Politically Biased Justice

In Georgia

2015

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Introduction

As the result of the parliamentary elections held on 1 October 2012, the Georgian Dream coalition won the majority of the seats and formed the government. Before coming to power, political leaders of the Georgian Dream methodically promised to their respective constituents that they would prosecute incumbent high-ranking officials of the United National Movement. They began to fulfil their promise upon coming into power.

Criminal proceedings have been instituted against the following after the Georgian Dream's ascension to power: Prime Minister of the previous government and Secretary General of the United National Movement; Minister of Interior; Minister of Defence; Minister of Labour, Health Care and Social Security; Minister of Justice; Mayor of Tbilisi; and various other senior officials. After the end of his term, the former President of Georgia and the Chairman of the United National Movement was prosecuted as well.

The above events raised questions among Georgia's strategic partners concerning possible political motivations. Particular concerns have been caused by the fact that those investigated or still under investigation are leaders of the United National Movement, which is the main opposition party. This fact further fuels suspicions about political retribution.

The numerous statements made by Georgian Dream coalition leader, and later Prime Minister, Bidzina Ivanishvili are particularly noteworthy in the above context. He virtually urged the United National Movement to self-destruct and promised immunity to those who would leave the party. The attitude of law-enforcement bodies carried a significant message as well. Those who left United National Movement would not be questioned as witnesses at the investigation stage of criminal proceedings; whereas others, equally linked with the same cases, who refused to leave the party, would not only be questioned as witnesses but prosecuted as well.

Georgia's international partners and friends frequently reminded the present regime about the necessity of conducting the investigations impartially and directing its efforts towards building the state's future. In November 2012, Assistant Secretary of State for European and Eurasian Affairs of the United States, Philip Gordon reminded Ivanishvili of the need to avoid creating the impression that the on-going investigation of suspected abuses selectively and unfairly targeted Ivanishvili's political opponents.[1] Furthermore, the US Department of State published a statement expressing concerns about the decision of Georgian authorities to summon former President Mikheil Saakashvili for questioning in criminal investigations. In the opinion of the US Department of State, launching

[1]Senior U.S. Official Warns against Creating Perception of 'Selective Justice' in Georgia, at http://www.rferl.org/content/senior-us-official-warns-against-creating-perception-of-selective-justice-in-georgia/24776141.html [Last visited 15.02.2015].

multiple simultaneous investigations involving the former President raises legitimate concerns about political retribution, particularly at a time when legal and judicial institutions are still fragile.[2] Similar views were expressed by President of European Commission, Jose Manuel Barroso, and Secretary General of NATO, Anders Fogh Rasmussen.[3]

Despite the concerns expressed by the West, the present regime of Georgia arrested Ivane Merabishvili, Secretary General of the United National Movement; Giorgi Ugulava, the same party's Election Campaign Coordinator and Member of the Political Council; and instituted criminal proceedings against Mikheil Saakashvili, former President of Georgia and Chairman of the United National Movement.

According to the statement made in March 2014, by Estonian President Toomas Hendrik Ilves, Georgia's EU treaty could be stalled if the investigation of former officials continued.[4] Thus, internal politics and legal measures endanger the course of the country's foreign policy as well. This is confirmed by the non-legislative resolution concerning Georgia, adopted on 18 December 2014 by the European Parliament. There are serious concerns expressed in the resolution about the potential misuse of the judicial system against political opponents, which could undermine Georgia's efforts towards European integration and the efforts of the Georgian authorities in the area of democratic reforms. The European parliament reminds Georgia that the existence of a viable political opposition is paramount to the creation of a balanced and mature political system, to which Georgia is aspiring. Furthermore, the Chairman of the European People's Party categorised the case of Giorgi Ugulava as a specific example of politically motivated selective justice.[5] The Parliamentary Assembly of the Council of Europe stated in its Resolution no. 2015:

"The Assembly takes note of the large number of allegations of possible criminal conduct by former government officials during their tenure. At the same time, it is seriously concerned about allegations that the arrests and prosecution of a number of former government officials are politically motivated and amount to selective and revanchist justice."[6]

For the purposes of the present report, it is significant to mention the Trial Monitoring

[2]In Support of Accountability and Justice in Georgia, at http://www.state.gov/r/pa/prs/ps/2014/03/223836.htm [Last visited 15.02.2015].

[3]EU warns Georgia against 'selective justice' as Saakashvili bows out, at http://www.dw.de/eu-warns-georgia-against-selective-justice-as-saakashvili-bows-out/a-17193429 [Last visited 15.02.2015].

[4]West Warns Georgia against Prosecuting Saakashvili, at http://dfwatch.net/west-warns-georgia-against-prosecuting-saakashvili-52612-27420 [Last visited 15.02.2015].

[5]EPP Warns Georgia over Criminal Inadmissibility on Political Persecution, at http://en.trend.az/scaucasus/georgia/2251724.html [Last visited 06.01.2015].

[6]Parliamentary Assembly Resolution no. 2015, The Functioning of Democratic Institutions in Georgia, 2014, para. 10.

Report on Georgia, dated 9 December 2014, drafted by the Trial Monitoring Project established by OSCE/ODIHR (OSCE/Office for Democratic Institutions and Human Rights). The Trial Monitoring Project monitored the criminal proceedings conducted on several cases and identified a number of shortcomings in the following areas:

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 a counsel; and witness protection.[7]

In the opinion of the Trial Monitoring Project, elements that engender doubt about 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. The Trial Monitoring Project draws particular attention to the incidents where 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 officials also contributed to disregarding the presumption of innocence by making public statements attributing guilt to the defendant prior to conviction, pre-empting the judgment to be made by the court, and influencing public opinion as to the guilt of the defendant."[8]

The Trial Monitoring Project 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."[9]

Finally, the Trial Monitoring Project concluded that the respect for due process was not fully guaranteed by the Georgian criminal justice system in the monitored cases.

As regards the recommendations, the OSCE/ODIHR Trial Monitoring Project called upon the public officials to respect the presumption of innocence when commenting on potential or pending criminal proceedings.

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[7]OSCE/Office for Democratic Institutions and Human Rights, Trial Monitoring Report Georgia, 9 December 2014, Warsaw, para. 5.

[8]*Ibid.*, paras. 7 and 9.

[9]*Ibid.*, para. 14.

One of the latest statements involving the issue at stake was made by Pedro Agramunt, Rapporteur of the Parliamentary Assembly of the Council of Europe (PACE) on "Abuse of Pre-trial Detention in Council of Europe Member States". Mr Agramunt visited Tbilisi on a fact-finding mission within which he met both high ranking political officials and the detainees: Giorgi Ugulava, Bachana Akhalaia, and Irakli Pirtskhalava.

Speaking at the very end of the fact-finding mission, Mr Agramunt made the following statement: "in these circumstances, I could not help getting the impression that this is part of a bitter campaign by the current authorities against their predecessors. The demonisation of political competitors, which seems to be mutual in Georgia, is not healthy for a democracy, and the power to detain suspected criminals must not be used, or appear to be used, to settle political scores."[10]

At a time the international community's attention is drawn towards the cases at stake, correct assessment of these cases is important as a matter of principle for the adequate awareness of the current events unfolding in Georgia. This is particularly significant to Georgia's journey towards European integration. We believe it is important to study the criminal cases instituted against the former government officials and/or members of the United National Movement. These cases need to be assessed based on the criteria defined by Resolution no. 1900, adopted by the Parliamentary Assembly of the Council of Europe on 3 October 2012.

The present document analyses the arrests of and criminal proceedings against the senior officials of the Defence Ministry. These events have been partly perceived by the society as the authorities' political retribution against the Free Democrats party.

Furthermore, the report covers the incident of physical assault on Nugzar Tsiklauri, member of the Parliament and the United National Movement. This incident has not been investigated to date.

Legal assessment by the organisation's lawyers, reflected in the present document, is based on the study of the criminal case files of the accused. These files have been accessed through the defence lawyers. Furthermore, the organisation itself searched for, requested and analysed various important documents the contents of which increase the informative value of the present report. This research does not aim at establishing either the guilt or the innocence of the accused; instead it is confined to the assessment of the reliability and probative value of the evidence adduced by the prosecution, as well as ulterior political motives behind the criminal charges.

[10]PACE Rapporteur in Georgia: "Don't Use Detention to Settle political scores', at: http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5439&lang=2&cat=5 [Last visited 21/02/2015].

Through the present study, the Georgian Democracy Initiative endeavoured in each particular case to point out those aspects currently featuring in the criminal proceedings against the former and incumbent civil servants, as well as the members of the United National Movement. E.g., the facts mentioned below engender the impression that the criminal prosecution instituted against Giorgi Ugulava is politically motivated. In terms of the several counts of indictment the impugned acts give rise to doubts whether they are punishable at all. When Ugulava was politically active, there was an attempt to distance him from politics, which was finally accomplished on 3 July 2014 upon his arrest.

There is a particular incident that exemplifies the discriminatory approach towards Giorgi Ugulava's case (the so-called Marneuli episode). Giorgi Ugulava has been charged in connection with an act which otherwise never warranted institution of investigation by law-enforcement bodies. The impression of political persecution is supported by the fact that criminal proceedings against Ugulava are still pending before Tbilisi City Court and not a single final judgment has been adopted in any of the cases.

Moreover, the arbitrary actions of the prosecution authorities are noteworthy. In particular, on 14 March 2015, the Prosecutor's Office, with the court's help, managed to apply new terms of detention with regard to Ugulava through formalistic and technical re-qualification of charges, whereas his previous term of detention was due to expire on 2 April 2015. Similarly, the prosecution kept bringing fresh ill-founded charges against Mikheil Saakashvili. The latter proceedings were also heavily punctuated with breaches of procedural safeguards. This leads to the conclusion that the prosecution authorities have been used for political retribution against the former President of Georgia. There are instances where the prosecution mostly relies on the statements given by political opponents.

The approach taken with regard to Ivane Merabishvili is also clearly discriminatory, which is logically explained by both his past activities and present political status. The political retribution towards Ivane Merabishvili and the misuse of justice system to this end are indicated within reasonable assessment by the following factors: multiple charges brought and the particular diligence to ensure that he remains in continued detention, including the incident related to the composition of the Section of Criminal cases; and alleged pressure exerted by the Chief Prosecutor.

In Bachana Akhalaia's case, the criminal proceedings against him can be considered as a particular example of political retribution; pressure exerted on witnesses, attempts of the Prosecutor's Office to delay proceedings, unjustified detention applied by the court, multiple acquittals on number of cases indicate the intentions of the Prosecutor's Office to guarantee the continued detention of Bachana Akhalaia by all means instead of ensuring administration of justice.

Similarly, numerous violations are identified in the cases conducted against Alexander Ninua, Giorgi Oniani, and Tengiz Gunava. Alexander Ninua has been subjected to

political pressure and his detention is not only unreasonable, it is also clearly disproportionate in terms of the alleged violation and the threats posed by the accused. Moreover, we express our reasonable suspicion that Alexander Ninua is a "political prisoner".

Tengiz Gunava was likewise arrested on the charges of a serious violation of the Criminal Procedure Code, which was followed by his indictment within a few days in connection with three counts of charges. It gives rise to misgivings regarding the ulterior intentions of the Chief Prosecutor's Office and possible political retribution.

And finally, discriminatory approach towards Giorgi Oniani is evident considering the approaches and measures the authorities took towards the other persons involved in the alleged criminal acts together with Oniani. At the same time, when assessing discrimination, it needs to be taken into account that Giorgi Oniani clearly expressed his views in favour of the United National Movement and even planned to take part in the election of the local self-government bodies on behalf of that political party. According to Giorgi Oniani, he announced his political plans at one of the trials of Bachana Akhalaia, which was followed by his arrest at his home. Considering the procedural violations and arbitrary actions on the part of the law-enforcement bodies, it is reasonable to assume that Giorgi Oniani is a victim of political retribution.

The indicators of political motives in the criminal proceedings against the former high-ranking officials of the Ministry of Defence are noteworthy. It is rather difficult to tie the actions of the accused to any violation of law. Moreover, the record of indictment omits the motive and purpose of the crime, and charges are not individualised. The application of detention as a preventive measure was clearly inadequate and disproportionate both in terms of the imputed crime and the threats posed by the accused as well as their previous activities. Finally, numerous breaches of procedural law indicated above leave the impression of unfairness.

The statements made by former Prime Minister Bidzina Ivanishvili and incumbent Prime Minister Irakli Gharibashvili indicate political motivation towards the pending proceedings. The incumbent Prime Minister discussed the possible involvement of Irakli Alasania and his colleagues in corrupt transactions despite the fact that the case files were classified from the very outset. According to Bidzina Ivanishvili, he had questions concerning the acquisition of the country's main line.[11]

Stemming from the above-mentioned, it is logical to discuss the political connotations of the criminal prosecution conducted by the present authorities; and the high-ranking officials of the Ministry of Defence can be considered to be political prisoners in

[11] http://news.ge/ge/news/story/111888-rad-unda-tavdatsvis-saministros-es-magistrali-ivanishvili-tavdatsvis-saministros-maghalchinosnebis-saqmeze-vrtsel-ganmartebas-aketebs [Last visited 3/16/2015].

accordance with paragraphs b), c), and e) of the resolution adopted by the Parliamentary Assembly of the Council of Europe.

Assessment criteria

On 3 October 2012, the Parliamentary Assembly of the Council of Europe at its 33rd sitting adopted Resolution no. 1900 on the definition of political prisoners. The following was defined as the criteria for assessing cases of alleged political prisoners:

"A person deprived of his or her personal liberty is to be regarded as a 'political prisoner':

a. if the detention has been imposed in violation of one of the fundamental guarantees set out in the European Convention on Human Rights and its Protocols (ECHR), in particular freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association;

b. if the detention has been imposed for purely political reasons without connection to any offence;

c. if, for political motives, the length of the detention or its conditions are clearly out of proportion to the offence the person has been found guilty of or is suspected of;

d. if, for political motives, he or she is detained in a discriminatory manner as compared to other persons; or,

e. if the detention is the result of proceedings which were clearly unfair and this appears to be connected with political motives of the authorities."[12]

It is noteworthy that the Assembly invites the competent authorities of all the member States of the Council of Europe to reassess the cases of alleged political prisoners with the application of the above-mentioned criteria and to release or retry any such prisoners as appropriate. The assessment of the cases in the present report is guided by the very criteria and their spirit.

[12]Parliamentary Assembly Resolution no. 1900, The Definition of Political Prisoner, adopted on 3 October 2012, (33rd Sitting), para. 3.

1. Criminal cases against Giorgi (Gigi) Ugulava

Giorgi Ugulava was member of the United National Movement; Tbilisi Mayor during 2005-2014; and Head of the Elections Campaign Coordinator of the United National Movement for the elections of self-government bodies in 2014.

As of 1 February 2015, Giorgi Ugulava has been charged for seven "criminal" episodes in five criminal cases.

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The first count in the indictment against Giorgi Ugulava is related to the so-called Imedi TV and Tbilservice Group cases. According to the formal charges filed on 22 February 2013, the criminal proceedings against Ugulava have been instituted in connection with the alleged misappropriation of especially large amount of public funds, committed by an organised group with recourse to official position;[13] and legalisation of proceeds of crime by an organised group resulting in gain in especially large amounts.[14] The court did not apply a preventive measure in these cases.

Giorgi Ugulava and former Defence Minister of Georgia, Davit Kezerashvili are charged with forcing the Owner of Imedi TV, Joseph Kay to relinquish his ownership in their favour promising him in return to reimburse him the expenditure incurred on the TV channels' operations. According to the indictment record, Ugulava and Kezerashvili have been acting in conspiracy; however, there is no evidence to be found in the case file in this regard.

Joseph Kay maintains that by that time he had spent USD 12,000,000 on acquisition and development of Imedi TV. However, he agreed to relinquish the ownership in return of USD 10,000,000.

The prosecution believes that with the view of implementing the above plan Giorgi Ugulava issued a resolution on transferring GEL 25,000,000 on behalf of the representative body of Tbilisi municipality. The sum was transferred to New Rike LTD for buying the area previously sold to the company for USD 7,000,000. GEL 25,000,000 was allocated from the central budget into the Old City Rehabilitation and Development Foundation. In its turn, the foundation bought the so-called Rike property with the transferred money.

[13] Article 182.2d), Article 182.3a), and Article 182.3b) of the Criminal Code of Georgia, Law of Georgia no. 2287, Georgian Legislative Herald, 22/07/1999.
[14] *Ibid.*, Article 194.3a), and Article 194.3c).

According to the prosecution's speculations, as the result of the prior negotiations with Rike LTD, the difference between the original sum paid for the acquisition of Rike and the repurchase sum paid by the Old City Rehabilitation and Development Foundation was transferred into Joseph Kay's company. In this transaction, the prosecution crystal-gazes for evidence for the misappropriation of funds by Kezerashvili and Ugulava and later even in the money-laundering scheme too.

As regards the episode of the so-called Tbilservice Group, Ugulava was charged with misspending especially large funds legally entrusted in him by abusing his official power.[15]

The second count in the indictment was filed against Ugulava on 19 December 2013 in relation to the so-called Tbilisi Development Foundation case. In this case bail was set and Giorgi Ugulava was dismissed from office.

In this case Giorgi Ugulava is charged for alleged embezzlement of large amount of state funds through the misuse of official power by a group. These funds have been allocated for Tbilisi Development Foundation established by Tbilisi City Hall for the rehabilitation and development of the capital on 16 July 2010.[16]

Despite the lack of evidence, the prosecution maintains that former Tbilisi Mayor and Head of Tbilisi City Organisation of United National Movement – Giorgi Ugulava – and other senior officials of the City Hall, in accordance with the previously agreed plan, fictitiously employed 719 party activists as construction assessment specialists within Tbilisi Development Foundation. The prosecution maintains that in total GEL 48,180,960.00 owned by the state was embezzled through the payment of salaries.

The third charge was filed against Gigi Ugulava on 30 June 2014 in relation to the so-called CT Park case. The Prosecutor's Office alleges the embezzlement of large amount of state property when it was lawfully managed by the embezzler.[17] In this case too the court did not deem it necessary to apply a preventive measure.

According to the case files, on 7 December 2007, a contract was concluded between CT Park LTD and Tbilisi municipality. The contract concerned leasing the right to parking management and allowed CT Park LTD to impose fines for the breach of Article 125.8 and Article 125^2 of the Code of Administrative Violations of Georgia. These said provisions of the Code concern the violation of traffic rules – the failure to follow the No Signs: "No Stopping" and "No Parking;" as well as other failures to follow statutory requirements for stopping and parking (Article 125.8) and the violation of parking vehicles within the confines of the capital (Article 125^2).

[15] *Ibid.,* Article 182.2d), and Article 182.3b).
[16] *Ibid.*, Article 182.2 and Article 182.3.
[17] *Ibid.,* Article 182.2d) and Article 182.3b).

According to the allegations of the prosecution, the *corpus delicti* elements are allegedly to be discerned in the act committed by Ugulava on 11 February 2009. On 30 December 2008, the Code of Administrative Violations of Georgia was amended. Within the amendment, a new Article 240^1 was added to the Code and it entrusted a representative body of local self-government and Tbilisi Mayor with the authority to define the contents of the record of violation of Article 125.8 and Article 125^2 of the Code of Administrative Violations and to determine the procedure of drafting this record.

The prosecution does not deny that Giorgi Ugulava was acting within the statutory authority entrusted to him. Exactly within the confines of this statutory power, Ugulava issued order no. 17 on 11 February 2009 and defined the contents and the procedure for drafting the record of violation in the cases provided for by Article 125.8 and Article 125^2 of the Code of Administrative Violations. It was pointed out in the form of a violation record that fines had to be paid to the treasury account with the code – 3250. This account of Tbilisi City Hall budget was set up for the fines imposed for the violation of parking rules in Tbilisi.

Based on the above, the prosecution concludes that due to the fact that the revenues from both types of fines were allocated to Tbilisi City Hall budget and therefore were in the lawful management of Tbilisi municipality, the revenue from the violation of traffic rules was no more distributed between the state budget and local self-government budget; CT Park LTD, therefore, received surplus income and the state budget suffered losses.

As the prosecution maintains, the budgetary funds were also embezzled through amendment no. 3 which was made to the contract on 6 April 20111. According to this amendment, unlike the stipulation of the original contract, CT Park LTD was additionally given three Lari per each fine and the rest of the revenue was subjected to 40/60 -%- distribution.

The prosecution invokes the following normative acts to corroborate their allegations: Order no. 1223 of 22 November 2007 issued by the Finance Minister On Approving the Treasury Codes of Budgetary Revenues, and the Budgetary Code of Georgia. Under the annex to the Budgetary Code, the revenue collected through the fines imposed for the violation of traffic rules (Article 125) is distributed between the state and local budgets on 40% - 60% ratio.

The last charges brought against Ugulava on 4 July 2014 are related to the allegations of money laundering and the so-called Marneuli case.

Giorgi Ugulava was arrested on 2 July 2014 at Tbilisi International Airport and charged with legalisation of illegal money, which entailed gaining especially large amount of

income;[18] the charges included the allegations of conspiracy to forge official documents with the purpose of misuse.[19]

On the second day, Ugulava's charges were aggravated with the allegations in the so-called Marneuli case. He was indicted with conspiracy of group actions related to clear resistance of legal orders of a representative of authorities that resulted in obstruction of an agency's proper function.[20] The aggravated charges included coercion, i.e., illegal deprivation of an individual's liberty; physical and mental coercion to commit or omit an act, the commission or omission of which is an individual's right; and subjecting a person to undesired influence.[21]

According to the investigation authorities, in the second half of April 2014, with the conspiracy of Giorgi Ugulava and Giorgi Ghoniashvili, Director of Eximus Holding, a company registered in offshore zone, Alexander Gogokhia and other members of the criminal group forged a contract dated 1 April 2014. The contract stipulated that Eximus Holding would render services (research and other services) to another company Brooktrade (also registered in offshore zone) in return of USD 1,500,000. From 4 May 2014 through 3 June 2014, using this forged contract, in agreement with Giorgi Ugulava and Giorgi Ghoniashvili, Alexander Gogokhia and some unidentified persons transferred in instalments USD 760,000 from Eximus Holding into the account of Brooktrade.

The prosecution maintains that after the above operations, a fictitious loan agreement was drafted based on which USD 760,000 was transferred in instalments into the account of New Service LTD registered in Georgia. The sum was received by member of the criminal group, Giorgi Ghoniashvili, and this fund had been at his and Ugulava's disposal.

As regards the Marneuli case, according to the resolution of indictment, on 5 June 2014, Ugulava and the members of his party entered by force the building of the election commission of Marneuli region and demanded from the chairman answers to the question why he had cancelled the registration of Akmamed Imamkuliev who was forwarded by the United National Movement as the party candidate for the *Gamgebeli*'s office.

On the very day of Gigi Ugulava's arrest he was remanded in custody.

The last charges were filed against Ugulava on 28 July 2014 in connection with the so-called case of 7 November. Criminal proceedings were at the same time instituted against former President of Georgia, Mikheil Saakashvili, former Prime Minister, Ivane Merabishvili, former Defence Minister, Davit Kezerashvili, and former Justice Minister, Zurab Adeishvili. The prosecution alleges that Giorgi Ugulava committed a criminal act,

[18] *Ibid.,* Article 194.2a) and Article 194.3c).
[19] *Ibid.*, Article 25/362.1.
[20] *Ibid.,* Article 226.
[21] *Ibid.*, Article 150.1.

in particular, by exceeding his official power while being in the office of a civil servant.[22] The prosecution maintains that Giorgi Ugulava together with other senior political officials was involved in the misappropriation of the property owned by Arkadi Patarkatsishvili. The indictment resolution specifies that appointment of Giorgi Kirtskhaia as the director of Lynx LTD (Mtatsminda recreational park), transfer of the title to Lynx LTD to Tbilisi City Hall and redistribution of the shares of Imedi TV amounted to *ultra vires* actions on the part of Tbilisi Mayor.

The prosecution did not motion for the application of a preventive measure in this case; they did however motion several times for postponing the pre-trial hearing, which was upheld by the court.

It is not only significant to study the cases filed against Gigi Ugulava from legal perspective but also in terms of the chronology of events. The pending criminal proceedings give rise to the reasonable suspicion that the criminal proceedings have been conducted not just by the prosecution but also by the entire ruling team in the power. The prosecution's actions would always follow the attitude expressed and activities announced in advance by the representatives of the ruling coalition.

On 18 December 2013, for instance, Giorgi Ugulava was charged with the embezzlement of the funds owned by Tbilisi Development Foundation.

The very next day, on 19 December 2013, in the talk show called Big Politics that was aired by TV3, President of the Parliamentary Committee of Human Rights and Civic Integration, member of the majority coalition, Eka Beselia announced that the authorities would request remanding Ugulava in custody. She expressly stated that the prosecution would lodge a detention motion with the court.

Two days after, on 21 December, as previously announced by Eka Beselia, the prosecution did request Tbilisi City Court to remand Ugulava in custody.

The violation of human rights in criminal proceedings conducted against Ugulava reasonably gives rise to perception that the prosecution arbitrarily intended to bring his official authority as the Mayor to an end and ensure the application of detention as a preventive measure. The ground on which the Mayor's dismissal was based was declared unconstitutional by the Constitutional Court; however the prosecution failed to appear before the court citing various unconvincing reasons in order to prevent Ugulava from being reinstated. All these factors undermine the fairness and legitimacy of the criminal proceedings conducted.

At the same time, the prosecution kept bringing new charges against Ugulava until they managed to have him remanded in custody.

[22]Article 333.1 of the Criminal Code of Georgia, Law of Georgia no. 2287, Georgian Legislative Herald, 22/07/1999.

The recent events give rise to serious suspicions about the arbitrary objective of the Office of the Chief Prosecutor of Georgia, i.e., to ensure that Ugulava remains in continued custody after his initial detention. Despite the fact that since 2013 until to date Ugulava has been prosecuted in relation to more than ten criminal cases, there is not a single final judgment rendered by a court in any of those cases. Furthermore, presently Ugulava is remanded on the account of one criminal case only (the so-called money-laundering and Marneuli case). The term of this detention was to expire on 2 April 2015. By a resolution of the Chief Prosecutor's Office of 13 March 2015, the charges brought on 28 July 2014 were aggravated. These charges concerned alleged misuse of official power by a civil servant and it was supplemented by the charges of assisting embezzlement (the case of Mtatsminda recreational park) and assisting legalisation of illegal property (the Imedi TV case). It is noteworthy that the new charges are essentially the same as the previous ones. There is no reference to a new criminal act in the redacted indictment resolution. The acts are specified in detail in the previous resolution.

As mentioned above, the prosecution did not motion for the application of a preventive measure in relation to the charges filed on 28 July 2014; in the course of eight months, charges have not been aggravated until the prosecution saw the "threat" that Giorgi Ugulava could be released due to the expiry of the term of detention. This gives a strong foundation for the belief that the sole objective of the motion for the remand custody filed by the prosecution on 14 March 2015 was to ensure that Ugulava would be detained as long as possible and not the prevention of either re-offending or absconding.

Furthermore, the prosecution has not adduced a single evidence for the examination of the motion that would corroborate the existence of the risks that justify the remand custody of Ugulava.

The US Embassy in Georgia expressed its concern regarding the above events. The Embassy said that re-qualified criminal charges against former members of the government, especially in the case against former mayor of Tbilisi, Giorgi Ugulava, "appear to be an effort to subvert the nine-month limit on pre-trial detention". The Embassy encouraged "the government of Georgia to take steps to strengthen the Rule of Law and avoid any perception it may be engaging in a campaign of politically-motivated justice."[23]

Some of the NGOs advocating human rights in Georgia considered, in their joint statement made regarding the issue at stake, the above events to be "a precedent of abusing the justice system". According to the statement, "this decision has further strengthened the perception in certain part of the public that keeping Giorgi Ugulava in custody is an arbitrary objective of the authorities."[24] Other NGOs stated that "the …

[23]http://www.civil.ge/eng/article.php?id=28130 [Last visited 3/16/2015].

[24]http://gdi.ge/en/news/a-statement-of-ngos-regarding-the-imposition-of-pretrial-detention-on-gigi-ugulava.page [Last visited 3/22/2015].

circumstances of the case indicate that the investigation is lingered in an artificial manner, which further raise reasonable doubt about the fact that the Imedi TV case was divided in three parts in order to enable the Prosecutor's Office to use pre-trial detention at the convenient moment. These facts make us believe there is ulterior political motivation behind these actions."[25]

1.1 Problems related to ill-founded charges

On 6 June 2006, Tbilisi municipality sold the land adjacent to Rike for USD 7,000,000 through a tender. Under the terms of the tender, New Rike LTD, the company that won the tender, took up an obligation to conduct constructions on the purchased land. When New Rike LTD failed to fulfil its obligations, Tbilisi municipality decided to buy back the said property for the old Tbilisi rehabilitation and development purposes.

On 29 December 2008, Tbilisi municipality issued a resolution (signed by Giorgi Ugulava) concerning the repurchase of the Rike property. Under the resolution, Rike property had to be repurchased for GEL 25,000,000 transferred from the central budget to the Old Tbilisi Rehabilitation and Development Foundation.

It is noteworthy that the above-mentioned GEL 25,000,000 was allocated from the central budget to Tbilisi City Hall as a non-targeted transfer. This issue was raised by the then Prime Minister Zurab Noghaideli at a meeting of the Georgian Government. The Government discussed and approved of the decision. The decision on the issue at stake was reached by the Parliament of Georgia, and these circumstances served as a precondition for transferring the sum to Tbilisi City Hall.

The decision of the repurchase of Rike property was collectively reached by Tbilisi municipality; Giorgi Ugulava, the then Tbilisi Mayor issued a resolution on behalf of Tbilisi municipality in accordance with the law. These factors exclude any individual responsibility on Ugulava's part in this particular decision-making process.

It would have been justified to charge Giorgi Ugulava for the above decision had the prosecution had the evidence proving that Ugulava pressured members of the board in any manner. However, no member of Tbilisi municipality confirms any pressure exerted on them or instructions given by Ugulava when reaching the decision concerning Rike property.

It is also obvious from the case files that a collective decision on the repurchase of Rike property was made by Old Tbilisi Rehabilitation and Development Foundation. The final decision-maker was this very Foundation and it received the transfer to buy back the property.

[25]https://gyla.ge/eng/news?info=2448 [Last visited 3/22/2015].

The documentation studied by GDI makes it clear that the investigation does not question the legality of the decisions reached by the Georgian Government, the Parliament of Georgia, and Tbilisi municipality, the governing body of Tbilisi City Hall and Old Tbilisi Rehabilitation and Development Foundation. No other officials have been prosecuted for the same acts.

The prosecution has its doubts regarding the repurchase of the property for USD 17,000,000, which had previously been sold for USD 7,000,000. Such a transaction would naturally raise doubts in an objective observer as well. At the same time, it is noteworthy that there is an expert's conclusion in the case file according to which the worth of the said property did not exceed USD 11,000,000 at the material time.

On the other hand, this was a private law transaction where a seller was not obliged to dispose of the property for its market price. In a free market economy, a proprietor is entitled to sell property for the desired price. The state cannot coerce an owner to sell property against the will of the owner except in the cases prescribed by law. This would have amounted to a serious violation of the right to property.

It is clear from the case file that in this particular instance, negotiations between Tbilisi City Hall and New Rike LTD concerned certain offers regarding the purchase of the property. The legal owner considered that USD 20,000,000 would be a fair price for the property; Tbilisi City Hall, however, offered USD 17,000,000 as it was not in the position to pay more at that time.

Despite the fact that the buyer was the state agency, the owner had no obligations to give back the property to the original owner for the same price it had been bought.

The gist of the charges and the list of the persons indicted raise suspicions that the investigation authorities were rather interested in prosecuting certain persons – the then Tbilisi Mayor, Giorgi Ugulava and former Defence Minister, Davit Kezerashvili. According to the information available to GDI, no other persons involved in either the allocation of non-targeted transfer or the decision-making process on repurchase have been prosecuted for these alleged crimes.

It is noteworthy that Ex-Provence court of France dismissed the motion of the Prosecutor's Office of Georgia to extradite Davit Kezerashvili for the very same reason that he could have been subjected to politically motivated prosecution.[26]

The legal irregularities, possible political undertones and, therefore, differential treatment are striking in the so-called CT Park case. The criminal case concerns the amendment of the contract with CT Park on parking in Tbilisi and approving the rules of distribution of revenues collected through fines.

[26]The court set Kezerashvili free, at: http://www.tabula.ge/ge/story/79751-sasamartlom-kezerashvili-patimrobidan-gaatavisufla [Last visited 23.01.2015].

The Prosecutor's Office has charged Giorgi Ugulava for an act committed on 11 February 2009, namely for the contents of Order no. 17 issued on the aforementioned date. The Order determined the format of a violation record and the procedure for its drafting.

The Prosecutor's Office maintains in the record of indictment that the normative act issued by Ugulava was illegal and incompatible with the Budget Code of Georgia. This Code was, however, adopted on 28 December 2009, i.e., after the impugned order had been issued.[27] The Prosecutor's Office virtually prosecutes a person for the failure to comply with the requirements of the law that was adopted ten months after the imputed crime.

If we assume that the act committed by Giorgi Ugulava constitutes a crime, then the incumbent Mayor should also be prosecuted since the revenues collected through fines are still distributed in accordance with the rules approved by Ugulava.

It is noteworthy that the Budget Code of Georgia determines the rules for the distribution of revenues collected through fines imposed for road violations. The Code is, however, silent about the distribution between the central and local self-government budgets of the revenues collected through fines imposed for parking violations (Article 125^2).

In accordance with the law in force at the material time of the commission of the imputed act,[28] Tbilisi City Hall had discretion to decide on its own motion about all those issues not falling within the exclusive competence of a self-government subject or within the competence of a state government body and not prohibited to a self-government subject.[29] Hence, Tbilisi City Hall had the right to direct the revenues collected from fines imposed for parking violations into the local budget.

As regards transferring the revenues collected from the fines imposed for the breach of road violations[30] (such as the violation of stop and parking) to the local budget, the legal aspects of the issue are rather vague. Under Article 125.8 of the Code of Administrative Violations, the failure to comply with the road signs "no stop" and "no parking" is an administrative violation and so are other breaches of the rules regulating stopping and parking of vehicles.

As regards Article 125^2 of the same Code, it categorises parking at the parking spaces in the capital city without paying the parking fees as an administrative violation, as defined by the self-government subject.[31] Under this provision, the breach of other regulations of parking on the territory of the capital city as defined by the self-government body also

[27]Budget Code of Georgia, Law of Georgia no. 2440, the Legislative Herald of Georgia, 12/12/2014.
[28]Article 3.2 of the Law of Georgia on Local Self-Government, the wording in force from 30/12/2008 until 27/03/2009.
[29]*Ibid.*, Article 1.j).
[30]Article 125.8 of the Code of Administrative Violations, Law of Georgia no. 161, Legislative Herald of Georgia, 26/12/2014.
[31]*Ibid.*, Article 125^2.1.

amounts to an administrative violation.[32] The latter logically covers the breach of parking and stopping regulations as well.

Stemming from the above, Article 125^2 partially merges with Article 125.8 which means the violation of parking regulations at the parking lots, i.e., the breach of stopping and parking regulations (Article $125^2.6$), is the same as the violation of the other stopping and parking regulations under Article 125.8

The above confusion is caused by the ambiguity of the legal provisions and therefore it can be argued that Ugulava was entitled under Article 125.8 of the Code to direct the revenues collected from the fines imposed for the violation of parking regulations to the local self-government budget.

In this case the principle of *in dubio pro reo* should have been applied before charging Ugulava for CT Park issue.

As regards amendment no. 3 of the contract that took place on 6 April 2011, this amendment was in accordance with the terms of the original transaction concluded in 2007 and it was motivated in its turn by the legislative amendment under which the fines imposed for the violations covered by the contract were decreased from GEL 40 to GEL 10. Until 11 March 2008, the fines for parking at prohibited spaces and for the violation of parking regulations amounted to GEL 40; both fines were reduced to GEL 10 in accordance with the decision of the Parliament taken on 11 March 2008 and 20 October 2009 respectively.

In particular, in accordance with the terms of the original contract concluded in 2007, in case of introduction of legislative regulations reducing fines which accordingly decrease the income of CT Park LTD, the latter was entitled to claim compensation.[33] Therefore, amendment no. 3 served the purpose of compensation as provided by the contract. This act, accordingly, cannot be categorised as a crime.

The qualification of the crime under the Criminal Code is no less interesting. Under the Criminal Code of Georgia, embezzlement implies misspending, selling or disposal of the property that is in legal management of the perpetrator.[34] The *mens rea* of this crime implies direct intent: a perpetrator is aware of misspending other person's property entrusted in his/her possession, "he or she must be aware that he/she incurs damages to

[32] *Ibid.*, Article $125^2.6$.

[33] Articles 5.1, 5.1.1, 5.1.2 of the Contract concluded between Tbilisi City Hall and CT Park LTD on 7 December 2007 on leasing the right to manage parking with the view of regulating vehicles on Tbilisi roads.

[34] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Section One of Substantive Criminal Law, Book One, Publisher Meridiani, Tbilisi, 2014, p. 438.

the owner and is willing to inflict this damage. In doing so the perpetrator is motivated by pecuniary motive and aims at gaining illegal income at the expense of another person." [35]

Thus, the direct intent of incurring damage should be present, which means that a perpetrator is willing to inflict damage and is driven by pecuniary motive. There is no evidence to be found in the case file corroborating either Ugulava's desire to damage the state budget or the fact that he benefited from illegal income.

And finally, it is worth mentioning one more time that the regulations are still in force and the same procedure applies to the imposition of a fine and distribution of revenues for which former Mayor of Tbilisi – Giorgi Ugulava- has been indicted.

From a legal viewpoint, the last episode is also noteworthy. This was the case that warranted Ugulava's arrest. According to the case file, investigation was instituted based on Giorgi Kapanadze's application; this person is in charge of New Service – a company registered in Georgia. Giorgi Kapanadze is the only witness who notified the investigation authorities about the alleged crime of Giorgi Ugulava. However, he pointed out that he heard about it from Ghoniashvili who had been indicted in the same case.

According to the information submitted by Kapanadze to the investigation, the transferred money was designated to fund the pre-election campaign of the United National Movement and Giorgi Ugulava was aware of this fact. It is however to be pointed out that there is no reference to Giorgi Ugulava in the records describing the meetings of Ghoniashvili and Kapanadze. Therefore, in this case, the charges have been brought against Giorgi Ugulava based on an indirect testimony deposited by one person and it is not corroborated by any other evidence.

As already mentioned, the charges filed against Ugulava were aggravated on the same day and he was also charged with the conspiracy of a group act grossly violating public order; flagrant disobedience of the legal request from a representative of the authorities that resulted in the obstruction of the functioning of an agency.[36] Ugulava has also been charged with coercion, i.e., illegal deprivation of liberty. This charge was, as already mentioned, related to National Movement activists breaking into a regional election commission office in Marneuli as a protest. The activists demanded public explanation from the head of the regional election commission office regarding the removal of Akmamed Imamkuliev (candidate for *Gamgebeli* position from the United National Movement) from registration.

The above-mentioned case is worth mentioning in the context that the reaction of the authorities was completely different in other similar cases where public agencies were

[35] *Ibid*., p. 437.

[36] Article 226 of the Criminal Code of Georgia, Law of Georgia no. 2287, Legislative Herald of Georgia, 22/07/1999.

prevented from functioning for a longer period and the organisers of the demonstrators were the representatives of the ruling coalition.

In Martvili municipality, e.g., the protest demonstrations started on 20 November 2012 and continued for 23 days. During this period, the demonstrators occupied the building of Martvili *Gamgeoba* and demanded the resignation of the *Gamgebeli* and the *Sakrebulo*'s president. During this entire period, the *Gamgeoba* could not function; there were several incidents of physical and verbal altercation between the demonstrators and the *Gamgeoba* officials. Unlike the above incident in Marneuli, the incident that took place in Martvili was not categorised in accordance with law; the law-enforcement bodies were completely inactive and according to the information at our hands no investigation has been launched.

The law-enforcement bodies thus showed different approach with regard to the two similar sets of events (the only difference was the political affiliation of the alleged perpetrators); in one case there was no investigation instituted and in another case Giorgi Ugulava was prosecuted. Such double standards naturally engender the feeling that the differential treatment on the account of political affiliations amounted to discrimination.

Another significant factor is the substance of the charges brought against Ugulava. He is charged with conspiracy of group activity grossly violating public order. The act is criminalised under Article 24/226 of the Criminal Code of Georgia. Under the Criminal Code, in the cases of conspiracy charges where a person is indicted for alleged conspiracy of imputed crime, there must also be a direct perpetrator who executes the crime planned by the conspirator. In Ugulava's case, the prosecution seeks his punishment as the conspirator while there is no one indicted as the direct perpetrator of the crime.

As in other cases, the charges in the so-called criminal case of Tbilservice Group are based on the direct testimony of one witness and indirect testimony of another witness. With such evidence the prosecution endeavours to substantiate the charges brought against Ugulava and prove his direct involvement in the imputed act. The resolution of indictment states that Giorgi Ugulava covertly funded the activists of the United National Movement from the budget. As already mentioned, in the case file, there is only one direct testimony (given by witness Tariel Khizanishvili) which is not corroborated by any other evidence and there is only one indirect testimony (given by Giorgi Khutchua). There is no other evidence in the case file which would prove in any form Giorgi Ugulava's involvement in the imputed act. It can be safely pointed out that the evidence existing in the case file is not sufficient to indict a person based on the standard of reasonable suspicion. It is also noteworthy that on 22 January 2015, the Constitutional Court of Georgia declared as unconstitutional those provisions of the Criminal Procedure

Code that allowed indictment based on a hearsay testimony.[37] From this perspective, the criminal proceedings virtually became a moot point.

1.2 Giorgi Ugulava's arrest, detention and dismissal from office

On 25 February 2013, in the so-called Imedi TV and Tbilservice Group cases, the prosecution motioned before Tbilisi City Court for setting bail at GEL 1,000,000 as a preventive measure with regard to Giorgi Ugulava. The court examined the motion and dismissed it. Thus no preventive measure was applied. The court explained that the prosecution had failed to meet the requirements of the provisions of the Criminal Procedural Code regarding drafting and submitting a motion. Furthermore, the court deemed that the prosecution had failed to adduce single evidence confirming there was the need for the application of a preventive measure with regard to Ugulava.

On the same day, Mr Justice Giorgi Arevadze, did not uphold the prosecution's motion about the dismissal of the accused considering it was manifestly ill-founded. The relevant part of the decision reads as follows: "in the case before the court, the grounds referred to in the motion filed by the prosecution concerning Giorgi Ugulava's dismissal from the position of Tbilisi Mayor are too abstract and devoid of any argument. This does not apply to the descriptive part of the charges in the record of indictment."

On 21 December 2013, the judge examined the prosecution's motion about remanding Giorgi Ugulava in custody with regard to the so-called Old Tbilisi Development episode. The motion was partially upheld and the amount of bail was set at GEL 50,000. In the opinion of the court, despite the fact that Ugulava held the office in which he was alleged to have committed the imputed crime, the court did not deem it necessary to apply detention as a preventive measure. Furthermore, the court pointed out that sufficient time had passed since the institution of investigation and most of the witnesses had been questioned which minimised the risk of obstructing investigation on Ugulava's part, as well as the risk that he would suborn witnesses and destroy evidence.

In the opinion of the court, the prosecution failed to refer to a single fact of suborning a witness or destruction of evidence by Ugulava that would entail a tangible outcome.

The court found the bail would suffice and attain most efficiently the purposes of a preventive measure.

It was unexpected for everyone that the same judge without an oral hearing, based on a prosecutor's motion on Ugulava's dismissal reached a different decision and upheld the motion in the same case, the same day, at night.

[37]Citizen of Georgia - Zurab Miqadze v. the Parliament of Georgia, judgment of the Constitutional Court of Georgia of 22 January 2014.

The judge pointed out in the decision the following: "while bail is already applied with regard to Ugulava as a preventive measure, the term of appeal has yet to expire, after which the applied preventive measure may be cancelled and even if it is not cancelled, Giorgi Ugulava is bound to obstruct the investigation if he remains in office. This is substantiated by the fact that Giorgi Ugulava is the Mayor of the city and those to be questioned in relation to the criminal case against him are his immediate subordinates; moreover, he has access to the documents obtained through investigation that are significant to the criminal case and this is a relevant factor assessing that if Giorgi Ugulava remains in office he will obstruct investigation and gathering evidence within these proceedings."

It is obvious from the above reasoning that the judge clearly contradicts her own arguments in her decision that had been reached the same day within the same proceedings finding bail as a fully sufficient measure to prevent Ugulava from either destroying evidence or suborning witnesses.

One more detail should be noted in this regard: the judge ruled on the dismissal of Giorgi Ugulava at 00:15, in the night, without an oral hearing at the time when both the prosecution and the defence were in the courtyard. Although Article 160.1 of the Criminal Procedure Code allowed the judge to consider the motion without an oral hearing, in order to ensure the high standard of adversarial procedure as well as in the light of considerable public interest in the case, it would have been expedient to examine the motion at an oral hearing in the presence of the parties. These provisions along with other norms were challenged by Giorgi Ugulava in the Constitutional Court of Georgia.

On 23 May 2014, the Constitutional Court of Georgia upheld the constitutional claim, lodged by Giorgi Ugulava, challenging the constitutionality of Article 159 of the Criminal Procedural Code in terms of Article 29.1, and Article 29.2 of the Constitution; as well as the compatibility of the second sentence of Article 160.1 of the Criminal Procedure Code with Article 42.1 and Article 42.2 of the Constitution of Georgia.

The Constitutional Court found that the dismissal of directly elected officials and, in the case before it, the dismissal of a city mayor under Article 159 of the Criminal Procedure Code would be in breach of Article 29.1 and Article 29.2 of the Constitution of Georgia. The Constitutional Court declared as unconstitutional the implication of Article 159 of the Criminal Procedure Code that allowed the dismissal of a directly elected official. Moreover, the Constitutional Court considered the last clause of Article 160.1 of the Criminal Procedure Code (allowing a court to examine a dismissal motion without an oral hearing) to be disproportional interference in the right to defence and the right to a fair trial.

1.2.1 Delaying Giorgi Ugulava's reinstatement to office

Based on the Constitutional Court's judgment, on 2 June 2013, Ugulava's legal team filed a motion with the court demanding his reinstatement. The prosecution motioned for time to prepare an observation regarding the motion and the hearing was adjourned until 5 June.

On 5 June, the prosecution did not appear before the court under the pretext that the Prosecutor's Office had approached the court with the request to adjourn the hearing for ten days, as the prosecutors would be dispatched to Batumi for this period. The hearing was rescheduled for 10 June 2013.

On 10 June, the prosecutors again failed to appear before the court due to the same reason – their dispatch to Batumi. The hearing was again adjourned until 20 June 2013.

On 20 June, at the hearing, the prosecution submitted its observation regarding the motion of reinstating Giorgi Ugulava. The Court adjourned the hearing to read out its decision until 25 June 2013.

On 25 June, the court once again adjourned the pronouncement of its decision for one more day.

On 26 June 2013, the defence sought the withdrawal of its motion on reinstating Giorgi Ugulava. The court upheld the defence motion and did not examine the issue of reinstating Giorgi Ugulava as the Mayor of Tbilisi.

In this chain of events, the court's actions are noteworthy. On 4 June 2013, one day before the scheduled hearing, the prosecution motioned before the court in writing for the adjournment of the hearing for the term of the prosecutor's dispatch to Batumi, that is for ten days. The court adjourned not for ten days as allowed under Article 190.3 of the Criminal Procedure but for five days until 10 June.

This caused the following adjournment to be justified with the same reason and the court this time adjourned for the maximum statutory term of ten days. All this gives rise to a suspicion that the prosecution and the court were willing to delay the proceedings as much as possible, having caused the violation of the right to a fair trial and the accused's right to have his case examined within a reasonable time.

The chronology of the above motion naturally gave rise to public's perception that the Prosecutor's Office was politically motivated to avoid timely consideration of the matter and ensure that the hearing was delayed. This way Giorgi Ugulava would not be reinstated as the mayor until the new mayor took the office through the local self-government elections. The decision was eventually delayed by the court and the Prosecutor's Office until the Central Election Commission issued final minutes of the

elections results. By this time the issue of reinstating Ugulava to the mayor's office was a moot point both politically and legally; since restitution of a right and the rational of the right to a fair trial guaranteed by Article 6 of the ECHR are not confined to formally restoring the violated right, it should be followed by a legal outcome as well.

1.2.2 Giorgi Ugulava's arrest

On 30 June 2014, Giorgi Ugulava was indicted with embezzlement of large amounts of sums owned by the state (the CT Park episode).

On 2 July 2014, a court heard the prosecution's motion on the application of bail as a preventive measure, imposition of an obligation to hand over his passport and identification card to investigation authorities. The court dismissed the motion. No preventive measure was applied.

The court noted in the decision that there was no substantive basis for the application of a preventive measure as the prosecution failed to adduce any evidence substantiating the risks of obstructing investigation, destroying evidence or suborning witnesses by Ugulava. The court pointed out that it was not enough to refer *in abstracto* to the grounds for the application of a preventive measure.

Giorgi Ugulava is known to have announced at the hearing on the application of a preventive measure that he was planning to leave for Kiev on 3 July and to return the next day. He also maintained that if the court did not deem it necessary to remand him in custody, he would by all means leave the very next day. The Court did not consider this circumstance to be of significance and did not scrutinise it in the context of the risk of avoiding a potential punishment.

On 3 July, Giorgi Ugulava was arrested in the airport, indicted for alleged money laundering (new charges), and the charges were aggravated by the reference to the Marneuli episode.

Giorgi Ugulava's arrest on the above charges is related to the local self-government elections held on 15 June 2014. The second round of elections had to be held in Tbilisi, where the candidates for the Mayor's position from the ruling party and the parliamentary opposition (United National Movement) confronted each other. Giorgi Ugulava was the Election Campaign Coordinator.

It is striking that Giorgi Ugulava was arrested at the time when the authorities declared moratorium on the arrests of those involved in pre-election campaigns. The moratorium was announced on 14 April 2014 and it contained a reservation that accused persons could only be arrested in urgent and exceptional circumstances which certainly were not present in Ugulava's case as the authorities were driven by ulterior motives.

Eventually, the prosecution motioned for detention as a preventive measure, which was upheld by the court. The court noted in its decision that "Giorgi Ugulava's arrest entailed no breach of legislation, the arrest record has been drafted in compliance with procedural provisions and it refers to the fact that the accused may abscond as the ground of arrest; meanwhile, the defence could not substantiate any particular breach of a procedure or question the ground for his arrest."

According to the arrest record and court decision, the investigation authorities arrested Giorgi Ugulava in application of Article 171.2e) of the Criminal Procedure Code allowing arrest of a person who may abscond. This ground for arrest enables law-enforcement agencies to affect arrest in an exceptional case, without a court's warrant.

The right to liberty and security of a person is a universal human right which may only be restricted when such interference is the last resort and without it the respective legitimate aim cannot be attained.

As mentioned above, on 2 July 2014, the court examined the prosecution's motion on the application of a preventive measure and did not consider Ugulava's statement about his departure to be of significance in terms of the risk of absconding and obstructing justice. On the same day, Giorgi Ugulava was handed a notice according to which he had to appear before investigation authorities on 4 July, at 10 am to take part in an investigative action.

The judge noted in the decision: "the defence could not substantiate a particular breach of the statutory provisions related to either the basis or the procedure of an arrest." This is a clear example of shifting the burden of proof to the defence, despite the presumption of favour that implies that "everyone shall be free unless there is a necessity of his/her detention".[38] It is the obligation of the prosecution and not of the defence to prove this necessity. The approach of the European Convention with regard to the burden of proof is noteworthy. The Strasbourg Court deems that there is a clear burden of proof on those who have taken away someone's liberty to establish not only that the power under which it occurred falls within one of the grounds specified in Article 5 but also that its exercise was applicable to the particular situation in which it was used.[39]

The Court further noted that "the accused maintained certain on-going friendship with those interrogated and still to be questioned as a witness and in the given circumstances this relationship could contain the risk related to reasonable suspicion of obstruction." [40]

In the case *Dubinskiy v. Russia*, the European Court found the violation of Article 5.1 of the Convention. With regard to the argument advanced by the domestic judicial

[38]Article 5 of the Criminal Code of Georgia, Law of Georgia no. 2287, Legislative Herald of Georgia, 22/07/1999.

[39]The Right to Liberty and Security of the Person, A guide to the implementation of Article 5 of the European Convention of Human Rights, Human rights handbooks, No. 5, 8.

[40] Decision of Tbilisi City Court of 4 July 2014 on first appearance of an accused before the court and application of a preventive measure, case no. 092060614001, 3.

authorities that the applicant might put pressure on witnesses or obstruct the course of justice in some other way, the Court discerned no indication in that the domestic courts in any way checked whether the applicant had indeed attempted to intimidate witnesses or to otherwise interfere with the proceedings. In such circumstances, the Court had difficulty accepting the argument that there had been a risk of interference with the administration of justice.[41] This approach stems from the well-established case-law of the European court that the danger of the accused hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*; it has to be supported by factual evidence.[42]

The *Dubinskiy* case, similar to the case of Ugulava, concerned the situation where domestic judicial authorities did not remand the applicant in custody and the next day he was arrested on the account of different charges. In the opinion of the European Court, such action clearly indicated bad faith on the part of the authorities. They did everything in their power to keep the accused in custody. The European Court found "that the investigating authorities' second application to a different court seeking the applicant's remand in custody was nothing but an attempt at forum shopping which degraded the administration of justice."[43]

In *Mooren v. Germany,* the European Court reiterated that no detention which is arbitrary could be compatible with Article 5.1. The notion of "arbitrariness" in this context extends beyond the lack of conformity with national law. As a consequence, a deprivation of liberty which is lawful under domestic law can still be arbitrary and thus contrary to the Convention. While the Court has not formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5.1, key principles have been developed on a case-by-case basis. "One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities."[44]

The events that unfolded since Giorgi Ugulava's arrest strongly suggest that the arrest was arbitrary irrespective of the fact whether the basis of the public authorities' action was formally in compliance with the domestic procedural legislation. The public perception that the arbitrary goal of the authorities was to ensure their political opponent Giorgi Ugulava stayed in custody was further enhanced by the application of detention which continued for more than nine months.

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[41] *Dubinskiy v. Russia*, application no. 48929/08, judgment of the European Court of Human Rights of 3 July 2014, para. 66.

[42] *Becciev v. Moldova*, application no. 9190/03, judgment of the European Court of Human Rights of 4 October 2005, para. 59; *Trzaska v. Poland*, application no. 25792/94, judgment of the European Court of Human Rights of 11 July 2000, para. 65; *Grishin v. Russia*, application no. 14807/08, judgment of the European Court of Human Rights of 24 July 2012, para. 148.

[43] *Ibid*., para. 47.

[44] *Mooren v. Germany*, application no. 11364/03, judgment of the Grand Chamber of the European Court of Human Rights of 9 July 2009, para. 72.

1.3 Conclusion

The series of events discussed above creates the impression that Giorgi Ugulava's criminal prosecution is politically motivated. Even the number of criminal acts imputed to Ugulava raises question. There were attempts to isolate him from the processes of significant political events that were underway. This goal was eventually attained on 3 July 2014 when Ugulava was remanded in custody. In the criminal case against Ugulava (the Marneuli episode), a particular example of discriminatory treatment is to be discerned as Giorgi Ugulava was charged with an act that never warranted the institution of investigation by law-enforcement bodies. The impression of political persecution is further supported by the fact that criminal proceedings against Ugulava are still pending before Tbilisi City Court and not a single final judgment has been adopted in any of the cases.

2. Criminal cases against Mikheil Saakashvili

Mikheil Saakashvili is the founder and the Chairman of the United National Movement and was the President of Georgia during 2004-2013. As of 1 February 2015, he has been charged on six counts in four criminal cases.

The first charges were brought against Mikheil Saakashvili on 28 July 2014 in connection with the disruption of an assembly held on 7 November 2007, as well as Imedi TV and a metallurgical plant. The first counts in the indictment alleged that Mikheil Saakashvili abused his powers as a holder of public political office, which resulted in grave breaches of legal interests of individuals or legal entities, the society or the state, through violence or recourse to arms, entailing degrading treatment of a victim.[45] On 2 August 2014, detention as a preventive measure was applied based on the aforementioned charges.

On 7 November 2007, police, armed with truncheons, without giving a prior notice, forcibly disrupted the protesters on a hunger strike, who had gathered in front of the Parliament building. Numerous other protesters joined the demonstration as the result. According to the prosecution, the police used excessive force and physically assaulted the protesters.

Despite the prosecution's failure to adduce any evidence corroborating Saakashvili's connection with the police actions, the Chief Prosecutor's Office is determined to tie him to the said incidents and prove that he had committed the imputed criminal acts.

The prosecution maintains that in accordance with the direct instructions of the former President of Georgia (who was also the Supreme Commander-in-Chief of the Armed Forces of Georgia), the armed forces personnel of the Defence Ministry, in violation of the Constitution of Georgia and the domestic legislation in force, were deployed along Rustaveli Avenue to demonstrate military prowess in order to establish effective control over the area, to intimidate protesters and deter them from reassembling.

Furthermore, the prosecution accuses Saakashvili of using law-enforcement bodies to have Imedi TV's broadcasting blocked and to have it taken it off air, and to have the real property of Lynx LTD owned by Arkadi Patarkatsishvili raided by the special forces unit and to have shut down Mtatsminda recreational park.

Under the record of indictment of 28 July 2014, the prosecution also alleges that Saakashvili misappropriated Arkadi Patarkatsishvili's property through abuse of official power.

The Prosecutor's Office maintains that Mikheil Saakashvili and other senior officials, managed to register the title to the property owned by Patarkatsishvili through the

[45]Article 333.3 of the Criminal Code of Georgia, Law of Georgia no. 2287, 22 July 1999, Legislative Herald of Georgia.

schemes described by the prosecution. They refer to *inter alia* the share of JMG Consulting Group JSC, which owned Imedi TV, Lynx LTD as well as Energy and Industry Complex LTD, owning Rustavi Metallurgical Plant.

The record of indictment also stipulates the following: "Mikheil Saakashvili's previously announced intention to employ all the official resources to misappropriate Patarkatsishvili's property based in Georgia has been fulfilled."

Within the aforementioned case, detention as a preventive measure was applied and Mikheil Saakashvili was put on wanted list on 2 August 2014.

The second count in the indictment brought against Mikheil Saakashvili on 5 August 2014 was related to assault on Valeri Gelashvili. On 10 November 2014, these charges have been aggravated.

Thus, the prosecution ties the incident of assault on Valeri Gelashvili to the former President of Georgia. According to the investigation, on 29 June 2005, an article insulting Mikheil Saakashvili and his family members was published in newspaper "Resonansi". The article was written by Valeri Gelashvili who was a member of the Parliament at that time. The prosecution alleges that after the publication of the article, Saakashvili being motivated by revenge, ordered the then Defence Minister Irakli Oqruashvili to have Valeri Gelashvili physically assaulted as punishment. According to Irakli Oqruashvili, he disobeyed the order.

The prosecution speculates that after Oqruashvili's refusal, Mikheil Saakashvili gave the same orders to the then Minister of Interior of Georgia, Ivane Merabishvili. The latter managed to comply with the order through his subordinate Special Operative Department. According to the prosecution, on 14 July 2005, armed officers of the Special Operative Department and the Special Task Force, the majority of which were aware that they were following the legal orders of their superior started the operation. At approximately 13:00, on Mirtskhulava Str., in Tbilisi, the officers boxed Valeri Gelashvili's vehicle in. Following their orders, they neutralised the driver and the passengers and extracted documents from the car. As the result of these actions, Gelashvili suffered non-grievous injuries with long-term health effects as attested by the conclusion of the Forensic Medicine Department of National Bureau of Forensics dated 17 April 2014.

Mikheil Saakashvili was indicted on 5 August 2014 for alleged abuse of his powers as a holder of public political office through recourse to violence and arms that resulted in major breach of human right and public legal interests.[46] On 10 November 2014, the charges were aggravated and re-qualified as conspiracy to inflict deliberate harm.[47]

[46] Article 333.3 of the Criminal Code of Georgia, Law of Georgia no. 2287, 22 July 1999, Legislative Herald of Georgia.
[47] *Ibid.*, Article 25/117.5.e).

Further charges were brought against Mikheil Saakashvili on 13 August 2014 in connection with the so-called case of "state property embezzlement". Under these charges, the Court of Appeals of Georgia adopted a decision concerning seizure of the property owned by Mikheil Saakashvili and his spouse Sandra Roelofs, as well as the bank accounts of Mikheil Saakashvili. According to the Prosecutor's Office, Mikheil Saakashvili intended to covertly expend the funds for his personal use. Earlier, presidential expenditure had been public and funded from the resources of the Administration of the President of Georgia and LEPL Public Procurement Agency. According to the prosecution, in order to avoid disclosure of the information on expenses, former President Mikheil Saakashvili issued an order in 2009-2013 to the effect of allocating GEL 5, 952, 500.00 from presidential reserve funds to the Special State Protection Service for covert personal expenditure. Later, according to the prosecution, the Special State Protection Service was illegally instructed by the former President to fund various personal expenditures of the President of Georgia, his family members as well as their guests both within and outside the country. This included the expenses related to travel and accommodation, cosmetic procedures, food, study, gifts and souvenirs, utility bills, etc. The prosecution maintains that, during 2009-2013, former President Mikheil Saakashvili instructed the Special State Protection Service to covertly fund his expenditures which otherwise would not have been legally borne by the Administration of the President and LEPL State Procurement Agency. The funds would be written off through classified channels by the Economic Department of the Special State Protection Service.

In the context of the above events, former Head of Special State Protection Service, Teimuraz Janashia was prosecuted together with Mikheil Saakashvili. The investigation authorities maintain that Janashia conspired with Saakashvili and acted in accordance with their agreed deal by abusing his position as the Head of Special State Protection Service.

The latest charges were brought against Mikheil Saakashvili on 27 November 2014 in connection with the so-called Girgvliani case. In this case, Saakashvili is accused of abuse of his public political office.[48]

It is stipulated in the indictment record, which is rather short of reasoning standards, that Mikheil Saakashvili had been informed from the very outset about the conspiracy of kidnapping Girgvliani by the then Head of the Constitutional Security Department, Davit Akhalaia, as well as the involvement of senior officials of the Ministry of Interior and possible connection of Tamar Merabishvili, wife of the then Minister of Interior, with the crime. It is alleged that Saakashvili was aware of the ramifications of the disclosure of crime details in terms of the rating of the authorities. In order to avoid these threats, through Saakashvili's support, his direct involvement and prior agreement various criminal activities were planned and carried out in order to enable the respective

[48] *Ibid.*, Article 332.2.

authorities to conduct biased, partial and incomplete investigation into the circumstances surrounding the crime committed against Alexander Girgvliani; to cover up the genuine reasons and motives behind the crime and involvement of the then senior officials, all of which ensured fabricating investigation, inadequate sentencing and ineffective execution of the judgment.

The prosecution maintains that Mikheil Saakashvili held a meeting to discuss, among other things, the responsibility of the persons to be prosecuted with regard to the Girgvliani case and their early release through pardon. Mikheil Saakashvili allegedly told Davit Akhalaia that Geronti Alania, senior officer of the Constitutional Security Department, would be prosecuted together with several low-ranking officials in order to quench increased public tensions caused by the Girgvliani case. This way, it is alleged, Davit Akhalaia and other officials would avoid responsibility. Furthermore, Saakashvili is alleged to have promised Davit Akhalaia that he would pardon the accused after their conviction.

It is alleged that on 24 November 2008, the then President of Georgia, Mikheil Saakashvili, in accordance with the previously agreed criminal deal misused his official power and kept his promise about the pardon. Convicted civil servants: Alania, Ghatchava, Bibiluridze and Aptsiauri were pardoned and their imprisonment sentences were halved through Presidential Ordinance no. 768.

Mikheil Saakashvili's deliberately illegal decision with regard to the convicted persons made it possible to trigger early conditional release proceedings, based on which they were fully exempted from serving their sentences.

The former President of Georgia is wanted in Georgia; the Chief Prosecutor's Office applied to the Secretariat General of Interpol to issue a red notice in Saakashvili's name.

The study of all charges brought against Mikheil Saakashvili as well as the case files leaves the impression that investigation is conducted despite the absence of statutory legal grounds. One of the common characteristics of all the charges is to build cases on the testimonies deposited by Saakashvili's political opponents and hearsay statements.

The public statements, made by the members of the present regime concerning Mikheil Saakashvili's guilt, accompanied the pending criminal proceedings, seriously undermining presumption of innocence and, therefore, obstructing the full realisation of the right to a fair trial.

Zaqaria Qutsnashvili, member of the parliamentary faction of the Georgian Dream coalition, made comments concerning Saakashvili's indictment pertaining to the so-called episode of the assault on Valeri Gelashvili. Qutsnashvili stated the following: "Valeri Gelashvili was a victim of violence […]. It was like driving a person to the edge of death.

Therefore, the charges brought against Saakashvili and Merabishvili are grave. No one ever doubted that the trace would lead to them."[49]

The statement made by Prime Minister Irakli Gharibashvili on 22 March 2014, i.e., five days prior to summoning Saakashvili as a witness before a court is also noteworthy. The Prime Minister stressed that the Prosecutor's Office would put Saakashvili on wanted list in case of failure to appear before the court. This constituted a clear example of the Prime Minister's serious influence over prosecution authorities.[50]

2.1 Problems related to ill-founded charges

There is only one witness that ties Mikheil Saakashvili to the 7 November case of alleged disruption of protesters, deployment of armed forces on Rustaveli Avenue, raid of Imedi TV by law-enforcement authorities and misappropriation of the company and other property owned by Patarkatsishvili. This is former President of the Parliament, **Nino Burjanadze**. Since Mikheil Saakashvili's resignation in November 2007, Nino Burjanadze had acted as the President *ad interim* and later shifted to opposition.

According to the case files, Nino Burjanadze was immediately involved in the 7 November events. Apart from other evidence, it is doubtful whether Burjanadze's statement meets the standard of reasonable suspicion necessary for the indictment of a person.

It is noteworthy that the record of Saakashvili's indictment was issued on 28 July 2014, at 13:00. Nino Burjanadze was questioned as a witness for the first time on 28 July 2014, at 15:50 (the time her questioning started). She was questioned again on 31 July 2014.

It is obvious from the case files that Burjanadze was questioned after the record of Saakashvili's indictment was issued. This fact clarifies that there had been no evidence warranting Saakashvili's indictment and the conducted procedure fails to meet the standard of reasonable suspicion necessary for bringing charges against a person. The events unfolded created the impression that the Prosecutor's Office tried to substantiate the ill-founded charges after they had been filed.

Burjanadze's statement is arguably the only evidence in the case that would indicate Saakashvili's direct connection with the actions imputed to him. However, there are serious misgivings concerning the credibility and relevance of Burjanadze's deposition. Nino Burjanadze, e.g., states in her deposition: "deployment of armed forces on Rustaveli Avenue was an illegal decision which of course was taken by President Saakashvili while

[49]Fresh Charges Brought against Saakashvili and Merabishvili – the assessment of indictment filed by the prosecution, at http://presa.ge/new/?m=politics&AID=30644 [Last visited 10.03.2014].
[50]*Ibid.*, para. 50.

being in the state of a shock."[51] The witness bases her statements on her opinions and fails to corroborate the allegations regarding taking any order or decisions by Saakashvili.

Furthermore, there is no evidence in the case file that would confirm the alleged fact that Saakashvili gave an illegal order to either Merabishvili or Adeishvili. Under this line of investigation, the authorities again base their allegations on speculations related to Saakashvili's official position.

The assessment of the episodes concerning Imedi TV and metallurgical plant is no less significant. The closer scrutiny of the record of indictment gives rise to an impression that it provides information about criminal activities in general, instead of the commission of these activities. At the same time, it is difficult to find any evidence in the case that would corroborate at least threats on the part of Saakashvili to misappropriate Patarkatsishvili's property. Based on the case files, there is no tangible link between Saakashvili and the criminal act. Instead, there is only an abstract allegation that can be found in the record of indictment.

As already mentioned, great significance is attached to the indictment alleging Saakashvili's role in the assault on Valeri Gelashvili. The alleged fact that Saakashvili instructed Oqruashvili to organise an assault on Valeri Gelashvili (this is mentioned in the indictment record) as an exemplary punishment is verified by the Prosecutor's Office by the very deposition of Oqruashvili. The latter maintains that he met Saakashvili by the end of spring in 2005, when he held the office of Defence Minister. According to Oqruashvili, no one witnessed the conversation he had with Saakashvili on the terrace of the mini presidential residence built on the Special Task Force base of Anti-Terrorism Centre located on Shavnabada. During this very conversation, Saakashvili is said to have requested Oqruashvili to organise a beating of Valeri Gelashvili, which is said to have been declined by Oqruashvili. During the additional questioning on 17 July 2014, Oqruashvili specified that Saakashvili requested him to organise not just a beating but also a severe physical assault.

Apart from Oqruashvili's direct statement, there is no other evidence in the case corroborating his deposition. Similarly, there is no evidence to be found in the case files confirming the statement that the two met at the place and time indicated by Oqruashvili. The case files show that in his original statement Irakli Oqruashvili confirmed that he had been ordered to arrange an assault and beating of Valeri Gelashvili whereas after one year and six months, when he was additionally questioned, he refers to severe assault and beating and not just assault and beating.

According to the medical report of forensic examination that was conducted on 15 April 2014, following the request of the Chief Prosecutor's Office, the injuries inflicted on Valeri Gelashvili are categorised as "less grievous, entailing long-term health damage".

[51]Record of interrogation of a witness, 28 July 2014, case no. 074251013802, p. 3.

After the additional questioning of Oqruashvili on 17 July, Valeri Gelashvili applied to the Forensics Bureau of Public Service of Forensic Medicine, subordinate to the Lithuanian Ministry of Justice, on 6 August 2014. The medical report of the Forensics Bureau reads as follows: "in accordance with paragraph 6.6.1 of Ordinance of 23 May 2003 issued by the Minister of Justice of the Republic of Lithuania and the Minister of Labour and Social Security of the Republic of Lithuania, the Regulations on Determining Health Damage approved by the Minister of Health Care of the Republic of Lithuania, injuries related to the fractures of the anterior skull base are considered to be grave health damage." [52]

On 10 September 2014, the Chief Prosecutor's Office applied to the Forensic Medicine Department of Levan Samkharauli National Bureau of Forensics which conducted the medical examination together with a Lithuanian expert and concluded as follows: "the injuries sustained by Valeri Gelashvili, taken together, amount to grave bodily injuries endangering his life…"[53]

This was followed by bringing aggravated charges against Saakashvili alleging conspiracy to intentionally inflict grave bodily injuries by a group.

The chain of events leaves an impression that alteration of the statement by Irakli Oqruashvili was aimed at aggravating Saakashvili's charges. Conspiracy of deliberate health damage is a crime that can only be committed with a direct intent. Apart from intent, there must be a result also present such as grave health damage. While in this particular case the additional forensic reports showed the result, *corpus delicti* lacks the *mens rea* - direct intent is missing. The deposition of the second statement by Oqruashvili activated the reasonable suspicion standard and prompted the aforementioned aggravation of charges.

In conclusion, the case files consist of hearsay statements deposited by Oqruashvili and Burjanadze, which made the prosecution authorities believe they had the ground to tie certain criminal activities to Mikheil Saakashvili. However, it is impossible to consider the existence of direct intent based only on the indirect evidence adduced by Oqruashvili. Upon a closer study of the case files it is obvious that Oqruashvili cannot allege that Saakashvili instructed Merabishvili to beat Gelashvili.

As regards Burjanadze, she maintains in her statement that when she told Saakashvili about the assault on Gelashvili, she realised Saakashvili had been aware of this incident; he was satisfied with the outcome and showed no remorse whatsoever.

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[52] Medical report no. G2625/14(01) of 27 August 2914, p. 6. The report was prepared by a specialist of Vilnius Division of the Forensics Bureau of Public Service of Forensic Medicine subordinate to the Lithuanian Ministry of Justice.

[53] Medical Report no. 005162914 of 1 October 2014, p. 2. The report was prepared within the Forensic Medicine Department of Levan Samkharauli National Bureau of Forensics

It can be concluded that two persons' indirect evidence served as the basis to indict Saakashvili. These witnesses allege certain facts based on their opinions. It is irrelevant for the purposes of a criminal case as to what is believed and felt by a witness. The relevance may only have the confirmation of a fact in reality. Furthermore, hearsay evidence is inadmissible unless it is confirmed by direct evidence (Article 76.2 of the Criminal Procedure Code of Georgia). The Constitutional Court of Georgia, in its judgment of 22 January 2015,[54] held that Article 13.2 and Article 169.1 violated Article 40 of the Constitution and were therefore unconstitutional. The Constitutional Court deemed unconstitutional on the one hand bringing charges based on hearsay evidence only and on the other hand convicting a person based on hearsay evidence.

Stemming from the above-mentioned, the procedural provisions based on which Saakashvili was indicted are now null and void as unconstitutional.

Moreover, there is no evidence to be found in the case files supporting the allegations that Merabishvili gave any criminal orders to Director of the Special Operative Department Erekle Kodua. Despite this omission, the prosecution still maintains that Merabishvili did instruct Erekle Kodua to organise the attack on Gelashvili.

Six members of Special Task Force took part in the special operation against Valeri Gelashvili. This is revealed from the statements deposited at the investigation stage by those very members of the Task Force. Among those was the leader of the group. According to the latter, he was instructed by his superior in the building of the so-called Module to neutralise a vehicle of an unidentified person, physically assault him and extract all documents and other items from the vehicle. The superior stressed that this person was Georgia's enemy and conducted espionage against the interests of our country.

The group leader communicated this order to other five members of the Special Task Force but only shared with one of them the direct instruction about physical retribution. No one witnessed the conversation of the superior and the group leader held in the building of Module. Therefore, the prosecution only has the above statement to confirm the fact.

The contents of the instructions given to the members of the Special Task Force are noteworthy. As mentioned above, only one member can confirm that the group leader ordered them to assault the target; other members maintain that their order was to block the vehicle, neutralise passengers, and extract documentation and not to beat and assault the object. They were entitled to use force only to override resistance.

Under Article 37 of the Criminal Code of Georgia, following orders or instructions is an excusable circumstance as a defence and exempts a person from criminal responsibility. However, under certain circumstances, "a person can be held criminally responsible in

[54]Citizen of Georgia - Zurab Mikadze v. the Parliament of Georgia, judgment of the Constitutional Court of Georgia, adopted on 22 January 2014.

accordance with general procedure for the premeditated following of a criminal order or instruction unless there is another excusable circumstance."[55]

As it follows from the factual circumstances of the case, two members of the Special Task Force deliberately complied with the illegal order. In its substance, the order run counter to substantive criminal legislation and contained the elements of *corpus delicti.* The duties of the Special Task Force, of course, include conducting similar operations in order to avert the threats posed to the state and public. However, it is not the purpose of the Special Task Force to carry out physical retribution on a particular person. The use of force would only be justified in case the target resisted, which is confirmed by some of the members of the Force as well.

Despite the above mentioned, the law-enforcement authorities have not launched investigation into the incident of Natchkebia and Tsotsonava complying with the illegal order. This violates the imperative requirement of the Criminal Procedure Code obliging law-enforcement authorities to institute investigation into any act containing elements of *corpus delicti*.

The position taken by the prosecution with regard to the episode of embezzlement of state property is equally noteworthy. Under Article 28.2 of the Budget Code of Georgia effective since 28 December 2009 and the Law of Georgia on Budgetary System of Georgia, in force before the enactment of the Code, sums are allocated from the reserve funds of the President of Georgia and Government of Georgia to fund the expenditure not provided in the state budget. The President and the Government define respectively the policies of expenditure of the reserve funds in accordance with the specified data of the pending budget.

Accordingly, the former President of Georgia was fully entitled to allocate sums from the Presidents reserve funds based on his discretion in order to cover the expenditure not provided in the state budget. In this particular case, the sum from the President's reserve fund was written off to cover the expenditure of the Special Service of State Protection. These expenses were not provided in the state budget.

Under the Law of Georgia on State Budget of Georgia of 2011, the targeted and non-targeted expenditures are determined in the budget of Special Service of State Protection. The draft Budget approved by the Parliament refers to the both targeted and "other" expenditure in the budget of the Special Service of State Protection. The legality of expending non-targeted funds for a purpose is beyond the scope of legal regulation and can be reasonably perceived as an example of selective justice.

[55]Article 37.2 of the Criminal Code of Georgia, Law of Georgia no. 2287, 22 July 1999, Legislative Herald of Georgia.

Similarly, it is devoid of any legal logic to accuse Saakashvili in the so-called Girgvliani case that in the end leads to granting pardon to the convicted persons when exercising his presidential authority.

The prosecution's lead in the above context is based on the speculations expressed in the only witness statement that can be found in the case file. This statement was deposited by Irakli Oqruashvili. He maintains that Saakashvili was well aware of the involvement of the then senior officials in the Girgvliani case. Oqruashvili is confident that when granting pardon, the former President knew the identity of those persons who were sentenced for the unintentional death of Girgvliani.

There is no other evidence that would corroborate the allegation that Saakashvili met Davit Akhalaia and gave him promises of any kind. Similarly, it is not established that Saakashvili had any ulterior interest in granting pardon to particular convicts. On 24 November 2008, the President granted pardon to 363 convicts apart from those sentenced in Girgvliani case.

It is unacceptable to indict someone based on one person's statement. This procedure cannot meet the reasonable suspicion standard of proof that would convince an objective observer that the person committed a crime. As it was mentioned, Irakli Oqruashvili deposited several other testimonies with regard to multiple charges against Saakashvili. This questions the credibility of the witness apart from the fact that Oqruashvili had had disagreement with the former President and his team after his dismissal from the position and subsequent arrest.

As already mentioned, the authority to grant pardon is a constitutional power vested in the President as the Head of the State. The Presidential power to grant pardon is not conditioned either by the gravity of a crime, or the length of the sentence yet to be served, etc. The President takes a decision within the constitutional discretion granted. The President could be partial with regard to a certain convict. The discussion of abuse of official power when exercising the right to grant pardon is devoid of any legal reasoning.

2.2 Problems related to seizure of property owned by Mikheil Saakashvili and his relatives

On 27 August 2014, the Chief Prosecutor's Office of Georgia motioned before Tbilisi City Court for the seizure of the property owned by Mikheil Saakashvili and his family members. The prosecution requested the seizure of the property acquired by Saakashvili and those related to him during the particular period of 2013-2014. It is noteworthy that the criminal case against the former President concerning embezzlement of public funds in especially large quantity covers the period of 2009-2013.

When motioning for seizure of the property, the prosecution pointed out the incompatibility of the worth of the property owned by the accused and his relatives with their respective incomes. The urgency of the seizure was motioned by Mikheil Saakashvili's failure to appear before investigation authorities on several occasions and his considerable connections in foreign countries. Stemming from the aforementioned, the prosecution observed that the accused could attempt avoiding pecuniary responsibility. The Prosecutor's Office also requested to seize Mikheil Saakashvili's all current accounts in all active banks of Georgia, if any.

Tbilisi City Court examined the motion of property seizure and on 29 August 2014, dismissed the request to seize most of the property owned by Saakashvili and his relatives. The Court only seized the immovable property based in Kvareli.

The Court recalled in its decision that both factual (evidential) and formal (procedural) grounds should exist for the application of property seizure as the measure of criminal coercion. It further observed that realistic and time-coordinated grounds which indicate in the form of unity of facts and information that either an accused or a person substantively responsible for his/her actions or a person related would conceal property or dispose of property or the property amounts to proceeds of crime should be present. Furthermore, the fact of existence of property owned by an accused or his/her relatives does not warrant seizure of property.

It is obvious from the circumstances of the case, prosecution's motions and court decisions, the Prosecutor's Office failed to adduce the appropriate evidence about whether the accused attempted to dispose of his property, conceal or if it was the property acquired through criminal activity.

Significant reasoning has been elaborated by the court regarding the seizure of property in terms of the time of its acquisition. The court noted that Saakashvili was indicted in connection of the acts allegedly committed in the period of September 2009 and February 2013. According to the files attached to the motion of seizure, the registration of Saakashvili's and related persons' title to some of the properties does not coincide with the aforementioned period. The court further found that the prosecution failed to adduce documents proving the title to a particular property; and some of the property was received through inheritance, which excluded possibility of the property being linked to criminal activities.

Therefore, only that property can be subject to seizure, the time of acquisition of which coincides with the time of commission of imputed crimes and it is presumed that the property represents proceeds from crime. Both requirements must cumulatively exist together with other statutory requirements of the Criminal Procedure Code.

As regards the leave to seize the immovable property owned by Saakashvili in Kvareli, Tbilisi City Court did not give any reasons about either the grounds or purpose of granting the motion.

The prosecution appealed the decision of Tbilisi City Court. The Investigative Panel of the Court of Appeals allowed the appeal on 3 October 2014 and ordered the seizure of the part of the property from the list of possessions, which had not been seized by Tbilisi City Court.

It is noteworthy that the Investigative Panel was authorised to examine the application of the standard of reasonable suspicion with regard to the crimes imputed to Mikheil Saakashvili instead of the grounds of property seizure.

The standard of a reasonable suspicion that would convince an objective observer that a person has committed a crime is sufficient for filing charges and the application of a preventive measure. As regards the context of property seizure, the court is authorised to examine the following grounds referred to in Article 151 of the Criminal Procedure Code (the risk of concealing property; disposing property; and property amounting to proceeds of crime). The fact that there is a standard of reasonable suspicion concerning the commission of a crime by a person does not warrantee the presumption that his or related persons' property has been acquired through criminal activities.

The Investigative Panel justified the refusal to uphold the appeal by referring to the fact that the title to the property had been acquired before the commission of alleged crimes. In the opinion of the Panel, this factor excluded the presumption that property constituted the proceeds of crime.

Despite this reasoning, the court seized the part of the property acquired prior to the alleged criminal acts imputed to Saakashvili. The seizure of the property owned by Sandra Roelofs was explained by the fact of her marriage to Mikheil Saakashvili. The court was satisfied that it was entitled to seize the property owned by the accused's spouse that was acquired during their marriage. This reasoning goes beyond the statutory requirements and is not foreseeable. The Investigative Panel of the Court of Appeals also seized Saakashvili's alleged bank accounts despite the fact that the evidence supporting their existence had not been adduced by the prosecution.

2.3 Conclusion

Considering the fact that most of the charges filed against Mikheil Saakashvili are unfounded and, at the same time, the pending criminal proceedings were punctuated with

breaches of due process, it can be concluded that the prosecution authorities have been instrumental in the political retribution against the former President of Georgia.

3. Criminal cases against Ivane (Vano) Merabishvili

Ivane Merabishvili has been the Secretary General of the United National Movement since 2012; he was the Prime Minister of Georgia from 4 July 2012 until 25 October 2012; and Minister of Interior from 28 December 2004 until 4 July 2012.

The first charges were brought against Ivane Merabishvili in connection with the so-called Country-house and Social Workers cases on 21 May 2013. On 22 May 2013, Kutaisi City Court ruled on remanding Merabishvili in custody. By its judgment on 17 February 2014, the Section of Criminal Cases of Kutaisi City Court found Ivane Merabishvili guilty of the crimes under Article 160.3b), Article 182.2a), Article 182.2)b, Article 182.3.d), and Article 164[1] of the Criminal Code of Georgia. He was sentenced to deprivation of liberty for five years and was prohibited to take office in civil service for three years.

According to the resolution of indictment, under the head of the so-called Country-house case, the then Interior Minister Merabishvili, with the use of his official power, illegally occupied a country-house located in the village of Kvariati, Khelvachauri district and used it for recreational purposes against the will of the owner – International Investment Company LTD. Furthermore, with Ivane Merabishvili's initiative, GEL 131,884.6 was allocated from the budget of the Interior Ministry to have the country-house refurbished; the staff was given GEL 25,784.7 in salaries. Accordingly, the Office of the Chief Prosecutor of Georgia alleges that Ivane Merabishvili embezzled for personal expenses GEL 157,669.3 that was owned by the state budget.

The so-called Social Workers case concerns the period when Ivane Merabishvili held the office of the Prime Minister of Georgia. Under the head of this criminal case, his co-accused was the then Minister of Labour, Health Care and Social Security of Georgia, Zurab Tchiaberashvili. The charges are related to the registration programme of job seekers that was approved by the resolution of the Government of Georgia on 5 July 2012. The aforementioned programme aimed at assisting the staff of the State Minister of Employment of Georgia in setting up a unified data-base of job seekers. According to the prosecution, Ivane Merabishvili had hatched a plan to use this programme as a disguise for bribing voters in the Parliamentary Elections of 2012 in favour of the United National Movement; he is alleged to have instructed LEPL Social Services Agency to boost its supernumerary staff by 10,932 non-permanent employees. The then Director of the Agency – Ramaz Sulamanidze – "in accordance with the previously agreed criminal plan directly applied to the Labour Minister and without any substantiation and using a false pretext […] requested to increase the number of non-permanent staff by 21,864 employees at one time, and set GEL 13,118,400 as their two-month remuneration."[56] Eventually, allegedly fictitious contracts were concluded with 21, 837 individuals with an ulterior aim to bribe voters with state-owned funds. These employees were paid salary; however, they have not carried out the tasks provided by the programme.

On 28 May 2013, the second charge was filed against Merabishvili in connection with the so-called 26 May case. On 30 May 2013, Merabishvili was remanded in custody. On 27 February 2014, by a judgment of the Section of Criminal Cases of Tbilisi City Court, Ivane Merabishvili was found guilty of exceeding official powers and was sentenced to

[56]Resolution of Indictment of 21 May 2013, case no. 088131212801, Kutaisi, p. 4.

deprivation of liberty for four years and six months. He was deprived of the right to hold office in civil service for one year, one month and 15 days.

According to the indictment resolution, on 25 May 2011, in front of the building of the Parliament of Georgia and adjacent area, a meeting organised by the Assembly Representing People was held. On 26 May, in the same area, a military parade dedicated to the Independence Day of Georgia was planned to be held. In order to ensure that this parade was held, the then Interior Minister ordered "the mass arrests of the demonstrators once the demonstration's time was over and for this purpose to block in advance all streets joining Rustaveli Avenue. He also ordered to issue a warning on the use of force without giving enough time to demonstrators to leave; to immediately stop the gathering and to disperse the demonstrators."[57] The prosecution maintained that this order was *ultra vires* and, hence, illegal.

On 24 June 2013, the third charge was filed against Ivane Merabishvili in connection with the so-called Girgvliani Murder case. By this time, he had been in custody and therefore, detention as a preventive measure was not applied. In this case, by a judgment of the Section of Criminal Cases of Tbilisi City Court, Ivane Merabishvili was found guilty of abuse of official power and official forgery. These crimes are penalised respectively under Article 332.2, and Article 341 of the Criminal Code. Merabishvili was accordingly sentenced to the deprivation of liberty for three years and was deprived of the right to hold office in civil service for two years and three months.

The Chief Prosecutor's Office accused Ivane Merabishvili of the following: it was ensured as the result of the "acts committed by him, that all individuals involved in the commission of the crime were deliberately not revealed in the case of Sandro Girgvliani and therefore not prosecuted; whereas those convicted were not adequately prosecuted in accordance with law. This resulted in ill-founded and illegal sentencing of the aforementioned persons; inadequate execution of the judgment having entailed major breach of legal interests of the state."[58] It is also alleged that together with Davit Akhalaia and other officials, Ivane Merabishvili planned and ensured fabrication of evidence, by staging investigation aimed at obstructing administration of justice in the case concerned.

On 28 July 2014, further charges were brought in connection with the cases of raiding Imedi TV on 7 November 2007 and criminal misappropriation of the property owned by Arkadi Patarkatsishvili. In these proceedings, the Prosecutor's Office did not motion before a court for the application of detention as a preventive measure.

According to the resolution of indictment, within the special deliberations presided over by Ivane Merabishvili, it was decided to prepare the list of those participating in protest demonstrations for the purposes of physical retribution. It was also decided at these deliberations to intimidate those businessmen who supported the opposition. The prosecution maintains that it was based on the instructions issued by Ivane Merabishvili at this meeting that the demonstration of 7 November 2007 was dispersed.

The prosecution further maintains that Ivane Merabishvili was involved in raiding Imedi TV and in the misappropriation of the property owned by Arkadi Patarkatsishvili in the

[57]Resolution of indictment of 28 May 2013, criminal case no. 074270513801, Tbilisi, p. 2.
Resolution of indictment of 24 June 2013, criminal case no. 074261112802, Tbilisi, p. 3.

following way: "in order to allegedly create a legal basis for the raid on Imedi TV, Ivane Merabishvili and Zurab Adeishvili exerted pressure on the Head of the National Commission of Communications of Georgia and had Imedi TV's broadcasting licence terminated in gross violation of the Law of Georgia on Broadcasting."[59]

Charges in relation to the Gelashvili case were brought against Ivane Merabishvili on 5 August 2014.

According to the resolution of indictment, after Irakli Oqruashvili turned down Mikheil Saakashvili, the latter instructed Ivane Merabishvili, the then Interior Minister, to have Valeri Gelashvili physically assaulted. Merabishvili ensured Saakashvili's orders were followed by conspiring with Erekle Kodua, the then Director of Special Operative Department, who was a subordinate to the Interior Minister. One of the witnesses featuring in this case is Irakli Oqruashvili.

When discussing the criminal proceedings conducted against Ivane Merabishvili, first and foremost the following factors should be taken into consideration: Merabishvili is the Secretary General of the United National Movement – the main opposition party in Georgia. Ivane Merabishvili was one of the first personalities from the previous government that the new government targeted, actively investigated and detained based on unsubstantiated decisions.

Apart from the above-mentioned, Ivane Merabishvili was allegedly subjected to pressure exerted by the Chief Prosecutor of Georgia, Otar Partskhaladze, and this incident was not investigated by the competent authorities. Furthermore, additional question marks punctuate the selection of judges examining the cases against Merabishvili as well as the ulterior intentions of the prosecution and judicial authorities.

As regards the breach of presumption of innocence by the representatives of the executive, the comments made by the present Prime Minister, Irakli Gharibashvili, are noteworthy. In particular, he stated that the order about "two corpses" issued by Mr Merabishvili, that was video recorded, entailed one death and grave wounds inflicted on another person.[60] In this way, Merabishvili was tied to this crime. Therefore, the criminal cases against Ivane Merabishvili are noteworthy not only from legal perspective.

3.1 Problems related to Ivane Merabishvili's detention

By a decision of Kutaisi City Court of 22 May 2013, Ivane Merabishvili was remanded in custody in relation to the so-called Country-house and Social Workers criminal cases. The relevant part of the said decision reads as follows:

"Despite the fact that the accused appeared before the investigation authorities when summoned as a witness, it is reasonably expected that having given the status of an accused and realised the possible heavy ramifications of numerous grave crimes imputed

[59]The Prosecutor's Office indicted Mikheil Saakashvili and several former senior officials, 28 July, at http://pog.gov.ge/geo/news?info_id=518 [Last visited 01.02.2015].
[60]Prime Minister Gharibashvili openly discusses the former President, justice, prisons and foreign partners, at www.agenda.ge, 12 February 2014.

to him, he may leave the territory of Georgia. The risk of absconding is also consolidated by the sentence involving the deprivation of liberty from seven to eleven years for the imputed grave or especially grave crimes."[61]

Sub-paragraphs (a) to (f) of Article 5.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention") contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. However, sub-paragraphs (a) to (f) amount to an exhaustive list of exceptions and only a narrow interpretation of these exceptions is compatible with the aims of Article 5.[62]

Under the established case-law of the European Court of Human Rights, the presumption is in favour of releasing the accused. Until conviction, an accused must be presumed innocent. One of the main purposes of Article 5.3 of the European Convention is that the pre-trial detention of an accused person should not exceed a reasonable time. To this end, the national authorities must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, the departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. These arguments must not be "general and abstract" and must be convincingly demonstrated in the decisions. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient," the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings.[63]

In the case of *Aleksandr Makarov v. Russia*, the domestic authorities assessed the applicant's potential to abscond by referring to the fact that he had been charged with serious criminal offences, thus facing a severe sentence; in a number of detention orders the domestic courts cited the likelihood that the applicant would re-offend as an additional ground that justified his continued detention; it was also maintained that the applicant was liable to pervert the course of justice. The Court has numerously reiterated in its case-law that the severe sentence taken alone does not justify continued detention.[64]

Furthermore, domestic authorities are obliged to prove the existence of concrete facts outweighing the rule of respect for individual liberty and justifying continued detention.

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[61] Decision of Kutaisi City Court on the first appearance of the accused before the Court and application of a preventive measure, 22 May 2013, case no. 10/A-104; no. 10/A-105, Kutaisi, p. 4.

[62] *A and others v. the United Kingdom*, application no. 3455/05, judgment of the European Court of Human Rights of 19 February 2009, para. 171.

[63] *Labita v. Italy*, application no. 26772/95, judgment of the Grand Chamber of the European Court of Human Rights of 6 April 2000, para. 153.

[64] *Panchenko v. Russia*, application no 45100/98, judgment of the European Court of Human Rights of 8 February 2005, para. 102; *Goral v. Poland*, application no. 38654/97, judgment of the European Court of Human Rights of 30 October 2003, para. 68.

The shift of this burden to the defence runs counter to the rule of Article 5 of the Convention.[65]

The first instance court took into consideration the fact that Merabishvili occupied a high ranking position, and arrived at the conclusion that there was a risk of witness intimidation. However, unlike the case of Tchiaberashvili, Kutaisi Trial and Appeal Courts did not discuss in their decisions Ivane Merabishvili's past behaviour and family situation. As mentioned above, under the case-law of the European Court of Human Rights, the national authorities are under obligation to take into account the accused's personal circumstances and demonstrate the particular reasons that are substantiated by evidence and thus justify continued detention.[66]

Furthermore, the trial court did not discuss the violations of the procedural legislation that could have taken place during Merabishvili's arrest. He was arrested without a court warrant and at the same time there was no urgency justifying his arrest as an exception from the general rule of arresting a person on the basis of a court decision.[67]

Merabishvili was not released from custody after the termination of investigation despite the motions filed with the court by the defence at the pre-trial and trial stages. It is also noteworthy that when reasoning on the application of a preventive measure, the Kutaisi City Court judge relied on the fact that Merabishvili attempted to suborn a witness and pointed out this in a court decision. The defence considers this statement to be in violation of presumption of innocence as suborning a witness is a *corpus delicti* under the Criminal Code of Georgia and the judge deemed this crime had been committed by the accused.

It is noteworthy that the Trial Monitoring Report drafted by OSCE/ODIHR identified, apart from the breach of Merabishvili's right to be presumed innocent, the problem of lack of reasoning in court's judgments.

In particular, the OSCE/ODIHR Trial Monitoring Group identified three main concerns in relation to the reviewed judgements: 1) insufficient or inadequate assessment of evidence; 2) lack of adequate legal analysis; and 3) lack of assessment of factors used to determine sentencing.[68]

3.2 Particular example of selective justice in the so-called 26 May and Social Workers cases

Under the head of 26 May case, the prosecution alleges that "Ivane Merabishvili ordered

[65] *Rokhlina v. Russia*, application no. 54071/00, judgment of the European Court of Human Rights of 7 April 2005, para. 67.
[66] *Sizov v. Russia*, application no. 33123/08, judgment of the European Court of Human Rights of 15 March 2011, para. 53; *Musuc v. Moldova*, application no. 42440/06, judgment of the European Court of Human Rights of 6 November 2007, para. 45.
[67] Article 112.5 of the Criminal Procedure Code of Georgia, Law of Georgia no. 1772, Legislative Herald of Georgia, 22/01/2015.
[68] OSCE/Office for Democratic Institutions and Human Rights, Trial Monitoring Report Georgia, 9 December 2014, Warsaw, para. 223.

the mass arrests of the demonstrators once the demonstration's time was over and for this purpose to block in advance all streets joining Rustaveli Avenue. He also ordered to issue a warning on the use of force without giving enough time to demonstrators to leave; to immediately stop the gathering and to disperse the demonstrators. This order was clearly *ultra vires* and, hence, illegal."[69]

It is to be pointed out that on 22 October 2013, the Office of the Chief Prosecutor of Georgia adopted a resolution on not instituting criminal proceedings against those (Svimon Qarchkhadze and Shalva Janashvili) having initiated and planned the dispersal of the 26 May demonstration.

As regards the so-called Social Workers case, the registration programme of job seekers, approved by a resolution of the Government of Georgia on 5 July 2012, was implemented through LEPL Social Services Agency. The Agency was established based on Article 4 of its Statute approved by Order no. 1190/N of the Minister of Labour, Health Care and Social Security of Georgia on 27 June 2007. On 3 September 2012, Director of LEPL Social Services Agency, Ramaz Sulamanidze, issued an order on employing extra non-permanent staff within the project. Therefore, the perpetrator in this criminal scheme is Ramaz Sulamanidze with regard to whom a resolution on not instituting criminal proceedings was adopted by the Prosecutor's Office.

3.3 Illegal order on the composition of the Investigative Board of Kutaisi Court of Appeals

The President of Kutaisi Court of Appeals examined the appeal lodged with regard to the detention of Ivane Merabishvili and Zurab Tchiaberashvili. It is noteworthy that the issues related to detention are examined by the Investigative Board. In accordance with decision no. 1/133 of the High Council of Justice of Georgia of 1 August 2008, Malkhaz Oqropirashvili was appointed the President of the above Board. At the same time, in accordance with the decision of the High Council of Justice,[70] the Investigative Board of Kutaisi Court of Appeals consists of a judge. The decision of the Investigative Board of Kutaisi Court of Appeals was adopted on 25 May 2013. At that time, the term of office of Malkhaz Oqropirashvili did not expire. It is noteworthy that according to the web page High Council of Justice, he still remains to be the member of the Investigative Board.[71]

Malkhaz Guruli issued an order on 20 May 2013 and defined this following sequence of the judges within the Investigative Board of Kutaisi Court of Appeals: 1) Guruli Malkhaz; and 2) Oqropirashvili Malkhaz.

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[69]Resolution of Indictment of the Chief Prosecutor's Office of 28 May 2013, criminal case no. 0003407391, p. 2.

[70]Article 23.3 of the Organic Law of Georgia on the Courts of General Jurisdiction, Law no. 2257, Legislative Herald of Georgia, 12/12/2014.

[71]http://hcoj.gov.ge/ge/qutaisis-saapelatsio-sasamartlos-sagamodziebo-kolegia [Last visited 21.02.2015].

When issuing the above order, Malkhaz Guruli relied on Article 5[72] and Article 7.2[73] of the Law of Georgia on Distributing Cases in the Courts of General Jurisdiction and Delegating Powers to Other Judges.

Furthermore, Guruli relied on Article 4.1.f) of the Statute on the Rules of District (City), Regional Courts and the High Courts of the Autonomous Republics of Abkhazia and Ajara, approved by Ordinance no. 466 of the President of Georgia on 27 October 2000. The said provisions entitle the President of a Court of Appeals to decide about the distribution of cases among judges. However, it should be pointed out in this context that Article 23.3 of the Organic Law of Georgia on the Courts of General Jurisdiction reads as follows: "the High Council of Justice of Georgia shall define the number of and the composition of the judges within the Chambers and Investigative Boards of a Court of Appeals."

In the light of the above setting of legislative basis, it is unclear on which authority the examination of the merits of the appeal by Malkhaz Guruli was based.

The statement made by Zurab Tchiaberashvili is relevant in this regard. According to him, after 21 May, when he and Vano Merabishvili were detained, there were in total six motions filed by the prosecution. All six motions were assigned to Mr Justice Davit Akhalbedashvili. This was the judge who remanded Ivane Merabishvili in custody and released Tchiaberashvili on bail.[74]

3.4 Regarding the competence of the authority arresting Ivane Merabishvili

There are question marks regarding the competence of the authority that deprived Merabishvili of his liberty. The defence invoked the Law of Georgia on the Prosecutor's Office. The text in force has essentially been redacted, however, in accordance with the wording of Article 2.a) in force until 30 May 2013, the Justice Minister was at the same time a prosecutor. Under Article 8.1c) of the same law, his/her competence included criminal prosecution of a member of the Government of Georgia, as well as an Extraordinary and Plenipotentiary Ambassador and Envoy of Georgia in case of alleged commission of a crime.

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[72]1. With the view of distributing cases among judges, the President of the Court shall determine the sequence of the judges in accordance with the first letter of the surname and in case of coincidence - in accordance with the following letter. In accordance with the sequence, number one is assigned to those two judges, whose surnames start with a letter (in case of coincidence, the second letter is implied) which is higher in the alphabetical order.
2. The sequence of the judges having the same surname shall be determined by the first letters of their first names and by second letters, in case of a coincidence. In case of the same first names, the sequence shall be determined by ballot.

[73]With the view of distributing cases among judges, the respective President of a Court of Appeals and the High Courts of the Autonomous Republics shall determine the sequence of judges in the respective court's chambers and boards.

[74]The defence attorneys of Merabishvili and Tchiaberashvili see the traces of prosecution's pressure in the decisions reached by Kutaisi Court, at http://news.ge/ge/news/story/64920-merabishvilisa-da-chiaberashvilis-advokatebi-qutaisis-sasamartlos-gadatsyvetilebebshi-prokuraturis-zetsolis-kvals-khedaven [Last visited 23.02.2015].

The said provision was differently interpreted by the defence on the one hand and the City and Appeals Courts of Kutaisi on the other hand. Considering that Ivane Merabishvili was arrested by a senior investigator of the investigative unit of the regional Prosecutor's Office of Western Georgia and the resolution of indictment was drafted by a prosecutor of the unit of regional Prosecutor's Office conducting procedural supervision over investigation by interior authorities - the defence maintained that Article 12 of the Criminal Procedure Code was violated (legality and independence of a court).

On the other hand, the decision of Kutaisi City Court reads as follows: "the provision questioned by the defence states clearly and expressly that the Justice Minister conducts criminal prosecution of an incumbent and not a former member of Government. The Court notes that the date of the alleged commission of the crime by the person subjected to prosecution is irrelevant in this case; the starting point, as seen by the court, is that the person subjected to prosecution holds the office referred to in Article 8 of the Law of Georgia on the Prosecutor's Office."

Conversely, it is noteworthy to point out the arguments of the defence, which concern the contradictions and double standards implemented by the Prosecutor's Office when conducting criminal proceedings under Article 332.2 of the Criminal Code of Georgia (abuse of the official power by senior state/political official) and at the same time not applying the provisions of the procedural legislation related to the criminal prosecution of the crimes allegedly committed by this official.

Furthermore, under the present wording of the Law of Georgia on the Prosecutor's Office, the Justice Minister's competence no more includes conducting criminal prosecution of certain persons. This competence is entrusted to the Chief Prosecutor of Georgia.

3.5 Failure to investigate Ivane Merabishvili's alleged removal from the penitentiary institution

On 17 December 2013, at a court hearing, Ivane Merabishvili stated that on the night of 14 December 2013, at approximately 01:30 am, he was taken out of his cell with his head covered with his own coat and was, in his opinion, brought to the Penitentiary Department where he met Chief Prosecutor, Otar Partskhaladze.[75]

The incident has not been investigated so far, except for the internal investigation conducted by the Penitentiary Ministry. According to the information submitted by the Ministry, the incident referred to by Ivane Merabishvili in his statement and comments was not confirmed. The storage capacity of video surveillance in nine prison establishments is noteworthy in this context. The Minister of Penitentiary and Probation, Sozar Subari, initially made a statement that the recordings were stored for ten days. However, according to the Ministry's announcement, the recordings were deleted within 24 hours. This reasonably raises suspicions, all the more so under the circumstances where no investigation has been conducted with regard to an alleged violation. Therefore, we

[75] Merabishvili accuses the Chief Prosecutor in threatening him http://www.civil.ge/geo/article.php?id=27666 [Last visited 20.02.2015].

conclude that there is a violation of state's positive obligations, due to the failure of the competent authorities to adequately investigate the alleged incident related to taking Ivane Merabishvili outside his prison cell.

3.5 Conclusion

In the light of the foregoing, first and foremost, the discriminatory approach taken with regard to Ivane Merabishvili is obvious. Such a differential treatment is reasonably related to his past, as well as present, political status. In this regard, Resolution no. 1900 adopted by the Parliamentary Assembly of the Council of Europe on 3 October 2012 is noteworthy. The resolution deems the following as one of the criterion of a political prisoner:
"if, for political motives, he or she is detained in a discriminatory manner as compared to other persons."[76]

The number of charges brought and the special diligence directed towards ensuring Merabishvili's detention; the incident related to the composition of the Investigative Board; Prime Minister Gharibashvili's statements aimed at raising certain perceptions in the public; as well as pressure exerted by the Chief Prosecutor – all these factors, based on a reasonable assessment, indicate political retribution against Ivane Merabishvili and the misuse of the justice system to this end.

[76]Resolution 1900 (2012), The definition of political prisoner, Parliamentary, Assembly, adopted on 3 October 2012 (33rd sitting), at http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19150&lang=en [Last visited 17.11.2014].

4. Criminal cases against Bachana (Bacho) Akhalaia

Bachana Akhalaia was the Minister of Interior of Georgia from 4 July 2012 until 20 September 2012; Defence Minister from 28 August 2009; Deputy Defence Minister in 2008-2009; and between 2005-2008, Head of Penitentiary Department of the Ministry of Justice of Georgia.

As of 1 February 2015, Bachana Akhalaia has been prosecuted as an accused in connection with one criminal case. He was acquitted in two criminal cases consisting of four episodes. He has been found guilty and sentenced in two criminal cases consisting of three counts.

Bachana Akhalaia was indicted on 8 November 2012 for the first time in relation with the so-called Abesadze and Vaziani cases. In these cases, detention as a preventive measure was applied by the decision of Tbilisi City Court on 9 November 2012. The prosecution alleged that Bachana Akhalaia illegally deprived Abesadze of liberty. It is obvious from the resolution of indictment and Abesadze's testimony that on the evening of 13 September 2011, he was called on his phone by a stranger who verbally assaulted him. Abesadze responded to the verbal assault. Later he was visited by Grigol Bakuradze at his home, who took him to a restaurant where he met Bachana Akhalaia, Giorgi Kalandadze and other persons. It was revealed during the conversation that the person who had called Abesadze on his phone was Kalandadze and for having offended him, Akhalaia and the rest physically and verbally assaulted Abesadze. Later he was ordered to hand over to them the keys to his BMW X6 car. Abesadze himself was forcibly left in one of the apartments in accordance with Akhalaia's instructions. In this illegal deprivation of liberty, the following persons were involved: G. Mkurnalidze, M. Daraselia and G. Kintsurashvili. These persons have initially testified their involvement in detaining Z. Abesadze, however, at a later stage, they changed their testimonies.

As regards the second count of the charges, according to the resolution of indictment, G. Kalandadze, Z. Shamatava and Minister B. Akhalaia verbally and physically assaulted five officers of armed forces in Akhalaia's office.

In this case the charges brought against Bachana Akhalaia were aggravated by the so-called Senaki episode. He was indicted on 12 November 2012 in the latter case in relation to the alleged abuse of official power [crime under Article 332.3c) of the Criminal Code of Georgia]. The events described in the resolution of indictment are as follows:

On the night of 18 February 2012, at approximately 2-3 am, in the briefing room located at the headquarters of the second infantry unit, Bachana Akhalaia verbally assaulted Mamuka Burduladze, Ioseb Zurabishvili, Tengiz Ioseliani and 15 other servicemen of the National Guards Department as they had refused to eat after being offended with the swearing of Colonel Tariel Londaridze during their military training.

Furthermore, B. Akhalaia was indicted for the alleged commission of crimes under Article 25,143.3a), Article 25,143.3c), Article 25, 1441.2b), and Article 25, 1441.2d). These charges were brought under the head of the indictment alleging that Akhalaia conspired to illegally deprive of liberty and torture military servicemen.

By a judgment of the Criminal Section of Tbilisi City Court on 1 August 2013, Bachana Akhalaia was acquitted in all three counts of charges.

Other charges were brought against Bachana Akhalaia on 1 March 2013 with regard to the so-called Prison Riot case. On 2 March 2013, detention as a preventive measure was applied. He was charged for the alleged commission of the crimes under Article 332.3b) and Article 332.3c) of the Criminal Procedure Code, which imply abuse of the official power by a person holding political office, committed with violence and use of weapon, degrading a victim's dignity and entailing a grave violation of the interests of an individual, the society, and the state.

According to the resolution of indictment, between January-February 2006, B. Akhalaia was the Head of Penitentiary Department. He decided to dispel the rumours spread by Georgian media that he would beat and debase prisoners while intoxicated. To this end, he is said to have had a deal with Platon Mamardashvili, a prisoner and a member of the criminal underworld; the latter was to secretly record one of the "watchers" of institution no. 7 of the Penitentiary Department. The recording was to show the conspiracy of prisoners to inflict self-harm. This recording would be disseminated as a proof of the prisoners' conspiracy against Akhalaia. Mamardashvili did not follow the order and as the result, he and several other prisoners were physically and verbally assaulted. Such an abuse of the prominent members of criminal underworld caused protests by the prison population of penitentiary institution no. 7. The waves of protests spread to adjacent institutions no.5 and no. 1 ending up in a massive prison riot. Prosecution alleges that Megis Qardava, Director of penitentiary institution no. 7 and several unidentified persons participated in assaulting prisoners as ordered by B. Akhalaia.

Bachana Akhalaia was found guilty and convicted of the commission of crimes under Article 143^3.2.a), Article 143^3.2.b), Article 143^3.2.d), Article 143^3.2.e), and Article 143^3.2.g) of the Criminal Code of Georgia.

The other charges were introduced on 1 March 2013, in relation to the so-called Rangers case. In this case, the Section of Criminal Cases of Tbilisi City Court applied detention as a preventive measure.

According to the resolution of indictment, on 18 August 2012, when acting as the Minister of Interior, Bachana Akhalaia learned that the following officers of the first unit of the Special Task force of the Ministry of Interior supported the political party Georgian Dream: Teimuraz Palavandishvili, Zaza Pantsqalashvili, Mamuka Zhvania, Davit Bagratishvili, Mikheil Edisherashvili, Samvel Bazoiani and Arsen Mkrtumiani. Bachana Akhalaia decided to punish and subject them to torture, inhuman and degrading treatment on the account of their political views. To this end he conspired to take measures by misusing his official power. Akhalaia ordered to promptly gather the first unit officers and when Zaza Pantsqalashvili showed up, he was debased by Bachana Akhalaia who called him a traitor, and a penguin. On account of his political views, Pantsqalashvili suffered a verbal assault degrading his dignity by Akhalaia.

Thus, the prosecution alleged, Bachana Akhalaia committed crimes under Article 332.3.c), Article 332.3b); Article $25/144^1$.2.d), Article $25/144^1$.2.e), Article $25/144^1$.2.f), Article $25/144^1$.2.b), Article $25/144^1$.2.a) of the Criminal Code of Georgia. However, by a judgment of Tbilisi City Court, he was acquitted on 31 October 2013.

On 25 October 2013, other charges were brought against Bachana Akhalaia in relation with the so-called Girgvliani case. Detention was applied in this case on 26 October 2013

and other charges were additionally filed on 22 March 2014 regarding the so-called Navtlughi Special Operation case.

The prosecution alleges that in the beginning of January 2006, Bachana Akhalaia (acting as the Head of the Penitentiary Department) received information about prisoners' possible break from institution no. 1. In order to establish a sense of fear among the prisoners and to enhance the official authority and power of the Akhalaia brothers, Bachana Akhalaia exceeded his official power and did not institute an investigation. He planned, conspired and executed the special operation Navtlughi in the area adjacent to Navtlughi parking lot where the following persons were executed: Shota (Murad) Gorgadze, brother of Gia Gorgadze, prisoner of institution no. 1; Shota (Murad) Gorgadze's friends: Roman Surmanidze and Marad Artmelidze. These persons were accused of planning an armed attack on institution no. 1 to arrange for a massive escape of prisoners.

According to the resolution of the indictment, in order to justify this crime committed in collusion with Davit Akhalaia, it was decided to obtain confessions from prisoners of institution no. 1. It is said that Bachana Akhalaia, together with Megis Qardava, started to beat Gia Gorgadze, Davit Leqvetadze, Valerian Papava, Mikheil Mandaria, Mamuka Betchvaia, and Berdia Meskhi in the yard of institution no. 1. Those already on the ground were beaten with the butts of guns. The prisoners were ordered to strip down and get in a guard's vehicle. They were made to leave the institution's territory. The naked prisoners were ordered to get out, to lie in the snow and mud. Following the orders of Bachana Akhalaia, armed members of the special task force continued to severely beat and torture the prisoners lying on the ground. Later Bachana Akhalaia ordered to transfer the said prisoners to the stricter regime institution no. 7 where they continued to be subjected to cruel beating and torture in order to make them to confess to when, where and with whom they planned to escape. Betchvaia and Meskhi were additionally ordered to confess that they were members of the criminal underworld.

As regards the so-called Girgvliani case, the prosecution alleges that the persons convicted in the murder of Girgvliani (Alania, Ghatchava, Bibiluridze and Aptsiauri) did not reveal the involvement of the then Director of Constitutional Security Department of the Ministry of Interior, Davit Akhalaia. In return of this favour the convicted persons had had the promise from Akhalaia that they would be treated favourably when serving their sentence in prison. This was to be ensured by the active involvement and help of the then Director of the Penitentiary Department, Bachana Akhalaia.

According to the resolution of the indictment, after Bachana Akhalaia did not follow up the incident involving four prisoners illegally leaving the prison after he learned about it; accordingly, he abused the public authorities delegated to him by the state.

By its judgment of 22 October 2014, Tbilisi City Court found Bachana Akhalaia guilty of the crimes under Article 144^1.2a), Article 144^1.2d), Article 144^1.2e), and Article 144^1.2g), and Article 332.1 of the Criminal Code of Georgia (wording in force by 31 May 2006).

Bachana Akhalaia was charged with the so-called Tetradze case on 2 July 2014; detention as a preventive measure was applied in this case on 5 July 2014.

The prosecution alleges under this head of indictment that in September 2011, in the building of Military Police Department, Bachana Akhalaia, Megis Qardava, Alexander Mukhadze and several officers of the Military Police Department, in order to get confessions in the commission of espionage, continuously beat and debased for four-five hours Lieutenant Colonel Davit Londaridze, Officer of the Defence Ministry of Georgia; Reserve Colonel Sergo Tetradze; and citizens Sergei Chapligin and Giorgi Gorelashvili.

Bachana Akhalaia threatened Lieutenant Colonel Davit Londaridze that he would kill him unless the latter confessed to the commission of the crime. It is alleged that Akhalaia physically assaulted and swore at him. After Sergo Tetradze refused to confess to the crime pinned on him, Bachana Akhalaia and Deputy Head of Military Police Department, Megis Qardava conspired to inflict further torture and sexual assault.

Bachana Akhalaia is charged with Article 144[1].2; Article 25,138.3, Article 332.1, and Article 332.2 of the Criminal Code of Georgia.

Bachana Akhalaia was one of the first former high-ranking officials that were prosecuted by the new government. It is noteworthy that in one of the cases, the investigation started on 5 November 2012. By 6 November 2012, Bachana Akhalaia was already arrested. The keen interest of the authorities to keep him in custody is confirmed not only by the number of the charges brought against him but also by the intervals between the indictments.

The attempt of prosecution authorities to delay the proceedings is especially striking. The cases against Bachana Akhalaia are also noteworthy in that he was acquitted in most of the charges. During criminal proceedings pending before a court, there were statements concerning coercion exerted on witnesses by the prosecution. The case of Shalva Tatukhashvili is related to the cases against Bachana Akhalaia as well.

The keen interest of the new government in the cases against Bachana Akhalaia and their attempts to create certain perceptions in the public are obvious due to the statements made by Thea Tsulukiani and Gia Khukhashvili. The latter, in particular, referred to Bachana Akhalaia as guilty.

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Together with Bachana Akhalaia, the following were indicted under various articles of the Criminal Code of Georgia in relation to various criminal cases: Giorgi Kalandadze, Merab Kikabidze, Gaga Mkurnalidze, Giorgi Kintsurashvili, Manuchar Daraselia, Zurab Shamatava and Alexander Gorgadze. At the same time, Gaga Mkurnalidze, Giorgi Kintsurashvili and Manuchar Daraselia were the main witnesses in Abesadze case. They were indicted after they had changed their testimonies and stated that they were coerced into giving testimonies against Bachana Akhalaia. Mkurnalidze confirmed at a court hearing the fact that prosecution had been pressuring him. Mkurnalidze changed his testimony deposited during investigation and denied any guilt on Akhalaia's part in the crimes he was charged with. Furthermore, G. Kintsurashvili and M. Daraselia spread a video recording where they alleged that the prosecution pressured them to give testimonies against B. Akhalaia. As already mentioned, they were witnesses for prosecution in Abesadze case and despite the fact that their testimonies contained

incriminating information right from the beginning; they were only indicted after making the statements above.

There is a reasonable suspicion that at this stage of the proceedings the prosecution did not have tangible evidence against Bachana Akhalaia and by resorting to witness intimidation and pressure they endeavoured to gather testimonies against B. Akhalaia. This was the issue that has been addressed by Mkurnalidze, Kintsurashvili and Daraselia after they altered their testimonies. Despite these allegations, the competent authorities never launched any investigation into the allegations of attempts at forced confession; instead criminal proceedings were instituted against these very persons who made the allegations.

By a judgment of Tbilisi City Court of 1 August 2013, Akhalaia was acquitted from the Abesadze case. The court pointed out incomplete investigation and lack of evidence as the reasons for the acquittal. The court noted that the investigation was incomprehensive as not all of the factual circumstances had been established. The only direct evidence the prosecution relied on was a victim's testimony and even this was not compatible with other evidence.

It is also noteworthy that the court found the circumstances alleged in the resolution of indictment in connection with the Senaki case were totally unsubstantiated and not corroborated by evidence. The prosecution alleged that Bachana Akhalaia committed illegal deprivation of liberty and conspired to torture. However, the court opined that the words "take him and rest him," no matter how cynically uttered, would not amount to ordering deprivation of liberty, moreover, to torture. Furthermore, Bachana Akhalaia was indicted as the conspirator whereas the prosecution failed to identify the perpetrators.

With regard to the so-called Vaziani case, the court stated in its judgment: "the court deems that the accused G. Kalandadze and B. Akhalaia must be acquitted in the charges brought with regard to the crimes under Article 333.3), and Article 333.3c) of the Criminal Code of Georgia (under the head of the fourth brigade of Vaziani) given that their connection to the incident itself could not be established. Therefore, the Court does not pronounce itself on the guilt of the accused under this head."[77]

The court did not uphold the testimonies of the victims as there was no direct evidence corroborating their allegations.

The above-mentioned assessment gives rise to a reasonable suspicion that a deliberately unsubstantiated criminal prosecution is being conducted against Bachana Akhalaia. The rationale of the judicial authorities is that only a court is entitled to establish the guilt and either convict or acquit a convict. The acquittal itself does not necessarily mean that the prosecution was biased and intended to deliberately discredit a person through subjecting him or her to criminal prosecution. However, we believe, in the given case, at the time when the political confrontation between the previous and present government was at its height, the prosecution deliberately instituted criminal proceedings against a former high-ranking official of the previous government; the charges brought were so unsubstantiated that the perception of political motives behind the criminal proceedings against Bachana

[77]Judgment of the Section of Criminal Cases of Tbilisi City Court of 1 August 2013, criminal case no. 074061112803.

Akhalaia is obvious. It is noteworthy that the court did not even deem it necessary to pronounce itself on some of the charges as there was no single evidence corroborating the guilt. In other cases, the alleged act did not even constitute a crime under the Criminal Code of Georgia.

The Court of Appeals examined the prosecution's appeal in these cases and by a judgment of 4 December 2013, upheld the first instance court's sentence with regard to Bachana Akhalaia. The Court of Cassation also upheld the judgment of the lower instances with regard to Bachana Akhalaia.

4.1 Problems related to the application of a preventive measure in the so-called Prison Riot case

The lack of reasoning in a decision of Tbilisi City Court rendered on 2 March 2013 is particularly noteworthy. Bachana Akhalaia was remanded in custody in the so-called Prison Riot case.

The fact is Bachana Akhalaia had already been remanded in the Abesadze, Senaki, and Vaziani cases discussed above. However, the court deemed it necessary to apply detention all the same.

The argument submitted by the prosecution in favour of the application of detention as a preventive measure reads as follows: "in order to prevent the accused from absconding and interfering with the administration of justice, avoiding potential sentence, and obstructing collection of evidence; if released, the accused may suborn witnesses. Stemming from the above-mentioned there is an actual risk of re-offending; the accused has adequate contacts to misuse his being free for gaining favourable outcomes; he enjoys favourable financial situation which can be misused by him."[78] This argument was fully shared by the court.

The court opined: "...there is a substantiated threat that due to the potential severe sentence, the accused may abscond. [...] The accused has a wide circle of acquaintances and enjoys a favourable financial situation. At the same time, it is expected that Akhalaia will hide from justice due to his fears of potential punishment. " [79]

It is obvious from the above excerpt from the decision that the court did not actually have evidence corroborating the necessity for the application of detention as a preventive measure. The European Court of Human Rights has held on numerous occasions that it is impermissible to justify detention based on abstract references to statutory provisions. The national authorities have to demonstrate genuine public need by referring to actual facts.

Furthermore, the following part of the decision is noteworthy: "the court notes that while the accused is remanded in another criminal case pending, he has again been indicted on

[78]Decision of the Section of Tbilisi City Court of 2 March 2013 on the first appearance of the accused and application of a preventive measure, p. 2.
[79]*Ibid.*, p. 4.

the grave charges in this case; there is a possibility that the accused is left without any preventive measure in the other proceedings due to pre-trial or trial outcomes (discontinuation of criminal proceedings or acquittal); whereas in the present case there are grounds present that necessitate the application of a preventive measure. The prosecution's motion, therefore, shall be upheld."[80]

The court virtually stated that despite the fact there were no grounds for the application of detention at the moment (due to the fact that the accused was detained), detention had to be applied all the same in order to avert the risk of releasing Akhalaia from custody. The rationale of a preventive measure is exactly to avert future risks. However, the legitimate interest protected by the court system when applying detention must be facing certain threat at the given moment. A court in such occasions must seek to further avert these risks. Furthermore, the criminal procedural legislation, namely, Article 206.8 of the Criminal Procedure Code entitles a party to apply to a magistrate judge any time there is a new circumstance and request alteration or discontinuation of the preventive measure. It is completely unsubstantiated to discuss the future threat of Akhalaia's release as this fact could have been seen as a new circumstance by the prosecution to motion the alteration of a preventive measure.

4.2 Delaying court proceedings

Trial Monitoring Report prepared by OSCE/ODIHR identified several occasions where the court hearings of Bachana Akhalaia's cases were adjourned due to the failure of the prosecution to appear. According to the report, on several occasions prosecutors failed to appear, resulting in adjournments. An explanation for the absence was rarely publicly announced in advance, or at the time of the hearing. In the weeks leading up to the 27 October 2013 presidential elections, prosecutors in three cases were unavailable to try their cases. 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 after ten days, upon her requested, she was given additional time to prepare. She later moved to recuse herself by citing "psychological pressure," due to her alleged personal connections with the wife of one of the defendants. The replacement prosecutor was allowed a further ten days to prepare. 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.[81]

4.3 Tbilisi City Court's judgment in the so-called Prison Riot case

In its judgment of 28 September 2013, Tbilisi City Court dropped the charges filed against Bachana Akhalaia in connection with the crimes under Article 332.3b) and Article

[80] *Ibid.*, p.5.

[81] OSCE/Office for Democratic Institutions and Human Rights, Trial Monitoring Report Georgia, 9 December 2014, Warsaw, para. 187.

332.3c) of the Criminal Code of Georgia. In the same judgment, the court re-qualified the acts committed by Akhalaia and his co-accused and found them guilty of the crime under Article 143³.2a), Article 143³.2b), Article 143³.2d), Article 143³.2e), Article 143³.g) of the Criminal Code of Georgia (inhuman and degrading treatment of two or more vulnerable persons by a civil servant or a person with the same status committed by a group). Bachana Akhalaia was sentenced to deprivation of liberty for three years and nine months, and fined GEL 4,000.

On 3 November 2013, the President of Georgia pardoned Bachana Akhalaia by his resolution no. 03/11/01. He was exempted to serve the main and supplementary punishments imposed under Article 143³.2a), Article 143³.2b), Article 143³.2d), Article 143³.2e), Article 143³.g) of the Criminal Code of Georgia. His criminal records were purged.

The Court of Appeals upheld the judgment of the first instance court.

The Court of Cassation examined the prosecution's appeal and rejected it on 29 July 2014. The Chamber of the Supreme Court of Georgia upheld the judgment of the Court of Appeals of 14 February 2014 and noted that it was impermissible to base conviction on a victim's testimony only. The Court observed that the prosecution failed to submit any evidence that would corroborate the charges in conformity with the victim's testimony.

4.4 Tbilisi City Court's judgment in the so-called Navtlughi Special Operation case and witness intimidation

By a judgment of Tbilisi City Court of 22 October 2014, Bachana Akhalaia was found guilty of Article 144¹.2b), Article 144¹.2d), Article 144¹.2e), Article 144¹.2f), and Article 332.1 of the Criminal Code of Georgia (wording in force until 31 May 2006). He was sentenced to the deprivation of liberty for seven years and six months; he was deprived of the right to hold a public office for three years.

According to the judgment, "despite certain inaccuracies in the testimonies […] the victims and the witnessing prison staff unanimously confirm the violence they had been subjected to and directly identify the perpetrators."[82] However, the testimonies referred to in the judgment also indicate the existence of pressure on the part of the prosecution. Namely, the testimonies were given by Zurab Soselia, Giorgi Samushia, Ruslan Shamakhia, Zviad Gagua, Joni Ivanishvili, Davit Vekua, Gaga Mkurnalidze, Imeda Berianashvili, Nodar Japaridze, Davit Chaginava, Guram Tchitanava, Koba Todua, Paata Qiria, Bulia Tchitanava, Zurab Shamatava and Teimuraz Takidze. According to their testimonies, the prosecution threatened them with arrest/aggravating charges if they refused to testify against Bachana Akhalaia. Joni Ivanishvili, for instance, stated that "he was summoned for questioning as a witness, where he was told he had to testify against Gaga Mkurnalidze and Bachana Akhalaia and he had to testify exactly what they needed, in return of which he would find himself in a more favourable situation than others. He declined the offer as he could not describe the facts that had not taken place. Having

[82]Judgment of the Section of Criminal Cases of Tbilisi City Court of 22 October 2014, criminal case no. 1/3137-14, p. 96.

heard this, the prosecutor got angry and told him that he would write whatever he was ordered to, otherwise he had only himself to blame. He was arrested in a few months. " [83] Furthermore, "[the prosecutor] later offered him to testify as if prisoners were beaten after they were taken outside; this would give him a chance to be released. After he refused again, the prosecutor told him that his wife and child, who are waiting for him outside, would not see him for a long time as his torture charges would be further aggravated. " [84]

The case of one of the persons, Giorgi Gorgadze, who was acknowledged as a victim in the proceedings is noteworthy. According to the testimony given by Nodar Japaridze, Gia Gorgadze went to the NGO "Freedom Supporting Centre" as he wanted to say "the truth about the pressure he was under".[85] It was planned to hold a press-conference "when he was abducted by the officials of the Prosecutor's Office, with the incident being recorded by TV journalists."[86] Gia Gorgadze went to the NGO again after the incident and confirmed that he was under pressure and that he was taken to the Prosecutor's Office from the TV station. He asked Ani Nadareishvili to give him money so that he could leave the country and tell everyone the truth from there as "he was scared to do so in Georgia".[87] This incident was denied by Gorgadze at the court hearing; however, he stated that no one from the Akhalaias had ever threatened him.

Shalva Tatukhashvili was also presumably abducted. He was the former Deputy Head of the Active Measures Unit of the Constitutional Security Department of the Ministry of Interior. His cousin, Ketevan Kobiashvili, maintains that after a 12-hour questioning in the Prosecutor's Office on 24 February 2014, "Shalva Tatukhashvili was forced into a car and taken to an unknown place."[88]

The whereabouts of Tatukhashvili was only known to the family members on 18 March. He told his family and lawyer that he was threatened by life imprisonment and murder of his child. He also stated "Dznelashvili (prosecutor) was watching over me with a weapon as this recording was made."[89] The video was aired on TV showing Tatukhashvili denying that prosecution subjected him to any pressure. He was also made to say he that he received threats from the Akhalaias. The information about the death of Tatukhashvili was known on 24 March 2014.

It is noteworthy that the so-called Navtlughi Special Operation case involves six prisoners serving their sentences at Rustavi institution no. 1. One of the prisoners indicated in the court's judgment was actually serving sentence in Geguti institution no. 8 and not at Rustavi institution no. 1. This factor, naturally, undermines the credibility of the prosecution's allegations and later the court's judgment convicting Bachana Akhalaia.

[83] *Ibid.,* pp. 68-69.
[84] *Idem.*.
[85] *Ibid.*, p. 71.
[86] *Ibid.*,
[87] *Ibid.*,
[88] *Ibid.*, p. 77.
[89] *Ibid.,* p. 78.

Furthermore, one of the witnesses whose testimony was used by the court as the basis for conviction indicated that "he has heard on many occasions of the false accusations against Bachana Akhalaia." [90]

The court did not take into account the above facts as they "were not in compliance with the testimonies of the victims and … other witnesses and written evidence."[91]

It is noteworthy that in the judgment that found Bachana Akhalaia guilty, the judge referred to the European Court of Human Rights case *Aksoy v. Turkey*. The applicant in this case was detained for 14 days and subjected by the police to a form of torture known as "Palestinian hanging". The applicant lost the use of his arms and hands as a result. This treatment was qualified by the European Court as inhuman and degrading treatment and not as torture; whereas the court in Bachana Akhalaia's case qualified stripping prisoners naked and their beating as torture. Moreover, the Court gave the following reasoning in the judgment:

"[...] the acts of various persons involved in torture may not amount to torture when taken alone; those involved in such behaviour may not individually consider their individual actions to be torture. However, in this assessment the very perception of a victim is decisive, taking in entirety all the actions he or she is subjected to. Therefore, it is the victim that mentally registers the reality as very severe physical or mental suffering." [92]

Such reasoning runs counter to the principle of individual responsibility which implies establishment of intent on the part of a particular person. Moreover, this act was categorised as torture which necessitates reaching the highest minimum threshold of severity. This was not qualified even as a degrading or inhuman treatment.

The criminal past of the persons recognised as victims in the Navtlughi case is noteworthy. *Gia Giorgadze himself is convicted in theft and attempted theft and he twice attempted to escape from prison. Davit Leqvetadze was convicted four times for armed robbery committed by a group, convicted five times for storage, acquiring, and carrying arms illegally; convicted once of forcibly taking a vehicle; convicted once for theft and twice for acquiring drugs.*

As mentioned above, Mikheil Mandaria was not at all present at the time of torturing prisoners in Rustavi institution no. 1. *He was twice convicted for threatening to commit armed robbery, once convicted for deprivation of liberty and on one count of theft. Berdia Meskhi was convicted on one count of armed robbery and two counts of theft. Mamuka Betchvaia's criminal past includes: one conviction for armed robbery; two convictions for acquisition and storage of drugs; and one conviction for theft.* Valeri Papava was convicted for armed robbery. Even the trial judge questioned the credibility of their testimonies when it was stated regarding Davit Leqvetadze that he tended to change his

[90]Sergi Khulordava's testimony, judgment of the Section of Criminal Cases of Tbilisi City Court of 22 October 2014, criminal case no. 1/3137-14, p. 33.
[91]*Ibid*., p. 91.
[92]Judgment of the Section of Criminal Cases of Tbilisi City Court of 22 October 2014, criminal case no. 1/3137-14, p. 95.

testimonies. Moreover, it is rather suspicious that the Amnesty Act applied to all six prisoners and despite their multiple sentences they were released.

The case of Mamuka Betchvaia stands out from the cases of other prisoners. Mamuka Betchvaia committed an armed robbery after he was released from the penitentiary establishment as the result of the Amnesty Act. However, despite his criminal past, the authorities concluded a plea bargain with him.

4.5 Selective justice against Bachana Akhalaia

The following example of selective justice is noteworthy in the so-called Girgvliani case; Temur Tabaghua, the then Director of Penitentiary Department's no.10 institution, who "followed Bachana Akhalaia's instructions and orders to the letter" concerning providing certain privileges to certain prisoners (including illegal removal of one of the prisoners – Geronti Alania from the prison; and giving instructions to the unit's heads and deputy heads to facilitate the privileges) was afforded plea bargain. Whereas, other conspirators still carry on with their official duties.

4.6 Application of detention as a preventive measure in the so-called Rangers case

The judge remanding Bachana Akhalaia in custody referred to the following grounds in the decision: the gravity and category of charges filed; the presumption that the accused would prevent from obtaining important information in the proceedings; the contents and nature of the charges; the connections of the accused and his influence over his former subordinates; moreover, according to the court's reasoning, "despite the fact that Bachana Akhalaia is remanded in custody involving another criminal case, the following factual circumstances are noteworthy: the final judgment in the other criminal proceedings has yet to be taken, which, stemming from legal likelihood and theoretical possibilities, may entail the acquittal of the accused or the alteration of the preventive measure applied against him, which is detention..." [93]

Thus, in the above case, detention as a preventive measure was justified by reference to the legal likelihood and theory. Other factors such as the use of connections, obstruction, etc., were not corroborated by the judge with any form of reference to concrete examples which would substantiate the presumption of pressure and obstruction.

Under such circumstances, the application of detention defies the purpose of a preventive measure as Bachana Akhalaia was already in custody in another criminal proceedings and the lack of reasoning violates the relevant standards of the established case-law of the European Court of Human Rights.

4.7 Tbilisi City Court's judgment in the so-called Rangers case

[93]Judgment of the Section of Criminal Cases of Tbilisi City Court of 2 March 2013, case no. 1/953-13, p. 3.

Tbilisi City Court found that the evidence adduced by the prosecution was inconsistent and irrelevant. Accordingly, not only it was impossible to corroborate the charges filed against particular accused persons, it was even impossible to establish the alleged crimes beyond a reasonable doubt.

The Court found the prosecution's allegations to be groundless and unsubstantiated in relation to the charges brought under Article 332.3.b), and Article 332.3.c) of the Criminal Code of Georgia; in the court's view, the prosecution failed to prove who benefited in what manner from Bachana Akhalaia's actions. Moreover, the acts performed by the Minister of Interior are expressly defined by the statute of the Ministry approved by Ordinance no. 614 issued by the President of Georgia on 27 December 2004.

The court found that the evidence adduced before it did not corroborate the commission of the following alleged crimes: Article 25/144[1]2.d), Article 25/144[1]2.e), Article 25/144[1]2.f), Article 25/144[1]2.b), and Article 25/144[1]2.a); Article 25/144[3]2.d), Article 25/144[3]2.e), Article 25/144[3]2.f), Article 25/144[3]2.b) and Article 25/144[3]2.a) of the Criminal Code of Georgia. The court noted that not a single victim or a witness testified before the court that their torture, inhuman and degrading treatment was planned by Bachana Akhalaia.[94] In the court's view, the victims themselves excluded the motive of political retribution; similarly the witnesses did not support the allegations that their punishment was planned by Bachana Akhalaia.

The court deemed the statements of the victims and witnesses of prosecutions were unconvincing and conflicting. While enumerating the weaknesses in the charges, the court noted that "one of the witnesses, Simon Qarchaidze, had testified that he knew well all the victims, however, when naming them he tried to read their surnames out from a "cheat sheet".[95] Furthermore, some of the victims and witnesses could not identify the accused persons. The court also pointed out that the prosecution had attempted to misguide the court by stating that the victims went to Antalya one month after the completion of the rangers' programme and therefore the injuries were not to be seen in the photos; at the same time the prosecution showed the photos taken after one week the alleged crime was committed.

The court also pointed out in its judgment that the prosecution had pressured the witnesses. For example, Aleksi Gulisashvili was taken to Tskneti Road by force and was told "he would be reminded what to recall at the hearing; he was left alone in the woods, and his mobile was turned off and thrown away." [96]

As the result, the first instance court found Bachana Akhalaia not guilty of the acts imputed under Article 332.3.c), Article 332.3.b); Article 25/144[1]2.d), Article 25/144[1]2.e), Article 25/144[1]2.f), Article 25/144[1]2.b), and Article 25/144[1]2.a); Article 25/144[3]2.d),

[94]Judgment of the Section of Criminal Cases of Tbilisi City Court of 31 October 2013, case no. 1/953-13, p. 140.
[95]*Ibid.*, p. 136.
[96]Judgment of the Section of Criminal Cases of Tbilisi City Court of 31 October 2013, case no. 1/953-13, p. 144.

Article 25/144³2.e), Article 25/144³2.b), and Article 25/144³2.a) of the Criminal Code of Georgia. This judgment was upheld by the Court of Appeals and the Court of Cassation.

The opinions expressed by the Court of Appeals about the prosecution's allegations of conspiracy are noteworthy. The court noted that "usually he [conspirator] is to be denounced as a perpetrator by those person(s) who were given the instructions by the conspirator"…[97] Accordingly it is very hard to establish the guilt of the conspirator. In the present case, in the opinion of the Court of Appeals, considering the witnesses' testimonies, the position taken by the prosecution was only based on the general assumptions of the prosecutor regarding the guilt of Bachana Akhalaia. Therefore, this position lacks legal standing; the prosecution tried to tie Bachana Akhalaia to the imputed acts on the account of his words: "Done, everything is over, act as agreed"; "return everyone to the starting point and act as agreed."[98]

4.8 Incidents delaying proceedings

The criminal proceedings against Bachana Akhalaia were delayed on a regular basis. For example, in the so-called Vaziani episode, Bachana Akhalaia was arrested on 6 November 2012; on the ground of the necessity to conduct investigative actions, court hearings were postponed for two months. Accordingly, the trial started in the beginning of March, 2013. With regard to the so-called Rangers episode, court trial ended on 12 August but the judgment was only read out on 31 October, approximately three months later. The delay was also a problem in the criminal proceedings conducted in the so-called Prison Riot case. The major reason for delay was the frequent change of the prosecution's composition and, accordingly, their motions for additional time to be allowed for the study of the case file. In the latter case, the record of indictment is dated 1 March 2013 (similar to the record of indictment in the so-called Seven Rangers case) and the first instance court's judgment was read out only on 28 October 2013.

It is noteworthy that in the so-called Navtlughi Special Operation case, Tbilisi City Court remanded Bachana Akhalaia to custody on 26 October 2013. Accordingly, the nine-month term of detention was to expire on 26 July 2014. In order to keep Bachana Akhalaia in continued detention, on 3 July 2014, the prosecution brought new charges in connection with the so-called Tetradze case. One of the co-accused, Megis Qardava, was acquitted in the so-called Navtlughi Special Operation episode. The judgment was read out on 27 January 2014, whereas the judgment concerning Bachana Akhalaia was delivered by the first instance court on 22 October 2014.

[97] *Ibid.*, p. 128.
[98] *Ibid.*, p. 130.

As regards the so-called Prison Riot case, the assigned prosecutor did not appear before the court citing a health issue. The prosecutor was reported to have been seen in a street on the same day without any obvious health problems and he was therefore fined GEL 300 by the court.

4.9 Judges examining cases against Bachana Akhalaia

The composition of Tbilisi City Court has been changed several times during the examination of Bachana Akhalaia's cases. According to the report prepared by Transparency International – Georgia, the three trial judges appointed to Bacho Akhalaia's trials "were transferred to Tbilisi City Court shortly before the examination began, on the same day, and at the same time.[99] E.g. Mr Justice Besik Bugianishvili was transferred from Tetritskaro District Court for the consideration of the so-called Navtlughi Special Operation case to Tbilisi City Court."

The OSCE/ODIHR monitoring project identified several incidents during the examination of the cases against Bachana Akhalaia, where the accused could not communicate with his lawyers and receive further explanations regarding his rights when giving testimonies.[100] Moreover, the right to remain silent and not to incriminate himself, as well as the right to have his rights explained were violated with respect to Bachana Akhalaia.[101]

At the same time, according to the OSCE/ODIHR monitoring report, when asked about Bachana Akhalaia during an interview, the then Adviser to the Prime Minister, Gia Khukhashvili, was quoted as saying "He must be given his due for his misdeeds and unspeakable offences".[102]

4.10 Conclusion

Stemming from all the above-mentioned, the criminal proceedings against Bachana Akhalaia can be considered as political retribution. The incidents of pressuring witnesses, the attempts of the Prosecutor's Office to delay proceedings, lack of reasoning for the remand detention applied by courts; acquittals reached in numerous cases, etc., indicate the intention of the prosecution to ensure by all means the custody of Bachana Akhalaia instead of the administration of justice. Another argument supporting political retribution is the violation of presumption of innocence by the statements made by Adviser to the

[99]Transparency International Georgia, The Second Trial Monitoring of High-Profile Criminal Cases, Tbilisi, 2014, p. 57.
[100]OSCE/Office for Democratic Institutions and Human Rights, Trial Monitoring Report Georgia, 9 December 2014, Warsaw, para. 131.
[101]*Ibid*., paras. 135, and 171.
[102]Press Digests: Insurmountable Temptation – the Pressure of Power on the Shoulders of 31 year-old Prime Minister Interpressnews (IPN), 4 November 2013.

Prime Minister, Gia Khukhashvili[103], and Minister of Justice, Thea Tsulukiani, against Bachana Akhalaia.[104] Accordingly, the circumstances under paragraphs b), c), d), and d) of the resolution of the Parliamentary Assembly are present.

[103] *Idem.*

[104] Tsulukiani is accused of the violation of presumption of innocence, at http://www.gurianews.com/_/left_wide/13330_66_ka/wulukians_udanaSaulobis_prezumciis_darRvevaSi_adanaSauleben.html, [Last visited 20.01.2015].

5. Criminal Proceedings against Alexander Ninua

Alexander Ninua was the Head of the Procurement Department of the Defence Ministry of Georgia from 22 May 2007 to 4 January 2009. While he was still in remand custody, he was nominated as a candidate for the *Gamgebeli's* position in Tsageri by the United National Movement during the 2014 local self-government elections.

As of 1 February 2015, Alexander Ninua was found guilty in one case. He remains charged with two counts of crimes in another "criminal" case against him.

Alexander Ninua was arrested on 12 December 2013 and remanded in custody on 14 December 2013. Being convicted on 22 May 2014, Ninua was sentenced to three years of imprisonment.

The second charge, related to the embezzlement of movable property owned by Girwood Business Corp and others, and forgery, was filed on 7 May 2014 under Article 182.2a), Article 182.2d) (prior agreement by a group about misappropriation or embezzlement of property using official power), and Article 182.3b) (misappropriation or embezzlement of a large amount of sum) of the Criminal Code of Georgia. On 8 May 2014, Ninua was remanded by Tbilisi City Court.

5.1 Delayed proceedings and selective justice

Alexander Ninua, after being summoned to the Chief Prosecutor's Office as a witness on numerous occasions, made a statement that he had been pressured to give a statement against Davit Kezerashvili.[105] Due to this pressure, he provoked his own arrest. Ninua deliberately dropped his weapon in front of police for which he was sentenced to three years of imprisonment under Article 236.1, and Article 236.2 of the Criminal Code of Georgia. It is, however, interesting that due to the failure of the prosecution to appear before the court, the hearing was postponed six times. Each time, the prosecution motioned for postponement because the prosecutors had been replaced and the newly assigned prosecutors needed time to study the case files. Alexander Ninua was arrested **on 12 December 2013** and he was sentenced on **22 May 2014**. There is a reasonable suspicion that the proceedings were deliberately delayed as the prosecution was preparing a new case against Ninua. New charges were filed against him on 7 May 2014.

Alexander Ninua was a candidate, proposed by the United National Movement, for the position of *Gamgebeli* in Tsageri. Furthermore, in the context of selective justice and delayed criminal proceedings, it is noteworthy that the persons charged with illegal

[105] Alexander Ninua's video address, at https://www.youtube.com/watch?v=-gq2mXkD2BE [Last visited 15.01.2015].

acquisition, storing and carrying of weapons are usually punished with a fine, whereas Ninua was sentenced to three years of imprisonment.

5.2 Unjustified decision on the application of detention as a preventive measure

Under the decision of Tbilisi City Court of 8 May 2014, Alexander Ninua was remanded.
It is noteworthy that the decision on the application of the preventive measure refers to the gravity of the prospective sentence as a ground for remand detention. The decision also refers to the risks of suborning witnesses and obstructing collection of important information during investigative actions. However, there is no reference to particular incidents indicative of such influence or obstruction or even attempts based on which the Court could reasonably believe that such threats existed. Moreover, the judge did not take into account Alexander Ninua's family and financial situation. The decision on remand detention, falling short of the standards of reasoning, is in violation of the case-law of the European Court of Human Rights.

5.3 Violation of the principle of equality of arms

In the context of embezzlement and forgery, Alexander Ninua was charged under Article 182.2a), and Article 182.2d) of the Criminal Code of Georgia (misappropriation or embezzlement by a group conspiring to misuse official power); Article 182.3b) of the Criminal Code (misappropriation or embezzlement of a large amount of sum), and Article 341 (forgery). Some of the case files are classified and, accordingly, the defence was not allowed to study them. For this reason, the defence lawyer motioned for the postponement of the pre-trial hearing, which was dismissed by Tbilisi City Court.
It is to be pointed out that the right to a fair trial, guaranteed by the European Convention on Human Rights, incorporates the principle of equality of arms implying that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.[106] The right to a fair trial also incorporates the principle of adversarial proceedings. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the

[106] *Bulut v. Austria,* application no. 17358/90, judgment of the European Court of Human Rights of 22 February 1996, para. 47; *Dombo Beheer B.V. v. the Netherlands*, application no. 14448/88, judgment of the European Court of Human Rights of 27 October 1993, para. 33; *Öcalan v. Turkey*, application no. 46221/99, judgment of the Grand Chamber of the European Court of Human Rights of 12 May 2005, para. 140; *De Haes and Gijsels v. Belgium***,** application no. 19983/92, judgment of the European Court of Human Rights of 24 February 1997, para. 53.

opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[107]

In the case of *Öcalan v. Turkey*, the European Court points out that respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions.[108]

In the case of *Foucher v. France*, the European Court considered that it was important for the applicant to have access to his case file and to obtain a copy of the documents it contained in order to be able to challenge the official report concerning him. The fact that following a prosecutor's decision Mr Foucher was denied access to his criminal file and could not obtain a copy of the documents in it constituted a violation of the principle of equality of arms guaranteed by Article 6 of the European Convention.[109]

Therefore, it is presumed that Alexander Ninua could be a victim of the violation of the principle of equality of arms and the right to adversarial trial which are specific features of a wider concept of a fair trial.

5.4 Conclusion

Considering the fact that Alexander Ninua was under political pressure and at the same time he was detained, the preventive measure applied, which lacks reasoning and is clearly disproportionate with the alleged crime and risks, suggests that he is a victim of "political detention" in accordance with paragraphs b and e) of the resolution of the Parliamentary Assembly of the Council of Europe.

[107] *Borgers v. Belgium*, application no. 12005/86, judgment of the European Court of Human Rights of 30 October 1991, para. 24.
[108] *Öcalan v. Turkey*, application no. 46221/99, judgment of the Grand Chamber of the European Court of Human Rights of 12 May 2005, para. 140.
[109] *Foucher v. France*, application no. 22209/93, judgment of the European Court of Human Rights of 18 March 1997.

6. Criminal cases against Tengiz Gunava

Tengiz Gunava worked as the Chief of Police of the region of Samegrelo-Upper Svaneti. He also was a Governor of Samegrelo-Upper Svaneti.

It is noteworthy that Tengiz Gunava was arrested twice; on 16 November 2012 and 29 November 2012. He was charged with illegal purchase and storing of drugs and weapons on 7 November 2012. On 18 November 2012, Tbilisi City Court set his bail at GEL 10,000 as a preventive measure.

On 16 November 2012, based on the report drafted by Mirian Topuria, Deputy Chief of the Second Unit of the Criminal Police Department of the Ministry of Interior, Tengiz Gunava was arrested. According to the report, Tengiz Gunava was carrying drugs and an unauthorised weapon. He was arrested near his house. Tengiz Gunava maintains that he was not searched on the spot and the search records drafted by the officers in charge of the operation were fabricated. According to the police records, the following items were found during the personal search of Tengiz Gunava: an unregistered Makarov pistol with a magazine and eight cartridges; and heroin wrapped in silver foil.

As regards the criminal case regarding abuse of official power, it is composed of three episodes. The indictment record drafted by the Office of Chief Prosecutor of Georgia is dated 1 December 2012. Under the decision of Tbilisi City Court delivered on 2 December 2012, his bail was set at 10,000 in this case.

The three episodes to be discussed are the following:

1) intentional minor damage to health with the use of a weapon, amounting to abuse of official power – an act criminalised under Article 333.3b) and Article 120 of the Criminal Code of Georgia. According to the record of indictment, Tengiz Gunava, acting as the Chief of Police of the region of Samegrelo-Upper Svaneti, verbally abused, shot with his service weapon and wounded his driver Kakhaber Izoria at the Zugdidi railway station because the latter had sent a salacious text message to the wife of Gunava's cousin.

2) misappropriation of 3,000 litres of petrol through abuse of official power – an act criminalised under Article 333.1, Article 182.2c), and Article 182.2d) of the Criminal Code of Georgia. According to the record of indictment, Tengiz Gunava when acting as the Chief of Inspectorate General of the Ministry of Interior misappropriated 3,000 litres of petrol worth GEL 6,750, which he did not use for official purposes.

3) misappropriation of GEL 49, 500 through abuse of official power – an act criminalised under Article 333.1 and Article 182.2c), Article 182.2d) and Article 182.3b). In August 2012, when acting as the Chief of Inspectorate General of the Ministry of Interior of Georgia, Tengiz Gunava applied to Nikoloz Dzimtseishvili, Deputy Minister of Interior of Georgia, to write off GEL 49,500 in his favour. According to the prosecution authorities, this request was formalised later, when he received the sum. Gunava "on 24 August 2012, drafted a report addressed to Deputy Minister of Interior of Georgia, Nikoloz Dzimtseishvili, regarding GEL 49,500 for covert expenses. […] the said sum has not been used by Gunava for official purposes." [110]

6.1 The episode of 16 November 2012

The Office of the Chief Prosecutor of Georgia found certain procedural breaches in the arrest of Tengiz Gunava. On the basis of an appeal by Gunava's defence attorney, Malkhaz Velijanashvili, the Office launched an investigation into Tengiz Gunava's arrest and the alleged abuse of official power accompanying it. The Office of the Chief Prosecutor of Georgia, however, did not find that the officials of the Ministry of Interior fabricated evidence or committed any other crime.

Stemming from the above-mentioned procedural violations, the Office of the Chief Prosecutor of Georgia stopped criminal proceedings against Tengiz Gunava with regard to the second count in the indictment.

6.2 Case of abuse of official power

Concerning the first count in the indictment, Tbilisi City Court found that the evidence before it did not corroborate the fact that minor health damage was inflicted by Tengiz Gunava to Kakhaber Izoria with the service weapon registered in his name.

As regards the second count in the indictment, Tbilisi City Court was not satisfied with Tengiz Gunava's testimony that he had used petrol coupons for official purposes; there was no evidence (namely, a document describing in detail the plan of operational and investigation activities for which the petrol coupons were used) in the case files corroborating this statement. Stemming from the above-mentioned, the Court convicted Tengiz Gunava of the crimes under Article 182.2c) and Article 182.2.d) of the Criminal Code of Georgia.

Tengiz Gunava was also convicted of the third count in the indictment, under Article 182.2d) Article 182.3b) of the Criminal Code of Georgia. According to the reasoning of the judge, Tengiz Gunava's testimony concerning the use of petrol coupons for

[110]Indictment Record drafted by the Chief Prosecutor's Office on 1 December 2012, criminal case no. 19001029328, p. 4.

operational and investigation activities would not be corroborated either by testimonies of other witnesses or other documentary evidence.

The judgment of Tbilisi City Court was upheld by Tbilisi Court of Appeals. It is worth mentioning that the then President, Mikheil Saakashvili used his power granted by Article 73.1n) of the Constitution and pardoned Tengiz Gunava under the above heads of the judgment. His criminal records have been purged as well.

6.3 Conclusion

The fact that Tengiz Gunava's arrest in flagrant violation of criminal procedure legislation was followed by the filing of three counts of charges against him gives rise to misgivings about the intentions of the Chief Prosecutor's Office of Georgia and suspicions about the possibility of political retribution.

7. Criminal cases against Giorgi Oniani

Giorgi Oniani was the Deputy Head of Gldani-Nadzaladevi Unit of the Chief Department of the Ministry of Interior from 3 July 2009 until 13 November 2013.

The indictment record of Oniani is dated 5 March 2014. Tbilisi City Court set his bail at GEL 20,000.

On 4 February 2013, the Investigative Unit of Tbilisi Prosecutor's Office launched an investigation into the allegations about transgression of official powers by the officers of the Ministry of Interior under Article 333.1 of the Criminal Code of Georgia. Within this case, on 23 February 2014, based on a warrant of the Section of Criminal Cases of Tbilisi City Court, Giorgi Oniani was arrested as an accused at his home. Giorgi Oniani had previously worked as the Deputy Head of Gldani-Nadzaladevi Unit of the Chief Department of the Ministry of Interior from 3 July 2009 until 13 November 2013.

Before turning to the resolution of indictment, it is worth mentioning that Giorgi Oniani was arrested twelve months after the investigation had been launched. According to the accused, Shalva Tadumadze, Parliamentary Secretary of the Government, officially requested information from Tbilisi Prosecutor's Office about the progress of the case against Giorgi Oniani and due to his active involvement Oniani was arrested. It is noteworthy that Shalva Tadumadze defended the interests of Levan Mdinaradze (victim in one of the cases against Oniani). Therefore, Shalva Tadumadze was personally interested in the case filed against Oniani.

The criminal proceedings against Giorgi Oniani consist of two episodes: 1) Levan Mdinaradze's arrest; and 2) Davit Shatirishvili's arrest. Giorgi Oniani has been indicted under Article $369^1.3$[111], Article 156.2b)[112], Article 333.1[113], and Article 147.1[114] of the Criminal Code of Georgia.

The case concerns the arrest of Davit Shatirishvili on 15 October 2011 and the arrest of Levan Mdinaradze on 17 October 2011 for alleged acquisition and storage of drugs. The arrest operations were led by Oniani.[115]

On 28 January 2013, criminal proceedings against Levan Mdinaradze were discontinued, based on Article 8 of the Law of Georgia on Amnesty dated 28 December 2012, and he was exempted from criminal responsibility. He was granted the status of a victim by a

[111]Forgery of evidence in a criminal case involving a grave or especially grave crime.
[112]Persecution with the use of official position.
[113]Exceeding official power by a civil servant or an individual afforded the same status entailing a serious violation of the rights of an individual or a legal entity, legal interests of the society or of the state.
[114]Deliberate illegal arrest by a direct perpetrator or an accomplice.
[115]Article 260.1 of the Criminal Code, Law of Georgia no. 2287, Legislative Herald of Georgia, 22/07/1999.

resolution of 5 March 2014, issued by Amiran Guluashvili – prosecutor of anti-corruption investigative unit of Tbilisi Prosecutor's Office.

As regards Davit Shatirishvili, criminal proceedings against him are still pending, no final judgment has been rendered and the Prosecutor's office prosecutes him in relation of the crime under Article 260.1 of the Criminal Code of Georgia; whereas in the same case, Giorgi Oniani is charged under Article 333.1.

Thus, in one case, the Office of the Chief Prosecutor of Georgia alleges that one person (Davit Shatirishvili) stored drugs and at the same time, in another case, alleges that the same person had no drugs and the officer (Giorgi Oniani) exceeded his authority by "planting" drugs.

It is noteworthy that on the day Giorgi Oniani was arrested, on 23 February 2014, he and his apartment were searched without a court warrant. Both procedural actions were found to be illegal by the City Court and the Court of Appeals since there was no urgency which allowed the exception from the general rule of conducting a search based on a court warrant.[116]

Tbilisi Prosecutor's Office motioned for the application of detention as a preventive measure by referring to the risk of Giorgi Oniani suborning the witnesses. However, the City Court and the Court of Appeals found the motion to be abstract and set the amount of bail at GEL 20,000 and secured it with detention.

It is noteworthy that apart from Giorgi Oniani, other officers of Gldani-Nadzaladevi Unit also feature in the cases against Levan Mdinaradze and Davit Shatirishvili (Levan Gamkhitashvili, Levan Kopaliani, Guram Qadeishvili, and Giorgi Sharipashvili – were involved in Davit Shatirishvili's arrest). These officers were exempted from criminal responsibility and to date they carry out their official duties. They were in office even during the period when criminal proceedings against them were pending.

Giorgi Oniani's defence attorney Elene Lazariashvili faced serious problems in studying the case file. This issue has been addressed in the letter of Aldo Bulgarelli, President of the Council of European Bars and Law Societies of the Council of Europe.[117] The same letter addresses another incident wherein Giorgi Oniani was meeting his client, Levan Qardava, when the staff members of the prison forced their way into the room and threw Oniani out. Accordingly, the lawyer was not allowed to have a conversation with his client which constituted a violation of Article 6 of the European Convention on Human Rights.[118] In conclusion, Aldo Bulgarelli expresses his concern about the fact that the

[116]Article 112.5 of the Criminal Procedure Code of Georgia, Law of Georgia no. 1772, Legislative Herald of Georgia, 22/01/2015.
[117] The Lawyer, Law Journal of the Georgian Bar Association, issue no.1, 2014, p. 11.
[118]Right to a fair trial.

above incident of intimidation, obstruction and undue interference in the lawyer's professional activities is related to his clients' cases. It is to be pointed out that Giorgi Oniani notified the competent authorities about the incident involving Levan Qardava; however, this case has not been investigated so far.

The case file of Giorgi Oniani features a telephone conversation between the accused and the Chairman of the Georgian Bar Association, Zaza Khatiashvili. This fact is considered by the Chairman of the GBA to be amounting to coercion. Zaza Khatiashvili accuses the Georgian authorities of the violation of Article 20 of the Constitution[119] and Article 8 of the European Convention on Human Rights[120] as his conversation was secretly recorded.

The court hearing scheduled for 23 December 2014 was adjourned until 20 January 2015. The reason for the postponement was a leave. Furthermore, the hearing that was to be held on 27 February 2015 was postponed until 20 March 2015 as the judge had planned a training session.
Article 6.1 of the European Convention entitles everyone to a hearing within a reasonable time. The reasonableness of proceedings is assessed by taking into account the following criteria: complexity of a case, the behaviour of an accused and the competent authorities. In the light of the above factors and the details of the proceedings, it can be argued that Giorgi Oniani's right to a hearing within a reasonable time has been violated

7.1 Conclusion

And finally, discriminatory approach towards Giorgi Oniani is evident considering the approaches and measures that the authorities took towards the other persons involved in the alleged criminal acts committed by Oniani. At the same time, when assessing discrimination, it needs to be taken into account that Giorgi Oniani clearly expressed his views in favour of the United National Movement and even planned to take part in the elections of the local self-government bodies on behalf of that political party. According to Giorgi Oniani, he announced his political plans at one of the trials of Bachana Akhalaia, which was followed by his arrest at his home. Considering the procedural violations and arbitrary actions on the part of the law-enforcement bodies, it is reasonable to assume that the case against Giorgi Oniani is possibly a part of political retribution.

[119]Right to respect for private life.
[120]Right to respect for private and family life.

8. Senior officials of the Defence Ministry of Georgia

On 28 October 2014, the following former high-ranking officials of the Defence Ministry were arrested: Gizo Ghlonti, former Head of the State Procurement Department of the Defence Ministry; Nugzar Kaishauri, former Head of J-6 Communications and IT Department of the Joint Staff of the Georgian Armed Forces; Giorgi Lobzhanidze, former Head of Administration at the Procurement Department of the Defence Ministry; Archil Alavidze, former Chief specialist at the Procurement Department of the Defence Ministry; and Davit Tsipuria, former Head of Administration of J-6 Communications and IT Department of the Joint Staff of the Georgian Armed Forces.

The above persons were indicted on 29 October 2014. They were charged as a group with embezzlement of especially large amount of state property by using their official positions, which is penalised under Article 182.2a)-d) and Article 182.3b) of the Criminal Code of Georgia.

The record of the indictment states that Davit Tsipuria, Nugzar Kaishauri, Archil Alavidze, Gizo Ghlonti and Giorgi Lobzhanidze, while working in senior positions at the Defence Ministry of Georgia, together with other senior officials, deliberated to embezzle GEL 4,102,872.6 from state budget in favour of Silknet JSC by using their official position.

According to the record of indictment, the above-mentioned persons ignored the requirements imposed on civil servants and did not comply with the principles of cost-saving and effectiveness while performing their official duties. In order to disguise their criminal intent and justify expending large amount of sums owned by the state, the accused persons fictitiously researched the market. To this end, J-6 Communications and the IT Department of the Joint Staff of the Georgian Armed Forces requested on 27 August 2013 nine companies active in Georgia to supply them with the information about the desired property, products and services they needed. The companies were expected to submit project details and estimates in sealed envelopes by 15:00 on 5 September 2013. On the same day, these envelopes had to be opened at 17:00 in the presence of the companies' representatives. The requested information was provided only by four companies.

The investigation alleges that the lowest price out of four companies' quotations was that of Silknet JSC. Therefore, on 8 October 2013, it was decided to conclude a contract with Silknet JSC. The prosecution has its own version about the quotation submitted by Silknet JSC. They maintain that Silknet had already been planning to install transmission lines carrying fibre optic cables and therefore its price would be naturally lower than the other companies' quotations.

When deliberating about the quotations, the accused and other senior officials intentionally withheld information from a representative of Deltacom LTD about the circumstances explaining how Silknet JSC could provide lower prices than them. Similarly, there were no enquiries made in the procurement terms of other properties

purchased by other state agencies. Deltacom, e.g., had been providing the same service to other public agencies and often their services were rendered free of charge. The aforementioned company also owned free cables which could have been used by the Defence Ministry. Stemming from the abovementioned, the prosecution concludes that the accused former Defence Ministry officials gave preference to Silknet JSC thus undermining public interest and enabled it to illegally win in the state procurement procedure.

Later on 26 December 2013, the Defence Ministry concluded a contract with Silknet JSC on the purchase of cables along with a specific number of optical fibres, network equipment and services. According to the contract, the Defence Ministry was supposed to pay in total GEL 6,720,877.42. This sum was paid up front to Silknet JSC, from which the Defence Ministry only received property/service worth GEL 2,618,004.82 on 16 January 2015.

8.1 Application of a preventive measure

On 30 October 2014, Tbilisi City Court ruled on application of detention as a preventive measure with regard to the following accused persons: Gizo Ghlonti, Giorgi Lobzhanidze, Archil Alavidze, Nugzar Kaishauri, and Davit Tsipuria.

The prosecution justified the motion by maintaining the following: "there is a reasonable suspicion that the accused persons, if released, will interfere with administration of justice by conspiring to suborn the witnesses that already have been questioned and those who are going to be interrogated in the future; for this purpose, the accused persons will use their official position and wide circle of acquaintances, as well as their personal entourage. Even though Gizo Ghlonti does not hold high-ranking office any more, given his authority, wide circle of acquaintances, the scope of his influence and access to various significant types of information, there is a real risk of him influencing witnesses and preventing the administration of justice." [121] Furthermore, "there is a reasonable suspicion that due to the fear of a strict penalty, the accused will flee or fail to appear before [the court] and continue criminal activity and re-offend when conducting other state purchases." [122]

Tbilisi City Court fully upheld the motion filed by the Office of the Chief Prosecutor of Georgia.

Under Article 198.5 of the Criminal Procedure Code of Georgia (based on which a judge of Tbilisi City Court based the decision on application of detention), "when deciding on a

[121] Decision of the Section of Criminal cases of Tbilisi City Court, 30 October 2014, case no. 2102-14S, p. 3.
[122] *Ibid.,*

preventive measure and its particular category, a court shall take into consideration the personality of the accused, his/her activities, age, health, family and financial status, reimbursement of pecuniary damages, violation of the terms of a previous preventive measure, and other circumstances."[123]

In contrary to the above requirements of the procedural law of Georgia, Tbilisi City Court did not pronounce itself on the personality of the accused persons, namely, it did not take into account the fact that the persons concerned had been indicted for the first time and that there is no reference to their family status in the decision. The Court agreed with the existence of risks of interference with the due course of justice (flight, failure to appear before the court, destruction of important information, and interfering with obtaining evidence) without particular evidence/facts. This runs counter to the standards under the case-law of the European Court of Human Rights. Moreover, when referring to the risk of absconding, the Court ignored the behaviour of the accused persons at the stage of the investigation, namely their appearance before investigation authorities. As regards the strict penalty, according to the approach of the European Court, only the factor of grave charges and possible strict penalty cannot justify the application of detention as a preventive measure.

Furthermore, the Court did not consider the following to be newly revealed circumstances: the letters of guarantee filed by tens of public figures, and the fact that most of the investigative actions have already been carried out and therefore the risks that the Court took into account have been considerably reduced. The Court, therefore, refused to alter the preventive measure already applied with regard to the accused persons.

Therefore, the presumption of liberty established in the case-law of the European Court was breached in the given case.

8.2 Delayed proceedings

The pre-trial hearing was scheduled for 11 December 2014. This was ruled by Tbilisi City Court on 30 October 2014 when the accused were brought before the court for the first time and detention as a preventive measure was applied.
On 29 November 2014, the Office of the Chief Prosecutor of Georgia motioned for extending the date of the pre-trial hearing until 10 February 2015. The following reasons were cited by the prosecution: the need to conduct investigative actions; namely, "approximately for a month, the investigative body was busy to declassify the criminal case, which requires much time and resources and was unable to conduct the necessary

[123]Article 198.5 of the Criminal Procedure Code of Georgia, Law of Georgia no. 1772, Legislative Herald of Georgia, 22/01/2015.

investigative actions before pre-trial hearing."[124] The prosecutor of the Investigative Unit of the Office of the Chief Prosecutor of Georgia, Zviad Gubeladze, referred to the following as the necessary investigative actions: requesting the detailed list of incoming and outgoing calls; requesting and obtaining information on bank details and interrogation of various individuals, including Irakli Alasania, Zaza Broladze - Silknet JSC Technical Director, and other similar investigative actions.

It is noteworthy that on 20 June 2014, the investigation was launched by the Investigative Unit of the Office of the Chief Prosecutor of Georgia based on the application dated 3 April 2015, filed by Paata Qiqodze, Director of Delta Com LTD. Despite the aforementioned, on 2 December 2014, Tbilisi City Court upheld the motion of the Chief Prosecutor of Georgia on extending the date of the pre-trial hearing. However, the pre-trial hearing was not held on this day since the prosecution again motioned about extending the pre-trial hearing by two months. The reasons indicated in the motion are identical to those pointed out in the motion of 29 November 2014. The Court again upheld the motion, and the date of the pre-trial hearing was scheduled for 1 April 2015.

Thus the investigation was launched on 20 June 2014; the accused were detained on 30 October 2014, and the pre-trial hearing is scheduled for 1 April 2015; almost **five months** later. Article 208.3 of the Criminal Procedure Code overrides a general provision concerning holding a pre-trial hearing not later than 60 days after the indictment of a person; it allows extending the date of the pre-trial hearing. However, there must be a substantiated motion and the hearing can only be extended for a reasonable term. In the given case, the motions are not substantiated as the same reasons are repeated in two sets of motions; and a five-month interval cannot be considered to be reasonable. Hence, the right of the accused persons to trial within reasonable terms has been violated.

8.3 Intent and motive

Embezzlement implies expending, selling or otherwise disposing of a property in the legal possession of a perpetrator.[125] *Mens rea* of this crime implies direct intent: a perpetrator is aware of embezzling another person's property entrusted to him/her. "He/she is aware that his/her actions damage the interests of the owner and he/she wishes to inflict this damage. The perpetrator's actions are motivated by pecuniary gain and aim at gaining illegal income at the expense of another person." [126]

[124]Motion of the Office of the Chief Prosecutor of Georgia concerning extension of the date of the pre-trial hearing, 29 November 2013, Tbilisi, p. 14.
[125]Mzia Lekveishvili, Nona Todua, and Gocha Mamulashvili, Section One of Substantive Criminal Law, Book One, published by Meridiani, Tbilisi, 2014, p. 438.
[126]*Ibid.*, p. 437.

Therefore, direct intent is present when a person wants to inflict damage and the person's actions are motivated by pecuniary gain. The prosecution uses the following wording in the record of indictment: the accused "did not intentionally provide information;" and "deliberately did not enquire". Accordingly, "through the aforementioned action [...] with the recourse to abuse of official position, they illegally embezzled GEL 4,102,872.6 that was in their lawful possession and entrusted to them from the state budget."[127]

There is no reference to a motive in the record of indictment; there is no explanation as to which action committed by the accused proved the motive of pecuniary gain. Moreover, the record of indictment does not identify the victims upon whom the accused wished to inflict harm and exactly what gain they expected to make. According to a TV statement of prosecutor Jarji Tsiklauri, Deputy Minister who has signed the contract - Aleksi Batiashvili - is a close relative of Silknet's Financial Director. Alexi Batiashvili himself is not indicted in this case. The fact that the prosecution had been unable to establish the motive of the crime was expressly stated by Jarji Tsiklauri in his TV interview. The only fact mentioned above is not sufficient to substantiate the accused persons' motive of pecuniary gain and the latter is a necessary element of *corpus delicti* of embezzlement, without which there is no crime under Article 182 of the Criminal Code.

8.4 Violation of the principle of equality of arms

Initially the defence was not given the possibility to study the case files under the pretext of confidentiality of the files.

On 19 November 2014, a representative of the Prosecutor's Office made a public statement announcing that the prosecution authorities were ready and on numerous occasions had offered the defence access to the case files in the Office building, in a room specially prepared for them. However, the law expressly obliges the prosecution to share the copies of evidence and the format of sharing evidence offered by the prosecution is not considered by the accused persons' lawyers to be sufficient for the preparation of defence.

The only limitation provided for by the Criminal Procedure Code in terms of the defence's access to the case files concerns the evidence obtained through operative and investigative measures or covert operations. This limitation may take place in accordance with a court's decision based on prosecution's motion only prior to the pre-trial hearing. Hence, the principle of equality of arms has clearly been violated throughout this period.

[127]Record of indictment of 29 October 2014, issued with regard to Davit Tsipuria, Tbilisi, pp. 2-3.

8.5 Conclusion

In the light of the reasons mentioned above, it is rather difficult to find any violation on the part of the accused persons. Moreover, the resolution of indictment does not refer to either an alleged criminal motive or purpose. The *mens rea* is not invidualised either. Furthermore, detention as a preventive measure is clearly inadequate and disproportionate both in terms of the charges filed, as well as the threats posed and the past activities of the accused persons. Finally, numerous breaches of procedural law that were indicated above leave the impression of unfairness. The statements made by former Prime Minister, Bidzina Ivanishvili and incumbent Prime Minister, Irakli Gharibashvili indicate political motivation behind the pending proceedings. The incumbent Prime Minister discussed the possible involvement of Irakli Alasania and his colleagues in corrupt transactions[128] despite the fact that the case files were classified from the very outset. According to Bidzina Ivanishvili, he had questions concerning the acquisition of the country's main line.[129]

Stemming from the above-mentioned, it is logical to discuss the political connotations of the criminal prosecution conducted by the present authorities; and the accused former high-ranking officials of the Defence Ministry can be considered to be political prisoners in accordance with paragraphs b), c) and e) of the resolution adopted by the Parliamentary Assembly of the Council of Europe.[130]

[128]The statement by the Prime Minister, at http://www.liberali.ge/ge/liberali/articles/121693/ [Last visited 19.12.2014].

[129] "Why does the Defence Ministry Need this Main Line", - Ivanishvili makes comprehensive comments on the case of Defence Ministry's senior officials, at http://news.ge/ge/news/story/111888-rad-unda-tavdatsvis-saministros-es-magistrali-ivanishvili-tavdatsvis-saministros-maghalchinosnebis-saqmeze-vrtsel-ganmartebas-aketebs [Last visited 23.01.2015].

[130]Assessment criteria, *vide supra*.

9. Case of Nugzar Tsiklauri

Nugzar Tsiklauri is a UNM list Member of the Parliament of the eighth convocation; a member of the United National Movement faction, and a member of the Political Council of the same party.

On 30 March 2014, late in night, Nugzar Tsiklauri was ambushed and physically assaulted by several masked persons at his house. According to Tsiklauri, the attackers used electric shock as well. The Ministry of Interior of Georgia instituted investigation under Article 120 of the Criminal Code of Georgia which criminalises intentional minor health damage. The victim and his lawyer do not agree with this classification of the crime as Tsiklauri maintains that the attackers attempted to kidnap him. Almost eight months have passed since the incident and yet the investigation has not been closed, the act has not been re-classified and Nugzar Tsiklauri has not been given victim's status either. This lack of diligence occurs against the background where the Prime Minister of Georgia stated that he was personally overseeing the investigation into the alleged assault on the member of the Parliament. A statement about the need for timely investigation was also made by the President of the Parliament. The victim himself alleges political motives behind the attack.

Accordingly, interest in the investigation still remains high considering that an alleged physical assault on a member of the Parliament is at stake. Despite all the above-mentioned, the law-enforcement bodies of Georgia failed to fulfil their positive obligation to investigate this particular criminal incident.

10. Criminal case against Davit Baqradze

Davit Baqradze is a UNM list Member of the Parliament of the eighth convocation; leader of the Parliamentary Minority; and a member of the Political Council of the same party.

When speaking about selective justice, the cases of Davit Baqradze and Bidzina Ivanishvili are particularly interesting in comparison. On 20 August 2015, investigation was started into the bank accounts, involving 276,849.89 GBP, held by Davit Baqradze. The accounts were not mentioned in the declaration by the member of the Parliament. The investigation was launched on account of deliberately providing incorrect data and legalisation of illegal and/or unaccounted income.

Conversely, the declaration of Bidzina Ivanishvili, filled in twice by him when acting as the Prime Minister, fails to mention the business centre, worth USD 40-50 million, and various art objects owned by him. Despite the information circulated in the media, the Prosecutor's Office has not instituted investigation into the said allegations.[131]

A breach of the fundamental principle of equality of law raises reasonable misgivings about selective justice by the state. The suspicion in this case is reasonable.

[131] Ivanishvili's declaration of property, at: http://www.netgazeti.ge/GE/105/News/15826/ [Last visited: 22.01.2015].