

Coalition for an Independent and Transparent Judiciary

Application of Preventive Measures in Criminal Proceedings:

Legislation and Practice

The study was conducted by the Criminal Law Working Group of the Coalition for an Independent and Transparent Judiciary

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The Coalition for an Independent and Transparent Judiciary was formed on 29 April 2011 and unites 30 non-governmental organizations. The goal of the coalition is to strengthen the capacity of legal professional associations, legal rights NGOs, business associations, and the media in monitoring relevant judicial practices and advocating for an independent judiciary. The Coalition was formed within the framework of the Civic Initiative for an Independent Judiciary project funded by USAID. The project is implemented by the Eurasia Partnership Foundation through a partnership with the East-West Management Institute.

The Criminal Law Working Group set up within the framework of the Coalition involves the following organizations: 42 of the Constitution, Georgian Young Lawyers' Association, Human Rights Center, Georgian Lawyers for Independent Profession, Transparency International Georgia, Open Society Georgia Foundation. The Working Group focuses its activity on analyzing preventive measures and related issues. In scrutinizing this topic, the Working Group placed emphasis on both the legislative framework and existing practice. In particular, the study covers the following issues: 1. the national legislation regulating application of preventive measures; 2. the proportionality of a concrete preventive measure; 3. the rule of contesting court decisions on the application, modification and revocation of concrete preventive measures; 4. the approach of the European Court to preventive measures; 5. the application of preventive measures in practice; and 6. recommendations.

Methodology

The methodology applied for the conduct of this study was the following: the national and international legislation regulating the application of preventive measures in the field of criminal law was examined. Problems existing in the national legislation in relation to the application of preventive measures were identified and corresponding recommendations developed.

To study practical application of preventive measures, the practice of member organizations of the Criminal Law Working Group (Georgian Young Lawyers' Association, Human Rights Center and 42 of the Constitution) over the period between 1 October 2010 and 28 February 2012, was examined. To this end, up to 50 court decisions on the application of preventive measures were scrutinized. Court decisions and information were summed up and analyzed, positive and negative aspects of this practice were identified, and recommendations developed.

Interviews were conducted with the following persons: Public Defender (Giorgi Tugushi); representative of the Justice Ministry (Levan Meskhoradze); representatives of the Chief Prosecutor's Office and High Council of Justice; members of Georgian Bar Association as well as defense lawyer practicing in the field of criminal law.

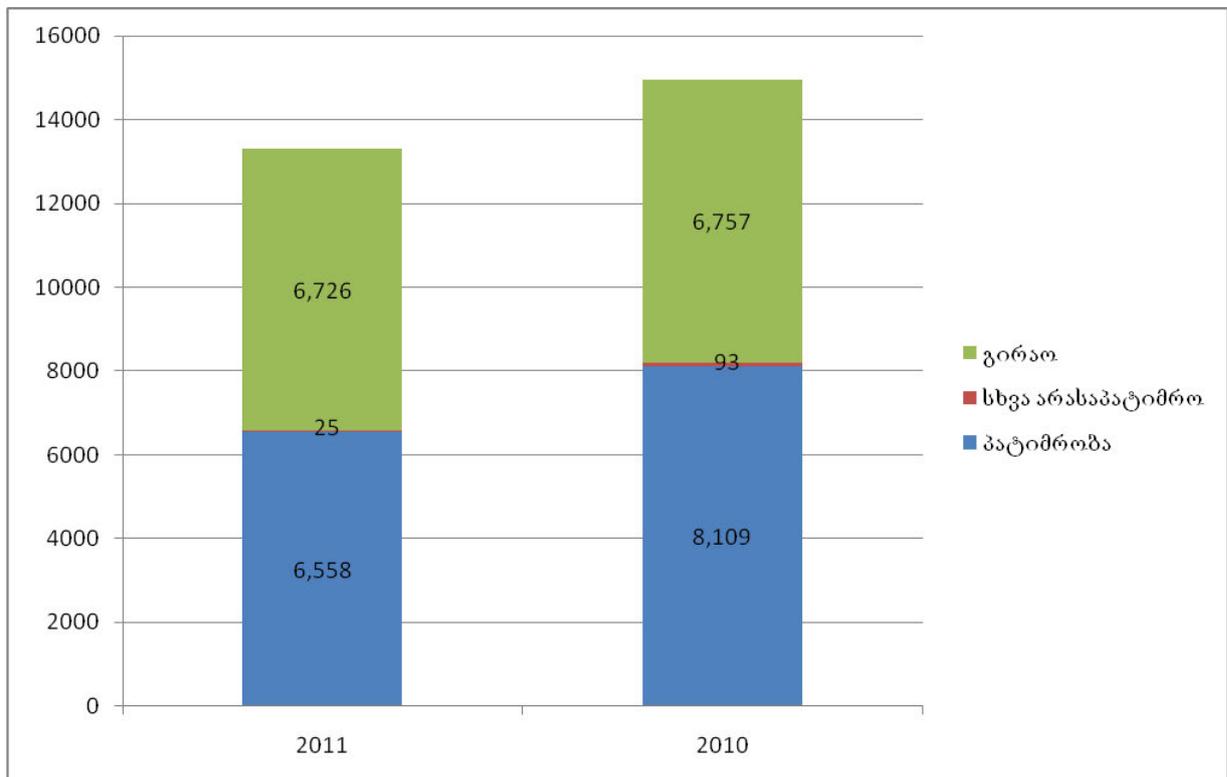
This study consists of three chapters. The first chapter analyses the national legislation regulating the application of preventive measures and provides recommendations based on that analysis. The second chapter discusses international standards in application of preventive measures. The third chapter reviews the existing practice, identifying problems in proceedings and providing recommendations aimed at improving the existing practice.

The Criminal Law Working Group set up within the framework of the Coalition extends its thanks to every expert, respondent and practicing lawyer who contributed to this study.

1. National Legal Regulation

This report provides an overview of general situation with regards to the application of preventive measures. As one of the most severe forms of preventive measures is detention/arrest which accounts for quite a large share in the overall statistics, the report focuses on the intensity and expedience of applying the detention. Application of preventive measures is assessed from the standpoint of both national legislation and international standards and based on this assessment, corresponding recommendations are provided at the end of the report.

According to the data of the Supreme Court of Georgia, out of 13,309 instances of applying preventive measures in 2011, detention was used in 6,558 cases (49.3%) while in 2010, the detention was applied in 8,109 (54.2%) out of 14,959 cases. Measures applied in the remaining cases were non-custodial with the bail amongst being most widely used. In 2011, the bail was applied in 6,726 cases (50.5%). The corresponding indicator of 2010 stands at 6,757 (45.2%).



Green – Bail; Red – other non-custodial measure; Blue – Detention

Regardless of its non-custodial nature, bail is closely linked to custodial measures because it can be conditioned by detention. Moreover, a failure to pay bail may lead to a stricter preventive measure for a person, namely, the detention. This may happen because of an

unreasonably large sum defined as a bail or a short period of time specified as the term of payment. Consequently, this report examines the possibility of applying non-custodial measures, and in particular the bail, in the context of existing interrelationship between bail and detention.

1.1. *Regulation of preventive measures in national legislation:*

Before reviewing international standards, one must outline those guarantees of defense which a person is granted under the national law. The key guarantee is the restriction of the application of preventive measures in accordance with aims and grounds explicitly specified in the law. According to the Criminal Procedures Code of Georgia, preventive measures can be applied for the following aims: to ensure the appearance of an accused person before the court, to prevent an accused person from committing a new criminal act, to ensure the execution of ruling. The criminal procedures legislation provides an explicit and exhaustive list of grounds any of which may prompt the application of preventive measures. Among such grounds is a reasonable doubt that an accused person may:

- Go into hiding;
- Not appear in front of court;
- Dispose of important material evidence;
- Commit another crime.

When applying preventive measures, one of the above listed grounds must exist, at the very least. Moreover, there must be, at least, a reasonable doubt about the existence of such grounds, which, in turn, requires the entirety of relevant facts and information.

Yet another legal guarantee is the restriction imposed on prosecutor when selecting a preventive measure. Moreover, the legislation lays the burden of proof on the prosecution. The Criminal Procedures Code explicitly stipulates that detention cannot be applied to an accused person unless there is a risk that the accused person will go into hiding, commit a new criminal act, intimidate witnesses, dispose of evidence or pervert the course of justice.

Apart from that, the Code requires that when selecting detention or any other preventive measure a possibility of achieving the same aim by applying less stringent measures must be considered. At the same time, it is an obligation of the prosecution to justify the necessity of applying preventive measures, in general, and a specific measure, in particular.

In the process of deciding on the application of a preventive measure, a court shall take into account the personality of an accused person, his/her activity, age, health condition, marital and material status, compensation of damages caused to property or/and a fact of breach of a preventive measure applied earlier to him/her, etcetera.

The legislation ties the application of a preventive measure and its separate type with the issues of expedience and proportionality of the measure, trying thus to strengthen the presumption existing in favor of the liberty of a person. These issues, for their part, require individual assessment of threats, circumstances of the case and personality of an accused person as well as consideration of peculiarities of each case. All the more so, each ground of applying a preventive measure must have its corresponding substantiation. For example:

- A threat that a person may go into hiding – this cannot be an abstract threat but conditioned by concrete circumstances. That is why it is important in assessing this threat to take into account peculiarities of a person's character, all factual circumstances related to the case and a nature of expected sentence. One must also consider whether a severity of expected sentence may give birth to a desire to go into hiding. Moreover, the existence of those objective circumstances which may help materialize such desire of the accused person must be considered as well.

In assessing that one must take into account “financial resources available to an accused person and property which he/she will have to leave in case of going into hiding; family status and connections; an accused person's ties abroad; severity of expected sentence; special conditions of pre-trial detention of an accused person; accused person's close ties in a country of his/her detention; degree of guarantees ensuring his/her appearance in front of a court, etcetera.”

- A threat that a person will not appear before the court – when assessing this threat one must take into account personal characteristics of an accused person. A person's attitude towards the judiciary as well as towards investigative or other entities studying the case must be assessed. Proper attention should be paid to whether a person appeared before a law enforcement body on his/her own initiative as well as to any other factual circumstance (failure to appear / difficulties in communications) and past experience which enhances or rules out the likelihood of such threat.
- A threat of disposing of evidence or perverting a course of justice – it is clear that such threat cannot be relevant at every stage of proceeding. One should also take into account peculiarities and factual circumstances of concrete cases. For example, if an investigation into an organized crime is underway, the threat of perverting a course of justice may be higher. In other cases, however, when the majority of investigative activities have been conducted by the time when the issue of preventive measure is considered, this threat no longer exists.
- It is important for the prosecution to substantiate, based on concrete data, a possibility of an accused person (and not only a probable intention or desire) to influence the execution of justice. Moreover, when demanding a preventive measure on this basis, one must specify those procedural measures which may be jeopardized.
- At the same time, a threat of ruining evidence or perverting the course of justice needs to be assessed and decided on case by case basis. For example, a car accident which did not result in a person going into hiding or when a person appears to law-enforcement bodies

on his/her own initiative. In such case, no threat exists that the person will ruin evidence or pervert the course of justice and consequently, the application of a preventive measure on this ground is unjustified.

- Prevent a new crime from being committed – in separate cases, the prevention of a new crime is indicated as a ground for using a preventive measure. This implies both repeating already committed crime and committing another type of crime. Here again the mentioned threat must be assessed in the light of entirety of circumstances. One must consider, inter alia, the following factors: conviction record of a person, his/her inclination towards crime. Even though these circumstances are significant, each of them taken separately does not constitute a sufficient ground for a reasonable doubt that a person may commit a crime again.
- It should be kept in mind that the application of preventive measure towards a person who is accused of committing an unpremeditated crime for the aim of preventing a new crime is unreasonable.

The above said shows that a reasonable doubt for applying a preventive measure arises from entirety of circumstances of a concrete case. Such entirety of circumstances should reflect facts and information to the maximum extent possible which, in turn, would convince an objective observer in the existence of at least one of above listed grounds of applying preventive measures.

In this regard, a representative of the prosecutor's office said that when substantiating the application of a preventive measure the prosecution is not required to submit a concrete written evidence for corroborating each concrete circumstance. Sometimes, facts and/or circumstances uncovered during the investigation of a case or at the time of arresting a person prove the necessity of applying a preventive measure towards that person.

However, apart from the expedience of preventive measure in general, a necessary criterion is the proportionality of applied measure. For the purposes of this study, the proportionality is examined in relation to the preventive measure of detention.

1.2. Proportionality of a concrete preventive measure

Proportionality of a preventive measure demanded by the prosecution is yet another burden of proof lying with the prosecution. Only after the application of preventive measure is deemed expedient by the standard of reasonable doubt, the prosecution is obliged to justify the proportionality of a concrete preventive measure. Consequently, the issue of proportionality of a preventive measure arises after the application of a preventive measure has been accepted, in general.

For the purposes of proportionality, the Criminal Procedures Code provides alternative preventive measures of various severity. The Procedures Code also specifies an obligation of a prosecutor to substantiate the need of applying a specific preventive measure and also, to justify why the same aim cannot be achieved by another, less stringent preventive measure.

The latter is related to the assessment of proportionality of a preventive measure.

A recommendation of the Council of Europe's Committee of Ministers, requires that detention be used only in exceptional cases. Moreover, it must not be compulsory and must not serve the aims of punishment.

At the same time, this recommendation places the exceptionality of detention in the context of presumed innocence. For this recommendation to be implemented in practice, the proportionality must be observed. This obligation is equally imposed on the prosecution and the court under the national legislation. With regard to court, the legislation prescribes it the authority to apply detention only in case if general aims of preventive measure cannot be achieved by other measures.

Representatives of various institutions provide different assessments of the existing legislative framework for preventive measures. According to the Public Defender of Georgia: *“the procedural legislation has been amended in recent times with a number of positive changes introduced to it. There are issues which, according to a number of human rights defense lawyers, require further improvement. However, the criminal legislation operating in Georgia is not bad indeed and courts can apply it absolutely normally.”*

According to a representative of the Justice Ministry, a new regulation which was examined by the Council of Europe, fully reflects the requirements envisaged in Article 5 of the European Convention on Human Rights. According to him, a number of issues were improved even in the previous Procedures Code. However, in contrast to the previous one, the new procedural legislation no longer envisages the seriousness of a crime as a ground for applying detention as a preventive measure. The Justice Ministry representative underlined that the judgments of the European Court of Human Rights regarding the mentioned issue were executed. In particular, on 14 September 2014, the Council of Europe's Committee of Ministers adopted a combined summary resolution (CM/ResDH(2011)105) declaring three judgments of the European Court concerning the problems in pre-trial detention (*Patsuria against Georgia (Nº 30779/04)*, *Gigolashvili against Georgia (Nº 18145/05)*, *Ramishvili and Kokhreidze against Georgia (Nº1704/06)*) as executed. The execution of these judgments proves that the Georgian government has effectively implemented measures of particular and general nature, thereby eliminating structural problems existing in legislation and practice in relation to preventive measures.

In this regard, the position of the defense concerning the levers in the legislation, is a matter of special interest. According to a defense lawyer, the prosecution is in a better position. Possibilities of the defense are weak. To rectify the existing situation new regulations are needed. The defense lawyer also noted that courts actually do not apply norms regulating the issues of preventive measures in their practice. No relevant guarantees are in place for an accused person and defense lawyer.

Regardless of these guarantees provided in the national legislation, the practice that has developed with regard to the application of preventive measures provides interesting

material to analyze the domestic legislative regulation against those international standards that have been established in relation to this institution. The main reference point will be, of course, standards established by the European Court within the framework of the Convention, which we will discuss later in this report.

1.3. The rule of contesting a decision on the application, modification, revocation of preventive measure

Rules of application, modification and revocation of preventive measures are set out in Article 207 of the Criminal Procedures Code, explaining the rule and means of contesting a decision on the application of a preventive measure. Two issues can be singled out from procedures of contesting preventive measures, which significantly impede the process of appeal and render this right inoperative:

- A subject authorized to appeal;
- Grounds/conditions of appeal.

According to paragraph 1, Article 207 of the Criminal Procedures Code: “A decision on the application, modification, and revocation of preventive measures can be contested in the Investigation Collegium of the Appeals Court once, within 48 hours of the delivery of the decision, by a prosecutor or an accused person. A defense lawyer can contest a decision only if an accused person is minor or suffers from such physical and mental disorder which renders him/her incapable of giving his/her consent.”

Such provision creates certain difficulties for the defense. If a day on which a court delivered a decision on the application a preventive measure coincides with weekend, the defense, because of limited time, may fail to obtain consent from an accused person and consequently, contest the decision. Moreover, consent of an accused person, required by the law, is of absolutely formal nature, often creating problems in contesting a preventive measure. It will be therefore better to lift the obligation of obtaining consent from an accused person.

Another problem in terms of contesting the application, modification, revocation of preventive measures is, as noted above, preconditions that are set for contesting a preventive measure.

According to paragraph 2, Article 207 of the Criminal Procedures Code: “An appeal shall be enclosed with evidence (materials), proving a complainant’s position, about those new circumstances that were unknown to a court of first instance.”

At any stage of preliminary or court investigation, an accused person and his/her defense lawyer are entitled to make a motion for the modification or revocation of a preventive measure to a court of corresponding jurisdiction. In the motion, the defense must show incorrectness of provisions of a contested decision and indicate each and every of those new circumstances which was unknown at the time the preventive measure was applied and which could have affected the expediency of applied preventive measure.

Admissibility of a motion for modification or revocation of a preventive measure is considered without oral hearing of a judge. However existing precondition for contesting a preventive measure creates significant impediments on the very admissibility stage. In practice, a complaint lacking evidence proving new circumstances is considered inadmissible by the court. For example, if the defense contests the preventive measure which was not applied properly by the court of first instance, this appeal will be deemed inadmissible by the appeals court if it does not contain such new evidence which was not considered by the lower court.

This happens because the law requires from the defense to submit to the court new evidence on the ground of which it demands either modification or revocation of the preventive measure. An accused person and his/her defense lawyer have the right to contest illegal or/and unsubstantiated decision on a preventive measure in the upper court but the complaint must first meet strict formal requirements and clear the admissibility stage. At the same time, the burden of proof lies with the accused person to clearly show a new circumstance which will enable the court to deliberate on the modification or revocation of a preventive measure.

Such situation, in fact, restricts the right of the defense to a fair trial by establishing rigid and in a number of instances, inadequate procedural restrictions. The above discussed factors render the right to appeal a preventive measure illusory.

Is it worth noting that the interviews conducted within the scope of this study reveal that the prosecution gives different interpretation to the appeal mechanism specified in the law. In particular, according to a representative of the prosecutor's office, the mechanism for contesting a preventive measure is a very good lever to examine how lawful and substantiated is a decision taken by a court of first instance. Moreover, it provides an opportunity to provide those new circumstances to the court of appeal, which were unknown to the lower court.

For the defense, the submission of new circumstance is "a possibility" alone which may be used by a subject authorized to appeal in order to strengthen their position. The existing practice, however, proves the opposite, which views the submission of new evidence as an imperative requirement of the law. The European Convention does not specify a concrete mechanism of contesting a decision of the court of first instance (for example, the necessity to file a complaint with a court of appeals or court of second instance). The case law deems the existence of a means for reviewing a decision even in a court of the same instance as most important thing.

With regard to the mechanism for contesting a preventive measure, a representative of the High Council of Justice of Georgia believes that the Criminal Procedures Code gives a possibility to a person to contest decisions and review provisions which he/she considers wrong through courts. The mechanism of contesting preventive measures includes several key elements designed to protect human rights enshrined in constitution and international norms. In particular, appeal of a decision on preventive measure enables a party to contest a

decision of lower court, which it deems unlawful and unsubstantiated, to prove the truth of his/her opinion once again and obtain revised, fair decision. Appeal of the decision provides an opportunity to submit additional evidence which the party failed to submit to the court of first instance.

The Public Defender noted in his interview to a representative of the Coalition that the appeal mechanism is in place and fully meets standards. According to him, one can argue over timeframes, whether the timeframe given to an accused person to appeal a decision on preventive measure is reasonable. He also said that the practice of application of preventive measures is more problematic.

The right to appeal to court which is guaranteed by the Constitution does not imply only formal guarantee of access. The right to appeal to court implies a whole set of guarantees throughout the entire process – from admissibility of appeal to hearing it on merits.

Court supervision of the lawfulness of detention includes the right of an accused person to contest the lawfulness of detention in a court which, on its part, must ensure a speedy consideration of the complaint and decision on release if the detention is unlawful.

Detained or arrested persons must have the right to have the lawfulness of their detention reviewed both on merits and procedurally. A review of lawfulness of detention by a court must ensure that the right to review is practical and effective rather than theoretical and illusory. In any case, such proceeding must meet basic requirements of a fair court, which in case of above discussed norms are not met.

2. European Court's approach towards preventive measures

The regulation of detention on the national level is assessed, on the one hand, against Article 5 of the European Convention on Human Rights which reads that *“the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of 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”* and on the other hand, against judgments of the European Court for Human Rights, which made it clearer the content and boundaries of the restriction of freedom of a person.

The primary obligation of member-states of the Convention is clearly outlined in paragraph 3, Article 5 which requires that everyone arrested or detained on the above cited grounds shall be brought promptly before a judge or released pending trial. Moreover, the release may be conditioned by guarantees to appear for trial.

Any measure restricting the freedom of a person must be viewed in the light of ensuring presumed innocence of a person, on the one hand, and on the other, fair hearing of a case against the importance of a person's freedom. Therefore, only a doubt that a person may commit a crime cannot outweigh the presumed innocence until the necessity and inevitability of restricting the freedom is not proved with undeniable, relevant and sufficient evidence.

The European Court has explained clearly that the severity of punishment faced by a person does not mean in itself a lengthy detention.

At the same time, the Court emphasized that the need of applying detention must rest on convincing and consistent grounds which must be assessed in concrete circumstances.

Such explanation of the Court indicates that no abstract threats can exist which may render the detention of a person necessary as well as that threats cannot be real and immediate during the entire period of detention. If such threats exist, its reality and immediacy must be proved by concretely perceptible, convincing and relevant circumstances. At the same time, once these threats are neutralized a possibility for unconditional termination of detention must exist.

According to the European Court, a threat of perverting the course of justice (which may be a ground justifying the detention) cannot exist at the stage when all evidence has been collected.

Such approach of the Court indicates about the need of constant revision of detention because a threat existing at the initial stage of detention, thereby justifying application of this preventive measure, may become neutralized, thereby rendering the continuation of detention of a person unjustified.

With regard to a motion for detention, one must note that the burden of proof always lies with the prosecution.

It is the prosecution which must prove the existence of those circumstances which justify the deprivation of a person's liberty at the initial as well as any following stage throughout the term of detention. According to the European Court, it is a responsibility of public bodies to examine all circumstances which either prove or deny the existence of that public interest which, taking into account presumed innocence, justifies the deviation from a general rule of the respect of human freedom.

Especially noteworthy is the attitude of the European Court towards the role of court in the protection of a person's freedom. Several cases are noteworthy in this regard, including a case against Georgia, in which the European Court expressed its deep concern about pre-trial detention applied by the Georgian courts and a decision "which was taken in the form of standard order prepared in advance." Instead of performing its duty to seek solid arguments to justify the pre-trial detention, Georgian court relied and limited itself to a decision which was "a standard template text with pre-printed reasoning." Such practice clearly indicates about absence of special diligence in considering the issue by national state bodies which runs counter to the spirit of paragraph 3, Article 5 of the European Convention.

The approach of the European Court in the case *Giorgi Patsuria against Georgia* it also noteworthy, in which the Court ruled that the application of pre-trial detention towards the complainant for the duration of 9 months and 12 days was unsubstantiated and unjustified.

In this case, the European Court assessed: “It is essentially on the basis of the reasons given in the relevant decisions of the national judicial authorities and of the arguments made by the applicant in his or her applications for release that the Court is called upon to decide whether or not the detention on remand was justified under Article 5 § 3 of the Convention. Those decisions must contain “relevant” and “sufficient” reasoning and address specific features of the given case in order to justify the deprivation of liberty. In other words, any period of detention on remand, whatever its length, requires appropriate motivation by the competent national authorities which, moreover, are obliged to display “special diligence” in the conduct of the proceedings.”

In the end, the Court, taking into account paragraph 3, Article 5 of the Convention, emphasized that when public officials decide on the issue of release of a prisoner, they must take into account alternative measures to ensure applicant’s appearance before the court. Even though this judgment indicates about the need to consider a case within a reasonable timeframe or the right of a detainee to be released during the consideration of the case, it also contends that such release can be conditioned upon a guarantee of his/her appearing before the court.

Regarding the substantiation of a court decision, the European Court expressed its concern in a case against Turkey, noting that decisions of the first court substantiating the necessity of detention contained almost identical and even banal phrases, whilst on three occasions the reasons were not provided at all. Therefore, the Court was suspicious about the presented substantiation.

The practice developed by the European Court clearly proves the exceptionality of detention as a measure, the expedience of which must be assessed by taking into account concrete and individual peculiarities of a case and an accused person which should provide or exclude a possibility of applying the detention. Moreover, each such concrete peculiarity or circumstance must be reflected in a decision on the application of detention to a person.

As regards other procedural rights and guarantees of an accused person, they are given in paragraph 4, Article 5 of the Convention which entitles everyone who is deprived of his liberty by arrest or detention to take proceedings by which the lawfulness of his detention shall be decided by a court. The timely control is especially important in case of application of detention to a person.

According to the European Court, the right of further court control enshrined in the Convention, which envisages revision of a decision on detention, is absolutely independent of an obligation of initial appearance of a detained person before the court.

2.1. Rights of accused person according to Article 5 of the Convention

Even though the text of Convention, taken separately, does not provide a comprehensive and exhaustive list of guarantees, the practice of the European Court establishes the boundaries of

the rights of an accused person. According to this practice the rights guaranteed under Article 5 (4) of the Convention are the following:

a) The right to revise lawfulness of detention/arrest by a court. Persons who are detained or arrested have the right to have the lawfulness of their detention revised both on merits and procedurally. The legislation must strengthen guarantees for a speedy decision by a court on the release of detainee if the review establishes that detention is not lawful or becomes unjustified after a certain period of time or because of certain developments.

An interesting aspect which the European Court established with regard to this right is that a court must consider not only procedural requirements envisaged by the legislation but also the reasonability of that doubt which supports detention and legitimacy of that aim which the detention and further arrest serve.

b) The right to hearing - according to the European Court, the hearing shall be conducted when a person is detained in accordance to paragraph 1(c) Article 5.

c) The right of equality and adversarial proceeding, which means the possibility of both parties to a proceeding to get familiar with evidence and argumentation presented by another party and express its opinion about them. According to the European Court, it is not always necessary that the proceeding related to Article 5 (4) meet all those criteria which are required under the right to fair court (paragraph 1, Article 6 of the Convention). However, it must be the proceeding which ensures a person with guarantees by applying which he will effectively argue about lawfulness of detention applied to him. In order to assess how effective is the review procedure, one must take into account concrete circumstances and the proceeding must meet requirements of fair court.

d) The right of access to case materials – one of significant guarantees is the access to investigative materials which enables a detainee to argue over arguments and facts which constitute the ground for his pre-trial detention.

Moreover, to ensure effective exercise of this right, a very important requirement to public bodies is to ensure the notification of a party to a proceeding about the review procedure in order to enable it to present comments about those arguments which constitute the ground for continuation of pre-trial detention.

The European Court noted that the equality of parties to a proceeding is not observed when the defense has not the access to those documents of the case which are necessary to effectively contest the lawfulness of the detention of his client.

e) The right related to the availability of defense lawyer, which in some cases implies the right to have a public defense lawyer.

f) The right to speedy consideration of a case.

Regarding the right to adversarial proceeding, one should single out the judgment of the European Court, dated 27 May 2010, delivered on the case *Saghinadze and Others v. Georgia*, in which the Court stated that, "...as a matter of domestic law and practice, in the present case also, the prosecutor had the privilege of addressing to the trial court, along with the bill of indictment, submissions pertinent to the issue of continued detention which the first applicant could not contest either in writing or in oral submissions. The judicial review of 29 June 2006 cannot therefore be said to have been of an adversarial nature, where the principle of equality of arms was respected."

2.2. European Court's approach to the application of bail

The European Court's approach towards the application of bail as a preventive measure is interesting. First, it must be noted that the Court formulated its approach towards several main issues, including: in what circumstances the application of bail can be reasonable/unreasonable, how the amount of bail should be calculated, what is the obligation of the state in regards to the application of non-custodial measures.

According to the European Court, bail can be necessary only until convincing reasons justifying detention exist.

Moreover, the application of bail to any criminal case is not, of course, considered reasonable. The Court noted that the use of bail with the aim to avoid disposal of evidence, commitment of new crime or violation of public order will not be effective.

The issue of size of bail is, as noted in the beginning, closely related to aggravating the severity of preventive measure if the bail is not paid within the timeframe set for that. Therefore, the European Court's approach towards the size of bail is worth noting: when defining the size of bail, the property of a detainee and his/her relationship to those persons who pay the bail must be assessed, in other words, to what extent is the loss of the amount of bail or institution of a criminal proceeding against the surety, in case the detainee fails to appear before the court, constitute a sufficient factor to prevent the detainee from going into hiding.

And finally, considering the magnitude of the bail, the Court imposed on states the obligation of a similar special diligence in defining the amount of bail as in deciding on the necessity of detention.

3. Conclusion

The review of national legislation and international practice allows, *inter alia*, to outline similarities and differences between them. Findings resulting from the comparison enable to assess how the concerns about the application of preventive measures are related to the legislative regulation of this mechanism and its practical application.

As seen from above, the national legislation contains several guarantees for the defense of an accused person, which, similarly to the approach developed by the European Court,

strengthen presumption in favor of freedom of a person. The key among these guarantees is a general restriction of preventive measures on four grounds and a reasonable doubt existing about them. As regards the use of a concrete preventive measure, the law requires from the prosecution as well as a court to observe proportionality when selecting a preventive measure. To this end, the law envisages several types of preventive measures and those circumstances which if existing, preventive measure can be used. Such regulation allows to ensure proportionality of restriction of a person's liberty, taking into account interests of justice and public as well as the right of an accused person.

Considering the standards developed by the European Court, one must single out the issue of burden of proof. The national legislation imposes the obligation on the prosecution to substantiate in its motion the expediency of a preventive measure, on the one hand, and on the other, proportionality of a concrete preventive measure.

As regards the right to review the lawfulness of detention, the national legislation in this part, in contrast to other regulatory issues of preventive measures, falls short of requirements of international standards. As noted above, by imposing an obligation to submit a new evidence in order to use the right of appeal, the legislation renders the exercise of this right illusory and its existence in the legislation senseless. Bearing this in mind, the grounds of the review of a court decision as well as a procedure for filing an appeal needs to be improved in order to be in line with the international standards of human rights.

As a conclusion, it must be said that the analysis of national regulation and its compliance with international standards heightens the assumption that the majority of problems concerning preventive measures are related to a practical use of the mechanism rather than to legislative regulation. Nevertheless, there are issues which can be improved only by legislative changes, among them is the right to appeal.

4. Application of preventive measures in practice

To study the application of preventive measures in practice, 50 court decisions were analyzed. In two of them different preventive measures were applied to accused persons.

As a primary assessment, it should be noted that none of the decisions studied denied a motion of the prosecutor for the application of preventive measure. Consequently, all decisions envisaged the application of preventive measures to accused persons. As regards the types of preventive measures, only detention and bail were applied, no other preventive measure was used. Moreover, none of preventive measures demanded by the prosecution was denied/modified in those court decisions that were analyzed.

It is worth noting that during the conduct of this analysis, monitoring reports of Tbilisi City Court' Collegium of Criminal Cases were published which provide information about the application of preventive measures. The reports cover the period from October 2011 through March 2012 and accordingly, provide the information about 185 sittings of first submission to courts.

According to monitoring reports, in none of 185 cases was an accused person cleared of preventive measure. Moreover, no other measure was applied save detention and bail.

The analysis of decisions studied within the framework of this study revealed basic trends in the practical application of preventive measures. Among them one can single out the following main problems:

- Banality of court decisions;
- Lack of substantiation;
- Application of different preventive measures under similar circumstances;
- Lack of deliberation on the use of less stringent measure.

Before discussing each of the above problems separately, it should be noted that the structure of studied court decisions is identical. In the substantiation part, the absolute majority of them repeats the text of prosecutor's motion word by word. The decisions allocate quite a large space to the reasoning about a possible commitment of crime by an accused person and submission of evidence against him/her. Also, each of the studied court decisions is focused on depicting the nature and severity of crime. Considering this, the majority of decisions is marked by irrelevant deliberations.

It is worth to note those cases separately which contain identical phrases, for example, decisions taken by various courts read: "It [the sum of bail] represents a guarantee of further normal behavior of the accused person and a reminder to him to determine his further behavior properly."

Such instances further underscore the banality of decisions.

During the analysis of application of preventive measures in practice, respondents expressed their opinions about available data on preventive measures.

According to a representative of the prosecutor's office, such practice of applying preventive measures is conditioned by efficiency of bail and detention. A defense lawyer contended that "even though the developed practice is justified based on the principle of delivering effective justice but the Georgian practice is conditioned by a strict criminal policy and result from declared 'zero tolerance.'" Moreover, another defense lawyer said that "these two measures (bail and detention) are applied because only they achieve the aims of preventive measure."

4.1. *Banality of court decisions*

The study of court decisions show that courts use identical arguments to substantiate their decisions, thus making court decisions banal. The main problem in analyzed court decision is the scarcity of facts. A decision relies on provisions of the Procedures Code defining grounds for application of preventive measures. Decisions indicate about the threat of an accused

person's going into hiding, disposing of evidence, perverting the course of justice or committing a new crime although do not present reasons for this threat.

Consequently, substantiation used in the majority of court decisions is the indication of threats irrespective of how relevant or real those threats are in relation with given cases.

A court, as a rule, does not discuss and take into account individual circumstances of a concrete case – what is the basis of the doubt that an accused person may go into hiding, what are the fact that indicate that an accused person may pervert the course of justice, intimidate witnesses or dispose of evidence, what is the ground for assuming that he/she may commit a new crime if not detained and why the public order may be jeopardized by an accused person being out of prison. Each of these circumstances is of crucial importance when applying a preventive measure to a person.

Scarcity of facts in court decisions results from the quality of substantiation of a prosecutor's motion although this does not relieve a court of its responsibility to apply a preventive measure to an accused person only in case of reasonable doubt that an accused person will pervert the course of justice, intimidate witnesses, go into hiding or commit a new crime. The reasonable doubt itself rises from concrete facts which must be reflected in a court decision properly. If the prosecutor fails to present sufficient evidence, a court must deny the motion.

Banality of court decisions results from the scarcity of facts which should support a reasonable doubt about the existence of one of the grounds specified in the law. When such circumstances are not provided in court decisions on a massive scale, court decisions become of banal nature.

4.2. Lack of substantiation

As noted in the part where the legislation was analyzed, the Procedures Code entitles relevant subjects (the prosecution and the court) to apply preventive measure only in case if there is a reasonable doubt which relies on four grounds explicitly specified by the law.

This obliges the court to start reasoning in a court decision with the issue of expediency of applying a preventive measure. However, such substantiation is strange to the court cases studied by us. The court starts reasoning about a possibility of committing a new crime by an accused person and only thereafter continues reasoning about the application of a preventive measure. It was revealed that the issue of expediency of a preventive measure is, in general, not considered by the prosecution as well. The absolute majority of courts links a reasonable doubt with a possible commitment of a crime by an accused person and cites corresponding evidence proving this circumstance even though a court is obliged to examine with the standard of reasonable doubt a threat of a person's going into hiding, perverting the course of justice, intimidating witnesses and committing a new crime. This, in turn, requires the existence of absolutely different facts from those which may prove a threat of committing a new crime. Nonetheless, courts place emphasis on the fact of possible commitment of crime by a person and then directly proceed to the application of a preventive measure.

In selecting a preventive measure courts do not apply uniform approach. There is no common test which courts would use in selecting a preventive measure. In some of decisions, when selecting a preventive measure, a court uses a test – whether or not an accused person has a place of permanent residence. Court uses this test when applying bail as an argument against the threat of accused person's going into hiding. However, in those cases where court denies the application of bail, its substantiation does not show the use of a similar test. The approach of court is not uniform either towards such instances when an accused person pleads guilty, cooperates and compensates damages. In separate cases, a court uses these circumstances to substantiate the application of bail. However, in cases when detention is applied, a court does not pay attention to these circumstances and focuses on the nature of crime and severity of possible punishment as circumstances which may prompt an accused person to go into hiding. A severity of crime, itself, does not justify the application of preventive measure, in general, and a concrete preventive measure, in particular.

It is also worth noting that when a court deliberates over the reconciliation of an accused person with a victim, compensation of damages, existence of place of permanent residence, thereby denying the threat of person's going into hiding, the ground for applying bail is unclear. If no threat exists of accused person's going into hiding or perverting the course of justice why then is there a need to apply any preventive measure, including a bail? The law explicitly specifies grounds of applying preventive measures which are common for any preventive measure. In the absence of these grounds it is unacceptable to use any type of preventive, even non-custodial measure.

With regard to substantiations of court decisions, the Public Defender of Georgia noted in his interview to the Coalition: *“the analysis of part of cases which we received over the period of past two to three years reveals that a court very often does not go into details of a case and very often easily decides on the need of application of preventive measures. As regards substantiation, one may say that a court always, in most cases, meets the prosecutor's demand and this, of course, must give a rise to doubt that the degree of independence of court is very low.”*

One of the decisions on applying the bail is interesting: a defense lawyer of accused person requested the decrease in the sum of bail because the accused person did not have personal income and imposition of 15,000 GEL would be unreasonable. Consequently, the defense made a motion for decreasing that sum to 8,000 GEL, which the court denied. The decision taken by court does not substantiate the ground of denying the motion of the defense lawyer.

According to the monitoring report on criminal cases, out of 99 instances of applied bail during the monitoring period, the prosecutor presented an evidence of financial status of an accused person for defining the size of bail only in 33 percent of cases. Court did not even try to inquire about that in any of the remaining cases.

Yet another interesting court decision worth noting is the one on applying detention to an accused person. It must be noted that an accused person appeared to the police department within an hour after the incident. Nevertheless, the prosecutor made a motion for detention

citing a possibility of intimidating witness as the ground. A court, without appropriate deliberation and argumentation, granted the prosecutor's motion.

According to monitoring reports on criminal cases, when deciding on application of preventive measures, judges rarely substantiated their decisions. Moreover, courts rarely required from prosecution to substantiate their motions for detention. According to the reports, courts substantiated their decisions only in 34 percent of 86 cases.

4.3. Non-uniform approach

In some of court decisions studied within the framework of this analysis, courts applied different preventive measures to persons accused of committing identical crimes. Naturally, court is entitled to apply different measures even towards several persons having committed one and the same crime if different circumstances exist which condition different approaches. Nevertheless, in some of court decisions under which different preventive measures are applied to several accused persons, different circumstances were not identified.

Under the decision of Tbilisi City Court, dated 11 January 2011, preventive measures were applied to seven accused persons, of which six were released on bail, on the basis of prosecutor's motion, whilst the seventh was detained.

In substantiating the application of bail, the court indicated that accused persons (six persons) have permanent housing, were not convicted in the past, which excluded the threat that those accused persons may go into hiding or pervert the course of justice. However, substantiating the application of detention to one accused person, the court did not mention any of these circumstances and limited itself to noting that a number of investigative actions were to be conducted in relation to the case and the interference in this process on the part of the accused person, if left on freedom, was absolutely real. The court decision does not make it clear why investigative actions to be conducted constituted the ground for the detention of only one person and what was the cause of threat emanating specifically from that accused person. The court decision did not contain concrete circumstances which could condition such behavior of the detainee.

4.4. Application of less stringent preventive measures

Each of the studied court cases lack the deliberation over the expedience of applying less stringent preventive measure. When deciding on this issue, a court, as a rule, limits itself to a standard phrase that "application of less stringent preventive measure to an accused person is at this stage inexpedient." Some court decisions also contain a phrase: "Aims specified in paragraph 1, Article 198 of the Criminal Procedures Code of Georgia can be ensured only by applying detention as a preventive measure." Presumably, making such a reference to the law in court decisions is considered as the implementation of obligation imposed on courts under the law which requires from courts to consider a possibility of applying less stringent measure to an accused person.

A requirement of the Criminal Procedures Code says: “Detention or other preventive measure shall not be applied to an accused person unless the aims specified in this paragraph cannot be achieved by other, less stringent measures.”

The above requirement, at the very least, obliges a court to deliberate over this issue and indicate those circumstances in a court decision which make the use of less stringent measures to an accused person impossible.

Phrases used in court decisions show formal attitude of courts towards this issue, which does not comply with the content of the obligation imposed on courts by the procedural law.

As a summary conclusion, the main characteristic features common to court decisions which were analyzed by us must be outlined as the following:

- standard of proof is low;
- majority of court decisions are in the form of standard order with identical reasoning;
- court does not start its reasoning with the issue of the expedience of preventive measure;
- court does not deliberate over a possibility of applying a less stringent preventive measure;
- court decisions do not reflect appropriate reasoning and arguments that would be in compliance with the standard of reasonable doubt.

5. Recommendations

- *Decisions taken by court are banal and fall short of requirements of substantiated decision:*

Courts must evaluate individual situation and factual circumstances of concrete cases, including peculiarities of a person’s character, his/her health and economic conditions as well as any relevant factor which may be of importance in taking decisions on applying preventive measures.

- *Standard of proof in prescribing preventive measure is low, which places the prosecution in an advantageous position:*

Given that courts are required to apply preventive measures only if grounds, explicitly identified in the law, exist and to apply detention only as an exceptional measure, courts must strictly observe the standard established by the law when considering motions of prosecutors and must grant prosecutors’ motions only in case of proper substantiation.

- *In general, courts do not start reasoning with the issue of expediency of preventive measures:*

A decision taken by court must primarily answer a question as to why the use of a preventive measure is necessary in a given case. Only after the court provides a substantiated answer must it proceed to the selection of preventive measure.

- *Court decisions do not allocate equal attention to arguments of the defense and the prosecution:*

Taking into consideration the principle of equality of parties and equal legal power of evidences submitted by the parties, a judge must pay equal attention to positions and arguments of the defense and the prosecution. At the same time, arguments of the defense must be reflected in decisions properly.

- *Courts lack common approach thus creating a risk of double standard:*

Courts must develop a common approach to the selection of preventive measures in order to avoid different approaches in a case with identical circumstances.

- *According to the Criminal Procedures Code of Georgia, the defense has no right to contest a decision on a preventive measure without the consent of an accused person:*

The Criminal Procedures Code of Georgia should not require the consent of the accused person for contesting a decision on a preventive measure.

- *According to the Criminal Procedures Code of Georgia, when contesting a preventive measure, an appeal must be enclosed with new evidences:*

The Criminal Procedures Code of Georgia should not contain a direct obligation of presenting new evidences when contesting a preventive measure.

- *The law does not define admissibility criteria for complaints in courts of appeal:*

The law does not define admissibility criteria for complaints in the court of appeal, thus enabling courts to deem complaints against preventive measures inadmissible. Admissibility criteria for such complaints must be set out in the Criminal Procedures Code of Georgia.