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Legislative Regulations and Practical-Legal Aspects of Arrest of a Person Without a Court Ruling

This article looks at the one of the problematic and topical issues of the criminal process. The presumption of liberty belongs to the category of fundamental human rights, which is recognized and protected by applicable national and international law. Interference with fundamental rights in criminal proceedings is justified only in exceptional circumstances. Arrest, detention is the most serious measure of coercion permitted by both domestic and international criminal procedure law and international human rights instruments.

The article is based on the analysis of doctrine and investigative/judicial practice. It describes and discusses the main aspects of modern unlawful arrest and the current challenges.

The purpose of the study is to identify gaps in legislative and investigative/judicial practice related to the arrest of a person without the court's permission and to determine the measures to be taken to ensure their resolution.

Keywords: *Arrest, Unlawful Arrest, Lawful Arrest, Judge's Ruling, Urgent Necessity, Factual and Formal Grounds for Arrest.*

1. Introduction

Coercive measures in criminal procedure are measures in legal doctrine, that ensure the proper performance of duties by the participants in the proceedings and the prevention of obstruction of the rendering of justice at the stages of investigation¹, prosecution and / or trial.²

So, Arrest is a legal measure of coercion in criminal procedure, which implies short-term (maximum period – 72 hours) restriction of a person's liberty. on the basis of a probable cause of committing an alleged offence for the purpose of preventing obstruction of the proper administration of justice.

The current criminal procedural legislation establishes two rules for arresting a person: 1) Ordinary rule – by a court ruling; And 2) Based on the urgent necessity without the permission of the court.

Arrest as a coercive measure in criminal procedure has an “ultima ratio” character.³ It can be used only in extreme cases when the constitutional and lawful purposes cannot be achieved through other means.

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¹ Records of June 26, 2015 № 646 of Constitutional Court of Georgia.

² Decision of 18 April 2016, case № 2/1/631 “Citizens of Georgia Temur Janashia and Giorgi Alasania v. Parliament of Georgia” of the Constitutional Court of Georgia, II-20.

³ *Papiashvili L. (ed.), Private Part of Criminal Procedure Code of Georgia, Tbilisi, 2017, 213 (in Georgian).*

An essential prerequisite for a coercive measure in criminal procedure – lawful arrest – is the existence of probable cause, that a person has committed a crime for which the law provides imprisonment.⁴

A probable cause is a binding standard of proof, whose legislative definition is provided for by article 11(11) of the Criminal Procedure Code. According to this definition, a totality of facts or information that, together with the totality of circumstances of a criminal case in question, would satisfy an objective person to conclude that a person has allegedly committed a crime.

During the arrest with or without a court ruling, there must be a probable cause that at least one of these dangers is available, in particular: the person will flee or will not appear before a court, destroys information important for a case, or will commit a new crime.

Therefore, it is clear that with the standard of probable cause it is necessary to establish the commission of an act that contains elements of crimes provided for by Criminal Code of Georgia.⁵

Arrest of a person without a court ruling, also called lawful arrest, is carried out in the case of urgent necessity on the basis of an instantaneous, abrupt necessity.⁶ Urgency indicates a lack of time, when it is impossible to obtain a judge's permission to restrict the right, and requires immediate action.⁷ However, it should also be noted that arbitrary arrest is largely related to urgent necessity.⁸

Accordingly, all necessary measures must be taken at the level of both legislative and investigative practice in order for the state to prevent unjustified arrest and groundless restriction of the rights of individuals.⁹

In view of all the above, the arrest of a person without a court ruling serves to promote the proper administration of justice. The existence of this measure is an important legal lever for the prosecution to prevent the accused from hiding, destroying evidence, and/or committing a new crime in the future. Taking into account these circumstances, it is necessary to identify problems at the legislative level, as well as in practice, to find ways to solve them, to refine national legislation and to legally use unlawful arrest in practice.

⁴ *Papiashvili L.*, The Legal Basis for the Use of Arrest and Detention in the Criminal Process, Constitutional and International Mechanisms for the Protection of Human Rights, *Korkelia K. (Ed.)*, Tbilisi, 2010, 176 (in Georgian).

⁵ *Lukanov v. Bulgaria*, [1996], ECtHR, 21915/93; *Steel and others v the United Kingdom*, [1998] ECtHR, 23/09/1998, 67/1997/851/1058.

⁶ Decision of 11 April 2013 № 1/2/503,513 “Citizens of Georgia Levan Izoria and David-Mikheil Shubladze v. Parliament of Georgia” of the Constitutional Court of Georgia, II-13.

⁷ Decision of 26 December 2007 № 1/3/407 “Georgian Young Lawyers Association and Citizen of Georgia – Ekaterine Lomtadze v. Parliament of Georgia” of the Constitutional Court of Georgia, II-26.

⁸ *United Nations*, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, New York, Geneva, 2003, 161.

⁹ *Myer E., Hancock B., Cowder N. (eds.)*, Handbook for Human Rights Prosecutors, Tbilisi, 2008, 68 (in Georgian).

2. Factual Grounds for the Arrest in the Case of Urgent Necessity

A more common case in investigative practice is the arrest of a person without a court ruling, in the state of urgent necessity. Similar to a lawful arrest, during the arrest of a person without the permission of a court requires both factual (evidentiary) and formal (procedural) grounds, there must be evidential standard of probable cause for both grounds cumulatively. The absence of one of these prerequisite prevents the possibility of using the arrest and makes it illegal.¹⁰ Factual ground for arrest in the case of urgent necessity is provided for by part 3 of article 171 of the Criminal Procedure Code, In particular, the first sentence of that part says that a person may be arrested without a court ruling only if there is a probable cause that the person has committed a crime. Accordingly, the body conducting the investigation had to have collected the sum of evidence that is sufficient to establish probable cause that the crime was committed by the person arrested without a court ruling. At the same time, unlawful arrest, different from sanctioned detention, does not require that this particular crime be punishable by imprisonment. Based on the above, the factual ground is established by the sum of evidence that proves the guilt of the person according to the standard of probable cause. Accordingly, the evidence listed in the decree on indictment and also other sum of evidence available in the case files, which may not be mentioned, in particular, in the decree, but exist in the criminal case and directly or indirectly indicate the guilt of the person. However, it should also be noted that all the basic, direct / indirect evidence that proves a commission of an incriminated act by the person against whom this act is incriminated, in most cases, directly specified in the decree on indictment.¹¹

In one of the judge's rulings of the Tbilisi City Court we read: " According to the facts and information referred to in the decree on indictment (a record of inspection of a crime scene, records of interrogation of witnesses, a record of interrogation of victim , records of interrogation of accused , a record of arrest and a personal search and other materials available in the case files) and according to the criminal case materials , there are sufficient factual grounds and probable cause ... "¹² According to another ruling, "The Court clarifies that ... the factual ground relates to the issue of evidence and with the standard of probable cause should evaluate the totality of facts or information that, together with the totality of circumstances of a criminal case in question, would satisfy an objective person to conclude that the accused has allegedly committed a crime."¹³ Existence of "reasonable suspicion" implies the existence of facts and information which would satisfy an objective person to conclude that a person has committed a crime, although what may be considered 'reasonable' depends on all the circumstances of the case."¹⁴

Unlawful arrest should not be perceived in such a way that judicial control over the arrest of a person is not carried out at this time. The court shall check the lawfulness of the arrest at the first

¹⁰ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 503 (in Georgian).

¹¹ *Brogan v. the United Kingdom*, [1988] ECtHR, 11209/84; 11234/84; 11266/84; 11386/85; *Murray v. the United Kingdom*, [1996], ECtHR, 25/01/1996, 41/1994/488/570.

¹² Ruling of November 9, 2013 case №10a/5899 of Tbilisi City Court.

¹³ Ruling of October 21, 2016 case № 10d/4666 of Tbilisi City Court.

¹⁴ *Fox, Campbell and Hartley v. the United Kingdom*, [1990], ECtHR, 12244/86, 12245/86, 12383/86.

proceeding before the court, and if it considers that there was no factual or formal ground for the arrest, it considers such arrest to be unlawful. It is the duty of the judge to make at least a few sentences concerning the lawfulness of the arrest in his ruling about the first proceeding before the court and applying a measure of restraint. According to the ruling of the Tbilisi City Court of January 30, 2017, "The fact of allowing substantial procedural violation during the arrest of I.B. bringing charges against him, also during carrying out other procedural actions, which would have led to the refusal to apply the measure of restraint, is not confirmed by the case materials."¹⁵ Consequently, if the no existence of the factual or formal grounds for arrest are not confirmed by the materials provided by the prosecution, even in such cases, the judge will make at least a few suggestions on the matter and declare that there was no substantial procedural violation during the arrest. And if the court finds that during arresting a particular person the case materials (combination of facts or information) in a criminal case against that person is not sufficient to establish a factual ground with probable cause, the judge will recognize the arrest unlawful and release the arrested immediately.

2.1. Formal Grounds for the Arrest in the Case of Urgent Necessity

For the arrest of a person in the case of urgent necessity, it is necessary to have a factual (evidential) grounds along with the formal (procedural) ground, otherwise arrest of the person is inadmissible.¹⁶ The degree of reasonableness of the arrest is much higher in the case of urgent necessity than in the case of a lawful arrest, because the arrest of a person is not preceded by the court's awareness of the act committed or to be committed and by the court's permission to arrest. In the case of a unlawful arrest, a police officer, an investigator or other person authorized to arrest shall make a decision based on personal experience and professional skills, after which the judge shall check the lawfulness of this decision at the first proceeding before the court. A person may be arrested without a court ruling if: the person has been caught in action while or immediately after committing a crime (in flagrante delicto); the person has been seen at the crime scene, and a criminal prosecution is immediately initiated to arrest him/her; a clear trace of crime has been found on or with the person or on his/her clothes; the person has fled after committing a crime, but he/she is identified by an eyewitness; the person may flee; the person is wanted; this possibility is provided for by the Law of Georgia on International Cooperation in Criminal Matters. At the same time, we must also remember part 3 of Article 171 of the Criminal Procedure Code, which is considered cumulatively in connection with the second part of the Article 171, according to which there must be any of the following circumstances (formal alternative ground) in addition to the factual grounds for arrest: the risk of the person fleeing or not appearing before a court, destroying information important to the case, or committing a new crime.

It is noteworthy that both the office of the General Prosecutor of Georgia (its structural units) and the common courts find it more difficult to convince a formal ground with an admissible standard than a factual ground. This is due to the fact that this requires specific, actual, objective factual

¹⁵ Ruling of January 30, 2017 case № 10d/163 of Tbilisi City Court.

¹⁶ Ruling of December 28, 2016 case № 10d/5660 of Tbilisi City Court.

circumstances, which, in addition to the crime already committed, indicate the existence of other above-mentioned normative risks. As already mentioned, arrest of a person without a court ruling is possible only in case of urgent necessity, when there is physically no other alternative present in the existing legal space. The Criminal Procedure Code of Georgia exhaustively lists seven specific grounds when the person may be unlawful arrest. Also, a person may be arrested without a court ruling only if there is a probable cause that the person has committed a crime and the risk that he/she may flee, not appear before the court, destroy information that is important to the case, or commit a new crime cannot be prevented by an alternative measure that is proportional to the circumstances of the alleged crime and to personal characteristics of the accused.¹⁷

Due to the importance of the issue, we will discuss each ground independently to be able to thoroughly identify problems at both the theoretical and practical levels and find appropriate ways to solve them.

2.1.1. Arrest of a Person While or Immediately After Committing a Crime

During the arrest of a person on this ground, it is necessary that there is no long interval between the unlawful act committed and the arrest. The person has been caught in action while or immediately after committing a crime is a case when a person, who has allegedly committed a crime, completes unlawful act and an arresting person is/goes to the crime scene immediately, which does not take a long time between the offender committing the crime and his/her attempt to leave the crime scene.¹⁸ The person has been caught in action while committing a crime is a case when the arresting officer catching, arresting an alleged offender while committing a crime, when the crime has not yet been completed or has instantly been completed and the accused is in the view of the arresting person, i.e. the arresting person also has the first touch of the visual perception of the criminal act.¹⁹

Arrest of a person immediately after committing a crime implies that the person does not hide from the view of the arresting person after committing the crime. Moreover, it does not matter if the person is arrested at the crime scene after the crime has been completed or away from the crime scene. The main thing is that the crime committed by the arrested person is directly seen by the arresting person and before his arrest he does not objectively hide from the view of the arresting person.²⁰

It is interesting to consider one of the examples from the investigative / judicial practice when there are cases of arresting a person on this ground. The record of an arrest and personal search of the accused dated April 6, 2017, provides Article 171(2)(a) of the Criminal Procedure Code “the person has been caught in action while or immediately after committing a crime ” as one of the formal (procedural) grounds for arrest in the case of urgent necessity.²¹ According to the materials of the mentioned case, on April 6, 2017, the accused, together with another person, used a screwdriver to try

¹⁷ See. Article 171 (3), Criminal Procedure Code, LHG, 31, 03/11/2009.

¹⁸ Decision of November 11, 2016 case № 1c/1722-16 of Tbilisi Court of Appeals.

¹⁹ Ibid.

²⁰ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 505-506 (in Georgian).

²¹ Criminal case № 001060417001, Record of Arrest and Personal Search of the Accused of April 6, 2017.

to secretly taking money from the Paybox for its unlawful appropriation, when mentioned persons were arrested by police officers under Article 19, 177 (3)(a) of the Criminal Code of Georgia, which implies attempted theft committed with a preliminary agreement by a group. The arrest of the mentioned persons was carried out on the ground of urgent necessity and, as mentioned, the record of an arrest and personal provides Article 171(2)(a) of the Criminal Procedure Code as one of the formal (procedural) grounds for arrest. The Tbilisi City Court, by its ruling of April 7, 2017,²² while discussing the issue of a measure of restraint of accused, considered the arrest of the mentioned persons on the ground of urgent necessity to be lawful. Indeed, it is clear that in the criminal case referred to above, there were both formal and factual grounds for unlawful arrest.

However, it is interesting to consider another example from the investigative / judicial practice that concerns similar factual circumstances. The record of an arrest and personal search of the accused dated December 21, 2014, provides Article 171(2)(c) of the Criminal Procedure Code “a clear trace of crime has been found on or with the person or on his/her clothes”.²³ as one of the formal (procedural) grounds for arrest in the case of urgent necessity. Moreover, it is established from the case materials, that person (B. K.) was arrested at the time when he was trying to secretly taking money from the paybox by using a hook. As a result of the personal search of the mentioned person it is true that the above-mentioned hook was seized, which the accused needed to commit a crime, but, it is clear that he was caught in action while committing a crime, so in the record of an arrest and personal search with Article 171(2)(c) of the Criminal Procedure Code had to be also mentioned subparagraph “a” of the second part of the above-mentioned article. Notwithstanding the above, according to the judge's ruling²⁴ the fact of allowing substantial procedural violation during the arrest of B. K. bringing charges against him, also during carrying out other procedural actions, is not confirmed by the case materials, so it is why the arrest of the mentioned person in the case of urgent necessity was considered lawful.

It is noteworthy that while working on the labor, up to a hundred judges' rulings on the first proceeding before the court and the applying measure of restraint were examined, from the analysis of which it is possible to make a conclusion that the court does not make a detailed discussion on the legality of the arrest and is limited to a few words whether there was a fact of procedural violation during the arrest of the person or not. We consider it appropriate for judges to discuss in more depth the issue of the legality of arrest, even with regard to the grounds for the arrest, whether the grounds provided in the record of arrest or/and personal search are relevant to the factual circumstances of the criminal case.²⁵ This will properly develop investigative directions in the context of the arrest and establish correct / uniform investigative / judicial practice. With regard to Article 171 (2)(a) of the Criminal Procedure Code, it should also be noted that it simultaneously considers both the completed crime and the attempted cases and their differentiation in the record of an arrest is not essential. An indication of the time at which the arrest was made specifically in action while or immediately after

²² Ruling of April 7, 2017 case № 10a/1686 of Tbilisi City Court.

²³ Criminal case № 001211214001, Record of Arrest and Personal Search of the Accused of December 21, 2014.

²⁴ Ruling of 23 December 2014, case № 10a/7319 of Tbilisi City Court.

²⁵ *Bokhashvili B., Mshvenieradze G., Kandashvili I.*, Procedural Rights of Suspects in Georgia, Tbilisi, 2016, 16 (in Georgian).

committing a crime, a practical purpose may be acquired later, during the interrogation of the arresting persons, in the descriptive section, in the context of compliance of the testimonies and persuasiveness.²⁶ It should also be noted that the possibility of the arrest a person on the grounds under consideration is also provided for by Belgian law, where the arrest is regulated at the legislative level in law on “Pre-Trial Detention”, which was passed in the 1990. Under Belgian law, an important ground for detaining a person is to catch him/her in action while committing a crime. In such a case, the police officer is authorized to apply a measure of procedural coercion against the person – in the form of arrest. At the same time, in the presence of a similar situation, a person can be arrested by a private person. In any other case, the prosecutor is a person who can make decisions about the arrest of a person.²⁷ Finally, with regard to the procedural law of Georgia, it should be noted that the grounds under consideration in this subsection are the only formal grounds on which even a person with immunity may be arrested. This possibility is provided for by Article 173 of the Criminal Procedure Code of Georgia, although it provides for an exception, in particular, even on this ground may not be arrested the President of Georgia, persons enjoying diplomatic immunity and their family members.

2.1.2. Arrest of a Person at the Crime Scene

A person may be arrested without a court ruling if the person has been seen at the crime scene, and a criminal prosecution is immediately initiated to arrest him/her; this means that the person did not hide from the view of the eyewitness / hot pursuit subjects. If a person has at least temporarily disappeared from the view of the arresting person and reappeared later, then his/her arrest must be carried out on other grounds.²⁸

It should also be noted that the mentioned ground are very similar to the grounds for arrest discussed above, but the difference between them is that, unlike the abovementioned, the person is not arrested at the crime scene, but is pursued and arrested away from the crime scene. At the same time, during the arrest of a person on this ground, it becomes much easier to substantiate the risk of hiding , even when discussing a measure of restraint, because it is indisputable that if a person tried to abscond immediately after committing a crime, Even at a later stage of the proceedings, there will be a priori danger of his/her absconding. Indeed, according to the judge's ruling: “Although the expected severe sentence is one of the relevant factors in reasoning the risk of absconding, the court does not consider the risk of absconding to be reasoned just by referring to a severe sentence. It should be taken into consideration that the accused tried to abscond from the crime scene and it was possible to arrest him only after the police chased him”.²⁹

It should be noted that this ground of the arrest significantly expands the circle of alleged arrested persons. Being at the crime scene a priori does not mean being directly came into contact with

²⁶ Department of Human Rights and Investigation Quality Monitoring, Recommendation on Drafting a Record of Arrest, Tbilisi, 2020, 4 (in Georgian).

²⁷ *Vingart K. (ed.)*, Criminal Procedure Systems of EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 40 (in Georgian).

²⁸ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 506 (in Georgian).

²⁹ Ruling of April 7, 2017 case № 10a/1686 of Tbilisi City Court in the.

the crime. Taking into account the principle of foreseeability of the rule of law, it would be desirable for the legislator to specify better the mentioned ground, which would allow us to conclude in what specific cases it is possible, in case of urgent necessity, to arrest a person on the above-mentioned ground, in order not to be groundless interfere with human rights in the field protected by the Constitution and international legal acts. It should also be noted that the grounds under review in practice are usually used in combination with other grounds for the arrest. Mostly It is used in cumulation with Article 171 (1)(a) of the Criminal Procedure Code.³⁰ Consequently, these two grounds are quite close to each other in practical terms as well.

It is also interesting to pay attention to the words “criminal prosecution shall be carried out immediately” on the grounds under consideration. As it is known from the current procedural legislation, the subject of criminal prosecution is the prosecutor. On the mentioned ground, it is clear that the prosecutor is not meant, but mostly the person who performs the duty of maintaining public order. In addition, under criminal procedure law, a criminal prosecution shall be initiated upon the arrest of a person or upon the recognition of a person as the accused.³¹

From the normative content of the grounds under consideration, it may be concluded that a person may be prosecuted even before he/she is arrested / recognized as the accused. Therefore, the question naturally arises: can a criminal prosecution be initiated before the actual arrest of the alleged offender?³² This question should be answered in the negative form for the simple reason that the current procedural legislation directly and imperatively regulates the cases of initiation of criminal proceedings. Consequently, there will be no prosecution until the arrest of a person or the recognition of a person as the accused.³³ Accordingly, the current edition of the criminal procedure legislation needs to be refined in this regard. There is no doubt that the term “criminal prosecution” is misused in Article 171 (2)(2)(b) of the Criminal Procedure Code, which makes it more complicated to understand of the main point of criminal prosecution and leads to terminological confusion. It is advisable to formulate this sub-paragraph as follows: “The person has been seen at the crime scene and a hot pursuit is being carried out to arrest him/her.”³⁴

2.1.3. Arrest of a Person in the Existence of a Clear Trace of Crime

If a clear trace of crime has been found on or with the person or on his/her clothes, in such case, the current procedural legislation provides for the possibility of arresting the mentioned person without a judge's ruling. According to the verbal explanation of the law, we can conclude that the trace of the crime must be clear and it must be found on or with the person or on his/her clothes. Otherwise, if an expert examination is required to prove the existence of trace, this does not create the possibility of arresting the person on this ground and in case of confirmation of the trace, the arrest of the person should be carried out based on a court ruling. However, clear traces include cases when a person, on

³⁰ Criminal Case № 001060417001, Record of Arrest and Personal Search of the Accused of April 6, 2017.

³¹ See. Article 167 (1), Criminal Procedure Code.

³² *Meurmishvili B.*, Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Process, Tbilisi, 2015, 92 (in Georgian).

³³ Ibid.

³⁴ Ibid.

whose clothes / with whom / or on whose body the mentioned trace will be found, cannot explain the origin of the mentioned trace and cannot indicate some reasonable / logical explanation.³⁵ In addition, the ground under consideration determines the location of the traces. In particular, the body of the person, the clothes of the person, a space or object in the immediate vicinity or in the possession of a person. Consequently, traces can be found both on the outside of the body and in the form of traces left in the body. For example, under the nails of the violater are samples of person's hair and skin, or a drug is found in the body of the person who transports it through the body. In the latter case, we will face another ground for the arrest: "the person has been caught in action while committing a crime". An example of a clear trace of a crime on a person's clothes may be a case when law enforcer (a person authorized to arrest) heard a loud scream from a residential building and a person with a bloody T-shirt ran out of the mentioned building. In such a case, the arrest of a person on the ground under consideration should be considered lawful. And, as it comes to the existence of a clear trace of crime on with the person, this may occur when it turns out a firearm or a narcotic substance in the bag on his back, the legal origin of which the person cannot prove. It is a common case in investigative practice when an investigative action is initially carried out – a personal search, on the ground of which a decision may be made to arrest a person in the case of urgent necessity. For example, on August 4, 2016, in city Tbilisi, the person took out the woman's mobile phone and then silently fled from the crime scene. The woman informed the law enforcers about the fact on the same day and also provided information about the individual and generic characteristics of the mobile phone. A few hours after the message, a person was found, who was personally searched on the basis of urgent necessity, as a result of which the above-mentioned mobile phone was seized.³⁶ After the mentioned, the unsanctioned arrest of the mentioned person took place immediately on the ground under consideration.³⁷

2.1.4. Identification as a Ground for Arrest

It should be noted that a person could be arrested without a court ruling even if the person has fled after committing a crime, but he/she is identified by an eyewitness. First of all, it should be noted that the identification referred to on the abovementioned ground is legally very different from the identification provided for by Article 131 of the Criminal Procedure Code. The latter is an investigative action, the procedure of which is regulated in detail in the mentioned article. But, as it comes to the identification of an alleged offender by an eyewitness, it is necessary for the person to first commit a crime, after which he/she must flee and after that he/she must be identified by an eyewitness, which will be the ground for arrest a person without a judge's ruling. The criminal procedure code provides two additional preconditions for the arrest of a person on this ground: 1) the person who committed a crime must flee from the crime scene; 2) he/she is identified later by an eyewitness.³⁸

³⁵ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 509 (in Georgian).

³⁶ Criminal Case № 001040816006, Record of Personal Search of August 4, 2016.

³⁷ Criminal Case № 001040816006, Record of Arrest of the Accused of August 4, 2016.

³⁸ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 508 (in Georgian).

It should also be noted that the previous code of the current Procedure Code formulated the mentioned rule differently. The 1998 Criminal Procedure Code of Georgia allowed for the arrest of a person if eyewitnesses, including victims, directly identified the person as the person who committed a crime.³⁹ The new Procedure Code did not share the rule of the previous legislation, as the above-mentioned provision unreasonably extended the procedural grounds for arrest, as the victim may not have been an eyewitness at all: For example, the person took out the woman's mobile phone and then silently fled from the crime scene, as it was the case in the previous reasoning example. The new Code of Procedure focuses directly on eyewitnesses to the crime, including the victim. An eyewitness is considered to be a person when he / she has directly witnessed the fact of committing a crime – in whole or in part – any part of committing a crime.⁴⁰

Indeed, according to the part of the report on the arrest and personal search of the accused dated July 1, 2016, “Under what circumstances did the arrest take place?”, “after receiving a message with the participation of the victim eyewitness L. J., the area around the crime scene was inspected by car and L. J. pointed at a young boy walking on the street and said that this boy had demanded him a mobile phone under the threat of using a knife”.⁴¹ The judge considered it lawful to arrest a person on such grounds and pointed out, that “the fact of substantial violations of the law during the arrest of the accused is not established by the case materials, including the record of arrest”.⁴²

It should be noted that in practice, it is not uncommon to arrest a person in the case of urgent necessity on the ground of identification by an eyewitness. As a rule, the identification of a person by an eyewitness is carried out during the above-mentioned investigative action – identification, after which the mentioned person is arrested on the grounds of urgent necessity. However, it is possible and in the above example it has been shown that also in practice there are cases when the investigative action – identification, does not precede the arrest of the person on the grounds under consideration, but the identification by the eyewitness is carried out orally or through other relations with law enforcers. Identification by an eyewitness can be related to several situations: 1) The eyewitness does not know the person committing a crime / does not know his / her identity but directly refers to him / her as the person committing a crime – this is practically equal to identification; 2) The eyewitness knows the identity of the person committing a crime and names him/her. This can happen not only in action while or immediately after committing a crime, but also later in relationship with law enforcement body (for example, in the record of interrogation of witness, in notification, etc.).⁴³

In practice, both cases had first Division of Tbilisi Gldani-Nadzaladevi police department's office. Robbery took place in both criminal cases. In particular, on July 5, 2016, the offender cut a golden necklace from the throat of the woman and fled from the crime scene. The mentioned woman did not know the person who committed a crime, but was able to remember the personality traits. In

³⁹ Article 172, Part 1, Subparagraph “b”, Criminal Procedure Code of Georgia, Parliamentary Gazette, 13-14, 20/02/1998.

⁴⁰ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 506 (in Georgian).

⁴¹ Criminal Case № 001010716009, Record of Arrest and Personal Search of the Accused of July 1, 2016.

⁴² Ruling of July 4, 2016 case № 10a/3229 of Tbilisi City Court.

⁴³ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 508 (in Georgian).

the framework of the mentioned case, on July 13, 2016, an investigative action – identification was carried out, during which the person who committed a crime was identified by the woman and this person was arrested by the law enforcers on the grounds under consideration. After that, on July 14, 2016, first proceeding before the court was held, where the judge considered it lawful to arrest the person on the above-mentioned grounds of urgent necessity and imposed the person sentence of imprisonment as a measure of restraint.⁴⁴

Except for the above-mentioned case, on April 24, 2014, the person who committed crime of robbery was arrested again, one of the formal grounds for his arrest is provided for by Article 171, Part 2, Subparagraph “d” of the Criminal Code of Georgia. The arrest was not preceded by an investigative action – identification, but person, whose mobile phone was stolen, knew the person who committed a crime and she notified to law enforcers about this as a witness in the record of interrogation. According to the decision of the Tbilisi City Court of April 26, 2014, the arrest was declared legal.⁴⁵

Based on all the above, the grounds mentioned in the sub-section under consideration are one of the important legal levers in the investigative practice of Georgia.

2.1.5. Arrest of a Person in the Existence of a Risk of Fleeing

One of the hypothetical and, therefore, most difficult to prove grounds for unlawful arrest is the existence of a risk of fleeing. According to the current Criminal Procedure Code, a person may be arrested if the person may flee. This should not be construed in such a way that the arrest of any person is considered possible only in the light of the private views of the persons carrying out the arrest, but rather that there are specific circumstances which reasonably indicate the real possibility of the person fleeing. In these circumstances, the personal and character features⁴⁶ of the person should be taken into account, such as when a person runs away, does not obey the lawful request of a law enforcer, or the person is obviously preparing to flee, and so on. The existence of such a ground for arrest increases the risk of arrogation from an appropriate law enforcement body. That is why, during the arrest of a person on the grounds of fleeing, we must face not only subjective but also objective circumstances that actually indicate a person's subjective desire to flee from justice.⁴⁷

The risk of a person fleeing may also be indicated by objectively existing circumstances of fleeing in the absence of his / her subjective desire. For example, when a person does not have a permanent place of residence. Accordingly, each such circumstance should not become a ground for interfering with a person's right of liberty. In such a case, there may be some difficulties in establishing a person's place of residence and later securing his or her appearance in court, but this difficulty does not constitute a legitimate aim for a short-term restriction of a person's liberty, even if there is no evidence of his or her hiding from law enforcement.⁴⁸

⁴⁴ Ruling of July 14, 2016 case № 10a/3393 of Tbilisi City Court.

⁴⁵ Ruling of April 26, 2014 case № 10a/2848 of Tbilisi City Court.

⁴⁶ Letellier v. France, [1991], ECtHR, 12369/86; Matznetter v. Austria, [1969], ECtHR, 2178/64.

⁴⁷ *Khaindrava N., Bokhashvili B., Khidasheli T.*, Analysis of Human Rights Law Related to Pre-Trial Detention, Tbilisi, 2010, 47 (in Georgian).

⁴⁸ *Papiashvili L. (ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 510 (in Georgian).

After studying the investigative practice, we came to the conclusion that in most cases, if there are any other grounds for arrest, the investigator or a person authorized to arrest, still indicate the ground – “person may flee” with the mentioned ground in the record of arrest, it seems that this makes the justification firmer for the arrest of a person in case of urgent necessity. This has its logical explanation, for example, when a person is caught in action while or immediately after committing a crime, it is objectively possible for that person to want to flee. Accordingly, in such a case, if in the record of arrest is indicated Article 171(2)(e) with the Article 171(2) (a) of the Criminal Code, it should not be a problem.

As mentioned, law enforcers must be very careful during the arrest a person in the case of urgent necessity only in relation to arresting a person on this ground, as the mentioned ground really and objectively needs to be proved by facts and only the subjective will of the arresting person is not enough. It is interesting to consider one of the criminal cases from the recent past. In the record of arrest dated April 8, 2015,⁴⁹ states the only reason for the arrest – “the person may flee” and in the column “Under what circumstances is the arrest carried out” read: “After he (the accused) appeared in the first division of the Gldani-Nadzaladevi department and said that he had inflicted multiple wounds with a cold weapon in the abdomen of G.O. a few minutes ago.”

Regardless of the category of the crime and the nature of the act committed, the substantiation of the existence of a risk of fleeing requires existence of specific, actual circumstances. The fact that a person voluntarily declares himself to the investigative body immediately and confesses to the act committed, indicates not only the risk of hiding, but also the opposite, which is evidenced by the judge's ruling in the same case. “As it comes to the risk of absconding, it is true that the accusation against the accused is punishable only by imprisonment and this is a relevant factor in assessing the risk of absconding, but the fact that the accused confessed to the police should be taken into account, which proves that he does not avoid possible responsibility”.⁵⁰ Accordingly, the judge himself closed out the risk of absconding in the present case, however, he considered the arrest of the person lawful,⁵¹ which we considered illogical and inconsistent with the legal argumentation. It should also be noted that in practice there was a case when the arrest of a person with urgent necessity in his / her apartment on the grounds only “the person may flee” was considered lawful by the court. The mentioned person was denounced in the robbery on the branch of JSC “Liberty Bank”, during which he opened fire on the police officers, inflicted health damage on one of them, after which he fled from the crime scene. Initially, the person could not be identified, but as a result of investigation the identity of the person was established, after which he was arrested in his apartment. According to the ruling of the Tbilisi City Court of October 1, 2016, the mentioned arrest was declared lawful, and imposed the accused sentence of imprisonment as a measure of restraint.⁵² It is inadvisable to arrest a person on the grounds of risk of fleeing in the case of urgent necessity⁵³ when the alleged accused pleads guilty in the law

⁴⁹ Criminal case № 001080415001, Record of Arrest of April 8, 2015.

⁵⁰ Ruling of April 9, 2015 case № 10a-1621-15 of Tbilisi City Court.

⁵¹ Ibid.

⁵² Ruling of October 1, 2016 case № 10a/4432-16 of Tbilisi City Court.

⁵³ Ruling of June 26, 2013 of Batumy City Court, <https://court.ge/courts/baTumis_saqalaqo_sasamarTlo/?page=25&id=695> [29.05.2021].

enforcement body, he is aware of the investigation initiated against him, is interrogated as a witness, appears in the investigative bodies to participate in various investigative actions upon summons and by his actions does not obstruct the investigation⁵⁴, also, in other cases, he voluntarily declares himself to the investigative body and confesses to the crime committed.⁵⁵ The following criminal case is interesting to illustrate this point: a judge of the Criminal Cases Panel of the Tbilisi City Court recognized as unlawful with his ruling dated on February 9, 2015, to arrest a person on the grounds of “the person may flee” in the case of urgent necessity due to the following circumstances: “According to the report of arrest of R.I., the arrest of the accused was based on the assumption that he was fled, but the presented materials show that the theft took place on December 23, 2014, moreover, on February 7, 2015, accused appeared in the investigative bodies upon summons, was interrogated as a witness, confessed to the charges against him, after which he was arrested as a defendant. The mentioned record also states that the arrest took place in a calm environment, there was no coercion, the prosecution has no specific information about his possible fleeing, this excludes the need for the arrest without a judge's ruling on the grounds of fleeing in the case of urgent necessity”.⁵⁶

In the present case, the court found that the requirement of Article 171 of the Criminal Procedure Code had been substantially violated, as there was no urgent necessity for the arrest. As a result, the accused was immediately released from the courtroom, but the bail was used as a measure of restraint against the accused. This emphasizes the fact that a recognition arrest as unlawful does not automatically mean a refusal to use a measure of restraint, as these two procedural institutions have been considered independently and need to be substantiated separately. It should be noted that, in general, the grounds under consideration are regulated in the Criminal Procedure Code of a number of European countries, including Italian law, where an arresting person is entitled to arrest a person on grounds of risk of fleeing without the permission of a court in case of urgent necessity.⁵⁷

In view of all the above, the arrest of a person only on the ground when “a person may flee” is associated with a number of procedural and factual difficulties and allows for a wide range of considerations by law enforcement, which may substantially restrict the right of liberty. Therefore, it is advisable to prevent / regulate the mentioned risk at the normative level and to further specify the mentioned ground, so that there will be no unjustified restriction of the rights of individuals and the rule of law will be enforced.

2.1.6. Arrest of a Wanted Person

According to Article 33 (6)(N) of the Criminal Procedure Code of Georgia, a prosecutor may issue a decree on the conduct of search for the accused (convicted person). Consequently, the search may be announced for both an accused and convicted person. After the issuance of a decree on the

⁵⁴ Ruling of June 26, 2013 of Batumi City Court, <https://court.ge/courts/baTumis_saqalaqo_sasamarTlo/?page=25&id=696> [29.05.2021].

⁵⁵ *Natsvlishvili A.*, Human Rights During Arrest and the Situation in Georgia, Analysis of Legislation and Practice, Tbilisi, 2017, 13-14 (in Georgian).

⁵⁶ Ruling of February 09, 2015 № 10a/536 of Tbilisi City Court.

⁵⁷ *Tsikarishvili K. (Trans.)*, Criminal Procedure Systems of EU Countries, Tbilisi, 2002, 260 (in Georgian).

conduct of search, if a law enforcer finds a person against whom the above-mentioned decree has been issued, he or she has the right to arrest the person without a court ruling. The reason for issuing a search decree may be a non-appearance of a person in an investigative body or in court. Also, if the accused is in fleeing and does not attend a hearing on the merits and he/she is sentenced to imprisonment in his/her absence, the search for the convicted person will be announced in such a case. On this basis, in practice, it is a more common case when a particular person commits a crime and then flees from the investigation not appears in the investigative body or in the court. In such a case, if the sum of evidence is obtained as a result of the investigation, which is sufficient to establish probable cause that the given crime has been committed by that person, criminal prosecution is initiated against him. According to Article 45 (h) of the Criminal Code, It shall be mandatory for the accused to have a defence lawyer if the accused evades to appear before law enforcement bodies. Accordingly, in such cases the legislation provides for mandatory protection. Indeed, in practice, the person fleeing from the investigation is appointed by the Treasury Attorney, who is assigned by the Legal Aid Service. The above-mentioned lawyer will be handed over a decree on the indictment of the person, also the case materials of the application of a measure of restraint will be handed over before the hearing. After that, first proceeding before the court is held, during which the judge considers the issue of applying a measure of restraint against the accused. If the accused does not appear in court again, the judge will make decision to apply against him/her detention as a measure of restraint, after which the mentioned person will be declared wanted under a decree of the prosecutor, and the decree will be sent to the search service by a letter of appeal.⁵⁸

Indeed, in the investigative practice there are numerous cases of the accused fleeing, which makes it necessary to declare a search for him. Moreover, it is inevitable to apply against mentioned person detention as a measure of restraint. One of the rulings of the Tbilisi City Court we read: “The accused left the territory controlled by Georgia the day after the alleged robbery, which is confirmed by the testimony of the accused's father. All of the above circumstances together, with a high standard of probable cause, confirm the risk of absconding by the accused.”⁵⁹

Accordingly, detention was applied against the accused, and the prosecutor issued a search decree. It should be noted that when the mentioned person is arrested, the grounds under consideration must be specified in the grounds for the arrest. However, the term of the searching person is indefinite. According to Article 71 (3) of the Criminal Code of Georgia, The running of the limitation period shall be suspended if the offender absconds during the investigation or trial. In this case, the running of the limitation period shall be resumed from the moment the offender gets arrested or appears with the confession of guilt.

Also, to illustrate, it is interesting to consider one of the criminal cases from the investigative practice. In practice, there was a case when a person for 20 GEL was first prosecuted, and then detention was applied against mentioned person as a measure of restraint, and was declared wanted by the prosecutor, because the accused avoided appearing in the investigative body or in court. According to the factual circumstances of the case, the accused by deception filled with 20 GEL worth of fuel on

⁵⁸ Ruling of September 2, 2016 case № 10a/4053-16t of Tbilisi City Court.

⁵⁹ Ibid.

the territory of “SOCAR” gas station and left the area without paying any fee. After the prosecutor issued a search decree for the mentioned person, the law enforcers arrested this person a few days ago and, of course, the reason for the arrest of the person in the case of urgent necessity was the fact that this person was wanted.⁶⁰ After that, the prosecutor applied to the court to leave detention in force as a measure of restraint, but, the Tbilisi City Court ruled on 22 May 2015 that the measure of restraint against the mentioned person was changed and this person was sentenced to 3,000 GEL bail.⁶¹

Considering the above example, we conclude that regardless of the category and nature of the crime, if the accused does not appear before the investigative body or the court, it is quite possible to apply detention as a measure of restraint, announce search for him, and then arrest him in the case of urgent necessity on the grounds referred to in that subsection.

2.2. Arrest of a Person within the Possibilities Provided for by the Law of Georgia on “International Cooperation in Criminal Matters”

According to the law adopted on July 20, 2018, Article 171 of the Criminal Procedure Code of Georgia has been amended, in particular, the following words were added to first part “or if the issue of requesting consent from a foreign state in accordance with Article 16(4) of the Law of Georgia on International Cooperation in Criminal Matters is under consideration”, also, a new ground was added for unlawful arrest in the second part, “this possibility is provided for by the Law of Georgia on International Cooperation in Criminal Matters.” It should be noted that this law (“On International Cooperation in Criminal Matters”) was adopted on July 21, 2010 and entered into force on October 1 of the same year. Consequently, a reasonable question arises as to why this change took place in 2018. The reason for this was the fact that the Law of Georgia on International Cooperation in Criminal Matters was significantly changed on July 20, 2018, which led to the relevant amendments to the Procedure. Amendments to the Law of Georgia on International Cooperation in Criminal Matters have established new regulations. With the mentioned legislative changes, the legislation of Georgia was brought in line with the “Third Additional Protocol to the European Convention on Extradition” and “The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism”. According to the first paragraph of Article 30 of the Law of Georgia on International Cooperation in Criminal Matters, if there is a relevant legal ground a person wanted by a foreign law enforcement authorities may be arrested in the territory of Georgia and a measure of restraint may be applied to him if: A motion for extradition of a person has been submitted by a foreign state; a motion for temporary detention for extradition has been submitted by a foreign state; a person is wanted internationally by a foreign law enforcement authorities. Therefore, in case of the arrest of person on any of the above-mentioned grounds, the ground indicated in the subsection under consideration shall be mentioned in the record of arrest. It should be noted that before the mentioned changes, in case of arrest of a person wanted at the international level, the reason for the arrest was the ground discussed in the previous subsection “the person is wanted”, but, after making

⁶⁰ Criminal Case № 001090515001, Record of Arrest of the Accused of May 21, 2015.

⁶¹ Ruling of May 22, 2015 case № 10a/2275-15 of Tbilisi City Court.

the mentioned changes, the person will be arrested on the ground specified in the sub-section under consideration. As the Law of Georgia on International Cooperation in Criminal Matters defines the grounds for the arrest of persons wanted by the competent authorities of a foreign state, Article 171, Part 2 of the Criminal Procedure Code of Georgia adds the relevant content, subsection G) which also considers the possibility of arresting a person without a court ruling also the cases provided for by the Law of Georgia on “International Cooperation in Criminal Matters”.⁶²

Upon the arrest in the territory of Georgia of a person wanted by foreign law enforcement authorities, the relevant prosecutor exercising procedural guidance over the activities of the arresting body shall be notified; the prosecutor shall, within 48 hours, file a motion with the court for the application of restriction measures.⁶³

In view of all the above, an arrest should be made on the grounds under consideration when a search for a person is declared internationally.

3. Conclusion

The arrest of a person without a court ruling remains one of the most serious challenges in the Georgian justice system. The present thesis is an attempt to improve both the existing legislative regulation at the normative level and the investigative / judicial practice, in order to promote the steady protection of the rights of individuals and to prevent cases of arbitrary arrest. Achieving this result avoids the responsibility of the state at the international level, including, above all, in the European Court of Human Rights. To do this, it is necessary to strike a balance between state security and the protection of the individual's right to liberty, which is directly related to the exceptional nature of arrest and its *Ultima Ratio* nature.

Indeed, the analysis of investigative and judicial decisions has revealed the heterogeneity of the practice of arresting a person without a court ruling and the importance of their linear development. In addition, it is extremely important to properly apply the law regulating arrest and to interpret the norm from its purpose, in order to ensure that human rights are strictly protected and that groundless unlawful arrest is kept to a minimum. In order to achieve these goals, it is necessary that each of the formal grounds for arrest to be actually based on specific circumstances and that the template justification be rejected at the normative level.

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⁶³ Department of Human Rights Protection and Quality Monitoring of Investigation, Recommendation on the Drafting of Record of Arrest, Tbilisi, 2020, 4 (in Georgian).

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