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INTERNATIONAL-LEGAL STANDARDS FOR APPLICATION OF PROCEDURAL COERCIVE MEASURES RESTRICTING FREEDOM

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Declaration of personal liberty is not a difficult task and, as a rule, it is less beneficial. What is genuinely hard to achieve is its execution.[1]

In the situation when the united European legislative sphere and legal systems are coming together, problems concerning the introduction of directly applicable European standards into the Georgian procedural legislation have become highly significant, as have the compatibility of the national court and investigative practices with Strasbourg case law. Articles 6 and 7 of the Georgian Constitution not only recognize the principle of the direct applicability of international standards in Georgia, but they also require the state authorities to ensure the appropriate guarantees for the realisation of the individual's right to freedom.

One of the most important institutions in criminal proceedings for assessing how human rights are protected is legislative regulation and the application in practice of preventive measures restricting individual liberty. Not only for the reasons that, without

[1] A.V. Dicey, Law and the Constitution, 10th ed. by E.C.S.Wade, 1959, 221.

providing effective mechanisms for ensuring the personal liberty and security of an individual, the protection of other rights is a mere illusion.[2] Any deprivation of liberty may also affect a person's enjoyment of other rights, such as the right to association, movement, and assembly.[3] It can also directly hinder the realisation of other rights guaranteed by the Convention – from the right to inviolability of a family life and privacy to the right of free expression.[4] However, the arrest of an individual may simultaneously violate the principles of presumption of innocence and adversarial proceedings, and complicates the carrying out of the appropriate defence for the individual either by a defence counsel or personally by himself.[5]

Article 5 of the Georgian Criminal Procedure Code (hereinafter, the CPC of Georgia) acknowledges the presumption of innocence. The CPC of Georgia is based on fundamental principles and norms of human rights and international law, and introduces standards and criteria under international law regarding the restriction of liberty and notions such as reasonable assumption, the reasonableness of a term for the restriction of liberty and the promptness of a trial.

However, it is one thing to take into consideration the guarantees of personal liberty set out in national legislation and quite another to carry out a prompt and effective defence through national judiciary in cases when any of the state agencies restrict the freedom of an individual.[6] This is a crucial reason why the present research paper aims to expose theoretical and practical problems and challenges related to the realisation of European standards in criminal proceedings. The findings will likely provide grounds for specific recommendations and suggestions for introducing additional guarantees for the rights of the participants of the proceedings. Also, they will likely encourage the participants to be more active in the criminal proceedings.[7]

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[2] Human Rights in Administration of Justice: a Manual on Human Rights for Judges, Prosecutors and Lawyers, UNITED NATIONS, New York and Geneva, 2003 p. 16.

[3] Ovey & White, The European Convention on Human Rights, Oxford university Press, 3rd ed, 2002, p. 138, Y. Aydin, The delimination of the scope of one of the guarantees of personal security set out in the European Convention on Human Rights, 3, http://www.justice.gov.tr/e-journal/pdf/Right_Liberty%20.pdf.

[4] Aksoy v Turkey, [App 21987/93] Judgment of 18.12.1996 (1997), 23 EHRR 553 para 76.

[5] Dr. Richard Vogler, The Right to Liberty and Security under ECHR and International Law: Arrest: Pre-Trial Detention: Bail and Time Limits, Summer School on Constitutional and Human Rights Law, 9th July 2010.

[6] M. W. Janis, r. S. Kay, A.W. Bradley, European Human Rights Law, Text and materials, third ed. 2008,690.

[7] The present paper does not aim to study legitimacy of restriction of liberty in cases when 1) terrorist acts or the acts against the State are being investigated, or 2) special subjects are being deprived of their freedom; and 3) in cases as stipulated by the CPC of Georgia when the following types of preventive measures are being applied: a) placement in a health care institution for medical examination; b) bail, c) restriction on abandoning a place where search is being carried out. The research does not also explore Habeas Corpus procedures.

PRECONDITIONS FOR THE USE OF DETENTION

The right of defence means more than the state authorities' protecting an individual's physical freedom in view of the fact that both liberty and personal security are confronted.[8] The notion of "security" forces the relevant public bodies to follow principles of the rule of law and basic regulations governing legal defence when a person's liberty is being thrown onto the scale.[9] That is why, although a person's liberty is not an absolute right,[10] legislations establish explicit rules and instances for procedures of arrest and detention and put forward the requirements for guaranteeing liberty, justice and security for ordinary citizens[11] and forbid the voluntary relinquishment of the right of defence or self-defense.[12] Article 5 (3) of the Convention grants everyone the right to be released during the investigation despite the expected length of the sentence and does not stipulate an unconditional pre-trial detention even in case of brief detention,[13] since the presumption of innocence always exists in favour of release.[14] And, presumption in favour of freedom includes the necessity of reduction in the use of imprisonment as a preventive measure, as well as the decrease of its length to the minimum required for the administration of justice,[15] and the imprisonment of the offender, only if there is a genuine requirement for public interest, which, notwithstanding the presumption of innocence, may still outweigh the requirement for individual liberty.[16] Prevention of escape, avoidance of obstruction of justice and inter-

[8] Giorgi Nikolaishvili v. Georgia (Application №37048/04), ruling, dated 13.01.2009, para 53; Kurt v. Turkey, Trial 25 May, 1998, Collection of Decisions and Rulings, 1998. III,§§ 123.

[9] Giorgi Nikolaishvili v. Georgia (Application №37048/04), ruling, dated 13.01.2009, para 53; Kurt v. Turkey, Trial 25 May, 1998, Collection of Decisions and Rulings, 1998. III,§§ 123.

[10] M. W. Janis, r. S. Kay, A.W. Bradley, European Human Rights law, Text and materials, third ed. 2008,608.

[11] Draft Multi-annual programme for an area of Freedom, Security and Justice serving the citizen (The Stockholm programme) Brussels, 16.10.2009, N 14449/09, JAI 679, 9, para 2.4, see also Mar Jimeno-Bulnes, Towards Common Standards on Rights of Suspected and Accused persons in Criminal Proceedings in the EU?, February 2010, CEPS,2010, 2**;** Попков Н.В. - Задержание подозреваемого и обвиняемого как вид государственного принуждения, автореферат диссертации, Нижний Новгород, 2007, 1**.** იხ. Resolution of the EU Council of 30.11.2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Official Journal C 295, 4.12.2009, p. 1-3; Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328, 28.04.2004.

[12] De Wilde, Ooms and Versyp v. Belgium, 18.06.1971, par. 65; Winterwerp v. the Netherlands, 24.10.1979, par.37.

[13] See Belchev v. Bulgaria, №. 39270/98, § 82, 08.04.2004, § 82; Patsuria v Georgia, №. 30779/04, § 66, 6 November, 2007, § 66.

[14] Giorgi Nikolaishvili v Georgia (Application №37048/04), ruling 13.01. 2009 para 75; see also, Patsuria v Georgia №. 30779/04, § 66-67, 6 November, 2007; McKay v. Great Britain [GC], judgment № 543/03, § 41.

[15] According to the Article 9 (pa 3) of the UN International Covenant on Civil and Political Rights: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment". The Tokyo Rules interpret the Article9 (pa 3) and state that "in order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions (See Article 2.3). See also, for example, Recommendation No. R (99)22 of the Committee of Ministers concerning prison overcrowding and prison population inflation, adopted by the Committee of Ministers on 30.09.1999 at the 681st meeting of the Minister's Deputies**,** par.11 Wafa Shah, overview of case studies relating to pre-trial detention, Fair Trials International- march 2009, submission to the directorate- General for Freedom Justice and Security of the Euroopean Commission on Issues relating to Pre-trial Detention, 6.

[16] *J.G.* v. *Poland*, No. 36258/97, Judgment of 6 April 2004, paras. 50 and 56; Labita v Italy, Appl. No. 26772/95,0 6.04. 2000.para 152., Punzelt v the Czech Republic, 25.04. 2000 (2001).

ference with evidence as well as a clear and serious threat for public order, which cannot be neutralized by any other means, are considered to be necessary grounds for the use of detention/arrest.[17]

However, since two legal values protected by legislation, that is, individual liberty and legitimate interest of the state to uncover crime, contradict one another in the process of using arrest, Article 12.4 of the Criminal Procedure Code of Georgia stipulates that the legitimate interest for uncovering a crime should be outweighed by a legal value protected by Article 18 of the Georgian Constitution. That is why the CPC states that possibility for the use of an arrest should occur only when there is a probable cause to believe that a person has committed a crime and it is necessary to arrest him for the proper administration of justice and this is the last resort:

a) "to prevent absconding and the obstruction of justice by the defendant;
b) to prevent obstruction in obtaining evidence;
c) to prevent the commission of a new crime by the defendant" (Article 205 (1), CPC of Georgia)."

The Constitutional Court of Spain states that the application of an arrest should be subject to strict necessity and respect for the principle of subsidiarity, which means not only the effectiveness of the use of an arrest, but also the ineffectiveness of a more lenient measure instead. Furthermore, the use of an arrest should be proportional, temporary and it should be subject to review in case new circumstances surface. Besides, the length of detention, as well as the gravity of the offence committed or the probable offence, which may be prevented by using an arrest, should be assessed and determined. As for purposes, they should be directed towards the administration of justice, the prevention of obstructions in the execution of a sentence and the prevention of recidivism danger. The use of the remand/arrest should be inadmissible for punitive reasons, for securing conviction, or even for supporting investigation.[18]

Consequently, the use of remand/arrest as a procedural coercive measure should be:

- Regarded as an **exceptional measure** and be used only in instances when it becomes actually impossible to achieve the procedural coercive objective by any other preventive measure. It must not be used for punitive or any other reasons.[19]
- It should not be **longer** than required by absolute necessity.
- It should be **reasonably justified**;

[17] See also Van Alphen v. the Netherlands (305/1988), 23 July 1990, Report of the HRC Vol Ii, (A/45/40), 1990, at115, See, Tokyo Rules (Art. 6.1,6.2).

[18] ESP-1995-2-025 **a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 26-07-1995 / **e)** 128/1995 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 22.08.1995 / **h)** .

[19] According to the Article 198 (4) of the CPC of Georgia the right to use detention/arrest as a preventive measure is granted only when the purpose of preventive measure can not be achieved by applying more lenient preventive measures.

- It should be **lawful**.
- It should be **proportionate**/appropriate to the legitimate objectives.[20] It should be imposed in individual cases and to the extent that is necessary for achieving those legal objectives which justify the use of remand/arrest in custody.[21]

In compliance with the principle of proportionality, a judge shall establish:

1. Existence of legitimate public objective;
2. Ineffectiveness of more lenient measures for achievement of such an objective;22
3. Necessity of custody pending trial for achievement of the objective.

And consequently, despite the existence of legal grounds for the restriction of liberty, detention/arrest shall be deemed unlawful if a harm caused by restriction exceeds the danger which had been evaded. The CPC stipulates the possibility for using more lenient preventive measures.[23]

REASONABLENESS OF A DECISION

The decision should be grounded and based not only on the provision of the CPC of Georgia which authorizes a judge to use an arrest;[24] but it should examine all those aspects which justify the use of this measure and its continuation,[25] it should be based not only on the gravity of probable penalty[26] but it should also take into consideration specific circumstances in which the act had been committed and the personal characteristics of the defendant.[27] It is inadmissible to rely on sterotypes,[28] anonymous statements or on the evidence obtained through the misuse of investigation techniques.[29] Judge and

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[20] *Ibid*.

[21] ESP-2000-1-008;a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spanish).

[22] See also, e.g., Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial.

[23] See Witold Litwa v. Poland 04.04.2000.

[24] As it was the case in Mansur v. Turkey, 08.06.1995, 20 E.H.R.R.535; **Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5)**, interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,,COUNCIL OF EUROPE, 2008, 40.

[25] ESP-2000-1-008 a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spanish).

[26] Kalashnikov v. Russia, 15.07.2002.

[27] ESP-2000-1-008 a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spanish).

[28] See Demirel v Turkey (2003) Appl. No. 39324/98, 28.01.2003, para 58; Svipsta v Latvia (2006) (Appl. No. 66820/01, 9 .03.2006).

[29] XVIII International Congress of Penal Law,The principle challenges posed by the globalization of criminal justice Istanbull, 20-27

prosecutor must clearly indicate the reasons for the use of the arrest, submit the arguments presented by both parties[30] and the facts of the case, as well as the circumstances ensuring the lawfulness of the arrest and justification.[31] The Spanish Constitutional Court states that all circumstances justifying an arrest or its continuation should be assessed in the decision concerning the imposition or/and the continuation of the detention. Furthermore, the assessment should correspond to the logical reasoning and those objectives, which justify the use of the arrest. In the course of assessing the circumstances, all information and considerations available at the moment of making the decision, including the rules for logical reasoning, an exceptional nature of custody pending trial and the subsidiarity of the application of the arrest and the proportionality to its aims should be taken into account.[32]

The same point is referred to in Article 198 (5) of the CPC of Georgia giving a list of "other" circumstances or considerations, which should be taken into account while selecting the preventive measure for the defendant. The catalogue contains, for example, the personal characteristic traits of the defendant, his occupation, compensation for loss, and facts confirming whether he had ever breached a preventive measure before. The legislation neither determines the level of importance of either of the considerations nor provides an exhaustive list of the considerations by which it would have obligated the investigatory bodies and the court to take into consideration many other circumstances related to the defendant (e.g. financial status and public standing,[33] social contacts, physical capacity, employment, place of residence, previous criminal records, background) apart from those already mentioned (gravity of a crime, data on defendant's personality, his age and health conditions). These data could have assisted judicial officials in studying whether the previous offences committed by the defendant could have been compared to the nature and the gravity of the crime for which he was remanded.[34]

At the same time, numerous suggestions have been put forward concerning the use of preventive arrest in cases of serious crimes or crimes which the state authorities believe are of high priority due to a grave criminal situation. It should be noted that the use of probable cause about the activities of specific individuals in a specific criminal organization for the objectives of public prevention policy, which target all those persons who create danger because of their permanent criminal inclinations, is inadmissible. The Convention

September 2009, para 17, Utrecht Law Review, vol. 5, Issue 2 (October) 2009.

[30] See Yagci and Sargin v Turkey (1995) para 50; Tomasi v France 27. 08.1992,No 241-A, para 84.

[31] See Boicenco v Moldova (2006) (Appl. No. 41088/05, 11.07.2006).

[32] ESP-1997-1-008 **a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07-04-1997 / **e)** 66/1997 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 114, 13.05.1997, 23-28 / **h)**.

[33] See also Васильева Елена Геннадьевна, ВОПРОСЫ УГОЛОВНОГО ПРОЦЕССА В МЕЖДУНАРОДНЫХ АКТАХ, Учебное пособие, 2007 г. Башкирского государственного университета, 136

[34] **Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5),** Interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ, COUNCIL OF EUROPE, 2008, 42, see. Clooth v Belgium (1991) (Appl. No. 12718/87, 12.12.1991)

regards as possible for the state authorities to carry out measures against offences that are concrete and established.[35]

The seriousness of the crime charged may also be a significant ground for preventive arrest/custody pending trial. However, even in this instance, the gravity of the crime should be examined in unity with other general criteria[36] so that it is possible to establish the existence of evidence confirming the risk of such a crime's reoccurrence. Strasbourg case law does not consider the gravity of a crime to be a sufficient precondition for the use of arrest.[37] Moreover, the European court found that Article 5.3 of the Convention had been violated by British judicial officials by automatically taking the possibility away from the defendant convicted of a serious crime to have an alternative measure imposed on him instead of an arrest as a preventive measure.[38] Georgian legislation does not link instances of the use of arrest to the gravity of crime and establishes the possibility of its use for all those crimes, which are punishable by the restriction of liberty. In this way, Georgian legislation increases the possibilities for the use of arrest since it grants opportunities for its use to the bodies conducting criminal proceedings in less serious cases. Consequently, the importance of justification for the use of an arrest is getting more significant to avoid a sharp increase in its use, as well as its automatic use for the wider range of crimes. That is why the CPC of Georgia obligates a prosecutor to justify reasonability the use of the remand in his application and the ineffectiveness of the use of a more lenient preventive measure for his case. He must also indicate the essence of the charge and any information or evidence upon which the charge is grounded. However, the CPC of Georgia does not and cannot provide a list of all necessary materials and documents. Practical recommendations for magistrate judges suggest that "copies of all materials and documents necessary for the consideration" of an application should be submitted to the court with the application. Practical recommendations note that the copies of all evidence and documents that are necessary for the comprehensive examination of an application and making a decision shall be submitted to the court. For example, the copy of an arrest record (if a person is or was arrested), the copy of a physical search record, copies of records of immediate actions (urgent measures), the copy of the resolution charging a person, and the copies of all written evidence upon which the charge was grounded. If possible, the documents about criminal records of the defendant and the circumstances set out in Article 198 (4) should be submitted to the court. What additional

[35] М. де Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 58.

[36] See CRO-2006-1-001 a) Croatia / b) Constitutional Court / c) / d) 07-12-2005 / e) U-I-906/2000 / f) / g) Narodne novine (Official Gazette), 2/06 / h) CODICES (Croatian, English). It should be noted that gravity of the crime charged is a criterion which is based on one hand on the expected penalty as envisaged by the Criminal Code of Georgia and on another on it's the influence on the society. In particular, one and the same act can have different outcomes and it can lead to diverse reactions in different ethnic groups. See, http://www.arab-niaba.org/publications/hr/jordan2/eric2-e.pdf.

[37] See Mamedove v Russia 7064/05, 01.06.2006; Scott v Spain 18.12.1996, para. 78); Van der Tang v Spain 17.07.1995, Series A., No 321 p.19, para 63; Tomasi v France, 27. 08.1992,No 241-A, p. 37, para 98.

[38] Caballero v the United Kingdom, 08.02.2000, para. 14.

documents should be submitted to the court for each separate case to consider application, i.e. in specific instances, is decided by the prosecutor.[39]

At the same time, while deciding on the application of preventive measure, the recommendations obligate a judge to pay attention to whether the requirements set out by the legislation were followed:

- during arrest;
- while charging the defendant; and
- while obtaining/fixing evidence.

The judge should also take into consideration the factual (proving) and formal (procedural) grounds and decide what type of preventive measure is necessary and why a more lenient measure cannot be effective for achieving the objectives as stated in Article 171 of the CPC of Georgia.

If the party to the criminal process does not question the compliance with requirements during the arrest, charging or obtaining of evidence, the court nevertheless must assess whether all of the requirements were observed while detaining the person and obtaining evidence in its ruling. However, when the court is assured that there were no violations during these processes, its instruction can be relatively Conventional. But if the party challenges the legality of the arrest, charging and obtaining of evidence, then the court must study why the party believes so, on what grounds the party concludes that violations took place, what particular requirements were not followed and how it materialized.

In this case, the court cannot confine itself with the Conventional direction that the requirements were not met. However, it is not necessary to make extended reasoning. Above all, it should be exhaustive and able to respond to the party's claims comprehensively. The motivational section should contain a substantiation of the existence of both the factual as well as the formal grounds for the use of the arrest. Let's see for an example of how the motivational section of the ruling can be formulated:

The court considered the applications submitted by the defence and prosecution and it finds that, for the reasons listed below, bail should be used as a preventive measure:

A fact of material procedural violation in the processes of arrest, charging and obtaining of evidence that would have resulted in the denial of the use of arrest, cannot be confirmed by case materials and documents (and also by records of investigative and procedural actions).

[39] Practical recommendations on the main problems of the criminal proceedings for magistrate judges, see http://www.supremecourt.ge/dafeult.aspx.sec_id=565&lang=1.

Pieces of evidence listed in the ruling on the charging of the defendant (they can be listed, for example, as search and identification records, etc) and other documents provide sufficient factual grounds (sufficient evidence) justifying the use of an arrest for the crime charged.

Taking into account the gravity of the offence charged (let's assume it belongs to a serious category), its nature (let's assume the offence was committed by a group and the defendant played a role in the crime committed) and other factual evidence, the court believes that the circumstances presented by the defence cannot constitute grounds for the use of personal bailout for the defendant since the objectives of the preventive measures cannot be achieved this way and on this stage the use of bail can guarantee the accomplishment of the legitimate aims of the preventive measures.

In light of a new criminal procedure code and the overall significance of this problem it is reasonable that the recommendations emphasise not only the persuasiveness of the reasoning of the motion/application, but also the necessity for proving that a defendant can abscond or obstruct the administration of justice or commit a new crime by factual concrete evidence in the case. It is also very significant to define the proportionality of the term of detention, as well as the rules for its monitoring.

LAWFULNESS OF THE RULING

Georgian criminal procedural law grants a wide discretional power to police and bodies conducting proceedings for the use of arrest; however, if restriction of liberty is illegal according to domestic legislation and Strasbourg case law, then it can be said that a violation has occurred.[40] That is why the restriction of liberty must be compatible not only with domestic substantial and procedural legislation[41] but also with international acts, including the requirements stated in Article 5 of the Convention[42] and its objective to ensure the protection of an individual against arbitrariness.[43] Although the Strasbourg Court has not yet defined "arbitrary" for the objectives of Article 5(1), international court practice shows

[40] M. W. Janis, r. S. Kay, A.W. Bradley,European Human Rights law, Text and materials, third ed. 2008,652.

[41] Communication No 702/1996, C. Mclawrence v. Jamaica (view adopted on 18 July 1997), in UN doc. GAOR, A/52/40 (vol II), pp. 230-231, para. 5.5; Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, UNITED NATIONS,New York and Geneva, 2003, 165.

[42] See, for example, Bouamar v Belgium, 29.02.1988,11 E.H.R.R.1, para 50; Winterwerp v the Netherlands,24.10.1979,2E.H.R.R.387, para 39; Thynne, Wilson and Gunnel v the United Kingdom 25.10.1990,13, para 70, Amuur v France, 25.06.1996, para 50, Reports 1996-III, Moren v Germany Appl.№11364/03, 09.07.2009 para 76.

[43] See Chahal v Uk 15.11.1996 E.H.R.R.413, para 118, Kurt v Turkey 25.05.1998, E.H.R.R.373 para 122, Weeks, 57.

that the arbitrary restriction of liberty means not only detention that conflicts with law but it also includes elements of unfairness and inappropriateness, as well as the absence of predictability.[44]

Observing the general principle of juridical accuracy becomes significant when a person's liberty is at stake. It is important for Criminal Procedural Law, as well as the formal decisions made by the state authorities and their actions, to be acceptable and definite to the extent that they will enable a person, when needed and with the assistance of the appropriate advice, to determine a specific action's outcomes within the frameworks of a sound mind.[45] It is impossible to talk about the lawfulness of the deprivation of liberty if a law does not provide explicit and exhaustive rules for this procedure.[46] That is why the Strasbourg Court assesses the procedure of the restriction of liberty according to what extent the law is comprehensive and refined.

In the opinion of the Spanish Constitutional Court, the lawfulness of the remand pending trial requires the existence of reasonable evidence that a crime was committed, the constitutional-legal lawfulness of the objective of the restriction of liberty and the compatibility with its essence; and, taking it as an exceptional measure, which is subject to subsidiarity and is proportional with abovementioned objectives.[47]

The state must strictly observe the principle of lawfulness in relation to all cases of the restriction of liberty,[48] which suggests:

1. Existence of legal grounds for the restriction of liberty and the definition of scope and objectives of the norm authorizing the use of arrest.[49] Detaining an accused in the absence of a specific legal ground or specific law that will regulate such situation may result in the indefinite continuation of the term imposed without legal sanction – this is not compatible with the principles of legality and protection from the arbitrariness that are characteristic of both the Convention and rule of law.[50]

[44] Albert Womah Mukong v. Cameroon, 458/1991/, 21 JULY 1994, UN Doc. CCPR/C/51/D458/1991 p. 12 UN HR Committee Communication No 458/1991, Mukong v. Cameroon (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol.II) p.181, para 9.8; See, also Communication No 305/1988, H. van Alphen v. the Netherlands (views adopted on 23 July 1990), in UN doc. GAOR, A/45/4 (vol.II), p. 115, para 5.8.

[45] See Gusniski v Russia, No. 70276/01, §§ 62 and 68, ECHR 2004 IV; Ladenti v Poland, No.11036/03, §§ 53 and 56, 2008w.; Kavka v Poland, No. 25874/94, § 49, 9 January, 2001; Lukanov v Bulgaria, decisión 20 March, 1997 Reports 1997 II, § 44

[46] Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 69.

[47] ESP-1995-2-025 a) Spain / b) Constitutional Court / c) Second Chamber / d) 26-07-1995 / e) 128/1995 / f) / g) Boletín oficial del Estado (Official Gazette), 22.08.1995 / h)

[48] See Brogan v UK(1988)11 EHRR 117, Engel v. the Netherlands(1976) 1EHRR 647, Askoy v Turkey(1966)23 EHRR 553.

[49] See, e.g., Lukanov v. Bulgaria, 20.03.1997,24 E.H.R.R.121.

[50] Ramishvili and D. Kokhreidze v Georgia, Application № 170406, 13.01.2009, para 106; see also, Gigolashvili v. Georgia, no. 18145/05, §§ 32-36, 8 July 2008; Ječius v. Lithuania, no. 34578/97, §§ 60-64, ECHR 2000 IX; Grauslys v. Lithuania, no. 36743/97, §§ 39-41, 10 October 2000; Baranowski v. Poland, no. 28358/95, §§ 53-58, ECHR 2000 III; Khudoyorov v Russia, appl. №6847/02, 08.11.2005, §§ 146-147).

2. Necessity of the restriction of liberty.[51] Using legal authority when the deprivation of liberty is not necessary is considered to be unlawful and the arbitrary use of power; it is arbitrary in the parts of the motivation or the result.[52]

3. Observance of the procedural requirements – the restriction of liberty should be in accordance with the grounds established by the procedural legislation, and objective throughout the entire continuation of the term imposed.[53]

Violations of procedural requirements resulting in the unlawfulness of the arrest can be categorized in several groups for convenience:

1. Deprivation of liberty is in compliance with the requirements established by legislation on the stages of its review and court hearing, but violations of the criminal procedural requirements did occur at the moment of deprivation;[54]

2. Deprivation of liberty was lawful at the moment of arrest, but there were no legal grounds for its use during later stages.[55] For example, there were substantial violations of procedural requirements in the process of deprivation, or the term was prolonged unreasonably;[56]

3. Deprivation of liberty is lawful in terms of legal grounds and implementation but its objective is unlawful. It is inadmissible to use legal power for the achievement of the illegal objective;[57] to restrict liberty on the grounds established by the CPC if there is no appropriate intention for the implementation of the said law,[58] if it aims to prevent a new crime, which is the aim of the sanction imposed after a fair trail and on the grounds of a court ruling[59], for punitive[60] or other reasons.[61]

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[51] *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,* UNITED NATIONS,New York and Geneva, 2003, *16*6.

[52] See *Caballero v. the United Kingdom, 08.02.2000* ; Y. Aydin, The delimination of the scope of one of the guarantees of personal security set out in the European Convention on Human Rights, 7.

[53] See, e.g., Assanidze v. Georgia 08.04.2004 appl. No. 71503/01.

[54] See Van Der Leer v The Netherlands (Series A, NO 170; Application No 11509/85) ECHR (1990) 12 EHRR 567, 7 BMLR 105, 21.02. 1990.

[55] Broniowski v. Poland, 22.06.2004, 40 E.H.R.R.21.

[56] See *K.-F. v. Germany,27.11.1997*; *Engel and others v. the Netherlands*, 05.06.1976; *Labita v. Italy* 06.04.2000.

[57] See *Bozano v. France*, 18.12.1996, Kabulov v. Ukrain(2005), para 51; Winterwerp v Netherlands (1979) 2 EHRR 387, para 37-39; Джереми Мак-Брайд, Реализация права личности на свободу: статья 5 Европейской конвенции о защите прав человека, Право на свободу и личную неприкосновенность: европейские стандарты и российская практика / Под общ. ред. А. В. Деменевой. - Екатеринбург: Изд-во Урал ун-та, 2005. — 198 с. (Международ. защита прав человека; Вып. 3), pg.9.

[58] See Jèčius v. Lithuania(Appl. No. 34578/97, 31 July 2000, Ciulla v. Italy, 22.02.1989.

[59] ESP-2000-1-008 **a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 17-02-2000 / **e)** 47/2000 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 66, 17.03.2000, 66-71 / **h)** CODICES (Spanish).

[60] Ch. Morgenstern, Pre-tial/remand detention in Europe: Facts and Figures and the Need for Common Minimum Standards, ERA Forum, N9(2009), 538. Detention will be used as an exclusive measure and never will be obligatory or used for punitive reasons –"*Recommendation No. R(80) 11* of the Committee of Ministers of the Council of Europe concerning *Custody Pending Trial,* Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse *(Adopted by the Committee of Ministers on 27 September 2006at the 974th meeting of the Ministers' Deputies)*

[61] L. Izoria, K. Korkelia, K. Kublashvili, G. Khubua, Comments on the Constitution of Georgia, Fundamental Human Rights and Freedoms, Meridian, 2005,105.

Thus, the arrest can be used only in case there is a high probability that the defendant will be found guilty of the crime charged and will be sentenced.[62]

4. The principle of proportionality is violated.[63]

The court emphasises that "according to Article 5 (4) of the Convention, the concept of the legality of an arrest is not limited to the fulfilment of the requirements prescribed by law; this also refers to the reasonable suspicion which served as the grounds for arrest, the legality of the objective pursued by the use of the arrest and the reasonableness of the ruling".[64]

Thus, the restriction of liberty is considered to be legal, if

- an act, which represents the grounds for arrest, is punishable under the Criminal Code of Georgia;[65]
- there is a reasonable assumption that the abovementioned act was committed by the defendant;
- there is the reasonable assumption that a person will obstruct the administration of justice;
- objective of the arrest is to bring a defendant before the court.

PROBABLE CAUSE (REASONABLE DOUBT)

International law and Georgian legislation envisage two main instances in criminal procedure for the use of the arrest as a measure for procedural coercion - before a crime is committed and after it has been committed and links both of them to probable cause and reasonable assumption.

Firstly, an arrest carried out by the police that aims to support the investigation and gather evidence if the case so requires. In this instance, the person detained should be brought before a court without delay.

The second case is linked to an arrest carried out after the judge enters the process, the objective of which is to keep the defendant in custody under the investigation bodies' su-

[62] CRO-2007-3-012 **a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20-12-2007 / **e)** U-III-4286/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 1/08 / **h)** CODICES (Croatian, English).

[63] See Steel and others v the United Kingdom, 23.09.1998 §54 reports 1998-VII.

[64] See Ramishvili and Kokhreidze v Georgia, Application № 170406, 13.01.2009, para. 124.

[65] See Lukanov v. Bulgaria, 20.03.1997,24 E.H.R.R.121.

pervision. The person arrested in this stage has the right to be heard in a reasonable time or released if the motives that served as the grounds for his detention ceased to exist.[66]

Although Strasbourg case law puts a great emphasis on each ground for the deprivation of liberty set out in Article 5.1 (c), it nevertheless stresses the standard of reasonable assumption ["reasonable suspicion"].

In what case assumption should be considered reasonable; what amount of evidence should be proven or to what circumstances the evidence should be related; is it necessary for the use of the arrest to submit such a volume of evidence to prove the defendant's participation in the crime? All of these issues are linked with the use of detention.

As already mentioned, the Law of Georgia on Police, as well as the CPC of Georgia, stipulate the possibility for the use of preventive measure only on the grounds of probable cause that the person will escape and will not appear before court, or he/she will destroy the necessary information and commit a new crime. According to Article 3 (11) of the CPC of Georgia, probable cause is "is a body of information or facts that in corroboration with all of the circumstances of the given criminal case would be sufficient for a reasonable person to conclude that a person has probably committed a crime; an evidential standard for conducting investigative activities directly prescribed by this code and/or imposing a preventive measure".

In relation to the nature of doubt, which authorises the use of detention/arrest, the Convention deems necessary that three circumstances should exist, namely the commission of a crime, the probable cause to believe that it is necessary to avoid the crime commission and the risk of escape.[67] According to the Fourth Amendment to the US Constitution, it is inadmissible to restrict liberty without probable cause, which must be based on those facts and circumstances that are substantial and sufficient for a reasonable person to believe that another person (defendant) has committed or is committing a crime.[68] This also means that probable cause should be related to:

1) commission of such an act, which contains elements of the crime as stipulated by the Criminal Code.[69] However, it does not imply the unquestionable establishment of a fact that a crime was committed;

2) commission of a crime by the person restricted of liberty; since "if there is no probable crime, then there is no main objective for the use of detention – administration of

[66] М. де Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 62

[67] *Ibid*., pg 59.

[68] M. W. Janis, r. S. Kay, A.W. Bradley,European Human Rights law, Text and materials, third ed. 2008,700.

[69] See, e.g., *Lukanov v. Bulgaria20.03.1997, 24E.H.R.R.121,* Steel and others v the United Kingdom, 23.09.1998 §54 reports 1998-VII, Y. Aydin, The delimination of the scope of one of the guarantees of personal security set out in the European Convention on Human Rights, p. 6.

justice, or detaining a person when there is no crime does not serve the achievement of a legitimate objective. At the same time, when there is the fact of the committing of a crime, but there is no link between this crime and the person, it means that an arrest in this case is not directed toward the achievement of a legitimate purpose";[70]

3) Since Article 171 (1) of the CPC of Georgia allows for the use of arrest in cases of crimes punishable by imprisonment, "the person authorised to arrest must be certain that he is detaining the person who has committed the crime but apart from that he has to know that the crime committed is punishable by imprisonment under the criminal code";[71]

4) Escape of a defendant, non-appearance before court, destruction of important information for the case or commission of a new crime.

Since assumption and doubt are subjective attitudes of an individual and they have not been exhaustively defined by a legislator, the fact whether anyone becomes doubtful or suspicious is dependent on a totality of various objective and subjective circumstances in every specific case.

The CPC of Georgia does not provide a list of grounds for "probable cause". The grounds may be various but even in case when there is good faith doubt it must be in the first place objective, reasonable, substantiated and invite a person who has become doubtful to believe that the person has committed a crime. It is inadmissible to interfere with anyone's liberty only on the grounds of personal feelings.[72] The only single instance that a person can flee unlike other grounds stipulated by the CPC cannot cause doubt that he has committed a crime.[73] The investigative bodies should indicate those pieces of evidence which are sufficient "for charging let alone convicting a person" in the motion filed for the use of an arrest.[74] The requirement for "probable cause" is met when there are facts and information on the grounds of which it is possible to make an impartial conclusion that the defendant could have committed the crime. That is why evidence proving the guilt of the defendant is not required".[75] However, "that police are not required to have evidence in a volume that is sufficient for overcoming the

[70] Constitutional Court of Georgia, Decision, №2/1/415,06.04.2009

[71] *Ibid.*

[72] At the same time, it should be noted that in a case of Nikolaishvili the Court found that the use of arrest violated the Convention. Since the Appellate Court justified pre-trail detention of the applicant apart from forwarding an argument concerning strictness of the sanction and pointed to the investigation of a criminal case brought against the applicant's brother in the same period, which did not have any links to this case. Such consideration of the case not only ran counter to the objectives of evaluation of the reasonableness of the applicant's detention on the grounds of the Article 5(3) of the Convention, but it also avoided essence of permissible exclusion under the Article 5 (1, "c") of the Convention. As for the statement made by the Appellate Court that the applicant was "insincere", this is unsubstantiated statement, which is not based on concrete circumstances in the case (para. 74).

[73] *Ibid*, Constitutional Court of Georgia, Decision, №2/1/415,06.04.2009.

[74] See Brogan v. the United Kingdom 24.11.1988,11 E.H.R.R117., Murray v. the United Kingdom 28.10.1994, 19 E.H.R.R. 193.

[75] Decision of the Constitutional Court of Slovakia N 10-07-2002. T. Mamukelashvili, R. Tushuri, Decisions of the Constitutional Courts of the European States In Relation to Basic Human Rights, Tbilisi, 2004.

presumption of innocence under Article 6 (2)[76] does not imply that evidence should be sufficient for convicting a person or proving his guilt".[77] Furthermore, the Strasbourg Court uses the "lower level of reasonableness" in relation to particularly serious crimes such as terrorism.[78] However, it does not justify the interpretation of the concept of reasonableness so narrowly when a person's liberty and inviolability protected by Article 5(3) are encroached.[79]

Thus, probable cause is substantiated by an objective link between the crime and the defendant, and when there are circumstances and data, which are sufficient to warrant the belief that a crime has been committed and this crime was committed by the person who is detained. To have a "reasonable doubt" means the existence of such facts and information that would have satisfied an objective observer that the person concerned has committed a crime. Although what may be regarded as "reasonable," depends upon all of the circumstances of the case.[80] At the same time, one of the necessary elements for the reasonableness of suspicion [probable cause] is its genuineness and *bona fides*.[81] A likewise approach was formulated by the US Supreme Court in Brinegar's case:" Probable cause exists where the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offence has been or is being committed".[82]

In order to assess the reasonableness of a police officer's conduct, the US Supreme Court deemed necessary to focus on the interests of the government that allegedly justified the intrusion upon the constitutionally protected interests of the private citizen. The officer had to point to specific, and articulate facts, which taken together would have reasonably justified his interference. In the court's opinion, while assessing the reasonableness of the intrusion, the judge should have used an objective standard – whether the facts available to the officer at the moment of the intrusion would warrant a person of reasonable caution in the belief that the interference was appropriate.[83] At the same time, the requirement for reasonable assumption should be met at the moment of arrest, but if detention is being continued then the arrest test changes its nature.[84]

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[76] M. W. Janis, R. S. Kay, A.W. Bradley, European Human Rights law, Text and materials, third ed. 2008,652.

[77] *Ibid*. See also M. W. Janis, R. S. Kay, A.W. Bradley, European Human Rights law, Text and materials, third ed. 2008,608,652

[78] В. Золотых, Заключение Под Стражу По Решению Суда», Интернет-журнал Ассоциации юристов Приморья «ЗАКОН» http://proknadzor.ru/ Обобщение практики применения ст. 108 УПК РФ.

[79] Human Rights and Police, Practical Course, Information Centre of Human Rights, Strasbourg, 1998, 40.

[80] Fox, Campbell *and Hartley v. the United Kingdom* 30.08.1990, 14 E.H.R.R.108.

[81] Murray v. United Kingdom, 28.10.1994, 19 E.H.R.R.193.

[82] Brinegar v. United States, 338 U>S>160,68 S.Ct.1302(1949).

[83] Terry v, Ohio, 392 U.S. 1 (1968).

[84] M. W. Janis, r. S. Kay, A.W. Bradley,European Human Rights law, Text and materials, third ed. 2008,652.

Consequently, even when the arrest has been carried out before the crime is committed it is inadmissible for prejudice, personal opinion[85] or fear that a defendant with a criminal past will again commit a crime to the form grounds for his detention. Criminal offences committed by the defendant in the past may trigger a probable cause, but they cannot be the single ground.[86] Additionally, the probable cause should link with the defendant's present activities.[87]

Even more so, the use of the restriction of freedom grounded on formulaic formulations without gathering the appropriate evidence for them should be inadmissible. The Strasbourg Court believes that using the formulaic argumentation for the arrest in the fill-out papers by the judges is inadmissible practice. The Strasbourg Court ruled that a violation of Article 5 occurred in the case of Nikolaishvili against Georgia, where the use of an arrest against the defendant was justified on the basis of the following circumstances: "[in accordance with the requirements of procedural legislation] after I considered the reasonableness of the motion/request for the use of an arrest and the motions submitted by the parties I made the conclusion that the evidence gathered – [reference to evidence obtained in June and July 2003 – see, Para. 8] – bring forth sufficient doubt that Giorgi Nikolaishvili committed an offence. Evidence is obtained in compliance with criminal procedures. The arrest and indictment of Nikolaishvili were conducted in full compliance with procedural law. I believe that [reference to prosecutor], a motion/request for the use of an arrest is substantiated, and has a relevant legislative ground. Therefore, if Nikolaishvili, charged with a less serious crime, is released, the risk of the obstruction of the investigation and the failure to appear before court have been grounded..."

The Strasbourg Court stressed that "in order to administer justice appropriately national judicial instances should with sufficient accuracy establish the motives that serve as grounds for their decisions".[88] However, at the same time, it should not be understood as if it were required to respond to each argument.[89]

Thus, for conducting an arrest, the CPC of Georgia requires a certain link to be established between the defendant and the action which is allegedly a crime; and a sufficient basis for confirming that the action concerned contains elements of that crime for which the CPC of Georgia stipulates the use of the arrest[90] and a probable cause to believe that

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[85] See Caballero v United Kingdom, 8.2.2000 (application No. 32819/96).

[86] Fox, Campbell and Hartley v. the United Kingdom 30.08.1990, 14 E.H.R.R.108.

[87] See K.-F. v. Germany, 27.11.1997,26 E.H.R.R.390, Punzelt v. the Czech Republic 25.04.2000.

[88] Jgarkava v Georgia, Application № 7932/03, 24.02.2009; para. .71; See also, *García Ruiz c. Espagne* [GC], no 30544/96, § 26, CEDH 1999-I; *Ruiz Torija c. Espagne*, arrêt du 9 décembre 1994, série A no 303-A, § 29; *Higgins et autres c. France*, 19 février 1998, § 42, *Recueil* 1998-I.

[89] Jgarkava v Georgia, Application № 7932/03, 24.02.2009; para. .71; See also (*Van de Hurk c. Pays-Bas*, 19 avril 1994, § 61, série A no 288).

[90] Lukanov v. Bulgaria 20.03.1997, *24E.H.R.R.121.*

there is the danger of the obstruction of justice.[91] However, the grounds should be interpreted narrowly since they are an exception to the most basic guarantee of individual freedom.[92]

The probable cause standard ensures the admissibility of the restriction of individual freedom when the suspicion is reasonable and excludes arbitrariness. It forms an essential part of the safeguard against the arbitrary restriction of the individual's freedom.[93]

1. RISK OF ABSCONDING OF A PERSONA

Risk of absconding belongs to one of the main and most used grounds for the use of an arrest. It is based more on the seriousness of an offence and the strictness of penalty than on objective data and information that would provide us with grounds for suspicion that a real threat exists.[94]

"Absconding means a future danger that the person concerned will avoid investigation, continue criminal activities, commit a crime to escape police, if nothing else and destroy evidence when the chance occurs. Eventually, it will create a mass of difficulties for the administration of justice if it is still possible".[95]

There are no general criteria for establishing the risks of absconding. Hence, the existence of the danger should be determined through the analysis of all of the circumstances of the case and an assessment of each fact.[96] In order to assess the danger of absconding, it is necessary to look at the crime's essence and its seriousness, the gravity of the possible penalty, the factual circumstances of the case and the defendant's personal character. The circumstances, which may provoke the defendant to flee, should be re-examined. At the same time, as time passes, and the defendant's stay in custody increases[97] the risk of his absconding from trial may also decrease. The conditions that made up grounds for the defendant's arrest initially may change at the time of the con-

[91] It means escaping/hiding and avoiding to appear before the court, later engagement in criminal activities – committing a new crime, obstructing gathering of information and creating a danger for execution of a sentence.

[92] See Kurt v Turkey 25.05.1998 E.H.R.R. 373, para 122, mutatis mutandis, Quinn v France, 22.03.1996, E.H.R.R. 529 para42.

[93] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, UNITED NATIONS, New York and Geneva, 2003, 174.

[94] М. де Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА, 2002, 66.

[95] Decision of the Constitutional Court of Georgia, №2/1/415,06.04.2009.

[96] See Letellier v. France 26.06.1991, 14 E.H.R.R 83.; Yağci and Sargin v. Turkey(1995) (Appl. No. 16419/90 and 16426/90, 8.06.1995

[97] See Melnikova v. Russia 2007, ECHR Application №24552/02 (21.06.2007).

tinuation of his arrest since new developments may reduce the danger of absconding.[98] That is why the reasoning of the decision for the defendant's arrest requires that specific circumstances be indicated. This enables officials to establish at a later stage whether the defendant will be pushed to flee after a certain period has passed in given circumstances. Finally, the fact that an indictment has already been formed does not create enough grounds for believing that the risk of escape is real since the continuation of detention can be justified only if the charges are supported by serious indictments representing an appellate claim's subject.[99]

At the same time, crossing state borders without obstructions (indeed, crossing borders has actually become easy since visa-free travel agreements were concluded among many states and travellers were allowed to receive entry visas at some border checkpoints) does not create the danger of absconding. So, in order to establish the genuineness of this kind of danger, it is required that all of the characteristic circumstances of the defendant either demonstrate the existence of danger or decrease the danger to a minimum to make the use of an arrest unjustifiable.[100] Even more so, the danger of absconding tends to decrease with time.[101]

The sketch kind of substantiation of belief based on a scant amount of evidence that the defendant may abscond may be satisfactory for the initial term of restriction on freedom, but it will not suffice after a certain lapse of time in circumstances when judicial officials have greater possibilities to obtain additional information.[102]

The assessment of the risk of absconding only on the basis of the gravity[103] of the crime committed and without studying other circumstances related to the given case, such as a defendant's previous criminal records, the impact of incarceration and prison life on him, etc.,[104] is considered to be unreasonable and in violation of his personal freedom. At the same time, simple referrals to previous criminal records to prove the existence of danger for recidivism, is insufficient.[105] It is also inadmissible to assess the danger of absconding with the help of the gravity of a possible penalty or general social danger, which the crime concerned, is believed to pose. These factors are important for one of

[98] ESP-1995-2-025 a) Spain / b) Constitutional Court / c) Second Chamber / d) 26-07-1995 / e) 128/1995 / f) / g) Boletín oficial del Estado (Official Gazette), 22.08.1995 / h).

[99] ESP-1997-1-008 a) Spain / b) Constitutional Court / c) Second Chamber / d) 07-04-1997 / e) 66/1997 / f) / g) Boletín oficial del Estado (Official Gazette), 114, 13.05.1997, 23-28 / h).

[100] Yagci et Sargin 52, Mansur, 55.

[101] ESP-1995-2-025 a) Spain / b) Constitutional Court / c) Second Chamber / d) 26-07-1995 / e) 128/1995 / f) / g) Boletín oficial del Estado (Official Gazette), 22.08.1995 / h).

[102] Makarova v Russia 15217/07. 12 March 2009.

[103] For example, some of the states in the US consider seriousness of crime to be one of the most important grounds for the use of arrest. Either this is linked to presumption of absconding or it forms a ground for mandatory arrest in those states which do not allow release on bail because of seriousness of charge.

[104] ESP-1995-2-025 a) Spain / b) Constitutional Court / c) Second Chamber / d) 26-07-1995 / e) 128/1995 / f) / g) Boletín oficial del Estado (Official Gazette), 22.08.1995 / h).

[105] Mutter c. France, 44.

the purposes of the penalty, namely general prevention, and require from the judicial officials that they establish the guilt of the defendant in the course of a fair trial where the defendant's rights will be respected and protected.[106] Hence, while discussing and deciding the continuation of the term of the arrest based on the risk of absconding, it is necessary to take into consideration the following circumstances:

- Personal characteristic features of the defendant[107] - the defendant's stark hatred to incarceration;[108] appearance before the bodies conducting the proceedings when he is summoned and without delay;[109]
- His financial resources; property, which the defendant has to leave behind if he absconds; family status;[110]
- Defendant's contacts abroad and in the country where he was arrested;[111]
- Seriousness of expected penalty;
- Special conditions of pre-trial detention;
- Level of guarantees, which ensure the defendant's appearance before the court,[112] etc.

The Spanish Constitutional Court notes that, in order to gauge the existence of the risk of absconding, other important information should be studied apart from the gravity of a crime and the seriousness of a penalty.[113] The court emphasises two criteria developed in the case law of Spain related to the problem of legal grounds and the conditions of detention. These two criteria identify the probable cause for the absconding of the defendant and his committing a crime:

1. Nature and gravity of the offence charged, seriousness of the expected penalty, the personal characteristic features of the defendant and the circumstances of the case.

2. Length of period from factual restriction of freedom until a decision about the continuation of the term is made. Requirement of the review of personal and concrete circumstances as time passes.[114]

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[106] *Ibid.*

[107] See Letellier v. France26.06.1991, 14 E.H.R.R.83; Matznetter v. Austria 20.11.1969, 1 E.H.R.R.198, Yağci and Sargin v. Turkey Appl. No. 16419/90 and 16426/90, 8.06. 1995).

[108] Stögmuller v. Austria, 10.11.1969, 1 E.H.R.R 155.

[109] See W v. Swetzerland 26.01.1993, 17 E.H.R.R 60., Nikolaishvili v Georgia, sited above.

[110] See Letellier v. France, 26.06.1991, 14 E.H.R.R.83 ; Nikolaishvili v. Georgia sited above.

[111] See W v. Switzerland26.01.1993,17 E.H.R.R.60 ; Punzelt v. the Czech Republic(2000) (Appl. No. 31315/96, 25.04.2000); Barfuss v. the Czech Republic 31.07.2000, 34 E.H.R.R.37.

[112] See Wemhoff v. the Federal Republic of Germany 27.06.1986, 1 E.H.R.R. 55; Letellier v. France 26.06.1991, 14 E.H.R.R.83; Stögmuller v. Austria. 10.11.1969, 1 E.H.R.R 155.

[113] Decision of the Constitutional Court of Spain, April 15, 1996. T. Mamukelashvili, R. Tushuri, Decisions of the Constitutional Courts of European States in Relation To basic Human Rights, Tbilisi, 2004, 130.

[114] ESP-1997-1-008 **a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07-04-1997 / **e)** 66/1997 / **f)** / **g)** Boletín oficial del Estado (Official Gazette), 114, 13.05.1997, 23-28 / **h).**

However, taken separately, none of these circumstances can justify the restriction of freedom. Danger should be assessed en masse in each specific case and it should be studied to what extent each of these circumstances provides grounds for suspicion that the defendant will abscond because the circumstances may cease to exist or they may be regarded as unreasonable or they may not reflect the defendant's actions.[115] It is certain that a decision, which uses stereotyped phrases in its reasoning of the existence of the danger of absconding, contravenes the European court's practice.[116] While using an arrest, courts should determine the specific circumstances indicating the danger of absconding and assess it according to the principle of proportionality.[117] The ECtHR has repeatedly noted that "if the sole justification for continuing the deprivation of liberty is a danger of flight … but it is possible to obtain from the defendant guarantees that would ensure his appearance [at the pending trial], he must be released before the trial"[118] and the guarantees for his appearance at the trial should be obtained.[119] However, if it impossible to get such guarantees, or they are regarded as incompatible, the court shall not use severe measures if the same legitimate aim can be achieved by less severe preventive measures,[120] such as [Article 198.1 of the CPC of Georgia] residing in a particular place, submitting identification documents to the relevant bodies, reporting to the police periodically,[121] etc. At the same time, it is necessary to observe the principle of proportionality. The measures ensuring appearance before the judicial bodies and the proper conduct of the accused while alternative preventive measure is imposed must be realistic and manageable. Besides, they must not be too difficult to be obeyed so that the main sense of release (return to freedom) is not lost.[122]

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[115] See Stögmuller v. Austria, 10.11.1969, 1 E.H.R.R.155 ; Letellier v. France 26.06.1991, 14 E.H.R.R.83.

[116] See **Jablonski v Poland** (Appl. No. 33492/96, 21.12.2000; Yağci and Sargin v. Turkey Appl. No. 16419/90 and 16426/90, 8.06. 1995).

[117] CRO-2007-3-012 **a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20-12-2007 / **e)** U-III-4286/2007 / **f)** / **g)** Narodne novine (Official Gazette), 1/08 / **h)** CODICES (Croatian, English).

[118] See Wemhoff v. the Federal Republic of Germany 27.06.1986, 1E.H.R.R.55 ; Stögmuller v. Austria, 10.11.1969, 1 E.H.R.R.155; Letellier v. France 26.06.1991, 14 E.H.R.R.83; Ambruszkiewicz v Poland Appl. No. 38797/03, 4.05.2006.

[119] Wemhoff v. the Federal Republic of Germany 27.06.1986, 1E.H.R.R55.

[120] So, when there are grounds for the detention as prescribed by law, the court should respect a principle of proportionality and use more lenient preventive measure if the latter permits achievement of the same legitimate aim [**CRO-2007-3-012 a) Croatia / b)** Constitutional Court **/ c) / d) 20-12-2007 / e) U-III-4286/2007 / f) / g) Narodne novine (Official Gazette), 1/08 / h) CODICES (**Croatian, English**)].**

[121] Decision of the Constitutional Court of Croatia, 2 December, 1998; T. Mamukelashvili, R. Tushuri, Decisions of the Constitutional Courts of European States in Relation To Basic Human Rights, Tbilisi, 2004, 130. See also, Stögmuller v. Austria 10.11.1969, 1 E.H.R.R 155.

[122] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,COUNCIL OF EUROPE, 2008, 45–46.

RISK OF INTERFERENCE WITH COURSE OF JUSTICE

The risk of interference with the course of justice is one of the main and, potentially, the most widely applicable ground. Interference can mean putting pressure on witnesses, destroying evidence, colluding with accomplices by a defendant and so on.

It is not easy to predict a defendant's behaviour with absolute exactness. Therefore, while deciding on the preventive measure to be used, the defendant's probable behaviour should be determined. However, the risk of obstruction with the administration of justice cannot be considered via abstract review. The court cannot take into account the risk *in abstracto* without those factual circumstances, which would prove the genuineness of the danger.[123] The resolution of the defendant's likely behaviour should be built on facts and evidence established objectively, specific circumstances of the case[124] rather than mere intuitive doubts. Although the threat is an element of assessment of expediency of restriction of freedom it can not be established on the grounds of unreasonable and abstract statements.[125] The suspicion that the defendant will put pressure on witnesses,[126] destroy evidence,[127] change evidence in order to impede or mislead investigations[128] is not regarded as sufficient and reasonable.[129]

The existence of risks should rely on specific facts and circumstances[130] and as is the case with other circumstances, these facts and circumstances should be checked for reasonableness and admissibility. The court should establish specifically what kind of action, concerning whom, and what means or techniques for the obstruction of the administration of justice it deems as grounded. For example, a complicated investigation increases the risk of concealing or destroying evidence. Specific features concerning concrete cases that may justify detention should also be taken into account. However, it should be noted that in the course of inquiry this risk tends to decrease. The existence of this kind of risk should be based on specific facts and circumstances, and as is the case with other evidence, these facts and circumstances should also be checked for reasonableness and admissibility. For example, a complicated investigation tends to increase the risks of con-

[123] See Trzaska v. Poland (Appl. No. 25792/94, 11.07.2000,).

[124] See *Smirnova v. Russia,* nos.46133/99 and 48183/99, §63, ECHR 2003-IX (extracts); *Nikolov,* cited above, §73.

[125] Patsuria vs Georgia, № 30779/04, 6 November, 2007, par. 71.

[126] A. v. France 23.11.1993, 17 E.H.R.R..462; W v. Switzerland 26.01.1993, 17 E.H.R.R.60; Letellier v. France 26.06.1991, 14 E.H.R.R.83;

[127] See Wemhoff v. the Federal Republic of Germany 27.06.1986, 1E.H.R.R55.

[128] Clooth v. Belgium (Appl. No. 12718/87, 12.12. 1991.

[129] *Trzaska v. Poland*, 11.07.2000, para 65.

[130] See Wemhoff v Germany (Appl. No. 2122/64, 27.06.1968; in the case, Kalashnikov v. Russia 15.07.2002 the Court held that a resolution on the use of arrest pending trial (pre-trial detention) had no indications to the facts, which could have proven existence of genuine threat of obstructing justice at that moment. Reasonableness of the risk of interference with justice has significantly decreased in the course of investigation and after the collecting of evidence. **Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5),** Interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,COUNCIL OF EUROPE, 2008, 41

cealing or destroying evidence. Special features related to the defendant's conditions, which may justify detention, should also be taken into account.[131] However, it should be noted that in the course of the inquiry this risk tends to decrease. Hence, it would be difficult to decide on the use of an arrest on the ground of the risks of putting pressure on witnesses after all of the investigative actions and interrogations have been completed.[132] Even more so, the continuation of the term for this reason cannot be regarded as justified after the process is over.[133]

A. Necessity to Prevent Crime

In separate cases, the court uses imprisonment as the ground for the deterrence of an individual from committing a new crime. This, in turn, implies special recidivism, as well as crimes aimed at preventing justice from being served, such as the disposing of evidence, intimidating witnesses, etc. The above is especially relevant to crimes where one element is a special subject and the crime is related to the performance of official duties by a person. However, bearing in mind the principles established under the Criminal Code of Georgia and international acts, in deciding an issue of imprisonment, the court should consider the appropriateness of other alternative measures of punishment, as "in relation to a crime associated with the performance of a person's official duty, the threat of obstructing justice on the grounds of special recidivism is unsubstantiated when a person's labour contract has been terminated. A hypothetical possibility that this person will get another job is not a sufficient reason to apply imprisonment as a punishment measure".[134]

At the same time, when applying the above-mentioned ground for imprisonment, the court, on the basis of the submitted evidence, shall determine what corroborates the assumption that the threat of the accused relapsing into a crime exists; what is that particular crime that must be prevented through the punitive measure used and why other measures of punishment (for example, dismissal from his position, holding of electronic monitoring, prohibition to perform a certain type of activity or to be at a certain location, etc) are ineffective in achieving the same goal. Given that the Criminal Code of Georgia prohibits the punishment of a person for his thoughts, intentions or illegal aims and wishes, in this case, as well as in the restriction of the constitutional right of a person, it must be based on concrete factual circumstances and evidence that openly indicate the existence of the intention to commit a new crime. The restriction of freedom is justified

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[131] See W v. Switzerland. 26.01.1993, 17 E.H.R.R.60

[132] See Nevmerzhitsky v Ukraine (2005).

[133] See Muller v. France, 17.03.1997 and I.A. v. France 23.09.1998.

[134] Decision 02-12-1998 of the Croatian Constitutional Court. T. Mamukelashvili, R. Tushuri, Decisions of Constitutional Courts of European States Concerning Fundamental Human Rights, Tbilisi, 2004, p.121.

if it is aimed at preventing a concrete crime. It is for this reason that the Hungarian Constitutional Court deemed a provision of the Criminal Code of Georgia to be disproportionate and, accordingly, unconstitutional, to the aim set by a lawmaker, which provided for the detention of a person to deter him from committing a new crime.[135] The Strasbourg Court has a similar approach. It has repeatedly noted that the detention of a person on this ground requires that those facts and circumstances be outlined in the case, which substantiate that such a threat is based on actually existing circumstances.[136]

Although the accusation against a person of committing a grave crime is, in separate cases, regarded as a legal ground for imprisonment to prevent a new offence, it should be stressed that as international practice and case law have shown, it is unacceptable to restrict the fundamental right of an individual based only on abstract threats, stereotypes or fears.[137] In order to discuss the observance of the principles of proportionality and legality, concrete factual evidence must exist, the probability of a threat must be evaluated based on the entirety of the circumstances of the case, the personality of the accused and his past must be taken into account. However, as has already been noted, a person's previous conviction, his inclination towards crime is a significant though insufficient ground for the deprivation of liberty, especially when committed crimes differ by their nature and severity.[138] A court decision must show what action may be taken by a person in case he is not detained and if it is expected in the near future.

B. Necessity to Maintain Public Order

It is obvious that separate categories of crimes, given their severity and the public reaction to them, may trigger public unrest and disorder. However, this is regarded to be a substantial motive for the restriction of liberty only in case if it is based on facts that the release of that person will inevitably entail disorder, and the threat of such a development is real.[139] Moreover, the length of the restriction of freedom must not contain elements of punishment.

The European Convention also provides for the detention of a person to defend public order, which, normally, is aimed at protecting society from a real and concrete threat taking into account the personality of the accused person. At the same time, in contrast to the Criminal Code of Georgia, Strasbourg case law provides a broad definition of "public order" and implies not only the protection of society from the accused but

[135] Ibid, Decision of Constitutional Court of Hungary 08-09-1999, p.24.

[136] See Smirnova vs. Russia, 24.07.2003.

[137] See I.A. vs. France 23.09.1998.

[138] See Clooth v. Belgium, Appl. No. 12718/87, 12 .12. 1991; Muller v. France, 17.03.1997.

[139] See Kemmache, 52 Tomasi, 91; I.A.c. France, 104

also the protection of the accused from society and from retaliation on the part of the participants in the proceedings. However, such cases belong to the category of exceptional cases and they cannot rely on either accusation alone or the expected severity of the punishment. A threat must not be abstract. There must be concrete factual circumstances indicating the existence of such a threat and the ineffectiveness of other measures to prevent it. The nature of the crime, the circumstances in which it was committed, the psychological state of the accused and the victim must also be indicated.[140] The nature and degree of the crime must be accurately determined. This is quite a subtle and evaluative category as a threat emanating from one and the same action can be differently perceived by different ethnic or religious groups, and various social groups.[141] Violation of public order can be regarded as a sufficient and relevant ground for the deprivation of a person's liberty only in case it is based on facts clearly indicating that the release of the detainee can really trigger public disorder.[142]

In contrast to the Convention, the Criminal Code of Georgia envisages additional grounds for the restriction of the freedom of a person as a punitive measure. In particular, if:

a) a person is caught when committing a crime or immediately after committing a crime;
b) a person was seen at the scene of crime and a criminal proceeding has been instantly instituted against him to detain him;
c) a clear trace of the crime has been detected on a person, near a person or on a person's clothes;
d) a person went into hiding after committing a crime but then he was identified by a witness;
e) a person is on a wanted list.

Thus, despite suspecting a person of committing a crime, the necessity to prevent a person from repeating a crime or going into hiding constitute the grounds for the restriction of freedom. The restriction of freedom even in such a case will be lawful only:

1. If it is aimed at instituting a criminal prosecution against the person, and
2. If it is ensured that the person will appear to courts for the aim of "considering an issue regarding the conduct of a proceeding within a reasonable term and the possibility of his release".

[140] Dummont-Maliverg v. France, 31.05.2003, par.64.

[141] See Minimum standards for the Rights of the Accused During Arrest/ Detention- http://www.arab-niaba.org/publications/hr/jordan2/eric2-e.pdf, 1

[142] М. де Сальвия, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения- под общей ред. В.А. Туманова, Л.М. Энтина, М. изд-во НОРМА,2002, 58, 65

DURATION OF DETENTION

Georgian legislation sets a maximum of nine months for the restriction of a person's freedom. According to the Georgian Constitutional Court, this term, as established under Article 18 of the Georgian Constitution, includes the pre-trial detention of the accused and "does not include the term of detention of the indicted individual before court delivers its decision on the punishment for the concrete crime". The new criminal code of reduces the term for the detention of the accused and brings it into line with the court's above-mentioned decision. As a result, the maximum length of the pre-trial detention of a person at the stage of the investigation is 60 days. The criminal code no longer envisages the possibility of remitting the case for an additional investigation and, accordingly, the additional extension of the duration of the detention by court; does not establish an initial minimum term for the detention, thus contributing to the use of the reasonable term of detention in each individual case. At the same time, the code envisages the further extension of the length of the detention limit to a "reasonable term" on the basis of a substantiated request on behalf of the defence and a one-off mediation on behalf of the prosecutor. At the same time, the criminal code does not define a limited length or the number of such extensions [in case of a request from the defence].

When assessing the legality of the extension of the proceedings and the length of the detention at the initiative of the accused, the Strasbourg court noted that "a very small segment of hearings have been extended upon the requests of applicants, which were rather articulate and this has somewhat impeded the pace of the hearings. However, the resulting impediments have never been of a significant size and their duration ranged between one and two months (see paragraphs 10, 12-14, 19-20). Therefore, the court does not regard that the applicants' actions have not affected the duration of the hearing. Moreover, most of the applications submitted by the applicants regarding the postponement of hearings, especially those submitted at an the initial stage of the hearings, represented the ordinary implementation of their procedural rights aimed at obtaining needed evidence without which it would have been impossible to prepare the case for hearing on its merits".[143]

As already noted above, the detention shall be used only in case it serves a legitimate aim and when its duration is proportional to its aim.[144] Therefore, international law attributes special importance to both the use of detention and the issue of its duration. However, it is unacceptable to abstractly determine the reasonability and legality of the term of detention. The reasonability of the term must be evaluated on a case by case

[143] Kharitonashvili v Georgia, sited above, par. 42

[144] Wafa Shah, overview of case studies relating to pre-trial detention, Fair trials international - March 2009, submission to the directorate-General for Freedom Justice and Security of the European Commission on Issues relating to Pre-trial Detention, 3

basis, taking into account the concrete circumstances of a case and such elements as the nature of the crime (crossing borders, organised crime, terrorism,[145] etc.), the number of the accused, difficulties related to the investigation, the complexity of legal issues, the behaviour of the accused.[146] However, the above-mentioned circumstances can justify the extension of the term only in case the entities conducting the hearing display *"due diligence"*.[147] International and Georgian practice prove that a significant amount of violations of Article 5.3 result from the lack of due diligence on the part of the bodies conducting the hearing[148] which may be attributed to management-related objective circumstances[149] or the failure by a separate participant to properly perform their duties.[150] Therefore, when extending the term, the court takes into account and checks the substantiation of the assumption of the possibility of the accused relapsing into the crime, on the one hand, and the "due diligence" conducted by the bodies holding the proceedings, on the other hand".[151]

"The length of the restriction of freedom shall not exceed a reasonable term. It is acknowledged that it is impossible to translate this concept into concrete days, weeks, months or years or any other periods corresponding to the severity of crime. At the same time, this notion is not subject to abstract control as the reasonability of the terms must be assessed on a case by case basis taking into account the concrete properties of each case. The restriction of freedom is justified until the concrete circumstances of the case indicate public interest which, irrespective of the presumption of innocence, overweighs respect of personal freedom.[152] The court assesses the reasonableness of the length of the proceedings in light of the circumstances of the case and having regard to the following criteria – the complexity of the case, the conduct of the applicant and the relevant authorities, and the importance of what is at stake for the applicant in the litigation (see, Mikulić v. Croatia, no. 53176/99, §38, ECHR 2002 I).[153]

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[145] See, for instance, Klass and Others v. Germany, 6.09. 1978, 2.E.H.R.R 305. para 48-49& 59; Brogan and Others v. United Kingdom, 29.11. 1988, 11 E.H.R.R.117 para 48; Murray v. United Kingdom, 28.10. 1994, 19 E.H.R.R193, para 47; Pantano v. Italy, т. 60851/00, para 70, 6.11.2003; Van der Tang v. Spain, 13.07. 1995, 22E.H.R.R262,.para 75; Chraidi v Germany (Appl. No. 65655/01, 26.10. 2006, para 37; W v. Switzerland 26.01.1993, 17 E.H.R.R.60.

[146] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights, РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,COUNCIL OF EUROPE, 2008,44

[147] See, for instance, Kalashnikov v. Russia 15.10.2002. Assenov &Others v. Bulgaria 28.10.1998., 28 E.H.R.R652.

[148] See, for instance, Nikolaishvili v Georgia [par. 78], where the court, when assessing a 10 month pre trial detention of the applicant, noted that such a long duration of detention indicates that the government failed to hear the case with due diligence, which is of utmost importance when assessing the legality of pre trial detention against the requirements of paragraph 5, article 5 of the Convention.

[149] See Assenov & Others v. Bulgaria 28.10.1998., 28 E.H.R.R, 652; Stögmuller v. Austria 10.11.1969, 1. E.H.R.R.155; Clooth v. Belgium (Appl. No. 12718/87, 12.12. 1991; Muller v. France 17.03.1997; Trzaska v. Poland (Appl. No. 25792/94, 11.07.2000)

[150] See Clooth v. Belgium (Appl. No. 12718/87, 12.12. 1991).

[151] See W v. Switzerland 26.01.1993, 17 E.H.R.R.60, Assenov &Others v. Bulgaria 28.10.1998., 28 E.H.R.R652 and Punzelt v. the Czech Republic (Appl. No. 31315/96, 25.04.2000, Melnikova v Russia 21.06.2007 ECHR Applic. No. 24552/02.

[152] Kudla, 110.

[153] Kharitonashvili v. Georgia, No. 41957/04, 10.02.2009, par. 41.

REGULARITY OF REVISION OF DURATION OF TERM

When a person is detained, the issue of the extension of the term, according to international standards, must be reviewed in accordance with the legislation or at a reasonably short regularity as established by court,[154] until the date of the hearing on the merits of the case has been set. To this end, the body conducting the proceedings shall, at a regular periodicity,[155] present the court with the grounds available to it, which justify the restriction of freedom and the accused must have the automatic right to be brought before the court at regular intervals for a periodic, systematic review of the restriction of his freedom.[156] At the same time, the intervals between the reviews must be short[157] [the nature of detention itself "requires short time spans between two applications for release], as in view of the assumption under the Convention such detention is to be of strictly limited duration. Since it rests on the need for a quick investigation, an interval of one month is deemed to be reasonable".[158]

Court control on the legality of the restriction of freedom must not only be immediate, but also automatic. It must not depend on the submission of an application by a person whose freedom is restricted. Such an approach would have essentially changed the nature of a guarantee.[159] The Criminal Code of Georgia does not establish an obligation to carry out an automatic periodic control and, therefore, reveals the need for the harmonization of the code with the requirements of the Convention. However, the Court noted in the Patsuria case that, "while the Criminal Procedure Code in this wording does not require the authorities review legality of continuation of arrest on their own initiative at regular intervals, according to a disputable paragraph 17 of the Article 140 of the CPC the applicant could demand reconsideration of a challenged measure during detention in case of any new circumstances."[160]

A term of detention can be extended only in case "there is an unbroken causal link between the original sentence and the re-detention".[161] The above-mentioned statement makes clear that the interests of the investigation prevail over the presumption of innocence and a departure from it is justified by the inability to complete the investigation

[154] Herczegfalvy v Austria 10533/83, 24 September 1992.

[155] See, for instance – Melnikova v Russia, 21.06.2007, ECHR Appl. No. 24552/02.

[156] Васильева Елена Геннадьевна, ВОПРОСЫ УГОЛОВНОГО ПРОЦЕССА В МЕЖДУНАРОДНЫХ АКТАХ, Учебное пособие, 2007 г. Башкирского государственного университета, 137; Право на свободу и личную неприкосновенность европейские стандарты и российская практика.Под общ. ред. А.В. Деменевой. Екатеринобург, Урал ун-та, 2005, 29.

[157] Assenov, 162.

[158] Bezicheri, 21.

[159] Aquilina,49.

[160] Patsuria v. Georgia, application № 30779/04, 6 November, 2007. par. 55

[161] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights, РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,COUNCIL OF EUROPE, 2008, 11.

or the excessive complexity of the case.[162] That's why the court must consider in light of all of the circumstances of the case and substantiate the necessity and expedience of the extension of the detention term of the accused, the existence of legal and factual, procedural and material and legal grounds for the extension of the detention term and their "relevance" and "sufficiency" for an extension. *"Ruling of the court on continuation of a term should contain "appropriate" and "sufficient" argumentation and it should be related to specificity of the given case in order to justify restriction of freedom[163]. In other words, any period of continuation of arrest notwithstanding its length requires appropriate motivation from the competent national authorities that are obliged to be "exceptionally attentive" while using these procedures."[164]*

The court must demonstrate how it arrived at the conclusion that the reason for the extension of the term still exists. The reason for the extension of the term must be proportionate to the aim pursued by this extension. A detailed study of the circumstances of the case must not reveal that the extension of the detention results in a constitutionally unacceptable disproportion between the legitimate aim of detention and the provision of law; in this particular case – between its entire duration and its necessity. The court has a lot of other instruments at its disposal to ensure that an accused be brought before court, including the possibility of the repeated use of a detention measure against the accused at a later stage of the proceedings.[165]

Even though a well-founded assumption is a necessary prerequisite for the extension of the detention term, this may not be sufficient,[166] after a certain time, to justify the continued detention, because the allegation that an accused committed the crime may prove to be wrong,[167] the suspicion about the culpability of the accused may be dispelled, and instituting a criminal prosecution against him may established as inexpedient due to his family or his own health and so on and so forth. That's why the court shall, after a certain period, make sure that the restriction of freedom is necessary by examining other circumstances relevant to the case under consideration and convincingly corroborate the necessity of further the extension of the term of the accused's detention;[168] it must check whether investigative bodies conduct the investigation with "due diligence",[169] and how the detained person behaves. At the same time, while a

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[162] Pg. 104.

[163] See *Jecius* v. *Lithuania,* No. 34578/97, § 93, ECHR 2000-IX.

[164] Patsuria vs Georgia, application № 30779/04, 6 November, 2007, Par. 62, see also *Jablonskiv. Poland,* no. 33492/96, §80, 21 December2000.

[165] CRO-2007-3-012 a) Croatia / b) Constitutional Court / c) / d) 20-12-2007 / e) U-III-4286/2007 / f) / g) Narodne novine (Official Gazette), 1/08 / h) CODICES (Croatian, English).

[166] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights, РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г., COUNCIL OF EUROPE, 2008, 40.

[167] See Brogan and Others v. United Kingdom, 29.11. 1988, 11 E.H.R.R.117; Murray v. United Kingdom, 28.10 1994, 19 E.H.R.R, 193.

[168] See Punzelt. the Czech Republic (Appl. No. 31315/96, 25.04.2000. para 73; v Germany (Appl. No. 2122/64, 27.06.1968.

[169] See, for instance, Scott v. Spain 18.12.1996, 24 E.H.R.R.391; Kemach v France, 27.11.1991, par. 45, 59.

suspect may validly be detained at the beginning of proceedings on the basis of a confession, it necessarily becomes less relevant with the passage of time, especially where no further evidence is uncovered in the course of the investigation.[170]

Unless a court takes a substantiated decision on the extension of the detention term based on a detailed study of the circumstances of the case, this procedure may turn into a mere injustice instead of guaranteeing protection from injustice and the defence of the rights of an accused.[171]

As already noted above, detention at the initial stage of the investigation may be justified only by the nature of the crime and the severity of the expected punishment, the necessity to institute criminal prosecution and to avoid a crime, and the absence of a place of permanent residence.[172] However, none of the above circumstances are sufficient for prolonging the term of detention.[173] **Automatic prolongation of a term of the arrest** … only because of presumption determined by law based on gravity of a charge and a hypothetical risk of flight, commission of a new crime or agreement, is not consistent with the paragraph 3 of the Article 5 of the Convention.[174]

An assumption that the accused may go into hiding, which is based on schematic, scarce evidence, may be sufficient for the initial detention, but not after the possibility emerges to further support it with evidence. The states are charged with the obligation to seek additional evidence.[175]

It is necessary that the reasons justifying the detention exist throughout the entire length of the restriction of freedom.[176] In this case, Melnikova vs Russia, the Strasbourg court noted that the "absence of a permanent place of residence may justify the use of detention, but only at the initial stage of investigation. The threat that an accused may go into hiding decreases along with the time spent in detention; the gravity of the accusation and the severity of the expected punishment[177] do not in themselves justify the prolongation of detention, the state shall take a detailed examination and assessment of the "emerged circumstances" in order to legitimate the extension of detention. A mere repetition of the previously indicated grounds at later stages of the investigation

[170] Labita v Italy, 159.

[171] Право на свободу и личную неприкосновенность европейские стандарты и российская практика. Под общю редю А.В. Деменевой. Екатеринобург, Урал ун-та, 2005, 29

[172] Melnikova v. Russia 2007, ECHR Application №24552/02 (21.06.2007).

[173] Stögmuller v. Austria 10.11.1969, 1. E.H.R.R.155; Clooth v. Belgium Appl. No. 12718/87, 12.12. 1991; Contrada v. Italy (Appl. No. 27143/95, 24.08. 1998; Jėčius v. Lithuania (Appl. No. 34578/97, 31.07.2000) and Barfuss v. the Czech Republic 01.07.2000, 34 E.H.R.R.37.

[174] Patsuria vs Georgia, application № 30779/04, 6 November 2007w. Par. 67, Also see *Nikolov v. Bulgaria,* no.38884/97, § 70, 30/01/ 2003.

[175] Alexsandr Makarov v Russia 15217/07, 12.03.2009.

[176] See, The Constitutional Court of the Republic of Croatia, Zagreb, 07.12.2005, CRO_2006-1-001 I-I-906/2000, par 10.

[177] See, Matznetter v. Austria 20.11.1969, 1 E.H.R.R198.; Letellier v. France, 26.06.1991, 14 E.H.R.R.83; Yağci and Sargin v. Turkey (Appl. No. 16419/90 and 16426/90, 8.06.1995 & Muller v. France 17.03.1997.

will not justify the detention. Similarly, trite phrases like “the nature of crime attributed to an accused and the circumstances of the case”, without indicating the concrete motives of the detention,[178] is insufficient for the substantiation of the extension of detention. Neither is it sufficient a manner of taking a decision – a paper form with suggestions typed in advance – which indicates that the decision of a local court concerning the detention of an applicant is not taken in accordance with the appropriate legal rules.[179] The practice of a court to rely on circumstances typed in a paper form reveals the lack of “special attention” on the part of local entities.[180] The court is obliged to check not only the compliance of detention with national procedural legislation, but also to examine the substantiation of the suspicion which served as a ground for detention, as well as the lawfulness of the detention”.[181] Similar guarantees should be in place where the second level of jurisdiction is available for such cases.[182]

Such issues as the health of the accused, is having under-age dependants, the availability of alternative preventive measures, may also be important in deciding the lawfulness of detention.[183] As soon as the threat that the defendant can abscond, obstruct justice, endanger public order and security or commit a new crime is eliminated, the person must be immediately released. Therefore, the extension of the term is acceptable when there are essential reasons for the extension[184] and these reasons are related to the personality of the accused due to which the extension of detention may be unjustified even in relation to crimes falling under the categories of grave and extremely grave crimes.[185] It is not possible to specify the particular point at which further reasons will be necessary to justify the continued detention - each case must be assessed on its merits in order to determine the point at which the prosecution must show more than a reasonable suspicion that the accused committed the offence in question.[186]

[178] See, for instance, Demirel v Turkey (Appl. No. 39324/98, 28.01.2003). para 58.

[179] See also, Belevitskiy vs Russia, No 72967/01, para. 111, 01.03.2007.21.06.2007 Applic. No. 24552/02.

[180] See Nikolaishvili v. Georgia, para 73, see, Patsuria vs Georgia, No. 30779/04, para. 74, 06.11.2007, G.K. v. Poland, № 38816/97, § 84, 20.01.2004.

[181] Nikolaishvili vs Georgia; see also Brogan et al vs the United Kingdom, para. 65.

[182] Nikolaishvili vs Georgia, para. 92; See, Navara vs France, 23.11.1993, series A, № 273-B, para. 28; Toth vs Austria, 12.12.1991, series A, № 224, para. 84).

[183] 21.06.2007 Applic. No. 24552/02.

[184] Decision 02-12-1998 of the Croatian Constitutional Court. T. Mamukelashvili, R. Tushuri, Decisions of Constitutional Courts of European States Concerning Fundamental Human Rights, Tbilisi, 2004.

[185] I.A. v. France, 23.09.1998; Letellier v. France 26.06.1991, 14 E.H.R.R.83.

[186] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), interights РУКОВОДСТВО ДЛЯ ЮРИСТОВ | ТЕКУЩЕЕ ИЗДАНИЕ ПО СОСТОЯНИЮ НА СЕНТЯБРЬ 2007 г.,COUNCIL OF EUROPE, 2008,40.

CONCLUSION

Although the new Criminal Procedure Code of Georgia establishes the most limited terms for detention, declares principles of the presumption of freedom and legality, it introduces a uniform standard for detention for all categories of the accused and provides for the application of detention to those categories of crimes for which the code envisages the restriction of freedom as a punishment. The introduction of a test based on necessity is a welcomed act, but, on the other hand, it also implies the introduction of uniform standards for people with serious diseases, pregnant women and minors.

The Code does not define a maximum length of detention by a court, thus allowing a judge to detain an accused at the initial stage for 60 days or for the entire duration of the investigation [Paragraph 3, Article 205 stipulates that the term of the pre-trial detention of the accused shall not exceed 60 days before the pre-trial hearing.] After the expiration of this term, the accused shall be released except in cases envisaged in Article 208.3. However, what "pre-trial hearing" implies – the opening of the hearing or the delivering of the decision at the hearing regarding the punitive measure in accordance with Article 205 – is unclear. The given wording provides the grounds to conclude that the detention of a person from the opening of a session until the decision of the punitive measure [which comprises a maximum of 24 hours] is groundless, which has been repeatedly pointed out by the Strasbourg Court.[187]

By effectively guaranteeing everyone's right to personal liberty and security at all times, states will also promote their own internal security, without which human rights cannot be enjoyed to the full.[188] The above implies, along with the strict legal regulation of the grounds and rules for the restriction of freedom, the limitation of a circle of persons who are authorized to restrict freedom and grant this right to only employees of the body responsible for conducting the investigation, who perform operative functions, are tasked with protecting public order, and carry out investigations or criminal prosecutions. It rules out any possibility of detention on the part of private persons even in the cases envisaged in Article 171 of the Criminal Code of Georgia [including, for example, when a person is caught red-handed] and thus ensures the establishment of additional protection guarantees.

At the same time, as noted above, for maintaining a genuine balance between the security of the state and personal freedom, it is necessary to ensure that any deprivation of freedom during a criminal prosecution is based on exclusive grounds, is an exceptional measure, objectively justified and reasonably long.[189] As the study of court practice re-

[187] See, for instance, Ramishvili and Kokhreidze vs Georgia, application No. 170406, 13.01.2009.

[188] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, 211.

[189] Y. Aydin, The delimination of the scope of one of the guarantees of personal security set out in the European Convention on Human

veals, an upward trend, though insignificant, is still observed in applying detention [in 2009, the indicator stood at 51.1 percent, while it reached 52.6 percent in the first quarter of 2010. In 2008, it comprised 45.3 percent]. Courts use pre-trial detention rather often and this measure is also frequently applied to minors, the elderly and sick persons and detentions are often based on so-called trite substantiations lacking comprehensive and detailed arguments. In frequent cases, unfortunately, judges share scarce arguments presented by the prosecution, do not consider concrete factual circumstances, do not detail in their decisions the circumstances that serve as grounds for the probable cause that a defendant may abscond or obstruct the administration of justice, and they also do not substantiate the necessity and proportionality of applying detention. Their decisions often lack a detailed and deep critical analysis of the materials of the case. In the absence of all of this, the guarantees established under the law lack any sense and lose practical meaning, which has been repeatedly pointed out by the European Court as well.[190]

Along with detention, the new code establishes the possibility of using other punitive measures commensurate with the aim of detention, provides a possibility of applying several measures simultaneously and, at the same time, establishes only a sample list of these measures thus facilitating the development of the so-called “judge law”, on the one hand, and a decrease in detention cases to the minimum, on the other hand. This further increases the need for the substantiation of the detention and its length.

Article 206 [as well as Article 207] provides in detail the criteria for the consideration of the admission of a request related to detention and obliges judges to examine the factual and formal (procedural) grounds of the request. However, it says nothing about a judge’s obligation to provide a detailed substantiation of the decision on the merits of the request, based on the factual circumstances of the case. In particular, Paragraph 6 of Article 206 states that “the decision on the application, change or nullification of detention shall indicate the date and the place of the decision, the names of the judge, prosecutor, accused and his lawyer, the essence of the presented charge, the instructions on the application, and the change or denial of detention. Moreover, it shall precisely indicate the essence of the decision and the addressee of the decision, which official or entity is responsible for the implementation of the decision, the rule of its appeal, the signature of the judge and the seal of the court”. Thus, the code does not formally establish the obligation to substantiate a decision.

As noted above, according to practical recommendations for Magistrate Judges, “A judge shall substantiate which factual or procedural circumstances [or both] exclude the use of detention or which factual or procedural circumstances [or both] justify the suf-

Rights, p. 14.

[190] See, e.g., Z.N.S. v. TURKEY(Application no. 21896/08),19.01.2010; mutatis mutandis, Stoichkov v. Bulgaria, no. 9808/02, § 66 in fine, 24 March 2005; and Vachev v. Bulgaria, no. 42987/98, § 71, ECHR 2004-VIII.

ficiency of, say, the use of bail for ensuring the aims of detention".[191] At the same time, to substantiate the use of a particular punitive measure, it provides the following sample wording for the motivation part of a court decision: "essential procedural violations during the detention of an accused, the institution of criminal prosecution against the accused, and the obtaining of evidence, which would result in the denial of detention, are not established from the case materials [protocols of the relevant investigative and other procedural actions].

The evidence indicated in the resolution on instituting a criminal prosecution against the accused [a list of, for example, search and identification protocols] and other materials provide factual circumstances [sufficient evidence] that are sufficient to use detention against the accused".[192]

Therefore, a judge has no formal obligation to consider the evidence indicated in the request of the parties and presented by them at the hearing and has no obligation to substantiate the threat that the accused may go into hiding or obstruct justice, according to the above-mentioned criteria.

The issue becomes more urgent due to the fact that although, by establishing neither the minimum term of detention nor the periodicity for reviewing detention, the new code envisages the introduction of higher standards in the process that imply the possibility for determining the individual term of detention based on the circumstances of the case. At the same time, it creates the possibility for the automatic use of detention for 60 days in any case. Even though the Strasbourg case law does not consider a two-month detention to be a violation, it emphasises the link between the length of the term and the issue of the conscientious performance of duties by investigative bodies and determines that it is unacceptable to restrict freedom for the purposes of facilitating an investigation, to apply detention for the entire term of the investigation, etc.

The new Code does not envisage a list of grounds for the continuation of detention and in contrast to the current Code does not set out all of the criteria for the extension of detention, such as the complexity of the case, the change of the degree of severity of charge, etc. At the same time, the prosecution is no longer formally obliged to substantiate the necessity for extending the detention and to prove that the investigation was conducted with due diligence by investigative bodies, as the code no longer provides for the extension of detention. Therefore, it no longer provides for such issue as which documents should serve as the basis for extension, how many days prior to the expiration date the court should consider the issue of the prolongation of detention or what procedure the court should apply.

[191] Practical recommendations for magistrate judges on the main issues of criminal justice process, 24.12.2007, 22.

[192] Ibid., p. 21

Article 206.8 of the CPC of Georgia grants the defence the right to apply to court at any time with the request to change the detention, provided that the request is connected with new circumstances, which were not known at the time when the detention was applied. Accordingly, the code does not envisage any revision of the detention unless new circumstances are uncovered. The issue is further complicated as it is unclear what will be regarded as new circumstances by the court. In particular, it is unclear whether the court will mull over the issue of changing the punitive measure if new circumstances were found during the initial 15 days, when everyone was interrogated and all of the evidence obtained could potentially be blocked by the accused and within the following 15 days, an investigation into the case did not take place. A literal analysis of the article shows that the burden of proof for the detection of new circumstances rests with the defence whereas "habeas corpus implies that a person who appeals with the request of control shall first submit prima facie evidence and a defendant authority, which bears the burden of proof, shall substantiate the legality of the decision on detention".[193]

The Georgian Constitution defines differentiated maximum terms for the deprivation of liberty [9 months, 48 hours, 24 hours], though it says nothing of the reasonability of the detention, which differs from the requirement of observing the maximum terms.[194] The CPC of Georgia repeats this provision, but does not fill the existing gap. Thus, although the code determines the limits of the length of detention before the pre-trial hearing as well as the entire length of the proceeding, the above does not rule out the use of an unreasonable term of detention in the criminal proceeding on the grounds of its short length, as it is concrete circumstances of the case and not a mechanic length of the term that determines the reasonability of the term.

The new code significantly decreases the length of detention as a punitive measure and by the deregulation of the initial minimal length of detention allows the subject conducting the proceeding to take into account the circumstances of the case and the personality of the defendant and to establish a proportional and fair term, but it does not determine the compulsory periodicity for reviewing the length of detention, thus enabling a court to use the detention for the entire period of the investigation. This conflicts with international standards and ECtHR case law. That's why it is of the utmost importance to introduce effective mechanisms for the monitoring of the terms of detention and to reasonably restrict the discretionary authority of the prosecution - to establish a reasonable periodicity for reviewing the terms of detention. Especially considering that the code envisages the extension of the investigation and the criminal prosecution even beyond the limits established under the code on the basis of a request from the accused to ensure the aims of a fair court trial.

[193] Page 109.

[194] See Article 18 of the Constitution.

Thus, although the new CPC of Georgia rests on the principle of the presumption of freedom of a person, defines the principle of using an arrest and detention on exclusive grounds, the fulfilment of international obligations and standards in the criminal proceedings will still largely depend on the decency of persons conducting a proceeding and the due performance of the discretionary rights granted to them, on the one hand, and on the amendment of the code to improve procedural legislation or the establishment of uniform court practice in accordance with international requirements, on the other hand.