#04-977

24/01/2020

To: Mr Nikoloz Marsagishvili,

Chairman of the Tbilisi City Court

**Amicus Curiae Opinion**

Based on the application by defence lawyer Dimitri Sadzaglishvili, Transparency International Georgia has examined the criminal case #010181119001 involving the charges against Giorgi Rurua.

A review of the case materials indicates that, while conducting investigative actions, the prosecution may have ignored the requirements of the law, unlawfully restricting Giorgi Rurua's rights and freedoms established by the Georgian Constitution and international acts. Consequently, we consider it important to present an amicus curiae opinion on these matters. [1]

**I. Grounds for presenting amicus curiae**

According to the Georgian Code of Criminal Procedure (GCCP or Code of Procedure), an "interested person who is not a party to a criminal case under review, may, at least five days before a hearing of the case on the merits, submit to the court in writing his/her own written opinion with regard to this case." [2]

It may appear that an amicus curiae opinion must only be considered during a hearing of the case on the merits. However, current legislation does not prohibit presenting it at an earlier stage. Moreover, we believe that an amicus curiae opinion will help the judge presiding over the pre-trial session to pass a lawful and fair ruling based on arguments.

Transparency International Georgia is aware that an amicus curiae opinion is of recommendatory nature and notes that its presentation does not serve the purpose of supporting either party's

[1] Additionally, we would like to inform you that we are prepared to provide oral explanation at the process.

[2] The Georgian Code of Criminal Procedure, Article 55, Paragraph 1.

position but only aims to assist the court in assessing legal matters and passing judgement.[3] Taking into consideration the arguments which it contains will facilitate effective delivery of justice, [4] the satisfaction of public interest, [5] and strengthening of the trust in the judiciary.[6]

## II. Factual circumstances of the case

According to the charges, Giorgi Rurua is accused of committing actions punishable under Paragraphs 3 and 4 of Article 236 of the Georgian Criminal Code (GCC) which involves illegally purchasing, storing, or carrying a firearm. According to the prosecution, the totality of facts and information which the case contains indicates that Giorgi Rurua was carrying illegally purchased firearm and ammunition near the Vake cemetery on Chavchavadze Avenue in Tbilisi on 18 November 2019.

Additionally, Giorgi Rurua is accused of committing action punishable under Paragraph 1 of Article 381 of the Criminal Code: Failure to comply with a court ruling and obstruction of its execution. The prosecution believes that the defendant's refusal to provide samples of saliva and fingerprints amounts to a failure to comply with a court order and therefore constitutes action punishable under the Criminal Code.

Giorgi Rurua denies having illegally possessed a firearm and ammunition, while also disagreeing with the charges under Article 381 of the GCC. According to the defence, Giorgi Rurua was not searched near the Vake cemetery and the police officers consequently did not seize the firearm and the ammunition from him, while the defendant only refused to provide samples because the police officers unlawfully moved traces of his DNA to the weapon which they had "seized" at the initial stage of the investigation.

## III. Giorgi Rurua's personal search

Although the court has recognized Giorgi Rurua's personal search as lawful, we consider it appropriate to examine the lawfulness of this investigative action. A person's right to privacy is restricted during the personal search, [7] so the lawfulness of the investigative action is essential

[3] Chang, 'How Does the Amicus Curiae Submission Affect a Tribunal Decision?', 30 *Leiden Journal of International Law* (2017) 647.

[4] Berg, 'The Limits of Friendship: The Amicus Curiae in Criminal Trial Courts', 59 *Criminal Law Quarterly* (2012) 67.

[5] Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy', 72 *The Yale Law Journal* (1963) 694.

[6] Mohan, 'The Amicus Curiae: Friends No More?', *Singapore Journal of Legal Studies* (2010) 352.

[7] The Georgian Constitution, Article 15.

both in terms of the protection of the rights of the parties to the process and in terms of effective delivery of justice.

An urgent investigative action usually passes several stages of judicial control. Aside from the initial examination, the pre-trial session judge also examines the lawfulness of the investigative action.[8] At this point, the judge is not restricted by the court's decision at the investigation stage.[9]

We believe that Giorgi Rurua's personal search was conducted with essential violations of the law which could serve as a ground for declaring this investigative action inadmissible as evidence. The following circumstances need to be assessed appropriately in order to make a correct decision on the matter:

*3.1 Grounds for personal search*

A report by Pavle Macharashvili, head of the 7th Unit at the Detectives (Operative) Directorate of the Internal Affairs Ministry's Tbilisi Police Department, served as the basis for launching the investigation. The report contains information about a possible crime committed by Giorgi Rurua. While a report is a sufficient basis for the commencement of an investigation, it is debatable whether a search conducted on the basis of information provided secretly by an undercover officer or any other person is lawful.

According to one view, the information provided to an investigative body by a confidential informant and an interview with a report's author does not meet the standard of probable cause unless supported by additional investigative activities. There is, therefore, no sufficient cause for a search.[10] Considering the fact that neither the prosecution nor the defence has the possibility

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The Georgian Code of Criminal Procedure, Article 112, Paragraphs 1, 5.

[8] The Georgian Constitutional Court's 31 July 2015 decision #2/2/579 in the *Maia Robakidze v. Georgian Parliament* case, I-26.

[9] The Tbilisi Court of Appeal Investigative Collegium's 14 July 2016 ruling #1g/1197, http://library.court.ge/judgements/5232016-07-20.pdf [accessed on 23.12.2019]; The Tbilisi Court of Appeal Investigative Collegium's 20 October 2016 ruling #1g/1614-16 http://library.court.ge/judgements/98182016-10-24.pdf [accessed on 23.12.2019]; The Tbilisi Court of Appeal Investigative Collegium's 26 November 2019 ruling 1g/1960-19.

[10] The Georgian Constitutional Court's 24 October 2019 protocol note #2/11/1276 in the *Giorgi Keburia v. Georgian Parliament* case, I-9 and 11.
Chomakhashvili, Tomashvili, Dzebinauri, Osepashvili and Pataridze, *Evidence in Criminal Process* (2016), 149, https://www.osgf.ge/files/2016/Publications/merged_document_2.pdf [accessed on 23.12.2019].

of identifying the informant and asking him/her questions,[11] such information does not meet even the minimal standard of reliability.[12]

In contrast, the executive branch believes that the goal of interviewing a law enforcement officer is to verify that a source of information is real and trustworthy, which provides additional information and constitutes sufficient standard for conducting an investigative action.[13]

According to the practice established by general courts, a police officer's report and interview are enough for conducting the personal search without a court warrant. According to the court, a party acting based on the standard of probable cause is not required to provide the kind of irrefutable evidence that is required when evidence is assessed based on the standards of high probability and/or beyond a reasonable doubt.[14]

The European Court of Human Rights (the European Court) allows for the possibility of using the information provided by an anonymous informant at the investigation stage.[15] Guaranteeing protection of the informants' anonymity may serve the purpose of protecting their life, health, freedom, and security, although it is necessary to strike the balance between their interests and a defendant's right to a fair trial.[16] The European Court has explained that, if a defendant's conviction is based entirely or essentially on the kind of evidence that the defence had no possibility to examine at any stage, the defendant's right to a fair trial is unduly restricted.[17]

For years, the rules for conducting a search based on the information provided by a confidential informant or provided secretly by any other individual were regulated in the United States according to the two-pronged test (*Aguilar–Spinelli test*) established by the Supreme Court.[18]

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[11] According to the Georgian Organic Law on the Prosecutor's Office, Article 25, Paragraph 4, and the Georgian Law on Operative and Search Activities, Article 21, Paragraph 2, the data about the person is providing or has previous provided confidential assistance to an operative and search body is not subject to prosecutorial oversight;
According to Georgian Law on Operative and Search Activities, Article 5, Paragraph 4, it is prohibited to publicize or disclose the identity of an operative and search body's secret employee or informant.

[12] The Georgian Constitutional Court's 24 October 2019 protocol note #2/11/1276 in the *Giorgi Keburia v. Georgian Parliament* case, I-11.

[13] Ibid., I-25.

[14]The Tbilisi Court of Appeal Investigative Collegium's 8 October 2015 ruling #1g/1547, http://library.court.ge/judgements/72182015-10-19.pdf [accessed on 23.12.2019].

[15] *Teixeira de Castro v. Portugal*, 9 June 1998, Reports of Judgments and Decisions 1998-IV [ECHR] § 35; *Ramanauskas v. Lithuania* [GC], no. 74420/01, 5 February 2008 [ECHR] §49-53.

[16] *Doorson v. the Netherlands*, 26 March 1996, Reports of Judgments and Decisions 1996-II [ECHR] §70.

[17] *Al-Khawaja and Tahery v. the United Kingdom [GC],* nos. 26766/05 and 22228/06, 15 December 2011 [ECHR] §128.

[18] *Aguilar v. Texas*, 378 U.S. 108 (1964) https://supreme.justia.com/cases/federal/us/378/108/ [accessed on 23.12.2019];

While deciding on the lawfulness of a search, the court examined (a) whether there were facts pointing to an individual's possibly having committed a crime, as well as (b) the trustworthiness of the informant or the indisputability of the information. [19]

The Supreme Court explained in *Illinois vs Gates* that the two-pronged test's criteria are relevant factors but, since it is too rigid, formalistic, and impractical, they must be evaluated in their entirety rather than separately.[20] The Court ruled that the totality of the circumstances which amounts to probable cause to believe that a person has committed a specific crime is sufficient condition for conducting a search. [21] It is believed, however, that applying this standard to the searches conducted based on the information provided secretly by a confidential informant or any other person provides the police with extensive power, violates the balance between the public and the private interests, and increases the danger of arbitrariness. [22]

It should be noted that the Georgian Constitutional Court has admitted for consideration on the merits an appeal concerning the constitutionality of a search conducted based on the information provided by a secret officer/confidential informant and of the convictions based on such information. [23] The Court decided that the constitutional appeal highlighted a clear and obvious substantive link between the disputed provisions, an individual's right to privacy, and the principle whereby a conviction must be based on irrefutable evidence.

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*Spinelli v. United States*, 393 U.S. 410 (1969) https://supreme.justia.com/cases/federal/us/393/410/ [accessed on 23.12.2019].

[19] Moore, 'Fourth Amendment: Totality of the Circumstances Approach to Probable Cause Based on Informant's Tips', 74 *Journal of Criminal Law and Criminology* (1983) 1249.

[20] *Illinois v. Gates*, 462 U.S. 213 (1983) https://supreme.justia.com/cases/federal/us/462/213/ [accessed on 23.12.2019].

[21] Ibid.

[22] Woollcott, 'Abandonment of the Two-Pronged Aguilar-Spinelli Test Illinois v. Gates', 70 *Cornell Law Review* (1985) 316.

It should be noted that lawfulness of search is still assessed based on the two-pronged test in the states of New York, Vermont, Alaska, Washington, Hawaii, and Massachusetts.

[23] The court has accepted for consideration on the merits the constitutional appeal No1276 (*Giorgi Keburia v. Georgian Parliament*) in the part of the appeal which concerns:

a) The constitutionality of the Georgian Code of Criminal Procedure's Article 119, Paragraphs 1 and 4, Article 121, Paragraph 1, in relation to Article 15 of the Georgian Constitution;

b) The constitutionality of the Georgian Code of Criminal Procedure's Article 13, Paragraph 2, second sentence, in relation to Article 31, Paragraph 7 of the Georgian Constitution.

https://www.constcourt.ge/ka/judicial-acts?legal=1933 [accessed on 23.12.2019].

No final decision has been made regarding the constitutionality of the disputed provisions.

Since the judge of a pre-trial session must apply during the adjudication of a case the provisions which regulate personal search and have been admitted for consideration on the merits in the Constitutional Court, we would remind the court of its power to suspend the adjudication of the case based on the incompatibility of the aforementioned provisions with the Constitution and send an application to the Constitutional Court. [24]

*3.2 Time of commencement of the personal search*

According to the information provided in the criminal case, Giorgi Rurua's personal search commenced at 13:02, i.e. within a minute of the end of the interview with the report's author (at 13:01). It is questionable whether the mandatory procedural actions could have been completed within a minute.

Before conducting an urgent search, the investigator is required to present a resolution to the person who is being searched.[25] Obviously, the presentation of a resolution must be preceded by its creation. The resolution on conducting Giorgi Rurua's personal search contains important information, including the date and the place of its creation, the identity of the person who wrote the resolution, the number of the criminal case, the reasons for the urgency, the location of the search, and the item to be seized.

We consider it highly unlikely that the aforementioned information could have been included in the resolution and presented to Giorgi Rurua in 60 seconds. This assumption is reinforced by the notes made at the bottom of the resolution: (a) "Giorgi Rurua has read the resolution on conducting his personal search but has refused to sign it for unknown reasons." (b) "He has also been handed a copy of the resolution." Obviously, it would have taken time to inquire about the reasons for the refusal to sign and to draw the conclusion that Giorgi Rurua was refusing to sign it for unknown reasons. Moreover, making a copy of the resolution and handing it to Giorgi Rurua would have required additional time.[26]

The entirety of the aforementioned circumstances leads us to conclude that (a) the resolution on conducting an urgent search was written before 13:01 (before the author of the report had been interviewed); [27] or (b) that Giorgi Rurua's personal search began later than 13:02 and the personal search protocol contains incorrect information; or (c) that Giorgi Rurua's personal search did not

[24] The Georgian Organic Law on Georgian Constitutional Court, Article 19, Paragraph 2.

[25] The Georgian Code of Criminal Procedure, Article 120, Paragraph 2, and Article 111, Paragraph 4.

[26] It should be noted that the Code of Criminal Procedure does not require that a copy of the resolution be provided.

[27] In that case, the report would be the sole basis for conducting Giorgi Rurua's personal search, which is insufficient information to meet the standard of probable cause.

take place near the Vake cemetery at all and the time was written in the protocol merely as a formality.[28] In any case, it is clear that the requirements of the law were ignored, which, considering the violations detailed in sections 3.3.-3.4, must result in the protocol of Giorgi Rurua's personal search being declared inadmissible as evidence.

*3.3 Contents of the personal search protocol*

An investigative action protocol which is written during the investigative action or after its completion must contain the formal and substantive requisites established by Chapter XV of the Code of Criminal Procedure. We believe that the requirements of this chapter were violated when the protocol of Giorgi Rurua's personal search was compiled.

An item discovered during a search must, if possible, be presented to the persons participating in the investigative action, whereupon it must be seized, described in detail according to its individual and typological characteristics, sealed, and, if possible, packaged. Along with a seal, the packaged item must carry the date and the signatures of the persons who participated in the investigative action.[29]

It is not clear why the investigator ignored the aforementioned requirements of the procedural law as he only provided a general description of a firearm. The personal search protocol only says that a "firearm of dark metallic colour" was seized during Giorgi Rurua's personal search. According to the findings of the ballistic examination, the firearm's number (ЛОН1376) does not show any trace of mechanic impact and is legible even with a naked eye (see the descriptive part of ballistic examination findings #1261/b and photo #8). Paradoxically, the investigator provided a detailed description of the items that were less important or unimportant for the case, including clothing -- "greyish pants of 511 brand", the metallic key -- "with the inscription ADFQS", and a banknote with serial number "AA16384627."

Moreover, the personal search protocol says that the seized weapon was placed in a package on which signatures were placed and the criminal case number and the investigative action date were written. The ballistic examination's photographic list (see the photos #1, #2, #3, #4) clearly

[28] This version has been confirmed by Giorgi Getiashvili and Shmagi Asanidze, who have said that Giorgi Rurua's personal search did not take place on the spot. Moreover, the defence's position that Giorgi Rurua had no connection to the firearm (ЛОН1376) is reinforced by the findings of the chemical examination #599/ran and dactyloscopic examination #3727/d (Giorgi Rurua's clothes showed no signs of metallization and the firearm did not have Girogi Rurua's fingerprints).

[29] The Georgian Code of Criminal Procedure, Article 120, Paragraph 6, Article 135, Paragraph 2, Article 77, Paragraph 2.

shows that the seal only carries the signatures of the persons who conducted the investigative action, the date, and the case number. The seal does not contain either Giorgi Rurua's signature or the relevant note about the refusal to sign.

It should also be noted that no video or photo records of the actions described in the personal search protocol were made. Although this is not an imperative requirement of the Code of Criminal Procedure, considering the fact that those who conducted the investigative action had access to the technical means (e.g. a cellular phone), it is not clear why they did not take advantage of it and did not take videos or photos of the investigative action.[30]

Since the current Code of Criminal Procedure does not require inviting a witness to observe a search, [31] the investigative action's participants often only include the person to be searched and law enforcement officers. They could offer diverging accounts and positions as to how the investigative action proceeded. For this reason, the use of technical means is decisively important in terms of recording facts and events, restoring the picture of the investigative action, and presenting it to the parties to the process.[32]

Considering the fact that (according to the personal search protocol) three police officers took part in the investigative action and Giorgi Rurua offered them no physical resistance, one of the police officers could easily have taken videos or photos. Such action would have dispelled the legitimate suspicions as to how Giorgi Rurua's personal search was conducted.

### *3.4 Other irregularities in personal search protocol*

According to the protocol of Giorgi Rurua's personal search, the search proceeded in a calm situation and without any resistance. This record contradicts Giga Darsavelidze's statement during the interview. He said that, during the personal search, he asked Giorgi Rurua to unblock the cellular phone, which the latter refused to do.[33] No such information appears anywhere in the personal search protocol.

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[30] The Georgian Code of Criminal Procedure, Article 134, Paragraph 4.

[31] Compare the Code of Criminal Procedure (20 February 1998), Article 102, the Georgian Code of Criminal Procedure (9 October 2009), Article 331 and Article 333, Paragraph 3.

[32] The Tbilisi Court of Appeal Investigative Collegium's 2 February 2018 ruling No1g/133-18, http://library.court.ge/judgements/64672018-02-05.pdf [accessed on 23.12.2019].

[33] The protocol of Giga Darsavelidze's interview on 19 November 2019: "We offered Giorgi Rurua to turn on the phone in order to record the IMEI code, which he refused to do." [sic]

The investigator had a duty to reflect how the investigative action proceeded in the personal search protocol in detail, indicating all circumstances that were important for the case.[34] He should, therefore, have recorded the fact of resistance in the protocol.[35]

Moreover, it is not clear why irrelevant items like a metal key, a cellular phone charger, a wallet, business cards, and 18 bonus cards of different stores were seized during Giorgi Rurua's personal search.

It is the items mentioned in a court warrant/an investigator's resolution that is usually seized during a search. An object containing information that (a) may be of evidentiary value for that case, (b) has been withdrawn from civil circulation, or (c) clearly points to another crime may be also be perpetrated.[36]

No investigative action has been taken concerning the aforementioned items seized during Giorgi Rurua's personal search. Neither do they contain evidence of a crime or guilt.[37] Consequently, the purpose of seizing those items is not clear.

The requirements of the Code of Criminal Procedure were therefore violated substantively when the protocol of Giorgi Rurua's personal search was compiled and the firearm was sealed. Gross disregard for the provisions of the Code of Criminal Procedure and the content of the examination's findings[38] cast doubts upon Giorgi Rurua's connection with the firearm and the authenticity of the evidence.[39] This constitutes grounds for declaring the personal search protocol and the seized material evidence inadmissible.

**IV. Compliance of automobile's search with law**

According to the information provided in the criminal case, the police officers' initial contact with Giorgi Rurua and the individuals who accompanied him took place at approximately 13:00. The prosecution also claims that there was an urgent necessity to search for Giorgi Rurua's

[34] The Georgian Code of Criminal Procedure, Article 134, Paragraph 3.

[35] The Georgian Code of Criminal Procedure, Article 135, Paragraph 2.

[36] The Georgian Code of Criminal Procedure, Article 120, Paragraph 5.

[37] None of the objects contain information that would be important for the case and could be used to confirm the charges.

[38] The findings of the dactyloscopic examination #3727/d and chemical examination #599/ran.

[39] The authenticity of evidence is linked, first and foremost, to the lawfulness of the method by which it was obtained.

automobile.[40] According to the resolution, delaying the search could have resulted in the destruction of the factual data essential to the investigation. Contrary to this assertion, the search of the automobile commenced at 16:40, three hours and 40 minutes after the initial interaction with Giorgi Rurua and the persons who accompanied him.

It is also problematic that the automobile was searched not on the spot (near the Vake cemetery road) but outside the Tbilisi Police Department's administrative building.[41] According to the police officers, the automobile could not be searched on the spot due to the narrow road, congestion, and excessive interest from the individuals passing by.

We believe that the aforementioned argument is unconvincing because (a) the "narrow road" is only 300-400 meters long.[42] Consequently, in the circumstances described above, Giorgi Rurua's automobile should have been moved outside this stretch of the road, whereupon the investigative action should have been conducted immediately; (b) given the number of the police officers present,[43] it was possible for them to protect the area and conduct the investigative action without impediment. In the event that it would still be necessary to move the automobile to the yard of the investigative body's administrative building, it should have been seized and sealed under the conditions of urgency.

It should be noted that the automobile was not searched immediately after its transfer to the yard of the investigative body's administrative building. According to the investigation's materials, the commencement of the automobile's search (16:40) was preceded by Shmagi Asanidze's personal search (14:08-14:33). Considering the investigative body's assertion that there was a case of urgency, it is not clear why the automobile's search was not conducted immediately -- before Shmagi Asanidze's personal search or soon after its completion.

Shmagi Asanidze's statement regarding the suspicious actions by the law enforcement officers[44] suggests that the police officers were only interested in Giorgi Rurua and that they committed

[40] See the 18 November 2019 resolution on conducting Shmagi Asanidze's personal search in the event of urgent necessity and the 19 November 2019 resolution on conducting the search of the automobile in the event of urgent necessity.

[41] The distance between the two objects is more than eight kilometers. https://cutt.ly/Brthvob [accessed on 23.12.2019].

[42] https://cutt.ly/yrthRmf [accessed on 23.12.2019].

[43] According to the Giorgi Getiashvili's 18 November 2019 interview protocol, aside from the patrol crew, there were five or six police officers on the location of the incident. According to the protocols of Giga Darsavelidze's, Beka Makharadze's, Giorgi Koghuashvili's, and Kartlos Khupenia's interviews, upon receiving the information about the crime, several operative groups were formed which departed for the place of the incident.

[44] See Shmagi Asanidze's 18 November 2019 interview protocol which describes the events that took place after the automobile was stopped near the Vake cemetery and Giorgi Rurua was detained. Specifically, two police officers got

unlawful actions. It is also worth considering the fact that Shmagi Asanidze's personal search which supposedly took place under the circumstances of urgent necessity was treated as a mere formality. The location of the investigative action points to this. The protocols of Shmagi Asanidze's questioning and personal search confirm that the personal search was conducted in the Tbilisi Police Department's administrative building after Shmagi Asanidze had left personal items in storage before entering the building. It is illogical to argue that, after leaving behind his personal items and undergoing a security check before entering the building, Shmagi Asanidze would have carried any illegal items or objects important for the case. Moreover, Giorgi Getiashvili, the other person who accompanied Giorgi Rurua, was not searched at all. If there were grounds for Shmagi Asanidze's personal search, it is not clear why the question of conducting the investigative action vis-à-vis Giorgi Getiashvili under the same circumstances was not raised.[45]

Although the Code of Criminal Procedure does not establish the order in which investigative actions must be conducted, an investigator has a duty to conduct a comprehensive, full, and objective investigation.[46] At the same time, investigative actions must comply with the principles of lawfulness and the protection of constitutional rights and freedoms. The manner in which investigative actions are conducted and the process of investigation must not create a sense of lack of objectivity and bias.

A piece of evidence is inadmissible if it has been obtained according to the rules established by the Code of Criminal Procedure but a reasonable doubt exists that it has been subjected to manipulation has not been dispelled.[47] Yet, while the requirements of the Code of Criminal

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into Shmagi Asanidze's automobile. Following their instructions, he continued to move along the Tskhneti highway. He stopped near the Student Town for approximately 10 minutes whereupon we began to move in the direction of the Tbilisi Police Department's administrative building. After arriving there, the police officer who sat behind him left the vehicle, took some item from an unidentified individual, and returned to the car. Although he locked the car after this, he left the keys in the storage at the police department's lobby along with other personal items. It was after these events and his entering the police office that Shmagi Asanidze's personal search was conducted.

[45] The suspicion that the actions were a formality is reinforced by the 18 November 2019 protocol of arrival at the apartment. According to the prosecution, it wanted to conduct an investigative action in Giorgi Rurua's residential apartment [apartment search] but decided against it solely because the apartment was locked. If the arrival at the apartment was not a formality and there was, indeed, a reason for conducting the investigative action, it is not clear why the defendant's apartment was not inspected again later or why other means established by the Code of Criminal Procedure were not used.

[46] The Georgian Code of Criminal Procedure, Article 37, Paragraph 2.

[47] The Georgian Code of Criminal Procedure, Article 72, Paragraph 2: "Evidence shall also be considered inadmissible if it has been obtained in the manner prescribed by this Code but a reasonable doubt has not been refuted that it has been replaced, or that its properties have been substantially changed or that the traces remaining on it have substantially disappeared."

Procedure were formally observed when the automobile was searched, the information provided by Giorgi Getiashvili and Shmagi Asanidze during the questioning, as well as the manner in which Shmagi Asanidze's personal search and the search of the automobile were conducted provides the basis for a reasonable suspicion that the silencer ended up in Giorgi Rurua's automobile as a result of an unlawful action by the police officers.

The prosecution which had a duty to prove that the evidence which it has obtained is admissible[48] did not conduct the kind of investigative action that would have examined and refuted the position which the defence and the persons who had accompanied the defendant had expressed at the initial stage of the investigation. It only interviewed the persons who were present at the location of the incident which is a necessary but not a sufficient action for dispelling legitimate suspicions.

Moreover, according to the information made available to the TI Georgia, the investigation has not even begun into the unlawful actions committed by the police officers against Giorgi Rurua. This contradicts the imperative requirement of the Code of Criminal Procedure whereby an investigator and a prosecutor have a duty to start an investigation upon receiving information about a crime.[49] Multiple international instruments for the protection of human rights point to the state's duty to conduct a timely, thorough, and effective investigation that will ensure remedy for a violated right, identification of the perpetrators, and commencement of prosecution against them.[50]

[48] The Georgian Code of Criminal Procedure, Article 72, Paragraph 3.

[49] The Georgian Code of Criminal Procedure, Article 100, Paragraph 1.

[50] The International Covenant on Civil and Political Rights, Article 2, Paragraph 3; the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 13;
UN Human Rights Committee (HRC), General comment no. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, para 15;
Ochoa S. J. O., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (2013), at 37-48;
Lavrysen L., "Protection by the Law: the Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights", in Y. Haeck and E. Brems (eds.), *Human Rights and Civil Liberties in the 21st Century* (2014) at 111-117.

## V. Right to defence

The defence has pointed out that Giorgi Rurua's right to defence was restricted unlawfully[51] because, at the initial stage of detention and investigation, he was denied the possibility of contacting a lawyer and family members.

The right of access to a lawyer is a fundamental element of a fair trial.[52] Ensuring adversarial proceedings, selecting an effective strategy, timely conduct of investigative actions, remedy for violated rights, and prevention of ill-treatment and arbitrariness of law enforcement officers all depend on a defendant's timely and unrestricted communication with a lawyer.[53] It is essential for a detained person to be able to freely choose a lawyer and to have appropriate communication with him/her.[54]

The Code of Criminal Proceedings reiterates the principles established by international acts and requires a representative of a law enforcement body to read the so-called Miranda Rights to a suspect in the event of arrest,[55] including the right to choose and have a lawyer.[56] A suspect also has the right to notify a family member or a close relative immediately after the arrest about the fact of having been arrested, as well as his/her location and condition.[57] This norm aims to provide a suspect with sufficient safeguards so that a lawyer can become involved in the criminal case in a timely manner. We must distinguish between this right and the prosecution's duty to

[51] The Georgian Constitution, Article 31, Paragraph 3; the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, Paragraph 3, Sub-Paragraph "c"; the International Covenant on Civil and Political Rights, Article 14, Paragraph 3, Sub-Paragraph "d".

[52] *Demebukov v. Bulgaria*, no. 68020/01, 28 February 2008 [ECHR] §50.

[53] Beuze v. Belgium [GC], no. 71409/10, 9 November 2018 [ECHR] §125-130, 133-134;
UN Human Rights Committee (HRC), CCPR General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 23 August 2007, para 23;
UN General Assembly (GA), United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), GA Resolution 70/175, 8 January 2016, rule 61;
Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2005) N. P. Engel Verlag (Germany), at 24-27.

[54] UN Basic Principles on the Role of Lawyers, 7 September 1990, arts. 7 and 8.

[55] Miranda v. Arizona, 384 U.S. 436 (1966), https://supreme.justia.com/cases/federal/us/384/436/ [წვდომის თარიღი: 24.12.2019].

[56] The Georgian Code of Criminal Procedure, Article 38, Paragraphs 2 and 5.

[57] The Georgian Code of Criminal Procedure, Article 38, Paragraph 10.

inform a suspect's family member, relative or friend of their arrest within three hours of the arrest.[58]

The circumstances of the criminal case indicate that the investigative body wanted to prevent the timely involvement of a lawyer. Our attention is drawn, first and foremost, to the protocol of defendant Giorgi Rurua's interview on 18 November 2019 which, according to the document, took place between 14:30 and 14:45. It indicates that the right to defence was explained to Giorgi Rurua along with the voluntary nature of the interview. However, unlike other interview protocols in the case, it does not contain a reference to Giorgi Rurua's position on having a lawyer.

It is unlikely that the defendant would have decided not to use a lawyer's services, had his rights been fully explained to him, given that he declared his distrust in the investigation from the very beginning. It would be baseless to claim that Giorgi Rurua could have refrained from demanding being allowed to contact a lawyer because of financial or other personal reasons. The European Court stated in *Salduz v. Turkey* that a defendant is particularly vulnerable during an investigative action and can easily succumb to compulsion or other types of harassment. These risks can be alleviated through the timely involvement of a lawyer.[59]

Moreover, the protocol of notification of a close relative about Giorgi Rurua's arrest was compiled at 16:03. We believe that the three-hour period allocated for the notification should have been calculated not from the time of the arrest (13:15) but from the commencement of personal search (13:02).

According to the Code of Criminal Procedure, a person is considered arrested from the moment when his/her freedom of movement is restricted.[60] The European Court stated in *Gillan and Quinton v. the United Kingdom* that, despite its short duration, a person's freedom of movement is restricted during a search, so the interference with the right of freedom is clear.[61]

Similarly, the US Supreme Court stated in *Brendlin v. California* that a person who has been stopped by the police has had his/her freedom of movement restricted, and can reasonably assume to be subject to the authority of the police, enjoys a detainee's procedural rights.[62]

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[58] The Georgian Code of Criminal Procedure, Article 177, Paragraph 1.

[59] *Salduz v. Turkey [GC],* no. 36391/02, 27 November 2008 [ECHR] §54-55.

[60] The Georgian Code of Criminal Procedure, Article 170, Paragraph 2.

[61] *Gillan and Quinton v. the United Kingdom*, no. 4158/05, 12/01/2010 [ECHR] §56-57.

[62] *Brendlin v. California*, 551 U.S. 249 (2007) https://supreme.justia.com/cases/federal/us/551/249/ [accessed on 24.12.2019].

For this reason, if a personal search is followed by a person's arrest, the three-hour period must be calculated from the time when the search commenced. Consequently, the failure to issue a notification of Giorgi Rurua's arrest within the established time frame (before 16:02) and the fact that the defendant was denied the possibility of contacting close relatives and a lawyer at the initial stage of the investigation violated the defendant's right to defence.

Other than this, the fact that an investigator seized Giorgi Rurua's personal item based on a court warrant but without a lawyer's participation should be considered a violation of the defendant's right to defence.[63]

The 28 December 2019 court ruling granted the prosecution's motion to seize bedding, clothes, shoes, a toothbrush, a hair comb, and a towel from Giorgi Rurua's cell. An investigator decided to conduct the investigative action on 3 January 2020. He was unable to contact lawyer Dimitri Sadzaglishvili, while Shota Kakhidze told him that he would be unable to attend the investigative action on the same day (Friday), proposing to perform the investigative action on 6 January (Monday) instead. The investigator did not reject this proposal[64] but later decided to seize Giorgi Rurua's personal items from the cell on 3 January without the lawyers' being present.

According to the Code of Criminal Procedure, a defendant has the right to demand a lawyer's presence during an investigative action involving him/her.[65] "If a defence lawyer does not participate in the ordered investigative action with a valid reason, the prosecutor shall be obliged to postpone, only once and for a reasonable period, the investigative action in which the defence lawyer should have participated, but no longer than five days…Non-appearance of a defence lawyer shall not result in the postponement of urgent investigative action."[66]

Investigator Zurab Beruashvili explained during an interview that he decided to conduct the investigative action without a lawyer because there was a danger that the items which were to be seized would be hidden or destroyed and that the court ruling was a compulsory measure.[67] It is not clear how Giorgi Rurua would be able to destroy or hide the bedding, clothes, shoes,

[63] See the 3 January 2020 seizure protocols.

[64] See the 3 January 2020 protocol on cellular phone conversation.

[65] The Georgian Code of Criminal Procedure, Article 38, Paragraph 7.

[66] The Georgian Code of Criminal Procedure, Article 40, Paragraph 3

[67] See the protocol of Zurab Beruashvili's interview. "A judge's warrant is a compulsory measure and it is not mandatory for a lawyer to attend an investigative action." The Code of Criminal Procedure establishes no such reason for restricting a lawyer's participation. An investigative action can be conducted without a lawyer being present if the conditions of urgent necessity are present.

toothbrush, hair comb, and towel since (a) he was in a solitary cell and (b) was under 24-hour visual and electronic surveillance.[68]

Moreover, the investigator did not demonstrate sufficient diligence to ensure a lawyer's attendance during the investigative action. The prosecution did not establish why Shota Kakhidze was unable to participate in the investigation on the same day and whether he had a legit reason for the refusal. The investigator relied solely on the assumption that the lawyers would have informed Giorgi Rurua by Monday whereupon the defendant would destroy or hide the evidence. It is also noteworthy that the investigator only contacted Dimitri Sadzaglishvili and Shota Kakhidze, although Giorgi Chiviashvili represented Giorgi Rurua too.[69]

The aforementioned facts, therefore, confirm that seizing Giorgi Rurua's personal items without a lawyer being present did not serve a legitimate purpose and the right to defence was restricted without justification.

## VI. Failure to comply with the court ruling

*6.1 Taking samples - a type of investigative action*

In order to establish whether the refusal to provide a sample constitutes a failure to comply with a court ruling and obstruction of its execution, it is necessary to establish the place of the sample's collection and its significance in the Code of Criminal Procedure.

The Code's Section IV (Investigation) comprises the following five chapters: Chapter XIV (Grounds for Investigation), Chapter XV (Investigative Actions), Chapter XVI (Investigative Actions Related to Computer Data), Chapter XVI[1] (Covert Investigative Actions), and Chapter XVII (Other Procedural Actions).

We believe that the common view whereby the measures which a criminal investigation involves are divided into investigative actions, procedural decisions, and procedural actions is incorrect.[70] The Code of Criminal Procedure contains no such classification.[71] An investigation is a combination of actions taken under the Code by an authorised person for the purpose of

[68] See the letter #387144/25 by the director of the N8 Facility for Imprisonment and Closed Type of Restriction of Freedom regarding the state of Giorgi Rurua's health.

[69] See the 2019 order #18/11/2019 by law firm Legal Consulting and Services.

[70] See the Tbilisi Court of Appeal Investigative Collegium's 20 October 2016 ruling #1g/1614-16, http://library.court.ge/judgements/98182016-10-24.pdf [accessed on 24.12.2019].

[71] Any investigative action conducted by the prosecution is a procedural action.

collecting evidence relating to a crime.[72] Since the collection of a sample can be a means of confirming or refuting facts, conducting a legal evaluation of an action or protecting the rights and lawful interests of the parties, it must be considered a type of investigative action.

The opposing side could argue, on the other hand, that taking a sample is not an investigative action because it is referred to in Chapter XVII which is devoted to other procedural actions. We believe that such an argument could only be shared if a superficial approach to the matter is adopted. Contrary to this assertion, multiple facts indicate that taking a sample is one of the types of investigative action.

To begin with, the collection of a sample (Articles 147 and 148 of the Code of Criminal Procedure) is part of Section IV (Investigation). The term "other investigative actions" implies that the investigative actions described in the preceding chapters are procedural actions too and vice versa.[73]

Moreover, there is a stronger substantive link between Chapters XV and XVII of the Code of Criminal Procedure than may seem at first. Specifically, only two articles of the Code are devoted to collect a sample.[74] Although they establish the grounds and the rules for taking a sample, they do not establish mandatory elements of a protocol. Undoubtedly, during taking a sample, the parties are guided by the general provisions on an investigative action protocol provided in Chapter XV.[75] Otherwise, it would be impossible to establish whether the requirements of the law were violated during the collection of a sample. Additionally, Chapter XV also details the circumstances which must be taken into consideration when a protocol of asset freeze (a different procedural action referred to in Chapter XVII) is compiled.[76]

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[72] The Georgian Code of Criminal Procedure, Article 3, Paragraph 10.

[73] The laws of multiple countries establish that sample collection is a type of investigative action, including the procedural laws of the Kingdom of the Netherlands (Criminal Procedure Code of the Kingdom of Netherlands, Section 195d (http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf), New Zealand (Criminal Investigations (Bodily Samples) Act 1995 http://www.legislation.govt.nz/act/public/1995/0055/latest/DLM368904.html), Slovakia (Act on Criminal Judicial Procedure, Section 114, https://www.legislationline.org/documents/id/3850), and Azerbaijan (Code of Criminal Procedure, Article 273, https://www.legislationline.org/documents/action/popup/id/8876) [accessed on 24.12.2019].

[74] The Georgian Code of Criminal Procedure, Articles 147 and 148 9Chapter XVII).

[75] The Georgian Code of Criminal Procedure, Article 134.

[76] The Georgian Code of Criminal Procedure, Article 135, Paragraph 2: " A record of arrest, search and/or seizure shall indicate: the place and circumstances of discovering an item, a document, substance or any other object containing information; also, whether it has been handed over voluntarily or removed forcibly. All objects shall be described in the record by indicating their quantity, weight, value (if possible), individual and generic characteristics.

At the same time, the Code of Criminal Procedure refers to cases where two investigative actions are conducted simultaneously and a single protocol is compiled. For example, during the inspection of the place of an incident, no separate protocol is compiled when an object containing information is seized and this investigative action (seizing) is described in the inspection protocol.[77] Similarly, the Code of Criminal Procedure establishes that, during the inspection of an unidentified corpse, another investigative action must also be conducted: fingerprinting and sample collection.[78] Consequently, there is undeniably a substantive link between Chapters XV and XVII of the Code.

It would also be baseless to argue that only the measures established under Chapter XV of the Code of Criminal Procedure qualify as types of investigative action. Operative-investigative activities are an inseparable part of an investigation if they serve the purpose of obtaining evidence.[79]

While assessing a provision, the court must apply the explanation method which explains most clearly and objectively the meaning of the provision, the limits of its application, the aim of the law, and the will of the law.[80] Although the legislators did not include a collection of a sample specifically in the chapter devoted to investigative actions, consideration of the above arguments leads us to conclude that it is a type of investigative action.[81]

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If, when conducting a seizure or search, there is an attempt to destroy or conceal a searched for item, document, substance or any other object containing information, and/or a person to be searched or any other person offers resistance, this shall be indicated in the record…."

[77] The Georgian Code of Criminal Procedure, Article 135, Paragraph 4.

[78] The Georgian Code of Criminal Procedure, Article 128, Paragraph 2.

[79] The Georgian Law on Operative-Investigative Activities, Article 3: " The objectives of operative-investigative activities are to… f) obtain necessary facts in a criminal case."
Aside from investigative actions, operative-investigative activities serve other purposes too. They could be used for identifying or preventing a crime or other type of illegal action, the search for a missing person, or provision of informational and analytical support in the management of penitentiary institutions.

[80] The Georgian Constitutional Court's 13 May 2009 decision #1/1/428,447,459 in the case of *the Georgian Public Defender, Georgian citizen Elguja Sabauri and Russian Federation citizen Zviad Mania v. Georgian Parliament,* II-18.

[81] If the court decides, in spite of the arguments presented above, that sample collection is not an investigative action, we believe that analogy of law must be applied and the rules for conducting an investigative action must extend to sample collection. According to the Georgian Code of Criminal Procedure, Article 2, Paragraph 3, if there is a shortcoming in Georgian law, it is admissible to apply a procedural provision of criminal law by analogy if this does not restrict the human rights and freedoms established by the Georgian Constitution and international treaties. In the case in question, applying a provision by analogy will result in the protection of the defendant's lawful interests rather than restriction of human rights and freedoms.

*6.2 Privilege against self-incrimination*

We believe that the defendant's refusal to participate in the investigative action (the sample collection) and his passive obstruction of it should not result in criminal liability. According to a universally recognized principle, a defendant enjoys the privilege against self-incrimination.[82]

The privilege against self-incrimination implies not only the refusal to testify but also a defendant's right to refuse to participate in investigative actions. The Constitutional Court stated in *Titiko Chorgoliani v. Georgian Parliament*:

> *The privilege against self-incrimination is a fundamental component of the right to a fair trial…this right is closely connected not only to other components of the right to a fair trial, such as the presumption of innocence and the right to defence but also to a number of fundamental principles of the constitution. Protection from compulsion to self-incrimination echoes the most important principle of a person's constitutional rights and freedoms whereby, in a democratic society, a person cannot be considered an object and a means of achieving a goal but should be viewed as a goal and landmark on which the state's policy in any area is based.*[83]

We believe that the purpose of a court's permission to collect a sample is not to suppress a defendant's will through the expectation of criminal liability but to exercise oversight over the investigative body, in order to prevent unjustified legal interference with the defendant's dignity, physical inviolability, and right to privacy.

A court examines whether there are grounds for the collection of a sample and authorizes the investigative body to take a sample from the defendant.[84] Consequently, the subject of a crime is specific and it can only be the person tasked with conducting the investigative action. If sample collection is obstructed through violence or threat of violence, only the question of applying Article 365 of the Criminal Code (Threat or violence with respect to legal proceedings, investigation, or conduct of defence) could arise.

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[82] See *O'Halloran and Francis v. the United Kingdom [GC],* nos. 15809/02 and 25624/02, 2007-III [ECHR]; Miranda v. Arizona, 384 U.S. 436 (1966), https://supreme.justia.com/cases/federal/us/384/436/ [Accessed on 24.12.2019]; the International Covenant on Civil and Political Rights, Article 14, Paragraph 3, Sub-Paragraph "g"; the Georgian Constitution, Article 31, Paragraph, 11; the Georgian Code of Criminal Procedure, Article 38, Paragraph 17.

[83] The Georgian Constitutional Court's 14 December 2018 decision #1/4/809 in the *Titiko Chorgoliani v. Georgian Parliament* case, II-41; also, *Saunders v. the United Kingdom*, 17 December 1996, Reports of Judgments and Decisions 1996-VI [ECHR] §68.

[84] For example, the 21 November 2019 ruling on authorizing a procedural action: "The employees of the Georgian Internal Affairs Ministry Tbilisi Police Department's Investigative Directorate shall be authorized to…collect samples of saliva and fingerprints."

Allowing prosecution of a defendant over a refusal to provide a sample will result in a legal absurdity. To illustrate this, it would be interesting to consider the following hypothetical examples:

a) Immediately upon being presented with a court warrant for a personal search, an individual fled or avoided personal search by other means (without resorting to violence or threat of violence);

b) Bail has been selected as the preventive measure against a defendant while appearing weekly before an investigative body has also been applied as an additional measure. He has failed to pay the bail by the established deadline. He also ignored the duty to appear before the investigative body.

Formally, by the logic of the prosecution, the first case can be regarded as obstructing the execution of the court decision, and the second case - the failure to comply with a court ruling. However, of course, none of the cases contains the signs of a crime under Article 381 of the Criminal Code.

Failure to comply with a court ruling/obstruction of its execution is a crime against the judiciary (the interests of justice). Criminalization of disregard for a court ruling serves the purpose of eliminating arbitrariness and unlawfulness, ensuring effective delivering of justice, and restoration of justice.

The question of whether a defendant's refusal to participate in an investigative action contradicts the interests of justice merits a negative answer. The Code of Criminal Procedure reiterates the spirit of the privilege of protection from compulsion to self-incrimination and establishes that (a) a defendant has the right to refuse to participate in an investigative action[85] and that (b) the "lawful interests of a person [including a defendant] shall take precedence over the public interest of solving the case and punishing the offender. The protection of a person's [a defendant's] lawful interests in criminal proceedings serves the public interest."[86]

The substance of this argument is compliant with the rules for conducting an investigative action established by the Georgian Code of Criminal Procedure. For example, during a search, a person is not required to voluntarily participate in the investigative action and to present the items that are important for the case to an investigator on his own accord. It is inadmissible to assess

[85] The Georgian Code of Criminal Procedure, Article 38, Paragraph 17.

[86] The Georgian Code of Criminal Procedure, Article 12, Paragraph 4.

negatively a defendant's exercise of his/her rights or decision not to exercise them or to view it as proof of his/her guilt.[87]

The US Supreme Court stated in *United States v. Hubbell* that the privilege against self-incrimination extends not only to the refusal to testify but also to voluntary disclosure of the kind of information that can be used as evidence against a person.[88] The European Court has ruled in multiple cases that using a threat of liability or imposing a sanction in order to force a defendant to renounce the privilege against self-incrimination is a gross violation of the right to a fair trial.[89]

A defendant's decision not to participate in an investigative action must not be interpreted as an investigative body's being deprived of the possibility of effective action. The European Court stated in *Saunders v. the United Kingdom* that, provided there is a court warrant, compulsory collection of blood, urine, or body tissue is not covered by the privilege against self-incrimination.[90] Similarly, the Code of Criminal Procedure establishes that, in case of resistance, a person conducting an investigative action has the right to use a proportionate measure of compulsion.[91] Proportionality of compulsion must be assessed based on the circumstances of the case and the test of proportionality.[92]

It is important to ensure that the medical intervention during sample collection does not create the danger of inhumane or degrading treatment.[93] It would be incorrect to argue *a priori* that a defendant will be subjected to mistreatment during sample collection. The court stated in *Jalloh v. Germany* that, in order to prevent inhumane and degrading treatment, it is important to ensure that there is sufficient proof of the need for medical intervention, that no less restrictive alternative is available, and that the medical intervention does not jeopardize the defendant's health.[94] Also, the pain experienced during sample collection should not exceed the minimum level of severity.[95] When this is being assessed, it is necessary to take into consideration the circumstances of sample collection, including the duration of treatment, its physical and physiological impact, the person's sex, age, and health condition.[96] It is unlikely that compulsory

[87] The Georgian Code of Criminal Procedure, Article 38, Paragraph 18.

[88] *United States v. Hubbell*, 530 U.S. 27 (2000), https://www.oyez.org/cases/1999/99-166 [accessed on 24.12.2019].

[89] *Brusco v. France,* no. 1466/07, 14 October 2010 [ECHR];
*Heaney and McGuinness v. Ireland*, no. 34720/97, 2000-XII [ECHR].

[90] *Saunders v. the United Kingdom*, 17 December 1996, Reports of Judgments and Decisions 1996-VI [ECHR] §69.

[91] The Georgian Code of Criminal Procedure, Article 111, Paragraph 7..

[92] Barak, A., *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012).

[93] The Convention for Protection of Human Rights and Fundamental Freedoms, Article 3.

[94] *Jalloh v. Germany [GC],* no. 54810/00, 11 July 2006 [ECHR] §70-74.

[95] Ibid., §72.

[96] *Bouyid v. Belgium [GC],* no. 23380/09, 28 September 2015 [ECHR] §86.

removal of a hair or collection of a sample of saliva by force would violate Article 3 of the European Convention.[97]

We, therefore, believe that Giorgi Rurua had the right to refuse to provide the sample. In exercising the privilege against self-incrimination, Giorgi Rurua did not commit the crime under Article 381 of the Georgian Criminal code. The investigator was authorized to collect the sample indicated in the warrant from Giorgi Rurua by proportionate means, thereby avoiding impediment to the investigative action.

At the same time, the prosecution of Giorgi Rurua has a chilling effect which could worsen the situation in terms of the rights of other defendants. Fearing criminal liability, the defendants might refuse to exercise the privilege against self-incrimination which is guaranteed by the law and participate in investigative actions against their wishes.

**VII. Conclusion**

The analysis of the investigative actions provides grounds for declaring (1) Giorgi Rurua's personal search and (2) the silencer seized during the search of Giorgi Rurua's automobile inadmissible as evidence. Moreover, (3) due to the lack of the elements of action under Article 381 of the Criminal Code, the prosecution against Giorgi Rurua must end.

(1) According to the Code of Criminal Procedure, a piece of evidence must be assessed in terms of its relevance to the criminal case, admissibility, and genuineness (authenticity).[98] The Code of Criminal Procedure does not contain the concept of admissible evidence. The Constitutional Court has explained that "the inadmissibility of evidence is decided based on the principle of so-called negative enumeration and a piece of evidence is considered admissible if there are no grounds for declaring it inadmissible."[99]

Evidence is inadmissible if it has been obtained through substantial violation of the law.[100] Inadmissibility of the evidence obtained in violation of the law aims to protect the rights and freedoms of the process' participants, including the protection of their dignity, to ensure a defendant's exercise of the right to a fair trial, to ensure effective delivery of justice, to enhance

[97] McCartney C., *Forensic Identification and Criminal Justice* (2006) at 19.

[98] The Georgian Code of Criminal Procedure, Article 82, Paragraph 1.

[99] The Georgian Constitutional Court's 31 July 2015 decision #2/2/579 in the *Maia Robakidze v. Georgian Parliament* case, II-13.

[100] The Georgian Code of Criminal Procedure, Article 72, Paragraph 1.

the population's trust in the judiciary, and to prevent arbitrariness of the bodies conducting criminal prosecution.[101]

We believe that the fact that the protocol of Giorgi Rurua's personal search was completed with substantial violations worsens the defendant's legal situation and casts doubts over the authenticity of some pieces of evidence (the firearm and ammunition) and the relevance of others (other items indicated in the personal search protocol).[102] Consequently, there are legal grounds for declaring inadmissible the resolution, Giorgi Rurua's personal search, and the material evidence indicated in the personal search protocol. Moreover, based on the fruit of the poisonous tree principle,[103] all pieces of legally obtained evidence that worsen the defendant's legal situation (such as the ballistic examination findings) must be declared inadmissible.[104]

(2) The silencer seized during the search of the automobile must also be declared inadmissible as evidence. According to the Code of Criminal Procedure, "evidence shall also be considered inadmissible if it has been obtained in the manner prescribed by this Code but a reasonable doubt has not been refuted that it has been replaced, or that its properties have been substantially changed or that the traces remaining on it have substantially disappeared."[105] The Constitutional Court has stated that this rule is linked to doubts regarding the authenticity[106] and that even the existence of reasonable doubt that a piece of evidence may have been fabricated may serve as the basis for declaring it inadmissible.[107] Declaring unreliable and suspicious information admissible evidence involves the risk of an innocent person's conviction and contradicts the constitutional principles of respect for the rule of law and a state based on the rule of law.[108]

The place and the timing of the investigative action, the information which Shmagi Asanidze and Giorgi Getiashvili provided during the interview, and the fact that the law enforcement officers had access to the automobile before the search does not exclude the reasonable doubt the firearm silencer ended up in Giorgi Rurua's automobile through the police officers' unlawful

[101] The Georgian Constitutional Court's 31 July 2015 decision #2/2/579 in the Maia Robakidze v. Georgian Parliament case, II-4 and 6.

[102] For a more extensive discussion, see sections 3.2-3.4 of the amicus curiae.

[103] *Gäfgen v. Germany [GC],* no. 22978/05, 1 June 2010 [ECHR] § 73.

[104] The Georgian Code of Criminal Procedure, Article 82, Paragraph 1.

[105] The Georgian Code of Criminal Procedure, Article 72, Paragraph 2.

[106] The Georgian Constitutional Court's 31 July 2015 decision #2/2/579 in the *Maia Robakidze v. Georgian Parliament* case, II-37.

[107] The Georgian Constitutional Court's 22 January 2015 decision #1/1/548 in the *Zurab Mikadze v. Georgian Parliament* case, II-7 and 25.

[108] Ibid., II-5 and 24.

action. The prosecution has not conducted an investigative action which would have been sufficiently convincing and would have dispelled the justified doubts.

(3) Moreover, the prosecution over the refusal to provide a sample renders Giorgi Rurua an object of the proceedings and ignores the privilege against self-incrimination, as well as other procedural safeguards reinforced by the right to a fair trial.

During a pre-trial session, a judge is guided by a high standard of probability when ruling on the admissibility of evidence and processing of the case for consideration on the merits.[109] A totality of consistent and convincing pieces of evidence must make it possible to assume with a high degree of certainty that the case will result in a conviction. In contrast to this, there are no signs of the elements of the crime of failure to comply with a court ruling or obstruction of its execution, so the prosecution against Giorgi Rurua must end.

Taking into consideration the arguments expressed in the amicus curiae opinion will thus facilitate the passing of a lawful and fair ruling and effective delivery of justice.

Sincerely,

Ivane Chitashvili

Lawyer, Transparency International Georgia

[109] The Georgian Code of Criminal Procedure, Article 3, Paragraph 12.