Georgian Young Lawyers' Association

MONITORING CRIMINAL TRIALS IN TBILISI AND KUTAISI CITY COURTS

Monitoring Report №3
Period Covered: July – December, 2012
April, 2013
Tbilisi, Georgia

The monitoring project is made possible by the generous support of the American People through the United States Agency for International Development (USAID). The contents are the responsibility of Georgian Young Lawyers` Association and do not necessarily reflect the views of USAID, the United States Government or EWMI.

USAID
FROM THE AMERICAN PEOPLE

EAST • WEST
MANAGEMENT
INSTITUTE
The Judicial Independence and Legal Empowerment Project (JILEP)

"The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government."

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

Authors: **TINATIN AVALIANI**
EKA KHUTSISHVILI

Editor: **KHATUNA KVIRALASHVILI**

Tech. Editor: **IRAKLI SVANIDZE**

Responsible of publication: **EKATERINE POPKHADZE**
TAMAR GVARAMADZE

The following GYLA monitors took part in the preparation of the monitoring and research results: **MARIAM NIKOLASHVILI**
GIORGI POPANDOPULO
VLADIMER BEKISHVILI
LEVAN VEPKHVADZE

Was edited and published
in the Georgian Young Lawyers' Association
15, J. Kakhidze st. Tbilisi 0102, Georgia
(+99532) 293 61 01, 295 23 53

CONTENTS

INTRODUCTION

Georgian Young Lawyers' Association (GYLA) has been carrying out its court monitoring project since October 2011. GYLA initially implemented its monitoring project in Tbilisi City Court's Criminal Chamber. On December 1, 2012, GYLA broadened the scope of the monitoring project to also include Kutaisi City Court. Identical methods of monitoring are utilized both in Kutaisi and in Tbilisi.[1]

GYLA held a presentation on the results of the first two stages of its monitoring project (October 2011 – March 2012) in June 2012, at which its first and second trial monitoring reports were presented to public and stakeholders.

This is GYLA's third trial monitoring report, covering the period from July through December 2012. During those six months GYLA monitored total of 428 court hearings, including:

- 74 first appearance hearings;
- 78 pre-trial hearings;
- 69 hearings where plea agreements were discussed; and
- 207 main hearings.

Of these 428 hearings, 402 took place in Tbilisi City Court (TCC) and 26 took place in Kutaisi City Court (KCC). Consequently, the observations in this report rely almost exclusively on data from TCC. In the 26 hearings observed at KCC, the results did not significantly differ from those observed at TCC. However, a positive observation worth noting is that the explanation of rights to defendants in KCC was found to be better than in TCC, with the KCC judges explaining the defendants' rights in a more intelligible way than in TCC.

Similar to the previous reporting periods, the purpose of monitoring criminal case proceedings was to increase their transparency, reflect the actual process in courtrooms, and provide information to the public. In addition to reporting its findings during the reporting period, GYLA also presents recommendations for improving the criminal justice system based on observations from the time it began its monitoring project.

[1] Due to the smaller number of cases in Kutaisi, monitoring is conducted by a single observer. In Tbilisi City Court monitoring was conducted by three observers, as in the previous reporting period.

During this monitoring period, GYLA found certain improvements on the part of the court relative to prior monitoring periods; these improvements are discussed further below. It should, however, be noted that these improvements were largely observed in cases involving former governmental officials. It is presently unclear whether the court's general approach in these areas has improved, or whether the court was merely treating former officials more favorably than other defendants. GYLA will continue monitoring this issue and report on developments in its future reports.

Methodology

All of the information in this report was obtained by monitors through their direct monitoring of hearings. Based on the monitoring methodology, GYLA's monitors do not communicate with parties of the proceedings, or familiarize with case files and court's decisions. Rather, the analysis is based on information received from trial monitoring. Both the monitoring and analysis of information obtained was carried out by experienced lawyers and analysts of GYLA.

Similar to the previous reporting period, GYLA's monitors utilized questionnaires prepared especially for the monitoring project. Information gathered by the monitors was evaluated, and its compliance with international standards, the Constitution of Georgia and applicable procedures and laws was determined.

The questionnaires included both close-ended questions requiring a "yes/no" answer and open-ended questions that allowed monitors to explain their observations. Further, starting in July 2012, GYLA's monitors made transcripts of trial discussions and particularly important motions in certain cases, giving more clarity and context to their observations. Through this process monitors were able to collect objective, measurable data, while at the same time recording more subjective facts and developments. The attached charts may not fully reflect this more subjective information; however, GYLA's conclusions are based on its analysis of all of the information gathered by the monitors.

In view of the complexity of criminal proceedings, GYLA's monitors typically attended individual court hearings rather than monitoring one trial from start to end. However, there were certain exceptions. "Important cases" – selected by GYLA's monitors and analysts accord-

ing to criteria elaborated beforehand – were monitored from beginning to end, to the extent possible. These cases involved blatant violations of rights, high public interest, or other distinguishing characteristics. During this monitoring period, GYLA closely followed 38 cases. Of these cases, one was concluded with a plea agreement, one was concluded by a guilty verdict, and the hearings in one were closed based on the motion of a party, for the purpose of protecting interests of the victim of sexual crime – rape[2]; 35 cases remain pending. Of the 38 cases, 15 involve high-level former government officials, 11 are drug or weapon cases (a type of case where violations of rights are frequently detected), and the remaining 12 are murder, rape and other crimes which were distinguished by their significance. If any of these 38 cases is appealed after verdict, GYLA's monitoring of the case will be continued in the Appellate Court.

Structure of the Report

This report first presents key observations related to three stages of criminal proceedings: the first appearance of defendants before the court, pre-trial hearings where evidentiary motions are discussed, and hearings concluded with a plea agreement.

The report then provides an evaluation of the basic rights that defendants have in criminal proceedings, regardless of the stage of the proceeding. These rights include: the right to public hearing, equality of arms, the right to be assisted by an interpreter, the prohibition against ill-treatment and the right to trial within a reasonable time period.

The report's Conclusion highlights the key issues identified during the reporting period. The report then identifies concrete recommendations for eliminating flaws and deficiencies identified by GLYA's monitoring project.

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

[2] According to the Article 182.3."d" of CPC, on the motion of a party, the court may decide to partially or fully close the session for the purpose of protecting interests of the victim of trafficking in person and sexual crime.

I. OBSERVATIONS REGARDING SPECIFIC STAGES OF CRIMINAL PROCEEDINGS

This chapter offers an overview of problems observed by the monitoring project that were characteristic of a certain stage of a criminal proceeding.

1. First Appearance

According to the Article 198 of the Criminal Procedure Code of Georgia (CPC), during a defendant's first appearance the Court considers the issue of what measure should be used to insure that the defendant returns to court for later hearings and does not either commit a crime while awaiting resolution of the case or interfere with the prosecution of the case. This "preventive measure" must be substantiated, meaning that the preventative measure imposed must correspond to the goals of a preventive measure.

Many different types of preventative measures are available to the court. These include: imprisonment, bail, guarantee, agreement of residence and due conduct, and supervision of the conduct of a military serviceman by commanders–in-chief.[3]

CPC Article 198(3) provides:

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

Further, CPC Article 198(5) provides:

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

The decision of the court as to preventative measures must be sub-

[3] Article 199 of the CPC.

stantiated, as a substantiated decision at any stage of the proceedings is part of the right to a fair trial, guaranteed by the Criminal Procedure Code[4] and reinforced by a number of judgments by the European Court of Human Rights (ECHR).[5]

Out of the trials monitored by GYLA, we would like to highlight the case of Giorgi Kalandadze

Following the October elections, criminal prosecution was instituted against former Chief of MOD's Joint Staff Giorgi Kalandadze. Court granted bail as a preventive measure. With respect to the very same case (but a different episode) the prosecution aggravated charges and applied to court once more, with a request for bail. The court rejected the motion, explaining that preventive measure had already been ordered in the case.

The case is rather interesting from legal point of view, as no other cases monitored were similar to it.

Similar to previous reporting periods, the monitoring found the use of only two types of preventive measures – bail and arrest, which GYLA views as one of the key problems in criminal justice system.

Problematic nature of preventive measures has been caused by motions filed by the prosecution and subsequent court's rulings; however, notably the defense itself rarely filed motions for alternative measures. For instance,

- In 98 cases monitored by GYLA the defense motioned for guarantee for two defendants only in the process of consideration of the possibility of ordering a preventive measure;
- In 98 cases monitored by GYLA, an order of proper conduct and not leaving a place was utilized as a preventive measure for 9 defendants only, as they had been charged with provisions of the Criminal Code that envisaged deprivation of liberty for the period of up to one year (six of these defendants were charged under Article 273 of the Criminal Code[6], two were charged under Ar-

[4] Article 194.2 of the CPC stipulates that "a court's decision shall be well-grounded;"

[5] E.g., *Hiro Balani v. Spain*, no. 18064/91, Para. 27 (9 December 1994).

[6] Article 273 of the Criminal Code, illegal production, acquisition, storage or consumption without prescription of small amounts of drugs, its analogue or precursor.

ticle 120[7] and one under prima Article 381[8]). Under Article 202 of the Criminal Procedure Code, an order of proper conduct and not leaving a place can be applied to only those crimes that do not envisage more than one year of imprisonment as a punishment. In none of the cases monitored by GYLA, neither the defense nor the prosecution filed motions for an order of proper conduct and not leaving a place; neither did court consider application of such measure.

Statistics related to use of imprisonment and bail as preventive measures include:

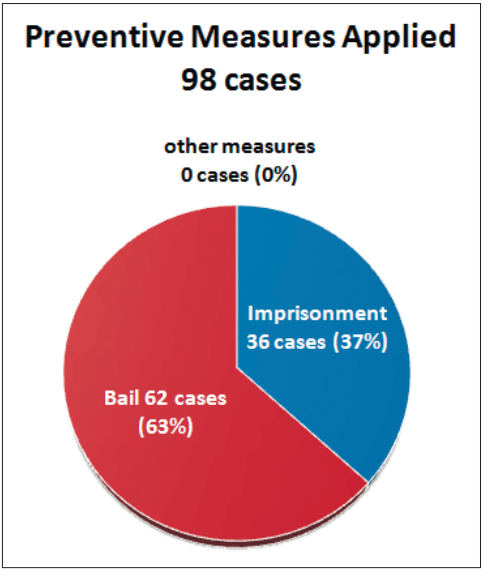
- Among the 74 first appearances that were monitored, one was closed. In remaining 73, the court considered preventive measures related to 98 defendants. Of these, the court imposed imprisonment as a preventive measure for 37% of defendants, and bail for 63% of defendants. *No defendants received a preventative measure other than imprisonment or bail*.
- Compared to previous monitoring periods, during this period the court appeared slightly less biased in favor of prosecution motions for preventive measures. For the first time during the whole monitoring period, GYLA detected cases when court did not grand prosecution's motion concerning preventive measure. In particular, judges ordered bail for 13 defendants even though the prosecution requested imprisonment. *Notably, all 13 cases occurred following the October 2012 parliamentary elections, and ten of the defendants were former government officials.*
- Nonetheless, GYLA believes that the *preventive measures ordered against defendants were non proportional in 31 of 98 cases -19 cases of bail and 12 cases of imprisonment - (32%)*, based on the gravity of the alleged crime and other factors (personal characteristics of defendant, his/her financial condition and marital status, damage inflicted, danger of destroying evidence, etc.). GYLA believe that judge must determine preventive measures on a case-by-case basis in view of concrete circumstances of the

[7] Article 120 of the Criminal Code, inflicting intentional damage to health.

[8] Prima Article 381 of the Criminal Code, failure to abide by requirements and/or obligations envisaged by a protecting or restraining order.

case, while being guided by common standards in the interests of justice.

- Out of 98 first appearances where the prosecution raised motions for imprisonment or bail, the inappropriateness of a less restrictive preventive measure was justified in only 18% of cases.
- Of the 98 motions for preventive measures, the prosecution based its motion on "probable continuation of crime" in 61 motions. In 64% of these 61 motions, the prosecution failed to justify its argument.
- In 45 motions, the key argument of the prosecution in support of preventive measures was probable "obstruction of justice and destruction of evidence." However, in only five of these 45 cases was the prosecution able to present concrete facts to justify its argument.



1.1. **Imprisonment**

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

The right to liberty is guaranteed by the Constitution of Georgia,[9] the European Convention on Human Rights,[10] and the Criminal Procedure Code.[11]

Under these provisions, the only grounds for imprisoning a defendant before a final determination of guilt are: a) a threat that the individual would flee; b) a threat of obstruction of justice; and c) to avoid the commission of a new crime. Reassessment of proportionality of imprisonment sentenced on periodic basis is another key element of

[9] Para.1, Article 18 of the Constitution of Georgia stipulates that: "human liberty is inviolable". Under para.2 of Article 18: "deprivation of liberty or any other restriction of perosnal liberty without a court decision shall be prohibited."

[10] Article 5.1. of the European Convention on Human Rights: „Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non--compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition";

[11] Article 205.1 of the Criminal Procedure Code of Georgia stipulates that: „imprisonment as a preventive measure shall be applied when it is the only possible way to prevent the following:
a) Fleeing of a defendant and obstruction of justice by him/her
b) Interference with collecting evidence
c) Commission of a new crime";

the right to liberty both under the ECHR[12] as well as national procedure legislation.[13] The point is that court under the human rights convention and ECHR case law is obliged to review time to time the imprisonment under the party's request, and that denial to consider such request is also the matter of the right to liberty.

Findings

GYLA's monitoring revealed that judges imposing imprisonment as a preventive measure often failed to justify its necessity, and rarely requested justification of a motion for imprisonment from the prosecution. The prosecution mostly cited the same arguments in its motions for imprisonment as a preventive measure, only rarely providing any substantiation for those arguments. As a result, the imposition of imprisonment as a preventive measure was frequently not justified.

This conclusion is based on the following statistical data from the cases monitored:

- The court granted the prosecutor's motions for imprisonment as a preventative measure in 36 out of 49 cases (73%). In the 13 cases where the court did not grant the motion for imprisonment, *ten of the 13 defendants were former governmental officials* prosecuted after the October 2012 elections;
- Of the 36 cases in which the judge ordered imprisonment as a preventive measure, the judge failed to state basis of his/her decision in 50% of those cases.
- In numerous cases, the imposition of imprisonment as a preventive measure appeared clearly excessive.

[12] *Jėčius v. Lithuania; The Right to Liberty and Security of the Person, A Guide to the Implementation of Article 5 of the European Convention on Human Rights, Monica Macovei, Human Rights Handbooks, No.5, Council of Europe, p.60-61;*

[13] CPC Article 206.

Examples of Imprisonment Being Used as a Preventive Measure

- A single mother of three children was charged with a less grave crime – theft (Article 177.2a, Criminal Code of Georgia). Although the damage amounted to mere GEL 152, the defendant was sentenced to imprisonment;
- A single mother of a minor, charged with grave crime – fraud (Article 180.2.b of the Criminal Code) was sentenced to imprisonment even though damages amounted to only USD 800;
- A 67-year old defendant suffering from diabetes, charged with less grave crime – production and use of forged documents (Article 362.1 of the Criminal Code), four episodes, who confessed to the crime and was cooperating with the investigation, was sentenced to imprisonment.
- A single father of a minor charged with less grave crime – illegal acquisition, storage and carriage of fire arms (Article 236.1, 2 of the Criminal Code), who cooperated with the investigation, was sentenced to arrest without providing any substantiation.

1.2. **Bail**

Bail is a preventive measure by which the court achieves its goals of assuring the defendant's return and preventing the commission of future crimes or interference with the prosecution by requiring that the defendant deposit funds in order to be released.

As a type of a preventive measure, bail is subjected to all of the obligations envisaged by the Criminal Procedure Code for application of preventive measures. As a result, the prosecutor must justify the reason behind his/her choice of preventive measure and that the court must take into consideration a variety of factors, including the defendant's character, financial status and other significant characteristics, even where such circumstances are not provided by the prosecutor. Moreover, the defense is not obligated to present information about these circumstances, as it is the prosecution that must justify the relevance and proportionality of the preventive measure sought.[14]

Hence, the appropriateness of bail depends on its substantiation.

[14] Under CPC Article 200.2, the amount of bail is determined according to gravity of crime committed and financial position of defendant.

Findings

Substantiation of bail that GYLA considered sufficient was used in over half of the cases where bail was prescribed (37 out of 62), in which the defense submitted proof of defendant's financial status. GYLA believes that in similar cases defendant's consent to the amount requested in bail must be viewed as sufficient substantiation. The need to further examine financial status of a defendant concerned did not arise before court in any of these 37 cases, while in remaining 25 cases court determined defendant's financial status in only three cases even though it was indicated neither by the defense nor by the prosecution.

Further, although the CPC envisages several types of less severe preventive measures (such as agreement to not leave an area and behave properly), in *none* of the cases observed by GYLA's monitors were these types of preventive measure imposed even though they would have been entirely reasonable as to numerous less grave crimes.

Examples of Bail Being Used as a Preventative Measure

- Socially vulnerable defendants working at Eliava Market had bail set at GEL 5,000 even though they clearly could not afford to pay the sum. They were charged with a less grave crime, hooliganism (Criminal Code Article 239.2.a).
- For less grave crimes, storage of a small amount of narcotics for personal consumption and carrying a non-explosive weapon (Articles 273 and 238[1].1), bail was set at GEL 25,000 despite defendant's lawyer's vehement protest.
- For the less grave crime of resistance, threat or violence against a protector of public order or representative of the authorities (Article 353.1), a defendant who was the only bread-winner for his sick mother had bail set at GEL 7,000.
- A socially vulnerable defendant charged with grave crime – fraud (Article 180.2.a.b of the Criminal Code) was granted bail in the amount of GEL 35 000.

In addition, the bail amount ordered by the court was usually identical to that requested by the prosecution. Moreover, the amount of bail was frequently disproportionate to the financial position of defendant and the charges leveled against him/her. For example:

- In 78% of the cases in which the prosecution requested bail (38 of 49), the amount of bail prescribed by the judge was exactly the amount requested by the prosecution.
- In only 13 of the 49 cases (27%) where the prosecutor requested imprisonment did the court order bail and ten of those 13 cases (77%) involved former high government officials. Notably, no such case was detected during the previous monitoring periods (from October 2011 till October 2012).
- Of 62 first appearances, the judge justified the imposition of bail in only 37 (59%) of cases, and the prosecution submitted proof of defendant's financial position in only these 37 cases. Except for one case that involved a former government official already under bail for the same case (another episode), the court *always* ordered bail when requested by the prosecution. Moreover, the amount of bail demanded and prescribed was frequently inappropriately high [see text box above].

There were, however, two potentially positive and different trends related to bail were observed after the October 2012 elections:

- During previous monitoring periods, judges *never* ordered bail unless it was the most severe preventative measure requested by the prosecution, and in each of those cases the court ordered the *exact* amount of bail requested by the prosecutor. By contrast, after the October elections the court ordered bail against 13 defendants even though the prosecution requested imprisonment; however, ten of those defendants were former high government officials.
- In addition, after the October elections there were 11 cases in which the court set bail at an amount less than what was requested by the prosecution. Potentially even more significant, only one of these 11 cases involved a former high governmental official.

Particularly with regard to the cases where the court ordered bail for a former government official despite the prosecutor's request for imprisonment, it is difficult to know whether the court's leniency was

a result of the defendants' positions in the prior government, or if it reflects a changed attitude of the court after the elections that will be observable in more routine cases in the future. During the upcoming court monitoring period, GYLA will be monitoring this aspect of proceedings with special interest so that it can better assess any potential changes in the court's behavior.

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

The monitoring of first appearances also revealed a procedural problem related to a defendant's right to a public hearing.

The right of a defendant to a public hearing is guaranteed by the Constitution of Georgia[15], the European Convention on Human Rights,[16] and the Criminal Procedure Code of Georgia.[17]

To make this right effective, it is not sufficient for the public to merely have the right to attend at a criminal proceeding; the public must also have the right to be informed in advance about the proceeding so that it has the opportunity to attend. Therefore, the right to a public trial obligates the court to publish in advance the date and place of the first appearance hearing, the full name and surname of defendant, and the articles with which s/he has been charged.

[15] Article 85 of the Constitution of Georgia stipulates that "cases before court shall be considered at an open sitting. The consideration of a case at a closed sitting shall be permissible only in the circumstances provided for by law. A court judgment shall be delivered publicly";

[16] Article 6.1 of the ECHR stipulates that "In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[17] Article 10.1 of the Criminal Procedure Code stipulates that "generally, a trial shall be held in public and orally. Closing of a session shall be allowed only in cases prescribed by this Code. Under para.2 of Article 10, "all decisions made by court must be announced publicly."

Findings

In *none* of the 74 first appearances monitored by GYLA did the Court publish information about those hearings in advance.

This complete failure of TCC to publish information on first appearance hearings in advance has been observed since GYLA began its monitoring in October 2011. Despite GYLA's active involvement in raising the awareness of the judiciary about this situation, it remains unchanged. Representatives of the judiciary claim that this is because of technical limitations associated with the fact that first appearances are held shortly after a defendant's arrest. GYLA believes that this argument is insufficient to justify the court's gross violation of the right to a public hearing.

2. **Pre - Trial Hearings**

At a pre-trial hearing the court considers the admissibility of evidence that will be considered at the main hearing. This stage is of extreme importance, as the verdict at the main hearing will be based on the evidence deemed admissible by the court at the pre-trial hearing.

The court's rulings on pre-trial motions must be impartial and without bias to either side. The right of a defendant to impartial proceedings has been recognized by Article 84 of the Constitution of Georgia, Article 6 of the ECHR, and is guaranteed by the Criminal Procedure Code of Georgia.

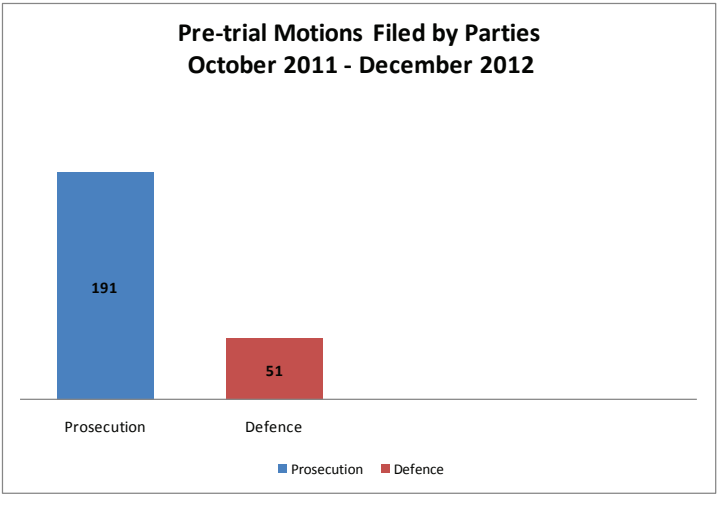
Findings

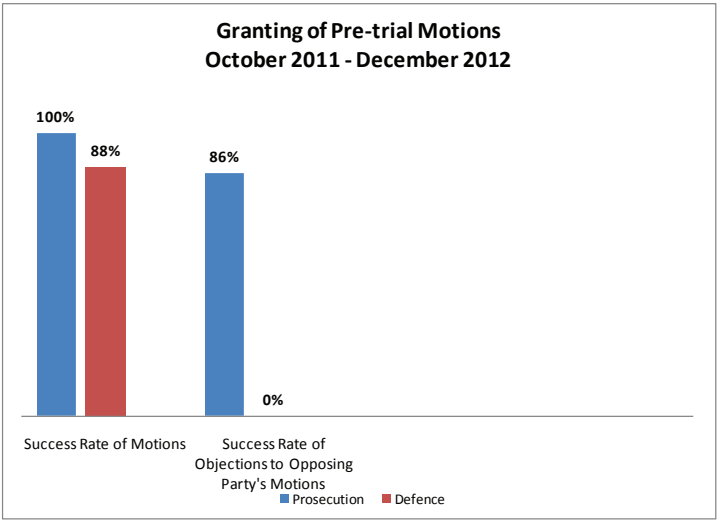
Statistical data from pre-trial hearings raises questions as to the impartiality of the court, affecting the right of a defendant to an impartial trial.

As in the prior court monitoring periods, the court seems predisposed to granting *all* of the prosecution's motions seeking the submission of evidence. During this current monitoring period, all 74 prosecution motions for the submission of evidence were granted, despite the fact that the defense objected to nine of those motions. During the GYLA's whole monitoring period (October 2011- December 2012), *191 of 191 prosecution motions for submission of evidence were granted, despite the defense objecting to 23 of those motions.*

During this monitoring period, however, the court also seemed inclined to grant motions seeking the submission of evidence by the defense; this is a noticeable departure from what was observed during prior monitoring periods. This monitoring period, the court granted 22 of 22 motions submitted by the defense. Of particular note, the court granted one of those 22 motions despite the prosecution's objection to the motion. This particular occasion was detected after the October 2012 elections. It remains unclear, however, whether the receptiveness of the court to defense motions represents a significant change in the attitude of the court. Since GYLA began its monitoring project, *only 45 of the 51 motions for submission of evidence filed by the defense* were granted.

Equally significant, since GYLA began its court monitoring project the court has sustained the prosecution's objection to defense motions in six out of seven cases. This represents a success rate of 86% for the prosecution's seven objections to motions, as compared to a 0% success rate for the 23 objections by the defense.





3. Plea Agreement Hearings

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

Under Article 213 of the Criminal Procedure Code, when a plea agreement is reached the judge must verify whether the charges brought against the defendant are lawful and whether the agreed-to punishment set out in the prosecutor's motion for acceptance of the plea agreement is fair.[18]

To ensure that fairness of punishment, judge must examine individual circumstances of the case, taking into consideration individual traits of the person concerned, circumstances under which crime was committed and punishment agreed upon[19]. The law does not contain any direct stipulations about types and forms of means for ensuring that

[18] Under United States federal legislation, the judge is imposed with same obligations. http://www.law.cornell.edu/rules/frcrmp/rule_11. The American Bar Association's model standards for plea agreements envisage the same obligations; http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html#3.3;

[19] Article 53 of the Criminal Code.

punishment is fair. However, based on general principles of imposition of punishment – e.g., when imposing a punishment a judge has the power to determine financial status of the defendant concerned; whether s/he can afford paying fine; whether amount of fine ordered commensurate to damage inflicted; circumstances under which crime was committed and anticipated measure of punishment in an event of a main hearing. Further, the law stipulates that before the pre-trial session judge may offer to parties the possibility of a plea bargain with modified conditions[20]. This way, the law delegates court with a limited leverage to influence fairness of punishment during a single stage of court proceedings.

Findings

Despite the obligations that are placed on the court, GYLA's monitoring indicates that during plea agreements judges played an extremely passive role and approved plea agreements almost automatically, without any consideration as to whether the agreement was either lawful or appropriate.

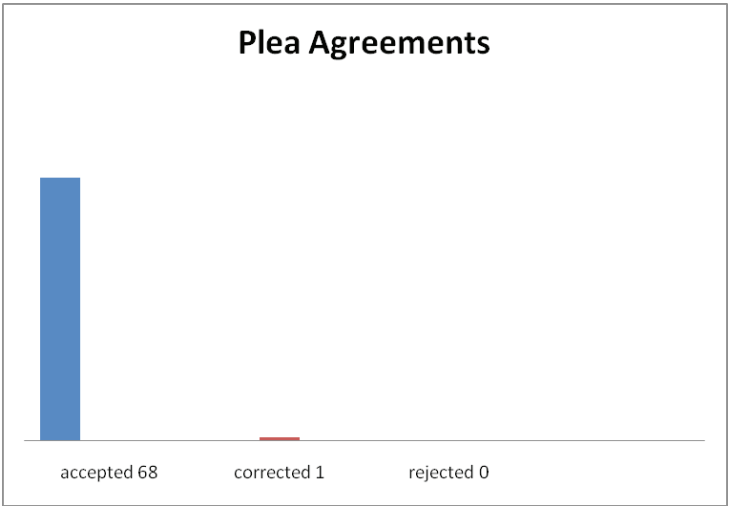
The judges' lack of engagement was clear in that judges approved every plea agreement brought before them, and in *none* of the cases observed did the judge take any significant interest in whether the punishment was fair. In fact, of the 69 plea agreements brought before the court the issue of fairness was raised in only one, where the judge asked a *pro forma* question as to whether the defendant agreed with prosecutor's motion; the court did not ask any questions about the defendant's circumstances to make sure that the punishment was fair.

GYLA's key observations include:

- Of the 69 hearings observed by GYLA at which a plea agreement was considered, the judge approved the plea agreement in *all* cases.

[20] Under Article 213.5 of the Criminal Procedure Code, if a motion for delivering a judgment without main hearing is considered before pre-trial session, and court determines lack of evidence supporting charges or finds that the motion for delivering a judgment without main hearing has been filed in violation of applicable procedures, it refers the case back to the prosecutor. Before referring the case back to the prosecutor, judge offers to parties the possibility of modifying plea bargain conditions during court's consideration of motion, consented by supervising prosecutor. If court finds modified conditions unsatisfying, it shall refer the case back to the prosecutor.

- All 69 plea agreements were approved by the court without any questions being asked to determine whether punishment was fair.
- Of the 69 plea agreements approved, there was only one in which the judge corrected a minor error in the prosecutor's paperwork, combined punishments, made changes in the plea agreement and indicated the corrections.[21]
- In 47 of 69 plea agreements (68%), a fine was imposed as part of the plea agreement. Total of GEL 474,000 was collected through fines imposed under the plea agreements, which is quite big sum for only 47 cases. Although it is hard to make final conclusions because of a small number of cases, this statistics provides grounds for raising concern that one of purposes of plea agreements may be raising funds for the state treasury.
- In those 47 cases fifty-two defendants were fined in total, for an average fine of 9,115 GEL per defendant. The highest fine imposed was 100,000 GEL, and the lowest was 500 GEL.[22]



[21] This was done with the permission of the parties, as authorized under CPC Article 213.6;

[22] Under CCG Article 42.2 the statutory minimum fine is 2,000 GEL, but a court can impose a lower fine in certain circumstances. GYLA observed fines less than 2 000 GEL being imposed in three cases, but in none of the cases was the reason for the lower fines provided.

II. OBSERVATIONS REGARDING SPECIFIC RIGHTS OF DEFENDANTS

The present section focuses on problems identified with specific rights of defendants. Unlike the problems detailed in the previous section, these problems were not typically connected to any specific stage of the proceeding.

1. Equality of Arms and the Adversarial Process

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

The meaning of these principles is that the parties to a proceeding have an equal right to present evidence in the case and to present their case under equal conditions.[23] To safeguard this right the judge must ensure the equality of arms during the trial, meaning that s/he must provide both parties an equal opportunity to examine evidence without interference. Further, the judge should not exceed the scope of the charges, but should be bound by the positions presented by the parties.

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

Findings

Ensuring the equality of arms and adversarial process cuts across all elements of a criminal proceeding. It involves the actions – or inactions – of the judge, the prosecution and the defense. GYLA's observations related to these diverse factors include:

- Judges were mostly successful in maintaining order in the courtroom and ensuring equality of arms. With some exceptions, they

[23] See Article 42.6 of the Constitution of Georgia: "The accused shall have the right to request summoning and interrogation of his/her witnesses under the same condition as witnesses of the prosecution. Also, Article 6.3 of the ECHR provides: "everyone charged with criminal offence has the following minimum rights … d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him."

did not usually interfere in the questioning of witnesses or go beyond the scope of the charges.

- Witnesses were questioned in 64 of the 207 main hearings that GYLA observed. Of those 64 hearings, judges were actively involved in the questioning of witnesses in 11 cases:
  - ✓ In four of those 11 cases, judges asked questions with the permission of the parties, as required under the article 25.2 of CPC.
  - ✓ In seven cases, the judge violated the procedure envisaged by the CPC and asked questions without the permission of the parties; in two of these seven cases, the judge asked seven questions in each case. The parties did not react to this violation of the CPC in any of these seven cases.
- In three of 428 hearings (one first appearance, one pre-trial hearing and one main hearing), the judge clearly interfered with the power of the prosecutor; in particular:
  - ✓ In the pre-trial hearing the judge hinted that the prosecutor should change the charge against the defendant. The defendant was charged under Article 261(1) of the Criminal Code: Illegal acquisition and sale of psychotropic substance or its analogue. The judge suggested the charge should have been aggravated due to large amount of the substance: *"To my surprise, you've been charged with paragraph 1. Rather, you should have been charged under paragraph 2 due to the fact that the amount falls under paragraph 2, but the court is unable to do anything about it even though you should have been charged under paragraph 2."* GYLA was unable to determine if the prosecutor amended the charges.
  - ✓ In the first appearance hearing the defendant was charged with fraud under Article 180 of the Criminal Code after being unable to pay back money borrowed from the victim at a high interest rate. The judge hinted that the prosecutor should bring proceedings against the victim as well. Judge: *"This person himself [the victim], is he registered for lending money?"* The prosecutor: "*No".* The judge: "*Shouldn't he be held liable for that?! A 20% interest rate like this does not fall within any of the market guidelines."* The prosecutor: "*We will*

pay attention to this matter." GYLA was unable to determine whether the prosecution later brought the charges against the victim.

- ✓ In the main hearing_the judge instructed the prosecutor: *"Provide a brief outline of the issue, what is indicated and the conclusion,"* and asked the prosecutor not to take much time. The prosecutor then read aloud only the titles of evidence and a two-word summary of what was in the document, and rarely identified the person who prepared the document or its date.

- The prosecution and defense differed in terms of how active their involvement was, which had a significant impact on the adversarial process. In particular, the defense was noticeably more passive than the prosecution in submitting evidence. Of the 74 pre-trial hearings observed by GYLA, the prosecution filed motions to submit evidence in all of the cases, whereas the defense filed motions for submitting evidence in only 22 cases.

2. **Right to Defense**

The defendant's right to a defense is of critical importance in criminal proceedings, and is guaranteed under Article 42 of the Constitution of Georgia and the ECHR. In addition, Article 45 of the Criminal Procedure Code requires that the defendant have a lawyer when realization of the right to defense and defendant's rights may be at risk, such as when the defendant does not have command of the language of the proceedings, is in the process of plea bargaining, or has certain physical or mental disabilities that hinder him/her from defending him/herself.[24]

For a full realization of the right to defense, the defense should be given adequate time and opportunity to prepare its position. Further,

[24] Article 45 of the CPC: "A defendant must have a lawyer:
a) if s/he is underage;
b) if s/he does not have command of the language of the proceedings;
c) if s/he has physical or mental capability, hindering realization of self-defense;
d) if a verdict (resolution) has been delivered to have a forensic psychiatric examination arranged;
e) if the Criminal Procedure Code of Georgia envisages lifetime imprisonment for the criminal offence committed;
f) If plea bargaining is ongoing with the defendant …".

the defense attorney should use all available legal means for the defending the client.

Findings

The monitoring results suggest that the right to defense was generally protected and that an attorney was provided in cases of mandatory defense.

However, there were instances when defendants were effectively denied their right to a defense because their lawyer was passive and failed to utilize all means available to protect the defendant's interests. Further, it often seemed that the strategy of defense attorneys was to arrange a plea agreement and that defense lawyers therefore tried not to show any resistance to the prosecution.

The desire to arrange a plea agreement does not justify the restriction of the right to defense. The right to defense was also sometimes improperly restricted by the judge's lack of consideration for defendant.

Below are some examples to illustrate the problem:

- A gross violation of the right to defense was observed during a pre-trial hearing. For unknown reasons, defendant's lawyer did not appear at the hearing. Although the defendant was charged with a crime punishable by 11 years imprisonment, the judge basically ordered the defendant to defend himself even though he was clearly unaware of the details of the proceedings.
- In one case, when the judge asked the defendant whether he plead guilty the defendant's lawyer kept telling him to say "[Yes, I do] plead guilty." The defendant was at first silent, but soon he responded: "You must know that I am compromising [a lot]." The lawyer continued telling him to say "[Yes, I do] plead guilty." Eventually, the defendant pleaded guilty. The lawyer said during the hearing that they were going to make a plea bargain during main hearing but the agreement had not been reached at that time. There was no reaction by the judge.
- When the judge asked the defendant in one case whether he pleaded guilty, the defendant basically responded that he did not. The lawyer was observed telling the defendant to confess.

When the defendant took the lawyer's advice and the judge asked him whether he pleaded guilty, the defendant's response suggested he did not. The lawyer still tried to have the defendant confess to the crime, and was reproved by judge who acted rightfully and in a timely manner. The hearing concluded with the defendant not pleading guilty.

- In another case, the lawyer was aware of the defendant's position that he did not plead guilty and was going to testify. Nevertheless, the lawyer did not include the defendant on his list of witnesses to be questioned, meaning that it was up to the prosecutor to decide whether to question the defendant. If the prosecutor removed the defendant's request to be questioned, the defendant would be deprived of an opportunity to testify. GYLA does not know if the defendant was allowed to testify.
- Defense lawyers in one case did not ask a single question of the prosecution's witnesses, and during the prosecutor's questioning it seemed that the lawyers did not pay attention to the witnesses' testimonies. Further, before the start of the trial the defendant rebuked his lawyers for not providing him with documents that he had requested while in prison. The defendant said he was not happy with work of his lawyers.
- In two cases, the defendants' lawyers acted rather indifferently to their clients' cases:
  - ✓ At trial, a defendant demanded to replace his lawyer, stating that the lawyer had not visited him in prison for one month. The lawyer responded that he was sick and that the defendant was aware that plea bargaining was ongoing. Nevertheless, the defendant demanded recusal, which was granted by the judge.
  - ✓ A defendant's lawyer did not appear at the defendant's trial as he was abroad. The lawyer had informed the court of his absence, but the defendant said he was unaware of his lawyer's absence.

3. **Prohibition against Ill-Treatment**

Ill-treatment is prohibited by the Constitution of Georgia[25], the ECHR[26] and the Criminal Procedure Code[27]. The prohibition provides protection against torture and degrading treatment.

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

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

Findings

GYLA's monitoring indicates that in one-fourth of initial appearances, the judge failed to explain to defendants the right to file a complaint over alleged ill-treatment. It was also revealed that judges mostly failed to thoroughly explain to a defendant his/her rights. However, in those instances where judges did explain these rights to a defendant, their explanation was mostly clear and understandable.

Specific observations include:

- In 25% of first appearances (18 of 73), judges did not explain to defendants their right to file a complaint over alleged ill-treatment. In 14% of first appearances, the judge did not even inquire whether the defendant alleged ill-treatment.

[25] Article 17.2 of the Constitution of Georgia stipulates that "torture, inhumane, cruel or treatment and punishment infringing upon honor and dignity shall be impermissible";

[26] Article 3 of the ECHR: „No one shall be subjected to torture or to inhuman or degrading treatment or punishnment";

[27] Article 4.2 of the CPC: „exerting influence on free will of an individual by means of torture, cruel treatment, deception, the use of medical intrusion [...] that affects an individual's memory or thinking shall be prohibited. ...".

- In 82% of the hearings where judges should have explained these rights to defendants (171 of 209), only part of the rights was explained. However, in 93% of cases where the judge explained at least part of the rights, it appeared to GYLA that the defendants more or less understood the explanations provided.
- GYLA found out that in 48% of plea bargains (33 of 69), judges failed to explain to defendants that filing a complaint over alleged ill-treatment would not hinder approval of a plea agreement reached in compliance with the law.
- In 67% of cases where a plea bargain was reached (46 of 69), judges failed to explain to a defendant that if the plea agreement was not approved, information that was revealed in the process of arranging the plea agreement would not be used in the future against them.
- In 12 of 69 cases (17%), the court failed to determine whether a plea bargain had been reached through coercion, pressure, deception or any illegal promise. In 20 of 69 cases (29%), the court failed to provide a defendant with thorough information about his/her right that a plea agreement must be reached without violence, pressure or deception. In 28 of 69 cases (40%), the court failed to determine whether a defendant had an opportunity to receive qualified legal aid when negotiating the plea agreement.

During its monitoring, GYLA observed two concrete cases of alleged ill-treatment:

- At a pre-trial hearing, the defendant was escorted into the courtroom because he could not move either of his feet. According to the defendant, he had suffered the injury in the police department after he was punched in his head, which damaged his nerve and left him incapacitated. The judge's response to the violation should be highlighted: he inquired whether a probe had already been launched and what the conditions for treatment of the defendant would be like in the future. The judge found that a probe had been launched and that the defendant would be examined in a medical institution:

  Judge: "Is an investigation ongoing and have proceedings been instituted?"

Prosecutor: "Yes, [the investigation] is ongoing and [witnesses] have been questioned."

Judge: "Do you confirm [what he said]?"

Defendant: "Yes, I do."

Judge: "Is it treatable?"

Defendant: "I don't know. They said I have suffered a nerve injury that caused [the damage]."

Judge: "Do they pay attention to you in prison?"

Lawyer: "They are unable to provide treatment in prison. He needs a general clinic but the prison has not yet concluded a contract with any such clinic."

Judge: "The parties need to pay attention and transfer him to a corresponding clinic."

- During a main hearing, a witness stated that he remembered only some episodes of the case and had forgotten the rest because he was constantly subjected to pressure by prison personnel: *"They were constantly beating me. Once they [beat me] too much; I don't know what they were beating me with, I just saw that I was bleeding from my foot. Before they took me to a cell they threatened and warned me to say that I was beaten by one of the guys in the cell. They forced me to blame it on one of the [cellmates]."* The witness then started crying. He declared that he did not agree with any of the statements, as he was forced to sign some papers without knowing what they said. He had not even read the papers, but signed them because he was threatened all the time. He stated that he was forced into signing the papers and writing that he agreed with the statement. He also stated that he was an ordinary peasant and did not understand the questions that they asked. The judge granted the defense's motion and postponed the hearing so the witness could get a lawyer and the authorities could launch a probe into the allegations.

In the first case the judge sought information about the launch of a probe even though the existing criminal procedure code does not impose any obligation on a judge to inquire about a probe or further actions taken by competent authorities.

In the second case the judge acted outside the legal framework, as the law does not envisage the possibility of providing an opportunity for a witness to get a lawyer when being questioned during a trial. As set forth in the section on Recommendations, GYLA urges that the applicable legislation be amended so that judges are required to take actions such as these to combat the ill-treatment of those in custody.

4. **Right to an Impartial Trial**

As noted above, the right to an impartial trial is one of the key rights of a defendant.

Findings

The monitoring has revealed a positive trend: during the hearings none of the judges acted in a way that was deemed as a clear act of pressure on parties of the proceedings. Further, judge's instructions were purely technical in nature, completely unrelated to his/her impartiality. The court's impartiality was questioned only in two cases:

The most egregious violation of violation of the right to an impartial trial that GYLA observed is detailed in the text box.

> ***Violation of Right to Impartial Trial***
>
> During one of defendant's initial appearances in a criminal proceeding, the judge directly violated the presumption of innocence by asking the defendant: "*Why did you commit the crime?*"
>
> Although evidence had not yet been introduced in the case, the judge clearly indicated his belief that the defendant was guilty. This violated defendant's right to an impartial trial.

In another case, the prosecutor asked a leading question at the main hearing. The defense attorney objected, and the judge ordered the prosecutor to rephrase the question. The prosecutor then asked the same question again, with a different sequence of words. Although the defense attorney again objected, the judge did not uphold the objection.

Related to the right to an impartial trial, a judge is required to inform a defendant of his right to recuse the judge.[28] However, of the 209

[28] CPC Article 197.1. "c" and Article 38.14.

hearings where the court was obligated to inform the defendant of this right, the court failed to do so in 11 cases (5%).

Further, as noted above in the section on first appearances, the court's bias in favor of the prosecution was revealed by a statistical analysis of the decisions delivered regarding preventive measures.

Nonetheless, it is important to note that during this monitoring period GYLA observed a verdict of not guilty after a main hearing [see text box, below]. Of the 11 verdicts GYLA's monitors have observed to date, this is the first time that a not guilty verdict was delivered.

First Observation of Not Guilty Verdict

The defendant was charged under Article 276.5 of the Criminal Code of Georgia for having allegedly hit and killed a pedestrian with his car. In reaching its verdict, Tbilisi City Court was guided by the fact that the prosecution failed to submit a single piece of evidence or any direct testimony of a witness, instead providing only an indirect witness statement saying that he saw a citizen thrown on the ground but was unable to confirm the collision. The prosecution also submitted forensic findings that did not confirm a collision involving the defendant's car. The court returned a not guilty verdict.

5. Right to a Motivated (Reasoned) Decision

As noted above, the right to a fair trial is an internationally recognized right of a defendant. Encompassed within this right is the right of a defendant to a motivated decision by the court[29].

To assess the reasoning of decisions and determine if there was a trend, GYLA also monitored a number of searches and seizures that were conducted without prior approval by a judge and justified on the grounds of urgent necessity. GYLA thinks this is a whole new area that merits separate research that is outside the scope of the court monitoring project. Although GYLA at this stage only provides a limited snapshot of the issue, we still believe this information provides an important addition better illustrating the situation in Georgian courts.

[29] Article 194.2 of the CPC stipulates that "a court's decision shall be well-grounded".

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

Articles 119-120 of the Criminal Procedure Code strictly outline the preconditions for a search and seizure: probable cause to believe that evidence of a crime will be obtained as a result of the search and a court's warrant. Search and seizure without a court's warrant is also allowed, but only in extraordinary cases when there is an urgent necessity to do so. Even so, the judge must then either legalize or invalidate the search and seizure after the fact.

Findings

As noted in the section on preventive measures, the court frequently violated defendant's right to a reasoned decision when determining preventive measures. GYLA also observed apparent violations of the right to a motivated (reasoned) decision with regard to searches and seizures.

In almost all of the hearings that involved search and seizure, GYLA determined that the search and seizure had not been authorized in advance and was justified on the basis of urgent necessity. Specifically, of the 42 cases of search and seizure observed, only three were performed with a court's warrant; the remaining 39 (93%) were legalized later by the court.

GYLA was unable to determine whether the later legalizations of searches and seizures were substantiated, due to the fact that they are not discussed in an open court session. However, the statistical data engenders doubt as to the bona fide compliance of law enforcement authorities and the court regarding their obligations not to conduct or legalize searches that are not appropriately justified on the basis of urgent necessity:

- As search and seizure curtails individuals' right to privacy, law enforcement authorities must take necessary precautions prior to a search. The fact that law enforcement officials applied to the court for a warrant in only 7% of searches shows their lack of concern regarding individuals' right of privacy and the abuse of procedural authority.
- The court granted 100% of motions for legalizing searches

that had already taken place or for providing a warrant. This indicates a routine attitude towards searches and seizures, which ultimately translates into the violation of individuals' rights.

6. **Right to Public Hearing**

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

The right requires that the court ensure that proceedings are conducted in a way that if a representative of public attends, s/he has no trouble hearing and understanding what takes place. The court must also make the verdict public, indicating punishment, the applicable legislation on which the verdict was based, and the right of a defendant to appeal the decision.[30]

Findings

GYLA's monitoring revealed that hearings were mostly open, allowing all interested individuals to attend. In exceptional cases, due to the small size of courtrooms some spectators had to stay outside. However, for one main hearing the hearing was relocated to a larger courtroom due to the high interest of attendees so that all interested persons could attend. Further, in almost all sessions where a conclusive judgment was delivered, it was published by judge.

By contrast, GYLA observed:

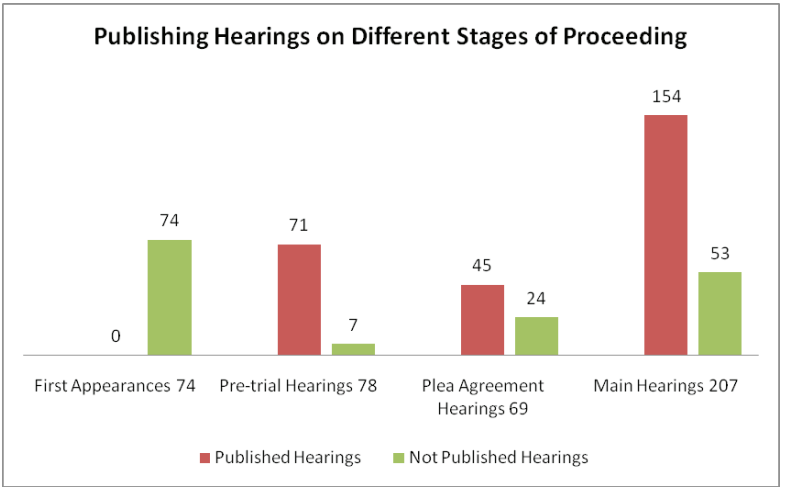
- The court failed to ensure publication of the date and time for a considerable number of hearings. As noted above, this was particularly true for first appearances.
- There where cases when the information published about court sessions was incomplete or incorrect. For instance, the notice provided did not specify all articles of the Criminal Code that defendant was charged with or listed the wrong time or courtroom.

[30] Article 277.1 of the CPC stipulates that "a verdict shall be delivered in a courtroom or in a meeting room. Afterwards, chairperson of the session shall publicly announce the resolution part of the verdict." Article 277.3 stipulates that the "chairperson of the session shall explain to parties the procedure and timeframe for appealing. …"

- Similar to previous monitoring periods, there were cases where the judges and parties spoke in a low voice and attendees had trouble understanding what was said. In one case, GYLA's monitor could not record a single word as the session was held in a large courtroom and the microphones were turned off.

Below is data from GYLA's monitoring:

- In 14 of 424 (4 hearings were closed) cases (3%), defendant's relatives and other interested persons were unable to attend due to the small size of the courtroom.
- Of 354 hearings, information about the date and time was not published for 158 hearings (45%); this includes 74 first appearances and 84 other hearings.



- A court TV monitor for the publication of information about court hearings was turned off on one occasion for several hours. On one other occasion, the city court's website could not be accessed, making it difficult to gather information about both individual court sessions and hearings in general. The website resumed operating in the second half of the day.
- Out of 270 hearings published (71 pre-trial hearings, 154 main hearings and 45 plea agreement hearings), information concerning 18 cases (17%) was incomplete or inaccurate, making

it impossible for GYLA's monitors to attend five hearings of particular interest.

- In 15 hearings out of 427 (3.5%), the judge talked in a low voice and attendees had difficulty understanding the judge.
- In one case, the prosecutor talked in a low voice which attendees had trouble understanding. When one of the attendees objected, the judge warned the attendee that he would be expelled if he said it again. The judge did not instruct the prosecutor to talk louder or more clearly.
- In 28 cases out of 427 (6.5%), there was an audio problem caused by technical problems that resulted in the courtroom microphones being turned off (21 cases); also, the door to the hallway was open, letting in noise from the outside (7 cases).
- Of the 73 hearings where a conclusive judgment was delivered (69 plea agreements and four verdicts), there were only two where the final decision was not made public. In both cases the parties concluded a plea agreement; the judge publicly announced approval of the deal but left the courtroom without announcing the verdict.
- In 48% of cases where the court publicly announced the verdict (35 of 73[31]), it failed to cite applicable legal provisions.

7. Right to be Assisted by an Interpreter

The Constitution of Georgia[32], the Criminal Procedure Code[33] and international conventions to which Georgia is a party[34] stipulate that

[31] This number includes all 4 main hearings, where verdict was delivered and 69 plea agreement hearings, where the plea agreement was approved;

[32] Article 85.2 of the Constitution of Georgia: „Legal proceedings shall be conducted in the state language. An individual not having a command of the state language shall be provided with an interpreter";

[33] Article 38.8 of the CPC: „a defendant has the right to use services of an interpreter during questioning and other investigating actions at the state expanse, if s/he does not have a sufficient command of language of the criminal proceedings...."

[34] Article 6.3 of the ECHR: "everyone charged with criminal offence has the following minimum rights… e) to have the free assistance of an interpreterif he can not understand or speak the language used in court."

when an individual does not have command of the language of proceedings, s/he must be provided an interpreter at the state expense.

Findings

GYLA observed 13 hearings where participation of an interpreter was mandatory. During three first appearance hearings, defendant's right to an interpreter was violated in that the interpreters failed to perform their obligations in a qualified manner:

- One case involved a Russian interpreter who translated for the defendant only when instructed by judge to do so. She had difficulty finding the right words; for instance, she could not translate the term "*subparagraph a.*"
- In another case the Russian interpreter spoke quietly when translating. The judge had to remind her several times to translate for the defendant instead of being completely quiet.
- In a third case the interpreter translated only portions of what needed to be translated for the defendant.

8. Right to Liberty

As noted above, the right to liberty protects individuals from the arbitrary or illegal deprivation of liberty. The right to liberty is protected both at the national and international levels.

Findings

In addition to the cases discussed above concerning preventive measures, a violation of the right to liberty was observed in one additional case. During the main hearing, the judge refused to examine a motion filed by the defense for the substitution of preventive measures (replacing imprisonment with bail), saying the law did not allow him to do so. However, the law specifically provides for an opportunity to substitute preventive measures. The issue can be considered during both pre-trial and main hearings. [35]

[35] Article 206 of the CPC;

9. Right to a Trial within Reasonable Time

During this monitoring period, GYLA observed that 228 of 354 hearings (64%) started more than five minutes late:[36]

- In 63 cases out of 228 (28%), the judge was late;
- In 49 cases out of 228 (21%), the defendant was late;
- In 23 cases out of 228 (10%), another hearing was being held in the same courtroom;
- In 19 cases out of 228 (8%), a defense lawyer was late;
- In 16 cases out of 228 (7%), the prosecutor was late;
- In the remaining 24 cases (11%), various reasons were cited.

It should be noted that the longest delay was observed at a main hearing; it started 120 minutes after its scheduled time.

CONCLUSION

This report discusses positive and negative trends in the administration of justice by the Tbilisi City Court. The new reporting period also incorporates the results of monitoring in Kutaisi City Court; however, because of the short period of time during which cases were monitored in KCC, the observations rely mostly on TCC results.

In most respects, there were few significant differences between the findings of the latest six-month monitoring period and the information collected in previous stages of court monitoring. However, certain important changes were observed during this monitoring period. Most of these improvements were observed in cases involving former government officials. It remains to be seen whether these changes represent a new attitude of judges following the October 2012 elections, or whether these changes will be limited to cases involving former government officials.

GYLA's primary observations during this monitoring period include:

- Similar to previous monitoring periods, the court resorted to only two types of preventive measures: bail and imprisonment. The preventative measures imposed were often disproportion-

[36] In three cases there were two reasons for which the session was started late; as a result, the sum of the reasons is more than the number of sessions that started late.

ate to the circumstances involved, and were imposed without justification or an inquiry into the defendant's circumstances.

- In most cases the court granted the motions for preventative measures filed by the prosecution; however, unlike previous periods there were several instances where the prosecution's motions were rejected. Similar to previous periods, the prosecutor rarely justified the inappropriateness of less restrictive preventive measures.
- Similar to the prior monitoring periods, the court failed to publish information about *any* of the first appearances in advance.
- Similar to previous reporting periods, all of the prosecutor's 74 pre-trial motions were granted by the court, even though nine were not agreed to by the defense. Unlike previous periods, however, all 22 of defense motions were granted, including one motion which was not agreed to by the prosecution.
- All plea agreements were once again approved by the court. Monitoring also revealed that judges mostly had a pro-forma role in approval of the plea agreement.
- Similar to previous reporting periods, the adversarial process was observed in most main hearings and witnesses were typically questioned without the judge's involvement. Also similar to previous reporting periods, the prosecution was more active than the defense in the proceedings.
- In a majority of hearings the right to defense was protected. However, monitoring revealed that the explanation of rights provided by judges to defendants was often incomplete.
- A positive observation was that judges did not act in an intimidating way or exert pressure on either party at any of the hearings observed. -
- Judges approved all of the searches and seizures put before them, even though almost all were justified after the fact based on a claim of urgent necessity.
- In most of the cases where a summary judgment was delivered after a main hearing and after approving plea-agreement, the decision was publicly announced by the judge. However, in almost half of the cases the judge failed to cite the applicable provision of law when announcing the verdict. It is worth noting that a verdict of not guilty was delivered for the first time at one of the trials monitored by GYLA.

- GYLA also observed interruptions in the work of court that may indicate a deficiency in court administration. In particular, 64% of the hearings monitored started late.

RECOMMENDATIONS

Based on the trends revealed and facts collected throughout the year in which it has performed trial monitoring, GYLA has prepared recommendations for the judiciary that would increase its transparency, public trust and have a positive impact on the reputation of criminal justice system:

1. Courts should take advantage of their discretion as to preventive measures and use measures other than imprisonment and bail in appropriate cases. This is particularly important for less grave crimes.
2. When selecting a preventive measure, the court must take into account the gravity of the crime, the possible punishment, defendant's financial situation, and all other circumstances in order to prevent the use of a disproportionate preventative measure.
3. Courts must impose on the prosecution the burden of showing the appropriateness of the requested preventative measure in order to prevent the arbitrary and illegal curtailing of liberty.
4. To facilitate the right to a public hearing, the court must publish beforehand accurate and complete information about all stages of the proceedings, including first appearances.
5. When approving a plea agreement, it is of crucial importance that judges play their appropriate role of protecting the rights and legal interests of the defendant, ask questions related to the plea agreement, and make sure that the punishment is proportional to the crime and was obtained without undue pressure. Further, new regulations must be introduced to increase the role of a judge in the process of delivering a ruling outside main hearing. In particular, judge must be delegated with the power to offer parties a possibility of a plea bargain with modified conditions not only during a pre-trial session but during all stages of court proceedings where it is possible to approve a plea agreement.
6. Before a witness is questioned by a judge, the judge should request permission from the parties, as prescribed by law. Further,

s/he should strictly adhere to neutrality and not interfere with the competences of either of party.

7. A judge should explain defendant's rights at all corresponding stages of proceedings, in a thorough and clear manner.

8. When delivering a verdict, in addition to announcing the verdict publicly the judge should always cite the applicable law.

9. The judge should assure that the right to an interpreter is respected. Attendance of an interpreter does not *a priori* mean that the right is respected. It is important for the court to ensure the service of a qualified interpreter.

10. To ensure court proceeding are conducted smoothly and within a reasonable period of time, courts should avoid starting hearings late to the extent possible.

11. The active involvement of the parties is essential to ensuring the fulfillment of the adversarial process. Therefore, the defense should be more active and involved in all stages of the proceedings, and protect the interests of defendants by all available legal means. This is particularly true for the collection of evidence and impugning of evidence submitted by the prosecution.

12. It is important for a judge to resort to the approach of judiciary law in delivering its judgment instead of binding itself to the formal framework of law, so long as it does not conflict with interests of an individual. In other words, judge should interpret the law so that it is fair and right to be used to the defendant.

13. The law should be amended to broaden the authority of a judge to combat the ill-treatment of defendants. In particular, a judge should be authorized to give binding instructions to investigating authorities to take further actions against alleged ill-treatment. The absence of a meaningful procedure for addressing allegations of ill-treatment largely defeats the prohibition against ill-treatment and potentially encourages the abuse of defendants.

ANNEXES

Preventative Measures **– Number of hearings attended: 74**

Was the announcement published outside the courtroom?	**74**	**100%**
Yes	0	**0%**
No	74	**100%**
Did the judge make an announcement about the hearing of the case?	**74**	**100%**
Yes	74	**100%**
No	0	**0%**
Was the judge speaking in terms understandable for the public?	**74**	**100%**
Yes	66	**89%**
No	8	**11%**
Did anybody in the courtroom mention that judge's speaking was not understandable (in only this 8 cases was the judge speaking in terms not understandable for the public)?	**8**	**100%**
Yes	1	**12.5%**
No	7	**87.5%**
Could anyone freely attend?	**74**	**100%**
Yes	69	**93%**
No (one hearing was closed)	5	**7%**
Did the judge/secretary state the names of the parties?	**74**	**100%**
Yes	73	**97%**
No	0	**0%**
The observer was unable to record data, because hearing was closed	1	**1%**
Did the judge explain to the accused the right to recuse a judge/ secretary?	**74**	**100%**
Yes	67	**90%**
No	5	**7%**
The observer was unable to record data (1 hearing was closed	2	**3%**
Did the judge comprehensively explain to the accused his/her rights	**74**	**100%**

Yes	12	**16%**
No	61	**82%**
The observer was unable to record data, because hearing was closed	1	**1%**
Did the rights become clear and understandable to the defendant?	**74**	**100%**
Yes	65	**88%**
No	7	**9%**
The observer was unable to record data (1 hearing was closed)	2	**3%**
Did the judge use intimidation or other informal action against any of the parties?	**74**	**100%**
Yes	0	**0%**
No	73	**99%**
The observer was unable to record data, because hearing was closed	1	**1%**
Did the judge give any instructions to any of the parties?	**74**	**100%**
Yes	3	**4%**
No	70	**95%**
The observer was unable to record data, because hearing was closed	1	**1%**
To which party (in one case the judge gave the instruction to both parties)?	**3**	**100%**
Defence	3	**100%**
Prosecution	1	**33%**
Was there any other reason to believe the judge was biased?	**74**	**100%**
Yes	0	**0%**
No	73	**99%**
The observer was unable to record data, because hearing was closed	1	**1%**
Did the defense counsel attend the hearing?	**74**	**100%**
Yes	49	**66%**
No	25	**34%**

Was there a translator invited when necessary? (Translator's attendance does not necessarily mean the right was provided – e.g. when the translator is visibly not doing his job)	**74**	**100%**
Yes	7	**9%**
No	0	**0%**
There was no need for a translator	66	**89%**
The observer was unable to record data, because hearing was closed	1	**1%**
Was a preventative measure imposed? (preventative measure was imposed on 98 accused persons from the attended hearing)	**98**	**100%**
Bail	62	**63%**
Detention	36	**37%**
Personal suretyship	0	**0%**
Agreement to not leave an area and behave properly	0	**0%**
Supervision of the behavior of a military serviceman by the military command	0	**0%**
Did the judge explain to the defendant his right to lodge a complaint about ill-treatment?	**74**	**100%**
Yes	54	**73%**
No	18	**24%**
The observer was unable to record data (1 hearing was closed	2	**3%**
Did the judge ask the defendant whether defendant wished to lodge a complaint about the violation of his/her rights?	**74**	**100%**
Yes	62	**84%**
No	10	**13%**
The observer was unable to record data (1 hearing was closed	2	**3%**

Pre-trial hearings **– Number of hearings attended: 78**

Was the announcement published outside the courtroom?	**78**	**100%**
Yes	71	**91%**
No	7	**9%**
Was the judge speaking in terms understandable for the public?	**78**	**100%**
Yes	78	**100%**
No	0	**0%**
Could anyone freely attend?	**78**	**100%**
Yes	76	**97%**
No	2	**3%**
Was there a translator invited when necessary? (Attendance of translator does not necessarily mean the right was provided – e.g. if the translator was visibly not doing his job)	**78**	**100%**
Yes	7	**9%**
No	0	**0%**
There was no need for translator	71	**91%**
Did the judge/secretary state the names of the parties?	**78**	**100%**
Yes	66	**85%**
No	12	**15%**
Did the judge explain to the accused the right to recuse a judge?	**78**	**100%**
Yes	72	**92%**
No	2	**3%**
The observer was unable to record data (hearing was postponed, the defendant was not present)	4	**5%**
Did the judge comprehensively explain to the accused his/her rights?	**78**	**100%**
Yes	6	**8%**
No	68	**87%**
The observer was unable to record data (hearing was postponed, the defendant was not present)	4	**5%**
Did the rights become clear and understandable to the defendant?	**78**	**100%**

Yes	72	**92%**
No	2	**3%**
The observer was unable to record data (hearing was postponed, the defendant was not present)	4	**5%**
Did the prosecutor make a motion for presenting evidence (4 hearings were postponed)?	**74**	**100%**
Yes	74	**100%**
No	0	**0%**
Was the motion granted?		
Yes	74	**100%**
No	0	**0%**
Did the defense agree to the prosecution's motion?		
Yes	65	**88%**
No	9	**12%**
In cases of search and seizure:	**42**	**100%**
The acts were legalized in advance by the judge	3	**7%**
The acts were legalized later by the judge	39	**93%**
Did the defense make a motion for presenting evidence? (4 hearings were postponed)	**74**	**100%**
Yes	22	**30%**
No	52	**70%**
Was the motion granted?	**22**	**100%**
Yes	22	**100%**
No	0	**0%**
Did the prosecution agree to defendant's motion?	**22**	**100%**
Yes	21	**95%**
No	1	**5%**
Did the judge approve the list of evidence submitted by the prosecutor?	**74**	**100%**
In full	72	**97%**
In part	2	**3%**
Was not approved	0	**0%**
Did the judge approve the list of evidence submitted by the defense?	**22**	**100%**

In full	22	**100%**
In part	0	**0%**
Was not approved	0	**0%**
Did the judge use intimidation or other informal action against any of the parties?	**78**	**100%**
Yes	1	**1%**
No	77	**99%**
Did the judge give any instructions to any of the parties?	**78**	**100%**
Yes	5	**6%**
No	73	**94%**
To which party (in one case the judge gave the instruction to both parties)?	**5**	**100%**
Defence	4	**80%**
Prosecution	2	**40%**

Main Trial Hearings **– Number of trials attended: 207**

Was the announcement published outside the courtroom?	**207**	**100%**
Yes	154	**74%**
No	53	**26%**
Did the judge make an announcement about the hearing of the case?	**207**	**100%**
Yes	196	**94%**
No	10	**5%**
The observer was unable to record data	1	**1%**
Was the judge speaking in terms understandable for the public?	**207**	**100%**
Yes	202	**97%**
No	4	**2%**
The observer was unable to record data	1	**1%**
Could anyone freely attend? (3 hearings were closed[37])	**204**	**100%**
Yes	198	**97%**
No	6	**3%**
Was there a translator invited when necessary? (Attendance of translator does not necessarily mean the right was provided – e.g. if the translator was visibly not doing his job)	**204**	**100%**
Yes	2	**1%**
No	0	**0%**
There was no need for translator	202	**99%**
Did the judge/secretary state the names of the parties? (This question was relevant only in 35 observed hearings that were the first hearing in the main trial)	**35**	**100%**
Yes	35	**100%**
No	0	**0%**
Was the judgment publicly announced? (This question was relevant only in 4 observed hearings)?	**4**	**100%**

[37] One hearing was closed from the begining to the end as it was juvenile's case, and two other cases were closed only partially.

Yes	4	**100%**
No	0	**0%**
Did the judge explain to the accused the right to recuse a judge (this question was relevant only in 35 cases)?	**35**	**100%**
Yes	31	**88.5%**
No	3	**8.5%**
Hearing was postponed	1	**3%**
Did the judge comprehensively explain to the accused his/her rights (this question was relevant only in 35 cases)?	**35**	**100%**
Yes	11	**31%**
No	22	**63%**
Hearing was postponed	2	**6%**
Did the rights become clear and understandable to the defendant (this question was relevant only in 35 cases)?	**35**	**100%**
Yes	33	**94%**
No	0	**0%**
Hearing was postponed	2	**6%**
Did the judge use intimidation or other informal action against any of the parties (1 hearing was closed)?	**206**	**100%**
Yes	3	**2%**
No	203	**98%**
Were witnesses other than the defendant present in the courtroom before their examination?	**50**	**100%**
Yes	0	**0%**
No	50	**100%**
Did the judge ask questions to witnesses in favor of any parties (including defendants and experts; this number indicates the amount of hearings where witnesses were invited and not the number of the witnesses)?	**64**	**100%**
Yes	11	**17%**
No	53	**83%**
In favor of which party?	**11**	**100%**
Prosecution	2	**18%**

Defence	2	**18%**
Both	7	**63%**
Did the judge give any instructions to any of the parties?	**206**	**100%**
Yes	17	**8%**
No	189	**92%**
To which party?	**17**	**100%**
Prosecution	6	**35%**
Defence	10	**58%**
Both	1	**5%**

Plea agreements **– Number of hearings attended: 69**

Was the announcement published outside the courtroom?	**69**	**100%**
Yes	45	**65%**
No	24	**35%**
Did the judge make an announcement about the hearing of the case?	**69**	**100%**
Yes	67	**97%**
No	2	**3%**
Was the judge speaking in terms understandable for the public?	**69**	**100%**
Yes	66	**96%**
No	3	**4%**
Could anyone freely attend?	**69**	**100%**
Yes	66	**96%**
No	3	**4%**
Was there a translator invited when necessary (Attendance of translator does not necessarily mean the right was provided – e.g. if the translator was visibly not doing his job)	**69**	**100%**
Yes	3	**4%**
No	0	**0%**
There was no need for translator	66	**96%**
Did the judge explain to the accused the right to recuse a judge (This question was relevant only in the 27 observed hearings that were the first hearing of plea agreements)?	**27**	**100%**
Yes	26	**96%**
No	1	**4%**
Did the judge use intimidation or other informal action against any of the parties?	**69**	**100%**
Yes	0	**0%**
No	69	**100%**

Did the judge explain to the defendant that lodging a complaint about ill-treatment would not impede the approval of a plea agreement concluded in accordance with the law?	**69**	**100%**
Yes	36	**52%**
No	33	**48%**
Did the judge comprehensively explain to the accused his/her rights (This question was relevant only in the 27 observed hearings that were the first hearing of plea agreements)?	**27**	**100%**
Yes	7	**26%**
No	20	**74%**
Did the rights become clear and understandable to the defendant (This question was relevant only in the 27 observed hearings that were the first hearing of plea agreements)?	**27**	**100%**
Yes	25	**92%**
No	2	**7%**
Did the judge give any insrtuctions to any of the parties?	**69**	**100%**
Yes	3	**4%**
No	66	**96%**
To which party?	**3**	**100%**
Defence	1	**33%**
Prosecution	2	**67%**