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Meeting: 1419th meeting (December 2021) (DH)

Communication from NGOs (International Partnership for Human Rights and Georgian Young Lawyers' Association) (11/10/2021) in the case of Rostomashvili v. Georgia (Application No. 13185/07).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419e réunion (décembre 2021) (DH)

Communication d'ONG (International Partnership for Human Rights et Georgian Young Lawyers' Association) (11/10/2021) relative à l'affaire Rostomashvili c. Géorgie (requête n° 13185/07) ***[anglais uniquement].***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DH-DD(2021)1103: Rule 9.2 Communication from an NGO in Rostomashvili v. Georgia.
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DGI

11/10/2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

IPHR International Partnership for Human Rights

GYLA

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8 October, 2021

International Partnership for Human Rights (IPHR) and Georgian Young Lawyers Association (GYLA) wish to present Rule 9 (2) submission to the Committee of Ministers of the Council of Europe in respect of the implementation of the **"Rostomashvili Group of Cases"** (Application No. 13185/07).

Please, find enclosed the submission. Should you require additional information about the provided submission, please, do not hesitate to contact us.

Sincerely,

Simon Papuashvili

Programme Director

International Partnership for Human Rights

ს. პაპუაშვილი

Tamar Oniani

Head of the International Litigation Team

Georgian Young Lawyers' Association



DH-DD(2021)1103: Rule 9.2 Communication from an NGO in Rostomashvili v. Georgia.
Document distributed under the sole responsibility of its author, without prejudice
to the legal or political position of the Committee of Ministers.

Submission by International Partnership of Human Rights & Georgian Young Lawyers' Association pursuant to Rule 9(2) of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments

Comments on the implementation of the Rostomashvili group of cases

A. Introduction

1. International Partnership for Human Rights (**IPHR**) is an independent, non-governmental organisation founded in 2008. Based in Brussels, IPHR works closely with civil society groups from various countries to raise human rights concerns at the international level and promote respect for the rights of vulnerable communities. IPHR is committed to promoting human rights worldwide but has a special focus on countries in Central Asia and the South Caucasus, as well as Russia and Ukraine. It acts to empower local civil society groups who are working to advance the protection of human rights in their respective countries and assists them in raising human rights concerns at the international level. In cooperation with partner organisations, IPHR advocates on behalf of individuals and communities who are among those most vulnerable to discrimination, injustice and human rights violations.

2. Georgian Young Lawyers' Association (**GYLA**) is a non-governmental organisation founded in 1994, in Tbilisi, Georgia. The organisation operates in nine regions across the country and, among other strategic activities, provides free legal services. The mission of the organisation is to create a fair environment for all by improving democratic mechanisms. GYLA has been engaged in international litigation before the European Court of Human Rights since 2004. Alongside this litigation, monitoring of the execution process of the judgments and decisions of the Court represents an important strategic focus of the organisation. For this purpose,on a regular basis, GYLA - on its own behalf or in cooperation with the partner organisations - presents Rule 9 communications before the Committee of Ministers, in which GYLA assesses the individual and general measures taken by the state to enforce judgments and decisions made against Georgia, as well as calling on the state to take concrete steps.

3. In line with Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, IPHR and GYLA hereby present a communication regarding the proceedings in *Rostomashvili v. Georgia*, Application No. 13185/07, and its seven repetitive cases[1] (**the "Rostomashvili Group of Cases"**). This

1 *Kobiashvili v. Georgia*, 36416/06; *Megrelishvili v. Georgia*, 30364/09; *Bakradze v. Georgia*, 21074/09; *Bokhonko v. Georgia*, 6739/11; *Tlashadze and Kakashvili v. Georgia*, 41674/10; *Kalandia v. Georgia*, 57255/10; *Shubitidze v. Georgia*, 43854/12.

submission demonstrates that Georgia, two years after the final judgment in *Rostomashvili*, has failed to undertake any meaningful steps towards implementation of the judgment or the remedying of the major structural problems in Georgia's judicial system that it revealed. The Committee of Ministers ("CM") should thus urge Georgia to provide an action plan (which the respondent state was expected to provide within six months, at the latest, of the judgment becoming final) and increase its emphasis on the Rostomashvili Group of Cases by examining it under enhanced supervision.

B. Case summary

4. The cases in question concern the applicants' right to a fair trial, as enshrined in Article 6(1) of the European Charter of Human Rights ("ECHR").

5. In *Rostomashvili*, the domestic courts failed to give sufficient reasoning for their decision to convict the applicant of a criminal offence.[2] While the Applicant claimed that no piece of forensic evidence linked him to the crime he had been accused of and that the key witness' testimony was not credible, the domestic courts failed to address his claims.[3] In the repetitive cases, the national courts further failed to examine the lawfulness of the way in which evidence was obtained. In a number of cases, the applicants were searched without a warrant (a fact not adequately justified by the authorities), during which time, according to the applicants, the authorities planted the collected evidence.[4] In addition, operational information (i.e. information received from anonymous sources) allegedly relied on for the searches was missing from the case file in most cases.[5] Subsequently, the applicants' criminal convictions were based largely on the testimony of the police officers that had conducted the relevant searches.[6] The courts did not seriously consider the allegations the collected evidence had been planted by the police or the arguments of the defence.[7] Additionally, the post-search judicial review was not adequate or sufficient for the purposes of challenging the authenticity and reliability of evidence.[8]

6. The shortcoming at issue is best illustrated by the conclusion of the European Court of Human Rights (**"ECtHR" or "the Court"**) in *Megrelishvili: "*[C]*umulatively, the procedural irregularities during the searches, the inadequate judicial scrutiny both before and during the trial, including the failure of the domestic courts to sufficiently examine the applicant's allegations* [*regarding the probative value of the evidence*]*, and the weakness of the corroborating evidence, rendered the applicant's trial as a whole unfair".*[9]

2 *Rostomashvili v. Georgia*, 13185/07, para. 60.

3 *Rostomashvili v. Georgia*, 13185/07, paras. 57, 59.

4 *Tlashadze and Kakashvili v. Georgia*, 41674/10, paras. 7, 11, 14, 32; *Kobiashvili v. Georgia*, 36416/06, paras. 9, 20; *Megrelishvili v. Georgia*, 30364/09, paras. 5, 8, 9, 18; *Bokhonko v. Georgia*, 6739/11, paras. 7, 10; Bakradze v. Georgia, 21074/09, paras. 6, 19; *Kalandia v. Georgia*, 57255/10, paras. 21, 39; *Shubitidze v. Georgia*, 43854/12, paras. 8, 26.

5 *Kobiashvili v. Georgia*, 36416/06, paras. 65, 68; *Megrelishvili v. Georgia*, 30364/09, para. 36; *Bakradze v. Georgia*, 21074/09, para. 28; in contrast: *Tlashadze and Kakashvili v. Georgia*, 30364/09, para. 50.

6 *Kobiashvili v. Georgia*, 36416/06, para. 72; *Tlashadze and Kakashvili v. Georgia*, 41674/10, para. 52; *Kalandia v. Georgia*, 57255/10, para. 43.

7 *Kalandia v. Georgia*, 57255/10, paras. 41-42; *Shubitidze v. Georgia*, 43854/12, paras. 36-37.

8 *Kalandia v. Georgia*, 57255/10, para. 41; *Shubitidze v. Georgia*, 43854/12, para. 35.

9 *Megrelishvili v. Georgia*, 30364/09, para. 39.

C. General measures

7. The Court has addressed several general measures that must be taken to remedy the established infringements.

I. INTRODUCTION OF MINIMUM DOCUMENTATION REQUIREMENTS FOR LAW ENFORCEMENT AGENCIES

8. The Court held that while Georgian law permissibly waives the prerequisite of a warrant in cases of *"urgent circumstances"*[10], the factual circumstances that necessitate an urgent search without a prior warrant must be documented in a substantiated manner.[11] Without any adequate explanation of those circumstances, an effective review of the search cannot be achieved. Indeed, for the present group of cases, the Court observed that the circumstances that allegedly justified a search without a judicial warrant remained unclear throughout the trial.[12]

II. NEED FOR AN EFFECTIVE REMEDY AGAINST POTENTIALLY UNLAWFULLY OBTAINED EVIDENCE

9. The Court found that there must be an effective remedy against potentially unlawfully obtained evidence.

1. Opportunity to challenge the authenticity of the evidence and to oppose its use

10. First, he Court held that for the proceedings to be fair, the defendant must be *"given the opportunity to challenge the authenticity of the evidence and to oppose its use"*.[13] The courts have to address the applicant's objections to the evidence in detail.[14] Moreover, *"where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance"*.[15] Thus, particular consideration must be given to the respect for the principles of adversarial proceedings and equality of arms between the prosecution and the defence.[16]

11. An effective review of the lawfulness of the evidence obtained can occur during the trial or by reference to a pre-existing post-search review.[17]

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10 Article 112(5) Criminal Procedure Code (formerly Article 290(2)-(4) Code of Criminal Procedure); See for example *Megrelishvili v. Georgia*, 30364/09, para. 33.

11 See for example *Megrelishvili v. Georgia*, 30364/09, para. 33; *Tlashadze and Kakashvili v. Georgia*, 41674/10, para. 47.

12 *Kobiashvili v. Georgia*, 36416/06, para. 61; *Tlashadze and Kakashvili v. Georgia*, 41674/10, para. 47.

13 *Bokhonko v. Georgia*, 6739/11, para. 92; in contrast see *Bykov v. Russia*, 4378/02, para. 95, where the Court held that *"the applicant was able to challenge the covert operation, and every piece of evidence obtained thereby, in the adversarial procedure before the first-instance court and in his grounds of appeal"*.

14 *Bokhonko v. Georgia*, 6739/11, para. 95.

15 *Tlashadze and Kakashvili v. Georgia*, 41674/10, para. 47; see also *Bykov v. Russia*, 4378/02, para. 95.

16 *Kobiashvili v. Georgia*, 36416/06, paras. 56, 71; see: *Bykov v. Russia*, 4378/02, para. 90; *Rowe and Davis v. the United Kingdom*, 28901/95, para. 60.

17 See for example *Kobiashvili v. Georgia*, 36416/06, paras. 66-69.

– An effective post-search review must establish the circumstances of a search and ascertain the authenticity and reliability of evidence later used in court.[18] This includes that the judge disposes of the relevant documents *"to assess* [...] *the degree of reasonable suspicion that the authorities had" before the search and "the urgency and necessity of carrying out a search without a prior judicial warrant"*.[19]

  The Court found that the Georgian system of post-search judicial review does not satisfy this purpose because the proceedings are neither accessible to the defendant nor adversarial.[20] In addition, judges often lack the relevant documents, resulting in decisions being unsupported by relevant factual circumstances and without proper reasoning.[21] This remains true regardless of the amendments to post-search review included as part of the reform of the Criminal Procedure Code in 2010.[22]

– Alternatively, the criminal trial itself must offer the accused an opportunity to effectively review the lawfulness of the evidence obtained. However, in the present group of cases, the Court could not *"overlook the fact that the applicant's repeated allegations concerning the planting of evidence* [...] *were not given any serious consideration at any stage of the criminal proceedings against him"*.[23]

2. Reasoning of judicial decisions

12. Second, domestic courts are under an obligation to adequately state their reasons when they do not consider the applicant's objections to the evidence as relevant.[24] To fulfil this obligation, they are not obliged to answer in detail every argument brought forward by the applicant but must give a specific and explicit reply to those arguments which are crucial for the outcome of the case, e.g. on crucial evidence when no other evidence in the case file is sufficiently strong on its own.[25]

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18 See for example *Bakradze v. Georgia*, 21074/09, para. 27; *Bokhonko v. Georgia*, 6739/11, para. 97; *Megrelishvili v. Georgia*, 30364/09, para. 35.

19 *Kobiashvili v. Georgia*, 36416/06, para. 68. These documents entail the decision ordering the personal search in urgent circumstances, the police report on the personal search and the 'operational information' that allegedly triggered the personal search of the defendant.

20 *Kobiashvili v. Georgia*, 36416/06, para. 67.

21 *Kobiashvili v. Georgia*, 36416/06, para. 67.

22 *Megrelishvili v. Georgia*, 30364/09, para. 35; the appeal was not yet available in *Kobiashvili v. Georgia*, 36416/06. For details, see below, paras. 18-21. Also, further adjustments in June 2021 remained ineffective, see below, para. 26

23 *Kalandia v. Georgia*, 57255/10, para. 41. See also *Kobiashvili v. Georgia*, 36416/06, para. 69; *Tlashadze and Kakashvili v. Georgia*, 41674/10, para. 50.

24 *Rostomashvili v. Georgia*, 13185/07, para. 59; in contrast: *Bykov v. Russia*, 4378/02, para. 95, where the Court held that the applicant's arguments were addressed by the national courts and dismissed in reasoned decisions.

25 *Rostomashvili v. Georgia*, 13185/07, para. 55, 59; *Bokhonko v. Georgia*, 6739/11, para. 96; see also *Lobzhanidze and Peradze v. Georgia*, 21447/11 and 35839/11, para. 66. See also *Boldea v. Romania*, no. 19997/02, para. 30; *Uche v. Switzerland*, no. 12211/09, para. 37. As the Court found in *Murtazaliyeva v. Russia*, 36658/05, para. 166, regarding the refusal to call and hear witnesses, *"the stronger and weightier the arguments advanced by the defence, the closer must be the scrutiny and the more convincing must be the reasoning of the domestic courts"*.

13. In the present group of cases, the Court found that Georgia fell short of its obligations. Where the domestic courts did in fact address the arguments raised by the defence, they dismissed them outright, without providing sufficient reasoning or explanation for their conclusions.[26]

3. Adequate assessment of evidence

14. Lastly, domestic courts must also adequately assess the evidence. They must examine the quality and reliability of the evidence, including the circumstances under which it was obtained.[27] Where the reliability of evidence is in doubt, it is necessary to confirm its probative value by comparison with other evidence.[28]

15. Again, in the present group of cases, the Court identified an inadequate assessment of the probative value of collected evidence. It observed that domestic courts considered the testimonies of the police officers who conducted the search to be objective without *"any meaningful attempt to address* [...] *contradictions or the applicants' related objections"*,[29] while testimonies of the applicants' friends were dismissed as subjective and lacking credibility.[30] The Court found it obvious that the police officers had an interest in the outcome of the case. Accordingly, the testimonies were required to be corroborated with evidence from other sources to be relied on by the courts.[31]

D. Continuation of infringements established in the Rostomashvili Group of Cases

16. Georgia has not provided an action plan to address the infringements found in the Rostomashvili Group of Cases and seems unwilling to implement the general measures prescribed by the Court. Accordingly, the infringements identified in this group of cases remain ongoing: even after its reform in 2010, the Criminal Procedure Code still fails to provide for effective remedy against potentially unlawfully obtained evidence (**I.**); similar cases still occur in Georgia (**II.**); and, at the core of this issue, Georgia lacks an independent judiciary to effectively implement the measures necessary to ensure a fair trial (**III.**).

26 *Rostomashvili v. Georgia*, 13185/07, para. 59; *Bokhonko v. Georgia*, 6739/11, para. 95-96; *Bakradze v. Georgia*, 21074/09, para. 29; *Tlashadze and Kakashvili v. Georgia*, 41674/10, para. 49.

27 *Rostomashvili v. Georgia*, 13185/07, para. 58. See also *Bykov v. Russia*, 4378/02, para. 90; *Jalloh v. Germany*, 54810/00, para. 96.

28 *Kobiashvili v. Georgia*, 36416/06, para. 72.

29 *Kalandia v. Georgia*, 57255/10, para. 43.

30 *Kobiashvili v. Georgia*, 36416/06, para. 72; *Tlashadze and Kakashvili v. Georgia*, 41674/10, para. 52.

31 *Kobiashvili v. Georgia*, 36416/06, para. 72.

I. NO EFFECTIVE REMEDY DESPITE THE ENACTMENT OF THE CRIMINAL PROCEDURE CODE IN 2010

17. In October 2010, a new Criminal Procedure Code ("**CPC**")[32] entered into force.[33] While the new CPC is considered as a step forward in meeting international standards, it did not introduce effective remedies to the present infringements.

18. At the outset, IPHR and GYLA note that the procedure leading to the CPC's enactment was already flawed. In particular, neither the Georgian society nor practising lawyers were comprehensively and effectively consulted.[34]

19. As to the CPC's substance, it did not introduce an adversarial post-search review or other remedy. According to Article 112(5) CPC, the judge may (not shall) review a motion on the lawfulness of the search with the participation of the parties and the person against whom an investigative action has been carried out. Therefore, according to Article 112(5) CPC, the judge is only entitled (not obliged) to conduct the post-search review with an oral hearing. However, Georgian law does not provide clear guidance regarding the circumstances in which the judge should review the motion with the participation of the parties and the person against whom an investigative action has been carried out. Consequently, both the accused and their lawyers still may not participate in the post-search review if it is not the judge's will for them to do so.[35] Further, the case of *Shubitidze* demonstrates that the enactment of the CPC did not change the national courts' deficient handling of the review.[36]

20. Newly introduced Articles 112(8) and 207(1) CPC provide for appeal against the judge's decision declaring the search as lawful. However, the court decides on the admissibility of the appeal without an oral hearing pursuant to Article 207(4) CPC. Also, according to Article 207(5) CPC, in the event of an appeal's admissibility, an oral hearing is not obligatory but lies in the discretion of the judge.[37] Thus, the appeal is not of an adversarial nature. Moreover, the deficiencies in post-search judicial review render the appeal procedure an inadequate redress, as the ECtHR already found in the case of *Megrelishvili*.[38]

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32 English translation of the Criminal Procedure Code published by the Legislative Herald of Georgia, Consolidated version with amendments until 29 November 2019, available at: *https://matsne.gov.ge/en/document/view/90034?publication=106*.

33 The new provisions were not in force at the material time of the Rostomashvili Group of Cases except for the latest case of *Shubitidze v. Georgia*, 43854/12, paras. 24-25; see Article 333(1) CPC.

34 Georgio Margiani, Human Rights House, *New criminal code coming into force in Georgia*, 26 January 2011, available at: *https://humanrightshouse.org/articles/new-criminal-code-coming-into-force-in-georgia*.

35 See also *Shubitidze v. Georgia*, 43854/12, paras. 11, 35.

36 Again, the decision was substantiated only by listing several domestic law provisions without any further elaboration, see *Shubitidze v. Georgia*, 43854/12, para. 11.

37 Formerly Article 293(3) Code of Criminal Procedure of Georgia; see *Megrelishvili v. Georgia*, 30364/09, para. 35. In *Kobiashvili v. Georgia*, such appeal was not yet available.

38 *Megrelishvili v. Georgia*, 30364/09, para. 35; *Shubitidze v. Georgia*, 43854/12, para. 35.

II. CURRENT CASES IN GEORGIA

21. The Rostomashvili Group of Cases are not isolated incidents. Rather, continuous allegations of planted evidence, searches, and seizures without prior court decisions and insufficient reasoning justifying the related judicial decisions reveal a structural problem in Georgia.[39]

22. Urgent necessity is a common argument to justify searches and seizures without a prior court decision, but judicial review remains inadequate. From January 2016 to July 2020, Georgian courts granted motions to declare searches and seizures conducted with this justification legal in virtually all cases. Only 0.2% of such motions were rejected.[40] Additionally, national courts still do not properly substantiate their decisions, rather court rulings are limited to a mere blanket justification.[41] The problem is underscored by the large number of applications made concerning the failure of domestic courts to give sufficient consideration to the arguments of the defence and reason their rejection.[42]

23. Frequent allegations of the police planting drugs on the accused have already led to protests.[43] An illustrative example that attracted significant publicity is a case of allegedly planted evidence which concerns the members of the music group "Birja Mafia". On 9 June 2017, the Ministry of Internal Affairs arrested the group members on charges of buying and storing narcotic drugs and initiated a criminal investigation.[44] "Birja Mafia" members denied the accusations and claimed that the police planted the drugs on them.[45] They stated that the real reason for their detention was their having mocked a policeman in one of their music clips.[46]

24. When called upon, the Constitutional Court of Georgia, much like the ECtHR in the decisions on the Rostomashvili Group of Cases, obliged the prosecution to obtain evidence from a neutral source to support the legality of the search conducted and evidence collected in order to

39 Aside from the Rostomashvili Group of Cases, there have been multiple other applications to the Court concerning the planting of evidence: *Tsiklauri v. Georgia*, 377/11; *Zlobini v. Georgia*, 10057/09; *Danelia v. Georgia*, 56610/11; *Saria v. Georgia*, 44984/07; *Badagadze v. Georgia*, 23846/08. Although these cases were struck from the Court's list, the frequency alone of such allegations evidences the systemic nature of the problem.

40 GYLA, *GYLA responds to the Draft Law on Amendments to the Criminal Procedure Code of Georgia*, 4 June 2021, available at: *https://gyla.ge/en/post/saia-ekhmianeba-kanonis-proeqts-saqartvelos-siskhlis-samartlis-saproceso-kodeqsshi-cvlilebis-shetanis-taobaze*.

41 GYLA, *GYLA responds to the Draft Law on Amendments to the Criminal Procedure Code of Georgia*, 4 June 2021.

42 See *Tsiklauri v. Georgia*, 377/11; *Tcholadze v. Georgia*, 35852/11; *Zlobini v. Georgia*, 10057/09; *Saria v. Georgia*, 44984/07; *Badagadze v. Georgia*, 23846/08; *Shanidze v. Georgia*, 56080/10.

43 Radio Free Europe, Radio Liberties Georgian Service, Video: *Protesters Accuse Georgian Police Of Planting Evidence*, 22 March 2017, available at: *https://www.rferl.org/a/protesters-accuse-georgian-police-of-planting-evidence/28384774.html*.

44 Ministry of Internal Affairs, *Drugs in especially large quantities seized by MIA*, 8 June 2017, available at: *https://police.ge/en/shss-m-gansakutrebit-didi-odenobit-narkotikuli-sashualeba-amoigho/10681*; OC Media, *Birja Mafia rap duo face life imprisonment on drug charges*, 9 June 2021, available at: *https://oc-media.org/birja-mafia-rap-duo-face-life-imprisonment-on-drug-charges/*.

45 Alan Crosby, Radio Free Europe, Radio Liberties Georgian Service, *Georgian Law Enforcement, Drug Laws Under Fire After Rappers Arrested*, 12 June 2017, available at: *https://www.rferl.org/a/georgia-police-drug-laws-under-fire-after-rappers-arrest/28543382.html*; OC Media, Controversial investigation dropped against Birja Mafia rap duo, 18 December 2017, available at: *https://oc-media.org/controversial-investigation-dropped-against-birja-mafia-rapper/*.

46 Civil.ge, *Rapper Duo Detention Sparks Protest in Tbilisi*, 11 June 2017, available at: *https://old.civil.ge/eng/article.php?id=30178*.

exclude any unlawful conduct on the part of members of law enforcement.[47] Examples of such evidence would be a video recording of the search or the testimony of a neutral person attending the search.[48] The Constitutional Court emphasised the importance of clear legislative instructions in this respect.[49]

25. As a result of the proceedings, Georgia amended Article 13(3) CPC,[50] which now states that an illegal object seized as a result of a search based on operative information can only be the basis for a guilty verdict if its possession is confirmed by evidence other than the police testimony and the search report. However, the new law is only a fragmentary implementation of the Constitutional Court's judgement.[51] In particular, the new rule does not specify what may be considered as "other evidence", meaning compliance is achieved through reliance on any other evidence, not only neutral evidence. Further, Article 13(3) CPC contains an exemption for cases in which it is objectively impossible to obtain or present other evidence, without defining clear preconditions for the derogation. This leaves ample room for interpretation and can thus be used on an arbitrary basis to justify cases where other evidence was simply not obtained.[52] This shortcoming is further aggravated by the fact that national courts grant motions for searches and seizures without proper substantiation.[53]

III. SEVERE STRUCTURAL SHORTCOMINGS OF GEORGIA'S JUDICIAL SYSTEM

26. The implementation of the judgments in the Rostomashvili Group of Cases cannot be assessed in isolation from the general development of the judicial system in Georgia. This is because the circumstances of the Rostomashvili Group of Cases raise doubts about whether the defendants' prosecution occurred in good faith or was politically motivated. Coincidentally, in the Rostomashvili Group of Cases, many defendants were politically active, either as members of opposition political parties, participants in anti-government protests, political party founders, or supporters of opposition political activities.[54] For the case of *Shubitidze*, even the Parliament of Georgia declared that the defendant had been arrested "*on political grounds*".[55] The demonstrative lack of attention given to these shortcomings by Georgia only affirms this impression.

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47 Constitutional Court of Georgia, *Giorgi Keburia against the Parliament of Georgia*, judgement no. 2/2/1276, 25 December 2020, paras. 1-17, available at: *https://www.constcourt.ge/ka/judicial-acts?legal=10430* (in Georgian).

48 Public Defender of Georgia, *On the situation of protection of human rights and freedoms in Georgia* 2020, p. 118, available at: *https://www.ombudsman.ge/res/docs/2021070814020446986.pdf*.

49 Constitutional Court of Georgia, *Giorgi Keburia against the Parliament of Georgia*, judgement no. 2/2/1276, 25 December 2020, para. 111.

50 Amendments to the Criminal Procedure Code of Georgia, 28 June 2021, N706-Vრს-Xმპ, available at: *https://info.parliament.ge/file/1/BillReviewContent/277193* (in Georgian).

51 GYLA, *GYLA responds to the draft law on amendments to the Criminal Procedure Code of Georgia*, 6 April 2021.

52 This poses a particular risk considering the frequency of cases in which searches are conducted on the basis of urgent necessity, see GYLA, *Four Year Criminal Trial Monitoring Report, Trends and Challenges*, 2021, p. 112, available at: *https://gyla.ge/files/news/ფონდი/ტურნირი/4-წლიანი%20მონიტორინგი.pdf* (in Georgian).

53 GYLA, Four Year Criminal Trial Monitoring Report, Trends and Challenges, 2021, p. 49.

54 *Tlashadze and Kakashvili v. Georgia*, 41674/10, paras. 23, 32; *Kalandia v. Georgia*, 57255/10, para. 13; *Shubitidze v. Georgia*, 43854/12, para. 28; GYLA, *GYLA has won another Drug Planting Case in the European Court*, 4 May 2021, *https://gyla.ge/en/post/evropul-sasamartloshi-saiam-narkotikebis-chadebis-kidev-erti-saqme-moigo*.

55 *Shubitidze v. Georgia*, 43854/12, para. 22.

27. In the same vein, a study conducted by GYLA revealed that there exist serious shortcomings in the implementation of criminal justice towards persons who can be considered as possible opponents of the government. The analysis found that representatives of various opposition parties as well as activists who actively took part in mass protests against the government between 2009 and 2011 had increasingly been subjected to firearms and drugs planting by law enforcement officers during personal searches.[56] This is supported by the findings of the Commissioner for Human Rights of the Council of Europe.[57]

28. Protection from politically motivated prosecution, however, can only be achieved through effective structural safeguards within a state's judicial system and, in particular, through an independent judiciary. Such safeguards are not present in Georgia. On the contrary, the Georgian judicial system has been characterised by grave structural deficiencies for quite some time and thus leaves room for politically motivated prosecutions. Although progress has been made with multiple reforms to the system of common courts between 2013 and 2021, Georgia remains unable to ensure the independence of the judiciary.[58] Multiple recommendations by the Venice Commission have not been implemented and many issues remain unresolved.[59] While some Members of the Georgian parliament signed the "A way ahead for Georgia" agreement with Charles Michel, President of the European Council, in a welcomed step towards judicial independence,[60] the necessary legislative amendments for judicial reform have not yet been implemented. Instead, a relevant amendment was withdrawn.[61]

29. IPHR and GYLA will in the following section highlight only the gravest deficiencies.

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56 GYLA, *Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive*, 2011, available at: *https://gyla.ge/files/news/gamocemebi2012-2013/2011წელი/Legal%20Analysis%20of%20Cases%20of%20Criminal%20and%20Administrative%20Offences%20with%20Alleged%20Political%20Motive.pdf*; see also GYLA, *GYLA has submitted written arguments to the European Court on cases of alleged political motivation,* 21 March 2017, available at: *https://gyla.ge/ge/post/savaraudo-politikuri-motivaciis-mqone-saqmeebze-saiam-evropul-sasamartloshi-tserilobiti-argumentaciebi-tsaradgina* (in Georgian). Similar findings were made by other NGOs, see e.g. Transparency International Georgia, *Justice System Against Opponents of the Government,* 9 March 2021, available at: *https://www.transparency.ge/en/blog/justice-system-against-opponents-government*; Amnesty International, *Annual Report* 2020/21, p. 167, available at: *https://www.amnesty.org/en/wp-content/uploads/2021/04/POL1032022021ENGLISH.pdf*.

57 Commissioner for Human Rights, *Report by Thomas Hammarberg following his visit to Georgia*, CommDH(2011)22, 30 June 2011, p. 3.

58 The U.S. Embassy in Georgia attested to *"serious problems with the independence of the judiciary along with detentions, investigations and prosecutions widely considered to be politically motivated"*; in: 2020 *Country Reports on Human Rights Practices: Georgia*, 31 March 2021, available at: *https://ge.usembassy.gov/2020-country-reports-on-human-rights-practices-georgia*. See also: GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 62 et seq., available at: *https://gyla.ge/files/news/ფონდი/2021/JUDICIAL%20SYSTEM%20REFORM-2.pdf*.

59 Venice Commission, Opinion No. 1001/2020, CDL-AD(2020)021, para. 36; Venice Commission, Opinion No. 1039/2021, CDL-AD(2021)020, para. 20; Commissioner for Human Rights, *Observations on the human rights situation in Georgia*, CommDH(2016)2, 12 January 2016, para. 2.

60 *A way ahead for Georgia*, 2021, available at: *https://eeas.europa.eu/sites/default/files/210418_mediation_way_ahead_for_publication_0.pdf*. See also European Council, *Remarks by President Charles Michel at the signing ceremony of the Georgia agreement with President of Georgia Salome Zourabichvili*, 19 April 2021, available at: *https://www.consilium.europa.eu/en/press/press-releases/2021/04/19/remarks-by-president-charles-michel-at-the-signing-ceremony-of-the-georgia-agreement-with-president-of-georgia-salome-zourabichvili/*.

61 Delegation of the European Union to Georgia, *Remarks by EU Ambassador Carl Hartzell following today's parliamentary vote in first reading on the post-19 April Agreement constitutional amendments,* 7 September 2021, available at: *https://eeas.europa.eu/delegations/georgia/103810/remarks-eu-ambassador-carl-hartzell-following-today%E2%80%99s-parliamentary-vote-first-reading-post_en*.

1. Influence of the 'clan' on the Judicial System

30. At the core of the problem lies the influence of a political network of a few influential judges within the High Council of Justice ("**High Council**"), who want to secure and expand their influence over the Georgian judiciary. This group, which has been criticised for past decisions and biased appointments of judges, is often referred to as the "clan".[62]

31. The High Council consists of judicial members - elected by the Conference of Judges, a self-governing body of the judiciary also criticised for its lack of political independence -[63] and of non-judicial members, who can be nominated by the ruling majority in Parliament.[64]

32. All major levers related to the appointment of judges and the management of the judicial system are in the hands of the High Council.[65] The clan uses a three-step control mechanism: appointment of new judges, supervision of judges, and disciplinary proceedings against them.[66] The High Council also nominates the candidates to be Supreme Court justices via a two-thirds majority, the latter then presented to Parliament for confirmation.[67] However, candidates nominated by the High Council are not selected on the basis of merit but rather on their loyalty to the "clan".[68]

33. The possible impact of this political influence in the High Council was particularly evident in the recent reappointment of Supreme Court justices in 2019, when the Court was left with only eight justices and 20 vacant seats.[69] Through the High Council, the ruling majority was effectively entrusted with the appointment of a mostly new Supreme Court, the composition of which will potentially remain unchanged for the next 20 to 30 years due to the lifetime appointment of the justices. The nomination of candidates belonging to the "clan" was heavily criticised and the Venice Commission proposed reforms to ensure the equality of candidates.[70]

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62 The term "clan" is used by NGOs, the media and even some other High Council members, see: Venice Commission, Opinion No. 949/2019, CDL-AD(2019)009, paras. 2-3; OC Media, *The 'clan' in Georgia's judiciary reattempt lifetime appointments*, 12 July 2019, available at: *https://oc-media.org/the-clan-in-georgia-s-judiciary-reattempt-lifetime-appointments/*.

63 GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 22-22.

64 GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 9, 15.

65 GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 17.

66 Vakhushti Menabde, *The Main Issue of the Justice System - The Clan (an influential group of judges) exerting power over the Georgian Judiciary*, UPR Georgia, 22 January 2021, available at: *https://www.facebook.com/UPRGeorgia/videos/131803572097472*.

67 GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 3.

68 GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 32-33. The Commissioner for Human Rights of the Council of Europe found that selection, appointment, and transfer fail to meet the criteria of being *"transparent, merit-based and carried out in accordance with clear criteria"*; CommDH(2016)2, 12 January 2016, para. 5.

69 Venice Commission, Opinion No. 949/2019, CDL-AD(2019)009, para. 10.

70 Venice Commission, Opinion No. 1039/2021, CDL-AD(2021)020, para. 20; Transparency International Georgia, *The Selection of Candidates for the Supreme Court Judges is Arbitrary and Unfair*, 24 June 2021, available at: *https://www.transparency.ge/en/post/selection-candidates-supreme-court-judges-arbitrary-and-unfair*; GYLA, *Judges in the Supreme Court were appointed as a Result of a Deal between the Clan and the Government*, 14 July 2021, available at: *https://gyla.ge/en/post/uzenaes-sasamartloshi-mosamartleebis-danishvna-klanisa-da-khelisuflebis-garigebis-shedegia*; U.S. Embassy in Georgia, *Statement on the Appointment of Judges*, 15 July 2021, available at: *https://ge.usembassy.gov/u-s-embassy-statement-on-the-appointment-of-judges/*; OSCE/ODIHR, *Third Report on the Nomination and Appointment of Supreme Court Judges in Georgia*, 9 July 2021, available at: *https://www.osce.org/*

2. Probationary period for judges

34. While judges have been appointed for life since 2013, a major outstanding problem is the three-year probationary period for first- and second-instance judges.[71] The independence of such judges who lack prior experience is placed under threat by the constant evaluation by the High Council to which the former are subjected for the first three years of their appointment.[72]

3. Case overload and distribution

35. Another key challenge for Georgia's judicial system is case overload.[73] When judges have to consider an unreasonably high number of cases, the risk of negligence, mistakes, and failure to meet deadlines is high.[74] Thus, case overload negatively impacts the assessment of evidence and reasoning of court decisions because judges have less time per case.[75]

36. Moreover, the exceptions to the random allocation procedure determined by the High Council threaten the independence of the judiciary. Georgian law prescribes that cases should be distributed randomly among judges.[76] However, in 2018 and 2019, from a total of more than 550,000 cases, the principle of randomness was adhered to for only as many as 345,000 cases, thus exceptions were applied in more than a third of all cases.[77]

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odihr/492115; Council of Europe, *Crucial issues still need addressing over the appointment of Supreme Court judges in Georgia*, 9 October 2020, available at: *https://www.coe.int/en/web/tbilisi/council-of-europe-news/-/asset_publisher/zsGQOJsjjHjv/content/pace-co-rapporteurs-react-to-the-adoption-of-amendments-to-the-law-on-common-court-with-regard-to-the-appointment-of-supreme-court-judges*.

71 GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 28 et seq.; Venice Commission, CDL-AD(2019)009, para. 11.

72 Venice Commission, Opinion No. 403/2006, CDL-AD(2007)028, para. 40; Venice Commission, Study No. 494/2008, CDL-AD(2010)004, para. 38; see also: Commissioner for Human Rights, *Observations on the human rights situation in Georgia*, CommDH(2016)2, 12 January 2016, para. 6; GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 30.

73 A study identified a lack of between 70 and 140 judges, see: Wittrup J. et. al, *Assessment of the need for judges in Georgia*, 13 August 2018, available at: *http://ewmi-prolog.org/images/files/4566AssessmentoftheneedforjudgesinGeorgia-ENG.pdf*.

74 Transparency International Georgia, *Judicial Reform Concept*, 17 March 2021, available at: *https://www.transparency.ge/en/post/judicial-reform-concept*.

75 See for example on Ukrainian courts: Venice Commission, Opinion No. 969/2019, CDL-AD(2019)027, para. 43.

76 The Commissioner for Human Rights of the Council of Europe proposed the introduction of a procedure for the random allocation of cases among judges in 2016; CommDH(2016)2, 12 January 2016, para. 2.

77 GYLA, *Judicial System Reform in Georgia* 2013-2021, 2021, p. 53.

E. Recommendations and Conclusion

37. An action plan from Georgia is overdue. Reforms have to be far-reaching, as the violations observed in the Rostomashvili Group of Cases are a manifestation of the underlying problems plaguing the justice system. As a result, we call upon the Committee of Ministers to transfer the Rostomashvili Group of Cases to enhanced supervision and to recommend the Georgian government to:

- establish a system for effective review and assessment of evidence obtained, in particular:
  - impose the **strict obligation** on law enforcement agencies **to substantiate** the result of search and/or seizure with neutral evidence and minimise exceptions in order to prevent arbitrariness by law enforcement officials;
  - **equip law enforcement agencies** with real opportunities to obtain neutral evidence, including video recording of searches;
  - introduce **minimum documentation requirements for law enforcement agencies** in order to enable the judiciary to effectively review the lawfulness of past searches and to assess the reliability of obtained evidence;
  - introduce **clear criteria** for the circumstance in which an oral hearing is obligatory during a post-search review in order to enable the accused and/or his lawyer to participate in and guarantee its effectiveness and adversarial nature;
  - **ensure that the accused have access to an effective remedy** to challenge the lawfulness of obtained evidence. The remedy must ensure that the court confirms the probative value of evidence by comparison with other evidence in cases of doubt.
  - ensure that the accused are given **a specific and explicit reply to arguments that are crucial for the outcome of the case**, e.g. by offering training to judges.
- remedy – in a transparent and accessible legislative process and in accordance with the "A way ahead for Georgia" agreement – the general shortcomings of the Georgian judicial system to safeguard the independence of the judiciary.