaliation for insulting Kalandadze; (3) physical abuse of Paata Paatashvili. The first-instance court acquitted most defendants. On 4 December, the Tbilisi Court of Appeals upheld the judgement, but re-qualified the charges against the two convicted defendants, Shamatava and Gorgadze, and increased their sentences. The Supreme Court upheld the decision of the Tbilisi Court of Appeals in its decision on 14 July 2014.

- Akhalaia, Bachana. In detention since early November 2012. Former Minister of Internal Affairs, Minister of Defence, Head of Penitentiary Department of Ministry of Justice, and Deputy Public Defender. Found not guilty of exceeding official authority, illegal imprisonment, and torture.
- Kalandadze, Giorgi. Brigadier General and Chief of Joint Staff of the Georgian Armed Forces. Found not guilty of exceeding official authority and illegal imprisonment by the first instance court. Found guilty of abuse of military service by the Tbilisi Court of Appeals, and restricted from military service for three months; sentence revoked under 2012 Law on Amnesty.
- Shamatava, Zurab. Former commander of the armed forces' Vaziani Fourth Infantry Brigade. Found guilty of exceeding official authority and battery. Sentenced to four and six hours of community service; sentence revoked under 2012 Law on Amnesty. The Tbilisi Court of Appeals re-qualified the charges and increased the sentence; Shamatava is currently serving a prison sentence.
- Mkurnalidze, Gaga. Former Deputy to the Head of the Penitentiary Department. Found not guilty of illegal imprisonment.
- Daraselia, Manuchar, *in absentia*. Former Penitentiary Department employee under the Ministry of Corrections and Legal Assistance. Not guilty of illegal imprisonment.
- Kintsurashvili, Giorgi, *in absentia*. Former Penitentiary Department employee under the Ministry of Corrections and Legal Assistance. Not guilty of illegal imprisonment.
- Gorgadze, Alexandre. Fourth Infantry Brigade sergeant. Guilty of exceeding official authority and battery; sentenced to 140 hours of community service; imposition of sentence suspended under 2012 Law on Amnesty. The Tbilisi Court

of Appeals re-qualified the offence and increased the punishment; Gorgadze is currently serving a prison sentence.

- Kikabidze, Merab. Commander of the Second Infantry Brigade of the Ministry of Defence. Not guilty.

4. **Abashidze, Akhalaia, Chubinidze, Davitashvili, Giorgashvili, Sutidze, Vekua, Zangieva** (Short form: Akhalaia II)

34 hearings monitored

On 31 October 2013, all defendants were acquitted of torture and imprisonment of seven Ministry of Interior staff they accused of insubordination and sympathizing with "Georgian Dream". On 17 April 2014, the Tbilisi Court of Appeals upheld the trial court's acquittal. An appeal submitted to the Supreme Court on 2 June 2014 was declared inadmissible on 13 October 2014.

- Akhalaia, Bachana. In detention since early November 2012. Former Minister of Internal Affairs, Minister of Defence, Head of Penitentiary Department of Ministry of Justice, and Deputy Public Defender. Acquitted of abuse of official authority, torture, and degrading or inhuman treatment.
- Davitashvili, Aleksi. Rangers program instructor. Acquitted of illegal imprisonment, torture, degrading or inhuman treatment, violation of human equality.
- Chubinidze, Davit. Rangers program instructor. Acquitted of degrading or inhuman treatment, violation of human equality.
- Giorgashvili, Davit. Rangers program instructor. Acquitted of illegal imprisonment, torture, degrading or inhuman treatment.
- Sutidze, Robert. Rangers program instructor. Acquitted of illegal imprisonment, torture, degrading or inhuman treatment.
- Abashidze, Mamuka. Head of the Rangers course in the Ministry of Defence. Acquitted of threat of torture, degrading or inhuman treatment.
- Vekua, Davit. Head of the First Division, Special Task Forces Department of the Ministry of Interior. Acquitted of torture, degrading or inhuman treatment.
- Zangieva, Vladimir. Rangers program instructor. Acquitted of illegal imprisonment, torture, degrading or inhuman treatment.

5. **Akhalaia, Charbadze, Kardava, Tchakua** (Short form: Akhalaia III)

15 hearings monitored

According to the prosecution, in spring 2006 the defendants urged certain prisoners to record a conversation about faking an assault by Akhalaia on an inmate, so that Akhalaia could later release the recording to demonstrate that allegations about his mistreatment of prisoners were invented to discredit him. The prisoners did not implement Akhalaia's order. In response, Akhalaia, Kardava, and Charbadze humiliated and beat them. Other prisoners protested the beatings, and the protest devolved into a riot. On 28 October 2013, the Tbilisi City Court acquitted all defendants of exceeding official authority, and convicted them of degrading

or inhuman treatment. On 5 November 2013, media reported that then-President Saakashvili pardoned defendant Charbadze and Akhalaia; reports of pardons cannot be confirmed as this has not been made public. In a discussion at the 5 February 2014 appeal hearing, the parties said only Akhalaia had been pardoned, not Charbadze. On 14 February 2014 the Tbilisi Court of Appeals upheld the trial court's judgement. By decision of 29 July 2014 the Supreme Court upheld the decision by the Tbilisi Court of Appeals.

- Akhalaia, Bachana. In detention since early November 2012. Former Minister of Internal Affairs, Minister of Defence, Head of Ministry of Justice Penitentiary Department, and Deputy Public Defender. Acquitted of exceeding official authority; convicted of degrading or inhuman treatment. Sentenced to 5 years, reduced to 3 years, 9 months under the December 2012 Amnesty Law. Temporarily barred from serving in an official position. Fined GEL 4,000.
- Charbadze, Revaz, *in absentia*. Prison department staff. Acquitted of exceeding official authority; convicted of degrading or inhuman treatment. Sentenced to 5 years, reduced to 3 years, 9 months under the December 2012 Amnesty Law. Temporarily barred from serving in an official position. Fined GEL 3,000.
- Kardava, Megis, *in absentia*. Prison department staff. Acquitted of exceeding official authority; convicted of degrading or inhuman treatment. Sentenced to 5 years, reduced to 3 years, 9 months under the December 2012 Amnesty Law. Temporarily barred from serving in an official position. Fined GEL 3,000.
- Tchakua, Davit, *in absentia*. Former head of Penitentiary Department. Acquitted of exceeding official authority; convicted of degrading or inhuman treatment. Sentenced to 5 years, reduced to 3 years, 9 months under the December 2012 Amnesty Law. Temporarily barred from serving in an official position. Fined GEL 3,000.

6. **Akhalaia, Davit; Alania; Melnikov; Topuridze** (Short form: D. Akhalaia)

28 hearings monitored

On 14 March 2014, all defendants were convicted of exceeding official powers in relation to the beating of three individuals they believed insulted in a Tbilisi restaurant the wife of then-Internal Affairs Minister Ivane Merabishvili. The case is on appeal at the Tbilisi Court of Appeals.

- Alania, Geronti, *in absentia*. Former Constitutional Security Department (CSD) officer. Convicted of exceeding official powers. Sentenced to 5 years, reduced to 3 years and 9 months under the Amnesty Law. Two-year ban on holding public office, reduced to 1 year and 6 months under the Amnesty Law.
- Akhalaia, Davit, *in absentia*. Former Deputy Defence Minister, CSD chair. Acquitted of illegal imprisonment. Convicted of exceeding official powers. Sentenced to 5 years, reduced to 3 years and 9 months under the Amnesty Law. Two-year ban on holding public office, reduced to 1 year and 6 months under the Amnesty Law.
- Melnikov, Oleg, initially *in absentia*, then extradited from Ukraine. Currently in detention. Former CSD officer. Convicted of exceeding official powers.

Sentenced to 5 years, reduced to 3 years and 9 months under the Amnesty Law. Two-year ban on holding public office, reduced to 1 year and 6 months under the Amnesty Law.

- Topuridze, Ioseb, *in absentia*. Former deputy head of CSD. Convicted of exceeding official powers. Sentenced to 5 years, reduced to 3 years and 9 months under the Amnesty Law. Two-year ban on holding public office, reduced to 1 year and 6 months under the Amnesty Law.

7. **Dzimtseishvili** (Short form: Dzimtseishvili)

11 hearings monitored

On 19 June, the Tbilisi City Court found Dzimtseishvili to have misappropriated GEL 126,900 of Ministry of Interior funds and fuel vouchers, which were used to hire minibuses to take people to a United National Movement rally in Zugdidi. Media reported on 30 October 2013 that former President Saakashvili pardoned him, but the pardon decision has not been made available to the public.

- Dzimtseishvili, Nikoloz, *in absentia*. Former Deputy Minister of Internal Affairs. Guilty of embezzlement; not guilty of abuse of official authority. Given a reduced sentence of 6 years and 9 months.

8. **Gunava** (Short form: Gunava)

11 hearings monitored

Prosecutors accused Gunava of shooting his driver in the leg and causing light bodily injury. He was also charged with exceeding official powers through the misappropriation of fuel from the Ministry of Internal Affairs through the use of fuel vouchers. On 12 July 2013, the Tbilisi City Court acquitted him of light bodily injury, and convicted him of misappropriation. Then-President Mikheil Saakashvili pardoned him on 30 July 2013.

- Gunava, Tengiz. Former acting governor of Samegrelo-Zemo Svaneti region. Former head of General Inspection of Ministry of Interior. Guilty of two counts of misappropriation of public funds, sentenced to 6 and 8 years imprisonment, to be halved under the amnesty law and served concurrently. Not guilty of exceeding official power and light bodily injury.

9. **Damenia, Gutidze, Gvaramia, Kandelaki, Khetaguri, Manukyan, Nemsitsveridze** (Short form: Khetaguri/Gvaramia)

31 hearings monitored

Prosecutors claimed that in July 2012 then-Energy Minister Khetaguri entered into a corrupt arrangement with Telasi electricity distribution company, through which the electricity distributor and three of its subsidiaries evaded tens of millions of GEL in taxes, in exchange for USD 1 million. Kandelaki, at the time Chief Executive Officer of the Telasi subsidiaries, was allegedly involved in the illegal negotiations. Gvaramia

asked Nemsitsveridze to register a shell consultancy company, L&F Service, which received the USD 1 million from Telasi and its subsidiaries. Nemsitsveridze withdrew funds on 30 August 2012 and gave them to Gvaramia. Gvaramia involved Damenia, a partner at GDC Solutions, in the scheme by entering into a contract with L&F Service, and acting as a sham sub-contractor by providing consultancy services to Telasi and its subsidiaries. The defendants were charged with accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime. All were acquitted on 14 November 2013. The Tbilisi Court of Appeals upheld the decision. There is no information whether an appeal to the Supreme Court has been lodged.

- Gvaramia, Nikoloz. Director General of Rustavi 2 TV. Former Science and Education Minister, Justice Minister, and First Deputy General Prosecutor. UNM Member of Parliament from 2004-2007. Acquitted of accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime.
- Khetaguri, Alexander. Former Minister of Finance, Minister of Energy, Director General of the Georgian Oil and Gas Corporation, First Deputy Minister of Energy, Deputy Minister of Energy. Acquitted of accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime.
- Kandelaki, Devi. Chief Executive Officer of Telasi company. Acquitted of accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime.
- Manukyan, Ashot, *in absentia*. Chief Executive Officer of Telasi company. Acquitted of accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime.
- Nemsitsveridze, Giorgi. Partner, L&F Service. Acquitted of accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime.
- Damenia, Kakha. Former Minister of Economy. Partner in GDC Solutions audit company. Acquitted of accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime.
- Gutidze, Isabela. Partner, GDC Solutions. Acquitted of accepting bribes, giving bribes, legalization of illicit income, tax fraud, preparation or using of forged document, false entrepreneurship, and concealing a crime.

10. Davitashvili, Iakubov, Imnadze, Janashvili, Kakiashvili, Kezerashvili, Lapanashvili, Melashvili (Short form: Kezerashvili)

30 hearings monitored

According to the prosecution, in 2006 Davitashvili and Imnadze began importing ethanol from Ukraine without paying taxes, and used it to produce cognac in Georgia, which was then illegally exported to Ukraine and Belarus. They asked Janashvili

to provide protection through his contacts with Kezerashvili, then Director of the finance police, and Kezerashvili agreed in exchange for around USD 13 million. The other defendants are customs officers. They are variously charged with forging or use of credit or settlement card; breach of customs procedures; giving bribes; preparation or using of forged documents, seal, stamp or blank; counterfeiting money or security or using thereof; and accepting bribes. On 27 May 2014, the Tbilisi City Court found Kezerashvili not guilty of breach of customs procedures and accepting bribes. Janashvili was acquitted of bribery, and convicted of breach of customs procedures, use of a forged document, and forging a credit or settlement card. The remaining defendants entered into plea agreements. The case is currently on appeal at the Tbilisi Court of Appeals.

- Kezerashvili, Davit, *in absentia*, currently in extradition proceedings in France. Former Minister of Defence. Not guilty of breach of customs procedures and accepting bribes.
- Janashvili, Meiri, *in absentia*. Acquitted of bribery. Convicted of breach of customs procedures (12 years, reduced to 9 years under the Amnesty Law), use of a forged document (4 years, reduced to 3 years after application of the Amnesty Law), and forging a credit or settlement card (4 years, reduced to 2 years after application of the Amnesty Law).
- Lapanashvili, Levan. Pleaded guilty under a plea agreement.
- Iakubov, Aleksandre. Pleaded guilty under a plea agreement.
- Melashvili, Mikheil. Pleaded guilty under a plea agreement.
- Imnadze, Ioseb. Pleaded guilty under a plea agreement.
- Kakiashvili, Zviad. Pleaded guilty under a plea agreement.
- Davitashvili, Nikoloz. Pleaded guilty under a plea agreement.

11. Kardava, Khizanishvili, Liluashvili (Short form: Khizanishvili)

11 hearings monitored

Prosecutors allege that on 26 September 2012 defendants instructed the CSD to obtain materials from the computers of Georgian Dream activists. Defendants also asked CSD to publish on YouTube secret recordings of GD politicians apparently made by then candidate for Prime Minister Bidzina Ivanishvili's bodyguard and paid Ivanishvili's bodyguard USD 100,000 to state that he recorded the conversations upon Ivanishvili's request. They are variously charged with misappropriation/ embezzlement; exceeding official authority; recording and distributing an illegally-recorded private conversation; damaging or destroying another's possession causing substantial injury; illegal access to computer information protected by law; and creation of a programme that damages a computer. The case is at first instance.

- Kardava, Levan. Former Head of CSD.
- Khizanishvili, Shota. Former Deputy Interior Minister.
- Liluashvili, Vazha. Former Deputy Director of CSD.

12. Merabishvili, Tchiaberashvili (Short form: Merabishvili/Tchiaberashvili)

36 hearings monitored

On 17 February 2014, the Kutaisi City Court convicted the defendants of misappropriation/embezzlement and election fraud for directing millions of GEL in public funds to UNM party activists via an employment program. Merabishvili was also found guilty of forcing a house to be transferred to state ownership for his personal use. The Kutaisi Court of Appeals upheld the first instance decision in its judgement of 21 October 2014.

- Merabishvili, Ivane. Former Prime Minister. In detention since 21 May 2013. Convicted of misappropriation/ embezzlement in the election episode; sentenced to 10 years, reduced to 5 years under the Amnesty Law; 3 year ban on serving in public office, reduced to 1 year 6 months under the Amnesty Law. Convicted of election fraud; sentenced to 2 years, plus an 18-month ban on serving in public office. Charges for abuse of official authority dismissed as "unnecessary." Regarding the property transfer, convicted of encroachment on inviolability of a house or other possession; sentenced to 3 years, reduced to 2 years and 3 months under the Amnesty Law; ban on serving in public office for 18 months, reduced to 1 year and 15 days under the Amnesty Law. Guilty of misappropriation or embezzlement, sentenced to 9 years, reduced to 4 years and 6 months; ban on serving in public office from 2 years and 1 month, reduced to 1 year and 3 months. Charges of abuse of official authority by a state official dismissed as "unnecessary". Sentences run concurrently.
- Tchiaberashvili, Zurab. Former Governor of Kakheti region, Central Election Commission Chair; Mayor of Tbilisi; Permanent Representative to the Council of Europe; Ambassador to the Swiss Confederation and Principality of Liechtenstein; Permanent Representative to UN office and other international organizations in Geneva; and Minister of Health, Labour and Social Affairs. Guilty of election fraud; not guilty of misappropriation/embezzlement. Charge of abuse of official authority by a state official changed to neglect of official duty, found guilty. GEL 52,000 fine, reduced to GEL 50,000 fine for the 2 days he served in pre-trial detention.

13. Merabishvili (Short form: Merabishvili)

29 hearings monitored

Merabishvili is accused of ordering the use of excessive force against protestors at the 26 May 2011 demonstrations, resulting in two deaths and scores of injuries. At the time, he served as Minister of Internal Affairs. He is charged with exceeding official authority. On 27 February 2014, the Tbilisi City Court convicted Merabishvili of exceeding official authority by violence or application of arms, and acquitted of the same charge by way of insulting the dignity of a victim. The sentence was upheld by the Tbilisi Court of Appeals in its decision of 11 August 2014.

- Merabishvili, Ivane. Former Prime Minister. In detention since 21 May 2013. Convicted of exceeding official authority by violence or application of arms,

and acquitted of the same charge by way of insulting the dignity of a victim. Sentenced to 6 years, reduced to 4 years and 6 months under the Amnesty Law. Prohibited from occupying an official position for 1 year and 6 months, reduced to 1 year and 1 month, and 15 days under the Amnesty Law.

14. Kezerashvili, Ugulava (Short form: Ugulava/Kezerashvili)

27 hearings monitored

The case addresses three incidents: (1) the creation of a shell company through which state money was funnelled to 712 UNM activists; (2) the misappropriation of USD 10 million in state funds intended for a rehabilitation project in Old Tbilisi for the purpose of taking over Imedi TV; and (3) laundering of the allegedly misappropriated funds. Defendants are charged with misappropriation or embezzlement and legalisation of illegal revenues (money laundering). The case is at first instance.

- Ugulava, Gigi. Former Tbilisi Mayor. Former Deputy Security Minister, and Governor of Samegrelo-Zemo Svaneti.
- Kezerashvili, Davit, *in absentia*. Former Minister of Defence.