The Case of Irakli Okruashvili

Legal Analysis

Georgian Democracy Initiative

2020

Introduction

Criminal prosecution against Irakli Okruashvili relates to the events unfolded during the so-called Gavrilov Night on June 20, 2019. The arrival of Sergey Gavrilov, a Russian MP, in Georgia and subsequently his presiding over a session of the Interparliamentary Assembly on Orthodoxy while seated in the chair of the Chairperson of the Georgian Parliament and using Russian as the working language of the session was followed by a large-scale protest rally. The events at the June 20 gathering developed rapidly, and dramatically. The rally in front of the building of the Georgian Parliament grew extremely strained due to the authorities' imprudent and inadequate reaction. According to representations of some members of the civil society, the attempt of a number of protesters to violently break into the Parliament premises and their physical confrontation with the police offered the law enforcement staff a ground to lawfully interfere with the protesters' right to assemble. However, the local non-governmental organizations assessed the government's response as being unlawful. Moreover, around 30 civil society organizations published a statement noting that the law enforcement members had used rubber bullets to target the protesters faces and heads at a close range – something that seems to suggest that the authorities were intending to injur the protesters rather than disperse the rally.[1]

Irakli Okruashvili was arrested on July 25, 2019 and charged by the Prosecution Office with leading, and participating in, a group violence on the night of June 20 (articles 225-1 and 225-2 of the Penal Code of Georgia respectively). The Ministry of Internal Affairs stated that Irakli Okruashvili and his fellow protesters were encouraging participants of the rally, and were themselves trying to forcefully break into the Parliament building and that Okruashvili was also personally involved in various other violent group actions.[2] 18 more individuals were charged with participation in group violence.[3] On July 27, Irakli Okruashvili was orderd to pretrial detention.

On April 13, 2020, the City Court of Tbilisi (Judge Lavrenti Maglakelidze being the judge of the case) acquitted Irakli Okruashvili of the leadership charges (Article 225-1) but convicted him of participation in the group violence (Article 225-2) sentencing him to 5 years of imprisonment.

1. Analysis of Article 225 of the Penal Code of Georgia

[1] The statement by the non-governmental organizations on the June 20 events is accessible at https://gdi.ge/ge/news/20-ivnisis-movlenebtan-dakavshirebit.page, last viewed 10.05.2020.

[2] http://www.tabula.ge/ge/story/153191-irakli-oqruashvili-ets-matrosovis-cixeshi-gadaikvanes

[3] *Ibid.*

Article 225-1 of the Penal Code of Georgia reads: "Organizing or leading a group action that is accompanied with violence, ravaging, damaging of or destruction of the property of others, use of weapons or rendering resistence to or attacking a representative of the authorities using a weapon, - shall be punishable with imprisonment for a term between six and nine years." The crime under Article 225 belongs to the Crimes against Public Safety and Order Chapter of the Penal Code of Georgia. Thus, public safety and order is the paramount value protected by Article 225. Until May 2011, the said provision used the phrase "mass disorder" instead of the currently applied "group action".[4] The change suggests that the legislator intended to expand the scope of the provision by making the crime committable by not only a large group (or "masses") of people but also a small group of three, including the organizer.[5] Paragraph 1 of Article 225 lists a variety of alternative actions of which at least one must take place during any impugned "group action" for the offense to be deemed committed. Violence is one of them. Without any one of the actions on the list, including violence, the crime under the said provision is not considered completed. The act of organizing the crime may take various forms such as selecting a location for the disorder, making steps to gather people, etc, while "leading" can take a form of instructing people during the actual disorder, for example, to act in a particular way, to continue violent actions, etc.[6]

Paragraph 2 of Article 225 says: "Involvement in the conduct described in paragraph 1 of this Article shall be punishable with imprisonment for a term between four and six years." So the latter section of the provision establishes criminal liability for taking part in the group action referred to paragraph 1[7] that is accompanied with at least one of the alternative actions listed in paragraph 1. One such alternative action is violence that may be perpetrated in the form of battery, inflicting mild or less serious injury to a person, etc.[8] But some legal authors have opined that violence does not have to be followed by pain.[9] In classifying a person's actions as falling within Article 225-2, a number of important cirumcstances ought to be considered:

- A group action entailing criminal liability under Article 225-2 should be organized. The wording of paragraph 1, which connects the words "organizing" and "leading" with "or", allows for such a supposition. One person could be "organizing" the crime commission, while another person can be responsible for its "leadership" and these persons would not fall within the scope of paragraph 1 had there been no conjunction"or". So, while "the organizer" may remain unidentified, it has to be proven that the "group action" the government tries to prove a person has taken part in must have been organized in order for it to qualify under Article 225-2. By way of example, in its 2018 judgment (concerning the violent actions perpetrated in Batumi in March 2018), the Supreme Court classified the actions described in the indictment as group violence. The indictment, on its

[4] Law of Georgia as of July 1, 2011 amending the Penal Code of Georgia

[5] Lekveishvili M., Todua N., Mamulashvili G. *The Special Part of the Criminal Code* (Book I), 5th edition, Meridiani Publishing House, Tbilisi, 2014, p. 500

[6] *Ibid.*

[7] Legal authors (see footnote 5) refer to "the group action" as "the group violence" – a version also shared by Georgia's Supreme Court (see footnote 10)

[8] See footnote 5 above.

[9] *Ibid.*

turn, read: "A person or group of persons who have not yet been identified by the investigation organized a group violence as a matter of protest during which the participants blocked the Ch…. Street and disobeyed police officers' lawful demands to free the motorway up."[10]

1. This norm establishes criminal liability for participation in the action envisaged in paragraph 1. In other words, it criminalizes involvement in the action under paragraph 1. Pursuant to Article 22 of the Penal Code, "A perpetrator is the one who has actually committed the offense or participated in the commission of the offense together with another person (an accomplice) […]". This means the person must perform at least one of the actions listed in Article 225, personally and directly, fulfilling the necessary objective elements of the offense. These actions are "violence, ravaging, damaging of or destruction of the property of others, use of weapons or rendering resistence to or attacking a representative of the authorities using a weapon". A person who is not directly performing the action cannot therefore be deemed to be a perpetrator and cannot be held liable under Article 225-2. **An example is the aforementioned 2018 judgment in which the Georgian Supreme Court deemed there was no participation in the group violence on the part of the person who stood next to the protesters and during a certain time period was driving in a circular manner, signalling, calling police officers names, shouting and whistling.** [11]

- Naturally, the offense discussed herein can only be an intentional crime. A person who as an accomplice carries out any or all of the actions listed in Article 225-1 must have the knowledge of the unlawful nature of his actions, be foreseeing the unlawful consequences of the actions and must be either wanting such consequences to occur or understanding their imminence. Whenever a person is prosecuted for the offense under Article 225-2, among others, the government must prove, first, that the person did carry out, for example, the violent action and, second, that the person acted deliberately.

2. Facts of Irakli Okruashvili's case

2.1. The court acquitted Irakli Okruashvili of the charge under Article 225-1

2.1.1.The Prosecution's theory of case

The Prosecution advanced two counts under alleged "leadership of the group action" by Irakly Okruashvili.

The first count concerned the events that took place when Irakli Okruashvili approached the law enforcement officers near the side entrance of the Parliament building in the Chichinadze Street. Two witnesses for the Prosecution, both of them being police officers, stated that they were guarding the side entrance of the Parliament when Irakli Okruashvili, in the company of about 30 people, approached them and demanded to be let into the building. Once his demand was rejected, according to the police officers, Irakli Okruashvili urged the people who came with him to forcibly break through the police cordon and make their way into the Parliament building. According to the

[10] The Supreme Court of Georgia, Criminal Cases Chamber, Judgment no. 2k-288ap.-18, 9 November 2018

[11] *Ibid.*

witnesses, the people who accompanied Irakli Okruashvili, were acting by his instructions and that Irakli Okruashvili and his followers started pushing the police officers but the latter managed to preserve the "live chain" unbreached. The court disagreed with the Prosecution's assertion that Irakli Okruashvili led the group violence for the following reasons:

- The allegation that the people accompanying Irakli Okruashvili committed group violence could not be proven and thus Okruashvili's orchestration of the group violence was excluded.
- The accounts of two police witnesses given in court not be considered trustworthy, since the Defense presented six witnesses (of whom one was already in the Chichinadze Street when Irakli Okruashvili approached the police officers and five were the ones to accompany him) who said Okruashvili neither himself engaged in or encouraged others to carry out any violence there.
- Other than the two police witnesses, the Prosecution failed to produce any neutral evidence in the court such as a video footage.

As for the second count of the charge, according to one of the police witness, when the protesters were making efforts to enter the Parliament courtyard he noticed Irakli Okruashvili and other people shouting "Go ahead, go ahead" attempting to make their way into the Parliament premises. The court noticed that non-police witnesses never corroborated this statement and righteously deemed that the words ["Go ahead, go ahead"] taken in isolation outside the context and with the circle of addressees remaining identified could not be labeled as "the leading of violent actions".

2.1.2.The test used by the court to render the acquitting part of its judgment

The course of assessment and standards applied by the court in the acquitting part of the judgment are consonant with both the Criminal Procedure Code of Georgia and the European Convention on the Protection of Human Rights and Fundamental Freedoms and its case law (the judge correctly invoked the European Court's judgment in *Ochelkov v. Russia*). Pursuant to Article 13-2 of Criminal Procedure Code of Georgia, "a convicting judgment must only be based on a body of coherent, manifest and credible evidence capable of proving the guilt of a person beyond reasonable doubt". Testimonies of two police officers that are not corroborated by any other evidence fall short of meeting the beyond reasonable doubt standard. Moreover, this standard would not be met even if the six defense witnesses did not testify to the contrary and the police officers' testimonies were the only evidence in the case file. The court's assessment is consistent also with the Georgian Penal Code, since the offense under Article 225-1 is not considered committed and the accused party cannot be said to have led a group's violent actions if the people making up the group did not take part in such violence.

2.2. The court found Irakli Okruashvili guilty of the offense under Article 225-2 of the Penal Code

The court's reasoning presents itself to be problematic for a number of serious reasons that are direcly linked with the outcome of the case.

2.2.1.An organized action of a group

As we have mentioned above in the analysis of Article 225, for a person to be criminally liabile for participation in a group action, the latter must be an organized one. There is no mention by the court in its judgement of whether the group activity that Irakli Okruashvili was charged with, had been organized and how this organization was manifested. In other words, the court neglected one of the necessary elements of the impugned crime under Article 225-2 that was required to prove Okruashvili's commision of the crime.

Nor did the court provide reasons for considering Irakli Okruashvili a member of "the group" and why his actions ought not to be deemed as actions of an individual protester, separated from the group (even if such a group existed). This is relevant because Okruashvili's guilt was significantly affected (by way of aggravation and the bringing of heavier charges against him) due to the consequences of other peoples' actions; indeed, the court had been repeatedly emphasizing the physical and property damages caused by other members of the rally.

2.2.2.Classifying Irakli Okruashvili's actions as "violence"

In the court's view, Irakli Okruashvili's violent actions were expressed in the form of pushing the police cordon, pulling the hand of one of the police officers and resisting the officer this way. Explaining Article 225, the court said it does not require "violence" to necessarily entail pain. The problem with the court's explanation is that, by asserting that "violence" under Article 225 does not have to cause pain, the judge of the case repeated the view of some legal authors verbatim in his judgment. The judge went on, in the same part of the judgment, as he was generally analyzing Article 225, to use very similar or at times even identical wording from a specific book of specific legal authors. Reference by a court to academic works in its judgments is not a problem per se. The problem is, however, that the court invokes an academic publication to the detriment of the defendant. Whareas there is no clear agreement among academics on a particular matter, the judge's reference to one of such writings in a way that worsens the defendant's position instead of exploring the impugned provision on their own (in which case the case could have a better outcome for the defendant) is problematic.

Indeed, the judge's interpretation of the word "violence" in Article 225-1 of the Penal Code presents itself as problematic: even if the Prosecution's allegation is correct in that Irakli Okruashvili pulled the hand of the police officer, the intensity of such pulling must have been very low. By court's interpretation, any physical pressure, no matter how intensive it is, qualifies as violence – a conclusion that is fundamentally wrong and contradictory to general principles of the criminal law. More specifically, the court's interpretation of Article 225 is incorrect because:

- The mere pulling of somebody's hand or moving them off the way is not a criminal offense. Under Article 126-1 of the Penal Code, "Battery or other violence that caused the victim to physically suffer but did not entail the consequences described in Article 120 of this Code, - shall be punishable with a fine or community service from 120 to 180 hours or home arrest from 6

months to 1 year or imprisonment for up to 1 year, with or without limitations on weapon-related rights." So a use of physical force against a person that does not cause physical pain to that person will not fall within the scope of Article 126 and, even if it does, the Penal Code offers a range of alternative sanctions for the conduct the harshest of which is imprisonment for up to a year or at most up to 2 years, if the conduct is committed by a group of people.

There is no reason for construing the word "violence" in Article 225 (by a group of people in riot) differently (as being less intensive) from the same word "violence" in Article 126 (in a normal setting). Quite the contrary, "violence" in Article 225 may well be understood to imply a higher degree of physical force for reasons explained in the next passage.

- Article 225 is concerned with riots, in which physical interaction among people such as pushing, shoving, scuffling and the very hand pulling are commonplace, especially between the protesters and the police. It is therefore logical to interpret "violence" in Article 225 to imply actions that are characterized with a higher degree of physical intensity than those in other, normal settings such as those implied by Article 126, which criminalizes a physical action that is able to cause physical pain. Interpreting the word "violence" in Article 225 as implying less intensity than the same word in Article 126 (as the court did in Irakly Okruashvili's case) not only leads to an unfair outcome of the case but generates a pratical nuissance suggesting that in a setting of mass riot when a lot of people are, this way or other, involved in physical actios directed at police officers (something that Irakli Okruashvili was prosecuted for), each protesters has to be prosecuted under Article 225-2. Such an interpretation simply makes Article 225-2 a weapon of political repression that has nothing to do with the aim of that provision. If an overwhelming majority of rally participants were to fall within the scope of Article 225-2 (as is suggested by the court's interpretation of that provision), then the government gains the opportunity to select and punish unwanted persons whom it dislikes, the way it actually happened in Irakly Okruashvili's case.
- The court's erroneous interpretation of the word "violence" in Article 225 is emphasized also by the sanction envisaged by the said provision. In particular, it does not allow for alternative sanctions to be imposed; instead, it lays down only one type of punishment: imprisonment, from 4 to 6 years. The court's understanding of the provision then is that either a person remains inactive and gets no punishment at all or he gets sentenced to at least 4 years even for using the least intensive physical force. As the Constitutional Court has stated, "The punishment imposed for particular conduct must reasonably and proportionally relate to the damage the offense causes or may cause to a person or a community."[12] Labelling the mere hand-pulling as "violence" meeting the Article 225-2 standard constitutes manifest disproportionality between the conduct punishable by the provision and the sanction envisaged for it. Indeed, a reasonable reading of Article 225 suggests that "violence" implies not any kind of physical action directed at another person but at least the one that causes physical pain, such as one inflicted by a fist punch or a bat hit. That is the kind of interpretation the judge of the case should have adopted rather than considering the mere pushing of police officers and pulling the hand of one of the officers as amounting to "violence" for the purposes of Article 225 of the Penal Code.

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[12] The Constitutional Court of Georgia, *Georgian citizens Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. The Parliament of Georgia*, Judgment no. 1/9/701,722,725, 14 July 2017

What would be the outcome of the case had Judge Lavrenti Maglakelidze adopted what we believe is a correct interpretation of Article 225 of the Penal Code described above? A person must carry out at least one of the alternative actions listed in Article 225-1 or, in other words, directly be involved in fulfilling the objective elements of the offense in order to be held liable under Article 225-2. These actions are "violence, ravaging, damaging of or destruction of the property of others, use of weapons or rendering resistence to or attacking a representative of the authorities using a weapon". The Prosecution argued commission by Irakly Okruashvili of none of these actions but "violence". Thus, had the judge of the case correctly construed the word "violence", as per the principles of criminal law and the Constitution, Irakli Okruashvili's actions would not qulify as "violence" and he would not be found guilty under Article 225-2 of the Penal Code. The aforementioned judgment of the Supreme Court bears witness to this conclusion.[13] In Okruashvili's case, the court never found the violence against police officers had been pre-organized.

2.2.3.Evidence

The convicting part of the judgment relied on the testimonies of 4 witnesses, all of whom were police officers. But unlike the first count of the charge ("leadership"), the Prosecution adduced video footages from various television channels to prove the second count ("participation"). The contents of the footages raise important questions but the forensic video analysis (habitoscopy report) confirmed the person on the videos was Irakli Okruashvili.

Before we go on to evaluate the contents of these evidence, the following question needs to be answered : was it justifiable to have the convicting judgment relied on testimonies of 4 police officers and video footages (as well as the habitoscopy report)? The practice established by the Georgian Supreme Court and the case-law of the European Court of Human Rights do not exclude that the said evidence could suffice to meet the "beyond reasonable doubt" standard for the judgement. In its 2018 judgment the Supreme Court stated: "It would be erroneous to say it outright that police officers' testimonies are, by definition, less (or more) importantin in any criminal case … Credibility and trustworthiness of police officers' testimonies should be assessed in the light of individual circumstances of the case, and giving them any predetermined evidentiary value is unjustified." [14] In the latter case the Supreme Court concluded that the "beyond reasonable doubt" standard had been achieved by the fact that police officers' testimonies had been corroborated by other pieces of evidence such as search and seizure reports, a crime scene observation report and a car search report. As for the European Court of Human Rights, in *Ochelkov v. Russia* (the judgment was cited also in Okruashvili's convicting judgment), the European Court stated that the police officers' statements were of little value as they were not supported by any evidence.[15] Thus, the European Court considered police officers' testimonies as having low evidentiary weight not in all cases but where they are not supported by other evidence. The Georgian Supreme Court has been citing the latter judgment of the European Court in many of its judgments and other decisions.

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[13] See footnote 10 above

[14] The Supreme Court of Georgia, Criminal Cases Chamber, Judgment no. 2k-328ap.-18, 26 November 2018

[15] The European Court of Human Rights, *Ochelkov v. Russia*, application no. 17828/05, 11 April 2013, par. 90

As for the contents of the evidence, the Defense attracted the Court's attention to identical testimonies of the two police officers as a fact that unequivocally confirmed that the police officers had simply put their signatures on pre-drafted papers. The court disagreed with the Defense stating that there were video recordings showing the witnesses testified in the presence of both parties in observance of the adversarial principle and that "the Defense's efforts to discredit the witness testimonies only for the reasons cited cannot deprive the testimonies of their credibility and trustworthiness". In fact the judge did not explain why the texts of the two testimonies were exactly the same and, if they were, then why this was not a reason for reasonably doubting their trustworthiness. The fact that the criminal proceeding ran in observance of the adversarial principle does not release the court of its obligation to substantiate why a particular piece of evidence is trustworthy and why a reasonable third party would not doubt its credibility because the judge is the one to decide whether to base his judgment on individual pieces of evidence. In the same way as contradictory testimonies might give rise to rasonable doubts as to their trustworthiness, exactly identical testimonies are also well capable of impelling a reasonable third party to reckon that the witnesses had agreed in advance, that they signed pre-drafted testimonies, etc.

A major piece of evidence relied on by the court to find it established that Irakly Okruashvili pulled the hand of one of the police officers and moved him away to break police resistance – which the court considered was a violent action – is a video footage. The footage is not clear enough to irrefutably tell Irakly Okrushvili did this. Where the recording shows, in the view of the Prosecution Office and the court, Irakly Okruashvili pulling the police officer to move him off and break his resistence, the two are covered by serveral people making it hard to discern what exacly Irakly Okruashvili did. Worth mentioning is also the following: while the Prosecution Office's major argument to assert Okruashvili's acting with intent was that he made his way to the Parliament building on his own rather than been driven by a crowd of people, the part of the video recording in which Okruashvili is pulling the police officer shows how Okruashvili is pushed by a crowd of people thereby determining the trajectory of his movement. In other words, it is more than evident that nothing but doubts exist about Irakli Okruashvili's conduct and they have not been proven at the beyond reasonable doubt standard. By contrast, the Constitution of Georgia, in its Article 31-7, posits that any doubt that cannot be proven in accordance with rules established by law must be decided in the defendant's favor.

2.2.4. Intent

The offense envisaged by Article 225-2 can only be committed with direct intent. So anyone who carries out all or any of the actions listed in Article 225-1 must be acting with direct intent. In the time span on the footage where Irakli Okruashvili is not clearly seen pulling the police officer's hand and moving the officer away while several people behind Okruashvili are pushing him from the back, it cannot be observed that Irakli Okruashvili acted with direct intent. The Defense asserted that Okruashvili was there to discharge the tension. But the court disagreed with the Defense on Irakli Okruashvili's attempt to diffuse the confrontation despite the fact that the case file has no hold of continuous and uninterrupted frame images of the whole process clearly showing every single action

of Okruashvili. This part of the convicting judgment too puts the burden of proof on the defendant – something that is a violation of the equality of arms and adversarial principles.

3. Political interference and selective justice

Irakli Okruashvili's arrest was preceded by the arrest of Koba Koshadze, his bodyguard and friend, on July 17. Koba Koshadze was charged with unlawfully buying, storing and carrying a gun.[16] This was followed by Irakli Okruashvili's intiation of a court action concerning the Rustavi-2 TV company on July 19 and his request for freezing the shares of the company shareholders.[17] Irakli Okruashvili was arrested on July 25.

These events immediately generated political statements. Various opposition parties spoke of Irakli Okruashvili's arrest as of a political decision. On April 14, a statement was published also by the United States Embassy in Georgia, which said: "The timing and circumstances of Irakli Okruashvili's arrest raised concerns about political interference and the selective use of justice."[18]

The impression of selective justice is reinforced also by the fact that charges related to the June 20 events were brought against 18 more people. All of them were at the frontline of tension and had been in close contact with the police. Except for a small group of people, a huge crowd of hundreds of citizens were at the Parliament building that day. A significant part of these citizens were, at least, pushing the police cordon. From those hundreds of people who were not located at the frontline of events but were in front of the Parliament and most likely were pushing the police cordon, the Georgian Prosecution Office brought charges only against Irakli Okruashvili.

Conclusion

Although the court has correctly and fairly evaluated a series of issues in its ruling – and that is true especially for Article 225-1 of the Penal Code – Irakli Okrushavili's criminal case and convicting judgment are significantly problematic.

The events preceding the charging of Irakli Okruashvili and the circumstances in which his criminal case was dealt with should be borne in mind (despite Covid-19-related restrictions in place, the case proceeded in an accelerated manner and the court announced the judgment only a few days before the expiry of the 9-month pretrial detention period). Both the contents of the evidence that the judgment relied on and compliance with the beyond a reasonable doubt standard of proof are seriously questionable. Also, the way the judge of the case construed the word "violence" for the purposes of Article 225 is problematic, presenting itself as a vivid example of a court interpreting a provision to the detriment of the defendant. And last but not least, the case contains clear signs of selective use of justice. Among hundreds of protesters who were not located close to the police cordon but participated in the rally and perhaps were a part of the crowd pushing the police, the

[16] https://www.radiotavisupleba.ge/a/30060688.html
[17] https://bit.ly/2WG3Th4
[18] https://civil.ge/ka/archives/346665

Prosecution Office brought charges only against Irakli Okruashvili. These circumstances collectively taken contribute to clear and reasonable doubts related to politcally motivated and selective use of justice against Irakli Okruashvili.