



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SAAKASHVILI v. GEORGIA

(Applications nos. 6232/20 and 22394/20)

JUDGMENT

(Merits)

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Fair hearing • Independent and impartial tribunal • Examination of witnesses • Conviction of former president of Georgia in two separate sets of criminal proceedings for acts committed whilst in office (complicity in criminal battery and misuse of authority, and abuse of official authority due to his exercise of presidential clemency respectively) • Single-judge composition of first-instance court that convicted applicant of abuse of official authority not lacking independence or impartiality (objective/functional) • Clerical or otherwise technical functions of judicial assistant not to be confounded with judicial role • Professional (trained) judge better equipped to maintain requisite detachment than lay judge or juror • Applicant's defence rights in both proceedings not breached • Domestic courts' administration of evidence in criminal proceedings in compliance with the Convention • Key witness statements constituting first-hand testimony, not hearsay • Applicant able to confront key witnesses during trials and to challenge their statements • Reasoned judgments addressing concerns as to witnesses • Lack of any arbitrariness

Art 7 • *Nullum crimen sine lege* • Applicant's conviction for abuse of official authority for granting a pardon during his presidency to high-ranking officials convicted of murder, reasonably foreseeable • Criminal-law provision on which conviction was based constituted an example of the legislative technique of "blanket reference" or "legislation by reference" which could not raise and issue under Art 7 § 1 as such • Applicant could not expect to enjoy immunity from individual criminal liability neither under relevant criminal-law provision nor under extended domestic constitutional framework • In light of comparative constitutional overview, applicant's expectation that pan-European Constitutional custom would shield him from criminal liability for acts committed while in office in the exercise of his discretionary powers, unfounded • Deference given, having regard to principle of subsidiarity, to manner domestic courts addressed, by applying concept of checks and balances, to the constitutional dimension of the seeming dichotomy between the

absolute nature of the presidential power of clemency and the possibility for that power to become object of abuse • Domestic courts explored applicant's state of mind during commission of criminal offence • Domestic courts' interpretation and application of the relevant domestic law both reasonable and consistent with the essence of the offence and within their remit

Prepared by the Registry. Does not bind the Court.

STRASBOURG

23 May 2024

FINAL

23/08/2024

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Saakashvili v. Georgia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Georges Ravarani, *President*,
Arnfinn Bårdsen, *ad hoc judge*,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Mattias Guyomar,
Kateřina Šimáčková, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the applications (nos. 6232/20 and 22394/20) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Mikheil Saakashvili (“the applicant”), on 27 January 2020 and 25 May 2020 respectively;

the decision to give notice of the case to the Georgian Government (“the Government”) under Articles 6, 7 and 18 of the Convention;

the fact that the Government of Ukraine, who had been informed of their right to intervene in the light of the applicant’s nationality (Article 36 § 1 of the Convention and Rule 44 §§ 1 and 4 of the Rules of Court), did not avail themselves of that right;

the withdrawal of Judge L. Chanturia, the judge elected in respect of Georgia (Rule 28 of the Rules of Court), and the decision of the President of the Chamber to designate Judge A. Bårdsen to sit as an *ad hoc* judge (Rule 29 § 2 (b) of the Rules of Court);

the parties’ observations on the admissibility and merits of the case;

the joinder of the proceedings in the applications (Rule 42 § 1) and the ruling to take a separate decision on admissibility (Rule 54A § 1 *in fine*);

the Court’s decision of 1 March 2022 declaring the case admissible;

the parties’ further written observations on the merits (Rule 59 § 1);

the Chamber’s ruling that no hearing on the merits was required (Rule 59 § 3 *in fine*);

Having deliberated in private on 9 April 2024,

Delivers the following judgment, which was adopted on the last mentioned date:

INTRODUCTION

1. The case concerns under Articles 6, 7 and 18 of the Convention the fairness and Convention compliance of two separate sets of criminal proceedings conducted against the applicant, a former President of Georgia.

THE FACTS

2. The applicant in both cases, Mr Mikheil Saakashvili, who was born in 1967, is currently serving a prison sentence in Georgia. He was represented before the Court by Mr G. Chiviashvili and Mr J. McBride, lawyers practising in Georgia and the United Kingdom respectively.

3. The Georgian Government (“the Government”) were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. BACKGROUND

5. The applicant, who was a Georgian national by birth, was elected President of Georgia in January 2004, after the United National Movement (“the UNM”), a political party co-established and led by him, came to power in November 2003. By the time his second consecutive presidential term expired on 17 November 2013, the UNM, defeated by the political coalition Georgian Dream (which took its name from its largest constituent party – also named “Georgian Dream”) in the parliamentary elections of October 2012, became the main opposition force in the country (for more details, see *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 9-13, 28 November 2017). The applicant left Georgia shortly after the expiry of his second presidential term in late 2013, settled in Ukraine and became a naturalised Ukrainian citizen. In taking Ukrainian nationality, he had to surrender his Georgian nationality, in accordance with Georgian legislation, which prohibited dual nationality.

6. After the handover of power by the UNM to Georgian Dream in 2012, more than 20,000 complaints were lodged with the Office of the General Public Prosecutor of Georgia (“the OGPP”) by people claiming to have been victims of serious human-rights abuses committed during the UNM’s rule and the applicant’s presidency. Of those, 4,000 complaints concerned allegations of torture and ill-treatment. It was on the basis of those individual criminal complaints that the OGPP initiated criminal investigations, including against former high-ranking officials. The newly-formed government officially dubbed this process “the restoration of justice” (*სამართლიანობის აღდგენა*), publicly stated that investigating the wrongdoings of the past would be one of its key priorities, and indicated that there should be no impunity for former officials for past abuses. In order to ensure transparency and to benefit from international expertise, the OGPP allowed some of the most politically sensitive and/or legally complex criminal investigations to be monitored by the International Prosecution Advisory Panel, a body set up in 2014 and consisting of three foreign and highly experienced criminal-justice professionals. The Panel reviewed case-file material relating to high-profile cases and advised the OGPP

regarding the compliance of the prosecution process with the relevant international criminal-justice standards (*ibid.*, § 261).

7. Two separate sets of criminal proceedings conducted against the applicant (which constitute the subject matter of the two instant applications) were part of the above-mentioned “restoration of justice” process. In both sets of proceedings, the applicant was tried and convicted *in absentia* since, residing in Ukraine until 29 September 2021 (see paragraph 61 below), he had chosen not to appear and had explicitly mandated a lawyer of his choice to represent his interests before the domestic courts, consenting to his trial *in absentia*.

II. THE CRIMINAL PROCEEDINGS ON CHARGES OF BATTERY AND MISUSE OF AUTHORITY (APPLICATION NO. 6232/20)

A. The incident of 14 July 2005

8. On 14 July 2005 V.G., a member of parliament, was attacked by a group of heavily armed men while travelling in a car, together with his bodyguard and his driver, along a street in Tbilisi. As was later recalled both by the three victims and by independent eyewitnesses to the incident, the attackers were wearing riot police uniforms and were carrying automatic rifles. The victims and witnesses further testified, when questioned in the course of the subsequent investigation, that after V.G.’s car had stopped at a traffic light, it had suddenly been encircled and hemmed in by other cars, from which six armed men had emerged and begun smashing the windows of V.G.’s car. The attackers had forced both V.G. and his bodyguard out of the car at gunpoint, relentlessly beating them with rifle butts. As a result, V.G. had received grave, life-threatening injuries and had been permanently disfigured. In particular (as was later confirmed by medical reports), almost all of his facial bones had been fractured, with deep open wounds appearing on his face and head. The attackers had seized V.G.’s personal belongings, including his official firearm.

9. A criminal investigation into the incident of 14 July 2005 (which was classified as a robbery) was initiated on the same day. The investigating authority interviewed a number of independent witnesses (including staff at a nearby car wash, residents of apartment blocks overlooking the crime scene and passers-by). All of the witnesses confirmed that the attackers had been wearing the easily recognisable uniforms of the riot police. V.G., when interviewed by the investigating authority, stated that a few days before the incident he had received an anonymous telephone call during which death threats had been made. In particular, the unknown male caller had warned him that “a terrorist attack” would be carried out against him unless he apologised for having insulted the President of the country (that is, the applicant) in a newspaper article that had been published on 29 June 2005

(see paragraph 18 below). The victim also recalled that during his beating one of the attackers had uttered the following phrase: “After this, you will no longer be able to write anything about our President!” V.G. told the investigating authority that the attack had therefore hardly been a random robbery and that there was a suspicion that it might have been carried out by the law-enforcement authorities on orders emanating from the applicant. V.G. also told the investigators that in the early morning of 14 July 2005 his driver had noticed that his usual car, which was equipped with armoured windows, unexpectedly appeared to be having technical issues with the braking system, for which reason V.G. had borrowed his wife’s car for that particular day.

10. The investigation into the incident of 14 July 2005 was discontinued in September 2005, without, it is alleged, the authorities having attempted to verify in any manner the victims’ and witnesses’ statements about the possible involvement of a riot police squad, and notwithstanding V.G.’s accusation against the applicant.

B. Reopening of the investigation into the incident of 14 July 2005

11. On 13 November 2012, after the change of the ruling forces in the country as a result of the parliamentary elections of October 2012 (see paragraph 5 above), a new criminal investigation was launched by the OGPP into the incident of 14 July 2005. Subsequently, and until November 2014 (see paragraph 20 below), the OGPP conducted a number of investigative measures. Specifically, it conducted additional interviews of V.G., his bodyguard and his driver – all of whom recalled the circumstances of the attack in the same terms as those that they had used when testifying in 2005. They additionally stated that on the day before the incident – that is, on 13 July 2005 – patrol police had stopped and examined V.G.’s armoured car, making enquiries about the owner of the car but without giving any reason for the police check.

12. The OGPP summoned I.O. (who had held the post of Minister of Defence in 2005 – see paragraph 68) for questioning in relation to public statements that he had made in 2007, when he had openly accused the applicant of masterminding the attack on V.G. I.O. stated to the OGPP that his previous public statements had been true. In particular, I.O. reiterated the statement that he had made to the effect that in June or July 2005 the applicant had personally and explicitly ordered him to arrange (using the Ministry’s resources) for a physical attack on V.G. to take place. Having refused to implement that request, I.O. had subsequently heard that the task had been reassigned to (and eventually carried out on the instructions of) another of the applicant’s ministers at the time – Ivane Merabishvili, the then Minister of the Interior (hereinafter referred to as “I.M.”; for more details regarding subsequent criminal proceedings against him, see *Merabishvili*, cited above, §§ 9-59).

13. The OGPP also questioned N.B., who had held the post of president of the Georgian Parliament in 2005 (see paragraph 62 below). The witness stated that in the immediate aftermath of the incident of 14 July 2005 she had had a chance to speak privately with the applicant, who had not hidden his satisfaction at what had happened to V.G. As regards other details of her interview with the investigating authority, N.B. made the same statement that she later reiterated during the trial (see paragraph 23 below).

14. The OGPP also questioned L.Sh., who had been the chief of the secret surveillance unit of the Special Operative Department (“the SOD”) of the Ministry of Internal Affairs. The witness confirmed that on 13 July 2005 his direct hierarchical superior – E.K., the director of the SOD – had tasked him with secretly monitoring V.G.’s communications and movements, in anticipation of a special operation to be carried out by the Ministry’s riot police. According to L.Sh., E.K. had mentioned to him that the operation was being planned on the direct orders of the country’s President.

15. The OGPP then questioned V.Z., who had been the head of the riot police at the time of the events in question. V.Z. stated that E.K., the director of the SOD, had on 13 July 2005 ordered him to assign a small group of riot police officers to a criminal-police operation, the exact purpose of which had not been disclosed to him at that time. After the group had been set up, it had been transferred to the command of G.S., another senior SOD officer. V.Z. also told the OGPP that approximately two weeks after the incident of 14 July 2005, he – together with some other senior Interior Ministry officers – had attended a meeting with the then Minister of the Interior (I.M.) and the President of Georgia. During that meeting, I.M. – in an informal and casual conversation with the applicant – had commended V.Z. for the successful completion of the operation against V.G.

16. The OGPP also identified and questioned the six officers of the riot police who had participated in the attack on V.G. The officers confirmed all the details of the attack that had previously been described by the victims (see paragraphs 8 and 9 above). They added that they had been misled by G.S. (the officer in charge of the squad – see paragraph 15 above) about the true identity of the victim. They had not known at that time that V.G. was a member of parliament. Rather, G.S. had told them that they had to disarm and physically assault “a very dangerous criminal” and punish him for being “an enemy of the nation and a traitor”. G.S. had further requested them to search V.G. and seize all his personal belongings because the latter was accused of transporting “classified documents concerning State secrets”. The six officers also testified that a few days after the incident of 14 July 2005 the director of the SOD, E.K., had personally met with each of them, awarding each of them a bonus of 500 United States dollars for their successful conduct of the operation. They were also requested not to speak with anybody about what had happened.

17. Between April and November 2014 the OGPP attempted to find out the whereabouts of G.S. and E.K. in order to summon them for questioning about the information provided by the other questioned Interior Ministry officers (see paragraphs 15 and 16 above), but both individuals had already fled the country by that time.

18. The OGPP further established that the press article which, according to V.G., might have prompted the above-described violent retribution carried out on the applicant's behalf (see paragraph 9 above) had taken the form of an interview published in the *Rezonansi* newspaper on 29 June 2005. In that interview, V.G. had firstly claimed that the President of Georgia had stolen some of V.G.'s property and had then made a number of offensive statements about the private life of the President's wife.

19. Before concluding the investigation and deciding whether criminal charges could be brought against the applicant, the OGPP solicited an opinion from the International Prosecution Advisory Panel (see paragraph 5 above). The Panel, after examining all the case material, issued a conclusion on 23 March 2014, which concluded as follows:

“We believe that the existing material is legally and factually sufficient to proceed with the prosecution of [the applicant], I[.]M[.], E[.]K[.] and G[.]S[.] for various offences relating to a physical assault on V[.]G[.] on 14 July 2005. We believe that you should continue your investigation and move towards trial, where any remaining issues will be addressed during the adversarial process.”

20. On 10 November 2014 the OGPP charged the applicant with complicity in committing criminal battery (Article 117 § 5 (e) of the Criminal Code) and misuse of authority by resorting to violence (Article 333 § 3 (b) of the Code). He was accused of having masterminded, with the help of high-ranking officials of the Ministry of the Interior, the attack on V.G. as retribution for public statements made by the latter, which had contained offensive speech against the applicant and his wife. On 11 November 2014 similar charges were also brought, in separate sets of criminal proceedings, against I.M., E.K. and G.S., as well as against the six riot police officers.

C. The applicant's trial and his conviction on 28 June 2018

21. On 28 June 2018 the Tbilisi City Court – after conducting a trial during which all the relevant witnesses were heard in person and other pieces of evidence were examined in the presence of the applicant's lawyer – convicted the applicant *in absentia* of the offences with which he had been charged.

22. During the trial – in reply to the applicant's lawyer, who had challenged the credibility of N.B.'s statements on the basis of the fact that she was a political opponent of his client – N.B. stated the following:

“Yes, one can say that I am a political opponent [of the applicant]. However, I can give reassurances ... that I take great responsibility for each and every word [contained

in my testimony]. In the present case, I am absolutely objective in my testimony because what is at stake here is not my personal opinion of political events. ... We are discussing the facts of a criminal case here, and I have told you all the truth under oath ..., and I stand by my statements.”

23. As can be seen from the record of the trial, N.B. stated before the City Court that immediately after the attack on V.G. she had visited him in hospital. The severely injured victim had told her about the circumstances surrounding his personal differences with the applicant, adding that he had no doubt that it was the latter who was behind the attack. N.B. further recalled that immediately after visiting him in hospital she had gone to see the applicant and had asked him if the victim was right in his assumptions about the applicant’s involvement in the attack, in reply to which the applicant (as N.B. told the court) had commented: “Why? Doesn’t he [V.G.] deserve to be duffed up?” A heated exchange had then taken place between the applicant and N.B., with the latter reproaching the former for employing State resources for the purposes of pursuing his “personal vendetta”. That conversation had ended, according to N.B.’s account of events, with the applicant trying to calm her down by “promising not to resort to violent methods in the future.” N.B. also added that after the incident the applicant had asked N.B. to initiate a procedure aimed at suspending V.G.’s status as a member of parliament. She also stated, in reply to an objection made by the applicant’s lawyer, that although it was possible that some other high-ranking State officials could have masterminded the attack on the victim without any direct orders from the applicant, she knew – having held the highest State offices in the country – “all too well how things worked”, adding that she was confident that, in the absence of a direct order from the applicant, nobody (not even the Minister of the Interior) would have ever dared to assault a member of parliament.

24. In the same vein, when I.O. was questioned by the applicant’s lawyer during the trial as to whether his previous incriminating statements (see paragraph 12 above) might have been conditioned by his personal animosity against the applicant, I.O. replied that, being under oath, “there could be no question of my committing the criminal offence of perjury” and that all of his statements were therefore true and accurate. To emphasise further the fact that his testimony against the applicant was trustworthy, I.O. also recalled that the first time that he had reported receiving the criminal order from the applicant regarding the “punishment” (დასჯა) of V.G. (see paragraph 25 below) had been in 2007 (see paragraph 69 below), when the applicant had still been the President of the country and the leader of the ruling authorities.

25. As can be seen from the record of the trial, I.O. reiterated before the City Court the statements that he had given during the investigation stage. That is to say, he confirmed again that shortly after V.G.’s newspaper interview had been published on 29 June 2005, the applicant had explicitly ordered him “to exemplarily punish” (სამაგალითოდ დასჯა) V.G. for the insults that he had made against his wife. However, I.O. had refused to carry

out that order. During another meeting between I.O. and the applicant that had taken place shortly after the incident of 14 July 2005, the latter had mockingly told the former, in reference to that incident, that “the thing that you could not do has been brilliantly executed by [I.M., the then Minister of the Interior)”.

26. As can be seen from the record of the trial, the City Court also heard V.G., the driver and the bodyguard who had been with him during the incident of 14 July 2005. They recounted the assault in the same manner and in the same detail as they had during the investigation stage (see paragraph 11 above).

27. The trial court also heard eight former officers of the secret surveillance unit of the SOD – including L.Sh., its chief officer – who all acknowledged that they had received direct orders from E.K., the former Director of the SOD, to monitor the daily movements and mobile telephone conversations of V.G. in preparation for the assault on the latter in July 2005. The same officers further confirmed that, as part of that preparatory work, they had tampered with the braking system of the applicant’s armoured car in order to prompt him to start using a less secure car so that the forthcoming special operation would have a greater chance of success. L.Sh. further reiterated before the trial court that E.K. had told him that the operation against V.G. was being planned on the orders of the applicant (see paragraph 14 above).

28. The trial court also heard the six officers of the Ministry of the Interior’s riot police who had participated in the attack on V.G. The officers confirmed all the details of the attack that they had previously given during the investigation stage (see paragraph 16 above).

29. The trial court also heard V.Z., the head of the riot police at the time of the events in question, who reiterated all of the statements that he had previously made during the investigation stage. Among other details, V.Z. reiterated before the City Court that he had had a chance to briefly meet with I.M. (the then Minister of the Interior) and the applicant towards the end of July 2005 during an official event hosted by the Ministry of the Interior. During that meeting, the Minister had praised V.Z., in the presence of the applicant, in the following terms: “You see, V.Z. is a real professional ... He is the one to be congratulated for how the [V.G.] issue has been handled”. According to V.Z., the applicant had not shown any signs of surprise upon hearing that remark but, on the contrary, had warmly thanked V.Z. for the completion of the task entrusted to him.

30. The City Court also examined, in the presence of the parties’ representatives, the relevant data received from mobile phone operators, which – according to an analysis of traffic between the relevant mobile-phone antennae in Tbilisi – showed that there had been a series of calls between the applicant, the Minister of the Interior (I.M), the director of the SOD (E.K.)

and the head of the riot police (V.Z.) shortly before and after the incident of 14 July 2005.

31. In its conviction judgment of 28 June 2018, the Tbilisi City Court, in reply to the applicant’s challenge to the credibility of the testimony given by N.B. and I.O., stated that “the fact that both witnesses are political opponents of the applicant could not mean that the statements they gave in the criminal case were untrue by default”. The court stated that it had assessed the two witnesses’ statements in combination with the other pieces of evidence available in the case file – namely the statements of all the other witnesses and the data retrieved from the mobile phone operators – and that “it was the totality of all the evidence that proved beyond reasonable doubt the applicant’s guilt in masterminding the attack on V.G.”. The City Court specifically noted that the applicant’s contention that only two witnesses (I.O. and N.B.) had accused him of being directly involved in the crime was factually incorrect, as the relevant statements given by V.Z. constituted equally direct incriminating evidence.

32. The applicant’s lawyer appealed against the conviction, complaining that it was largely based on the statements of I.O. and N.B., which constituted hearsay evidence and were unreliable, given the history of the political rivalry between the two witnesses and the applicant.

33. A final domestic decision – rejecting the applicant’s appeal, upholding his conviction and sentencing him to six years’ imprisonment (with an additional two-year ban on entering public service) – was delivered by the Supreme Court, sitting in camera, on 31 July 2019 (served on the applicant’s lawyer on 6 August 2019).

34. The Supreme Court stated in its decision that, *inter alia*, “the former political rivalry between the applicant and the witnesses N.B. and I.O. could not in itself have rendered the statements of these witnesses inadmissible for lack of credibility; rather, those statements ought to be assessed in combination with the body of all other available evidence”. The court also held that “it was exactly such an overall assessment that led the lower court to endorse the credibility of the two witnesses’ statements”. As regards the scope of the applicant’s involvement in the assault on V.G., the Supreme Court deemed that it was not necessary to show that the applicant had been involved in the planning “of each and every step of the crime in question.” It was sufficient to show (as the lower court had indeed shown) that the assault on the victim had been perpetrated by State agents who had been in a chain of command originating from the President of the country.

III. THE CRIMINAL PROCEEDINGS ON CHARGES OF ABUSE OF OFFICIAL AUTHORITY (APPLICATION NO. 22394/20)

A. Background

35. As was noted by the Court in its judgment in the case of *Enukidze and Girgvliani v. Georgia* (no. 25091/07, §§ 15-193, 26 April 2011), at around 1 a.m. on 28 January 2006, a young man, Sandro Girgvliani, went with a male friend, L.B., to a café in Tbilisi, to see a lady that he was courting at the time. She happened to be sitting at a table together with a number of senior officials from the Ministry of Interior, among whom was also the Minister of the Interior's wife ("the Minister's wife"). Sandro Girgvliani spoke to his lady friend, expressing displeasure at seeing her in the company of unknown men and referring in dismissive terms to the Minister's wife. According to L.B., who survived the assault described below, after he and Sandro Girgvliani and L.B. had left the café they were forcefully, at gunpoint, pushed into a vehicle by unknown men and driven away to a cemetery outside Tbilisi; there the two young men were made to strip and were severely beaten (separately and at a distance from each other) by several unidentified people who eventually left. L.B. managed to get up at some point, did not see his friend anywhere and made his way to a service station, from where he called the police. At about 3 p.m. on 28 January 2006 Sandro Girgvliani's body, naked from the waist up and covered with many wounds and lesions, including twelve knife cuts (mostly slashes) to his throat, was found, lying in the snow in the woods near the cemetery (hereinafter "the Girgvliani murder case").

36. A criminal investigation into the Girgvliani murder case was opened on 28 January 2006 by the Ministry of the Interior, and a number of important investigative measures were immediately thereafter undertaken by the Ministry's investigators. In March 2006, after the case had been taken away from the Ministry and handed over to Tbilisi City Public Prosecutor's Office, four senior officers of the Constitutional Security Department ("the CSD") of the Ministry of the Interior – G.A., A.A., A.Gh. and M.B. – were arrested on suspicion of abducting and assaulting Sandro Girgvliani and L.B. The investigation concluded that on the night in question, as the four suspects had been entering the café to join the group of their Ministry colleagues, they had come across Sandro Girgvliani – who had been leaving the café and insulting their colleagues; in retaliation, they had abducted and beaten Sandro Girgvliani and L.B. On 6 July 2006 the four officials of the CSD were convicted of premeditated false imprisonment with life-threatening violence, wilful bodily harm resulting in death and abuse of authority. Their conviction was upheld by the Tbilisi Court of Appeal and the Supreme Court of Georgia on 11 December 2006 and 27 July 2007 respectively (with minor amendments in respect of the legal classification of the criminal charges); the four convict officers received sentences ranging from six and a half to seven

and a half years in prison (for more details regarding the different stages of the criminal investigation and trial, see *Enukidze and Girgvliani*, cited above, §§ 23-193).

37. On 24 November 2008 the applicant, who was the President of Georgia at the material time, decided to grant G.A., A.A., A.Gh. and M.B. a measure of presidential clemency and reduced their respective sentences by half. As the presidential measure of clemency also rendered the former CSD officers eligible for release on licence, the four men lodged an application with the relevant body in the Prisons Department of the Ministry of Justice (“the prison authority”) for their release. On the basis of a unanimous opinion issued by the prison authority, which commended the four men for their exemplary conduct in prison and described the crime committed by them as “physical aggression towards other persons that arose from a verbal altercation” (“*ურთიერთშელაპარაკების ნიადაგზე ფიზიკური შეურაცხყოფა მიყენებს მოქალაქეებს*”), the Tbilisi City Court decided, on 5 September 2009, to release the four convicts on licence (*ibid.*, §§ 204-205).

38. In a judgment of 26 April 2011, the Court found a violation of the procedural limb of Article 2 of the Convention in a case brought by Sandro Girgvliani’s parents on account of the ineffective criminal investigation conducted by the domestic authorities into the Girgvliani murder case. Thus, the Court, having assessed in detail the various stages of the investigation, the judicial proceedings as well as the adequacy of the punishment of the four convicted officers of the CSD, found that the investigation in question had manifestly lacked the requisite independence, impartiality, objectivity and thoroughness (*ibid.*, §§ 244-78). Addressing, in particular, the adequacy of the punishment and the role of the presidential pardon granted by the applicant in that connection, the Court made the following statements:

“273. In any event, it is not so much the initial sentences imposed on the offenders as the subsequent manner of their implementation which is at the core of the problem. The Court is struck by the fact that on 24 November 2008 the President of Georgia found it appropriate to pardon State agents convicted of such a heinous crime by reducing the remainder of their sentences by half. Then, as if that measure of clemency was not generous enough, on 5 September 2009 the prison authority recommended and the relevant domestic court granted the convicts’ release on licence. ...

274. However, the Court considers that when an agent of the State, in particular a law-enforcement officer, is convicted of a crime that violates Article 2 of the Convention, the granting of an amnesty or pardon can scarcely serve the purpose of an adequate punishment On the contrary, the Court expects States to be all the more stringent when punishing their own law-enforcement officers for the commission of such serious life-endangering crimes than they are with ordinary offenders, because what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State’s duty to combat the sense of impunity the offenders may consider they enjoy by virtue of their very office and to maintain public confidence in and respect for the law-enforcement system

275. In the light of the foregoing, the Court concludes that the sentences as initially imposed upon the convicts by the domestic courts and actually implemented by the relevant domestic authorities did not constitute adequate punishment for the crime committed.

276. [T]he relevant circumstances of the case allow the Court to draw the conclusion that the domestic authorities were lacking in candour in the conduct of the investigation. Even if the failings of some of those authorities would not alone have been sufficient for a finding of the inadequacy of the investigation, their coexistence, cumulative effect is more than enough in this regard. Indeed, the Court is struck by how the different branches of State power – the Ministry of the Interior, as regards the initial shortcomings of the investigation, the Public Prosecutor’s Office, as regards the remaining omissions of the investigation, the Prisons Department, as regards the unlawful placement of the convicts in the same cell, the domestic courts, as regards the deficient trial and the convicts’ early release, the President of Georgia, as regards the unreasonable leniency towards the convicts, and so on – all acted in concert in preventing justice from being done in this gruesome homicide case.”

B. Repeat investigation into the Girgvliani murder case and the applicant’s indictment

39. On 26 November 2012, as part of the measures undertaken by the respondent State to remedy the violation found by the Court in its judgment of 26 April 2011 in the case of *Enukidze and Girgvliani* (cited above), the OGPP launched a repeat investigation into the circumstances surrounding the Girgvliani murder case.

40. When questioned by the OGPP on 26 and 28 November 2012, the above-mentioned four former officers of the CSD (see paragraph 36 above), who by that time had already been released from prison (see paragraph 37 above), revealed the following facts for the first time. They stated that they had received an order from D.A., the then Director of the CSD for the abduction and “exemplary punishment” of the victim on 21 January 2006. After the killing had prompted a significant public outcry in the country, D.A. had met with G.A., A.A., A.Gh. and M.B. and told them that there was no other option for the four of them but to confess to the crime. At the same time, D.A. had insisted that they should remain absolutely silent about his own involvement in the incident. In exchange for such loyalty, D.A. promised the four officers that their families would receive considerable monetary compensation, that they themselves would be given the most comfortable conditions of detention and that their prison terms would, moreover, be reduced by means of a presidential pardon and/or the granting of an amnesty.

41. In respect of the prospect of their early release from prison, D.A. had told the officers that he had personally obtained a promise from the President of Georgia that he would pardon them after they had served a certain part of whatever sentences that would be imposed on them. After they had been convicted on 6 July 2006, the four officers had indeed been placed in a newly-built prison, where their cells had been equipped with non-standard,

comfortable beds, refrigerators and other household appliances, and they had been provided with an Internet connection, cable television and the services of a personal cook and a maid. They had also been allowed to use their mobile telephones without any limitation and to receive an unlimited number of visitors. On 24 November 2008 the four convicted prisoners' sentences had been reduced by half on the basis of a presidential pardon granted by the applicant, and on 5 September 2009 they had been released from prison, having served only three years of their six-year sentences.

42. In the light of the above-mentioned information, on 27 November 2014 the OGPP, opening a separate investigation, charged the applicant with the offence of abuse of power by a public official holding a political post (Article 332 § 2 of the Criminal Code) on account of the presidential pardon granted on 24 November 2008 to the above-mentioned four former officers of the CSD. Specifically, he was accused of having granted that pardon in breach of the relevant domestic legal procedure and for the purposes of perverting the course of justice in the Girgvliani murder case. Within the framework of the second, separate investigation, the OGPP questioned a number of former high-ranking members of the UNM ruling forces, including I.O. and N.B. (see paragraphs 12 and 13 above). Those witnesses stated that their personal observation of the applicant in 2006 had led them to believe that the applicant had personally promised both D.A. (the then Director of the CSD) and I.M. (the then Minister of the Interior) that he would grant a pardon to the four officers after they had served part of their prison sentences (for more details in respect of those witnesses' statements, see paragraphs 45 and 46 below).

43. As another consequence of the repeat investigation into the Girgvliani murder case, additional criminal charges were brought on unspecified dates and in separate sets of criminal proceedings against I.M., D.A. and certain other officers of the Ministry of the Interior on account of their own respective roles in the murder case and the obstruction to its investigation.

C. Trial

44. After the applicant's trial had started, numerous witnesses were examined, under oath, in the presence of the applicant's lawyer. The most important of those witnesses were as follows.

45. I.O., who held the post of Minister of Defence at the material time (see paragraph 12 above), confirmed all of the statements that he had previously given to the investigator: he specifically stated that he had had a meeting with the applicant sometime after the murder of Sandro Girgvliani had taken place on 27 January 2006, and that during that meeting the applicant had shown that he was in full possession of all the details of the crime – including the fact that D.A. and the Minister's wife had been implicated in the murder (see paragraph 35 above and *Enukidze and*

Girgvliani, cited above, §§ 3 and 15-18). The applicant had told I.O. during that meeting that the applicant had no other option but to do everything in his power to mitigate the damage that the crime in question could cause to his political team in the event of a full public disclosure of all the details. The applicant had confirmed to I.O. that he had already given assurances to people from the Ministry of the Interior that he would grant a presidential pardon to those who would be ready to accept at least some sort of responsibility for the crime in question. I.O. also stated before the trial court that he had had another meeting with the applicant in April 2006, during which the latter had told the witnesses that the Minister of the Interior (I.M.) had been constantly reminding him of the need to pardon the four police officers, and that in due course the applicant would have no other choice but to yield those insistent demands.

46. When questioned by the trial court, N.B. stated that she had also had a meeting with the applicant shortly after the crime of 27 January 2006 had been committed by high-ranking officers of the Ministry of the Interior. During that meeting, the applicant had made it clear that he knew all the details of the case. Although N.B. stated that she had never heard directly from the applicant anything about his plans to pardon the people who would eventually be convicted, she said that there had been credible rumours circulating in the highest echelons of State power that the applicant had indeed given promises to the Minister of the Interior and D.A. that he would resort to his presidential power to exercise clemency in order to alleviate the consequences for those police officers who would be ready to accept criminal liability.

47. In addition to N.B., two other witnesses – Z.N. (a former Prime Minister) and S.S. (a former Ombudsperson) – stated before the trial court that there had been credible rumours circulating in the highest ranks of the State power that the applicant had told the Minister of the Interior that he would pardon the convicted police officers and would moreover do everything in his power to minimise the damage that the criminal investigation in respect of the *Girgvliani* murder case might cause to the public image of the government.

48. When questioned by the trial court, the four former officers of the CSD of the Ministry of the Interior, who had been convicted of murder, reiterated the statements that they had given during the investigation stage (see paragraph 40 above). Among other things, they confirmed again that D.A., the former Director of the CSD (who had been their direct supervisor) – on whose direct orders the homicide had been committed – had told the officers that he had personally obtained a promise from the President of Georgia (that is, the applicant) that the latter would pardon them after they had served part of whatever term of imprisonment to which they would be sentenced. They also added that they had been granted a pardon despite the

fact that none of them had ever lodged written applications for a pardon with the Presidential Clemency Commission.

49. The trial court also heard two additional witnesses, who had served as members of the Presidential Clemency Commission (which formed part of the President's office) at the time when the applicant had granted a pardon to the above-mentioned police officers in November 2008. Those witnesses stated that the pardon process had been conducted with procedural irregularities. Specifically, they stated that they had never seen any document relating to the four convicted people (such as applications for a pardon); nor had the witnesses participated in any discussions on the matter. The applicant had simply granted a pardon to each of the police officers without consulting the Presidential Clemency Commission at all. The already established legal practice (that is to say custom), however, indicated precisely the opposite: it was the Commission that should have examined the files of the convicted people in the first place and then given the President a recommendation regarding whether or not he should grant a pardon. The witnesses also stated that they had learned of the applicant's act of clemency from a television news bulletin.

D. The applicant's conviction and his appeals against it

1. Proceedings before the court of first instance

50. On 5 January 2018 the Tbilisi City Court, sitting as a single-judge bench (composed of Judge G.A.), convicted the applicant *in absentia* of the crime of abuse of power by a public official holding a political post (Article 332 § 2 of the Criminal Code). The court's analysis was focused on three major issues: (i) whether or not the presidential power of clemency was absolute and immune from jurisdiction, (ii) whether there was sufficient evidence to establish that the applicant had deliberately misused his power of clemency and (iii) what were the aims that the applicant had wished to achieve, if any, by abusing his presidential power.

51. As regards the first issue, which addressed the applicant's argument that the presidential power to exercise clemency was absolute and could not be bound by any restrictions, the City Court stated:

"The court deems it necessary to clarify that ... the unequivocal assertion that the President's constitutional power is limitless – and that it is therefore impossible to abuse this power, even if an unscrupulous and premeditated intent has been proved – is dangerous and could encourage high-ranking State officials to get involved in corruption or other illicit dealings in the future. Such an assertion erases the legal boundaries of a State official's authority and undermines the system of checks and balances. The principles of democracy and the rule of law are paramount among all other constitutional principles, ... and it is on the basis of these principles that State officials are obliged to comply with the constitutional order, which means that no branch of the State power may act solely on the basis of personal convenience, political necessity or other undue motivation. Thus, the power to grant a presidential pardon

cannot be limitless and is, on the contrary, limited by the relevant constitutional principles and [by] legal rationalism. The President can only exercise his/her powers in accordance with constitutional principles, not against them.”

52. In addition to its findings that the presidential power of clemency was not limitless, the City Court also referred to the fact that, under the normal course of events (that is, according to precedent) the applicant would have consulted the Presidential Clemency Commission before making his decision – a stage that he had bypassed (see paragraph 49 above). The fact that he had inexplicably circumvented the otherwise routine procedural stage of consulting the Presidential Clemency Commission stood, in the City Court’s opinion, as further proof (for more proof in this regard, see the immediately following paragraph) of the applicant’s intention to misuse his power of clemency.

53. As regards the second question of whether there was a sufficient evidentiary basis to establish that the applicant had deliberately misused, or abused, his power to grant clemency, the City Court stated that the best illustration of the applicant’s state of mind in that respect was the fact that he had issued prior promises to pardon the four former officers of the CSD officers convicted in the Girgvliani murder case. Specifically, the court found it established (on the basis of the statements of the relevant witnesses and other evidence available in the file) that the four convicted police officers had received promises from their direct supervisors – I.M. (the Minister of the Interior) and D.A. (the Director of the CSD) – that they would receive, among other undue benefits, presidential pardons in exchange for their readiness to accept sole responsibility for the Girgvliani murder and to remain silent about the implication of I.M.’s wife and D.A. It was further established – mainly on the basis of I.O.’s statements, but also with reference to the testimony given by other witnesses – that the applicant had indeed given such prior promises to D.A. and I.M., and that he had moreover been aware of all the circumstances surrounding the murder of Sandro Girgvliani, including the possible implication of the Minister’s wife from the very beginning and had thus been anxious about the damage that the crime in question could cause to his political team in the event of a full public disclosure of all the details (see paragraphs 45-48 above). When arriving at the latter conclusion, the City Court also attached importance to the fact that in a press interview given in 2014 (which formed part of the criminal file) the applicant had stated that his decision to grant a pardon to the four police officers (which he termed a “political amnesty”) had been one of the biggest mistakes of his political career. The City Court emphasised that the testimony given by the four convicted CSD officers, I.O. and other important witnesses constituted “direct evidence” and that their reliability could not therefore be called into question.

54. As regards the question of what purposes the applicant pursued when abusing his authority, the City Court found, after analysing both the direct

and circumstantial evidence, that the applicant had exercised his presidential power to exercise clemency “in bad faith” and “with significant prejudice to the public interest”. Indeed, the court continued, by granting a pardon to the police officers in exchange for their silence (that is, not revealing to the investigation that the murder had been committed on orders from D.A. and possibly also with the implication of the Minister’s wife), the applicant had contributed to perverting the course of justice in respect of the Girgvliani murder case. In arriving at that conclusion, the Tbilisi City Court also referred to the Court’s judgment in the case of *Enukidze and Girgvliani* (cited above, §§ 273 and 276). In its concluding statements, the court noted the following:

“The court thus finds it established that when pardoning the people who had been convicted in the Girgvliani murder case, [the applicant] acted not out of virtuous, humanitarian considerations but merely for the purposes of shielding from justice the other participants in the crime – his political allies (the then Minister of the Interior and other high-ranking officers of the Ministry) – and that that, in its turn, interfered with the legitimate public interest in the investigation in the murder case being conducted objectively and impartially. ...”

2. *Proceedings before the Tbilisi Court of Appeal*

55. The applicant’s lawyer subsequently lodged an appeal with the Tbilisi Court of Appeal – mainly arguing that: (i) Judge G.A. (see paragraph 50 above) had lacked independence and impartiality because he had served as an assistant to the first-instance judges who had examined the Girgvliani murder case; (ii) the conviction had mainly been based on untested hearsay evidence; and (iii) the applicant had been convicted for an act of presidential clemency that had not constituted a criminal offence and had, moreover, constituted the exercise of a plenary power conferred on him by virtue of his office as President and head of State.

56. The appeal was dismissed by the Tbilisi Court of Appeal, sitting as a single-judge bench, on 18 July 2018. After having reviewed the case both on points of law and questions of fact, the appellate court upheld in full the reasons given by the lower court, emphasising that the City Court had reached its findings of fact after examining the evidence available in the case file. The court dismissed as ill-founded the applicant’s allegation that the conviction had been based only on hearsay evidence and otherwise unreliable evidence. It stated in this connection that the majority of the witness statements had constituted direct evidence (in particular, the statements given by I.O.), and that all other items of evidence – both direct and circumstantial – had been consistent and had complemented each other and had proved beyond reasonable doubt that the applicant had exercised his power of presidential clemency in bad faith. The appellate court also upheld the first-instance court’s reasoning as regards the limits on president’s power to exercise clemency (see paragraph 51 above), emphasising the following considerations:

“While the court agrees with the defence party that under the Constitution the President of Georgia enjoyed full discretion and was not bound by any subordinate rules in the exercise of his constitutional power of clemency, this does not mean that the power in question could not be abused. The evidence available in the case file, in particular the statements of [I.O.] and [N.B.], confirm that [the applicant] was anxious about the damage that the criminal investigation in respect of the Girgvliani murder case might cause to the public image of the government. ... It was thus for the purposes of shielding the Minister of the Interior and D.A. from possible criminal and political responsibility – from which [the applicant] could only draw personal political benefit – that he issued promises to pardon the four officers [of the CSD] even prior to their arrest and conviction; he issued those promises in exchange for the four officers’ silence ..., which contributed to the obstruction of justice in the Sandro Girgvliani murder case. ... It should also be noted in this connection that the purposes for which [the applicant] abused his power of presidential clemency ... went against the pre-eminence accorded to the right to life both in domestic law ...[and] in all international instruments aimed at the protection of human rights, including ... the Strasbourg Court’s relevant case-law under Article 2 [of the Convention].”

57. In respect of the applicant’s challenge regarding the impartiality and independence of Judge G.A., the appellate court rejected that as unsubstantiated. The court stated that when G.A. had been, in 2006, employed as a judicial assistant, he had not exercised judicial functions. His job had consisted, under Article 53 of the Code of Criminal Procedure (see paragraphs 79 and 82 below), of providing purely technical assistance to judges. Therefore, even if G.A. had assisted the judges who had examined the Girgvliani murder case at first instance, none of his functions could have had any effect on the outcome of that case. In reply to a specific argument made by the applicant during the appeal – namely, that G.A. could not be considered to have been independent and impartial because he had attended the trial in the Girgvliani murder case and had been present when all of the witnesses had given their respective testimony – the Court of Appeal noted that the trial in 2006 had in any event been open to the public and that not only G.A. but any member of the public had been free to attend the hearings.

3. Proceedings before the cassation court

58. The applicant then lodged an appeal on points of law, which was rejected as inadmissible by the Supreme Court of Georgia, sitting as a bench of three judges, on 21 May 2019 (the decision was served on the applicant’s lawyer on 1 October 2019). The court dismissed the applicant’s argument that the conviction had been based on hearsay evidence, referring in particular to I.O.’s statements. The Supreme Court deemed that since the applicant had confirmed in private conversations with I.O. that he had promised to pardon the perpetrators of the murder, I.O.’s statements, made under oath at trial, could in no way be considered to constitute hearsay evidence. As regards the fact that I.O. was a political opponent of the applicant, the Supreme Court did not deem that that fact constituted sufficient grounds for questioning the reliability of his statements. The Supreme Court also referred (as had the

appellate court) to the importance of the circumstantial evidence, which had further indicated the applicant's guilt.

59. As regards the question of which act constituted the essence of the crime of abuse of official authority committed by the applicant, the Supreme Court made the following clarification:

“The key aspect of [the applicant's guilt] consists of his having issued advance promises that the high-ranking officers of the Ministry of the Interior would be pardoned ... The applicant was convicted by the lower courts ... not because he had exercised his power of presidential power as such, but because he had issued advance promises that he would do so in respect of the relevant police officers – and such conduct went against the legitimate public interest. ...

The criminal charge against the applicant was not based on his having pardoned the four officers as such but on his having promised to pardon them even prior to their arrest in exchange for their silence, ... which in its turn contributed to the perverting of the course of justice in the Sandro Girgvliani murder case. ... [In other words,] the presidential pardon of the four convicts did not constitute, but was merely a consequence of, the wrongful acts imputed to the applicant. ...”

60. As regards the issue of Judge G.A.'s independence and impartiality, in addition to confirming in full the reasons given by the Tbilisi Court of Appeal (see paragraph 57 above), the Supreme Court also noted that the Girgvliani murder case had concerned an entirely different issue (namely, whether or not the four police officers had been guilty of murder), whereas the subject matter of the present proceedings concerned the abuse of power on the part of the applicant in exercising his presidential power to exercise clemency. The latter issue had never been even remotely addressed in the Girgvliani murder case; hence, there could not be any objectively justified fear that the outcome of the proceedings against the applicant had in any manner been prejudged back in 2006. Lastly, in reply to the applicant's specific argument that Judge G.A. could not be considered to have been either independent or impartial because of the pressure exercised by the public and the Government on that judge, the cassation court noted that the applicant had failed to adduce any specific proof in support of those allegations.

IV. SUBSEQUENT DEVELOPMENTS

61. On 29 September 2021 a cargo ship, the *Vilnius*, which was transporting dairy goods through the Black Sea from Ukraine to Georgia, entered the sea port of Poti in Georgia. As was later established by the investigating authorities, the applicant – who had decided to return to Georgia in a clandestine manner – was aboard that ship. After the container in which the applicant was hiding had been unloaded at the port the applicant went into hiding in Georgia for two days, before he was finally arrested in Tbilisi on 1 October 2021. He was placed in prison to serve a combined sentence of six years, pursuant to the above-mentioned judgments against him of 5 January

and 28 June 2018. In addition, a separate criminal case was brought against him for illegally crossing Georgia's border.

V. ADDITIONAL INFORMATION REGARDING THE WITNESSES N.B. AND I.O.

62. N.B. held the post of president of the Georgian Parliament between 2001 and 2008. Between November 2003 to January 2004, and again between November 2007 and January 2008, she served as the acting President of the country.

63. In a public statement issued by N.B. on 13 February 2007, when she held the post of president of the Georgian Parliament, she called the Girgvliani murder case a "tragic event in the political life of the country" and expressed the hope that "the truth will finally be established". She further added in the same statement that "it is a question of principle for us that the ongoing trial in respect of the murder case shall reveal, once and for all, the ultimate truth of this tragedy – exactly as our society expects to happen."

64. In an interview given by N.B. to a national newspaper on 3 April 2009, she stated that in the immediate aftermath of the murder committed on 27 January 2006, she had advised the applicant to sack the then Minister of the Interior, I.M, given the fact that the latter's wife, as well as certain other high-ranking police officers had been implicated in the murder case.

65. On 19 May 2009 N.B. publicly announced that she was going to sue the applicant for defamation because he had publicly accused her of being "a Russian spy".

66. In yet another public statement dated 31 July 2014, N.B. stated that "holding [the applicant] criminally liable would be in the national interest because it would serve as an important example of a highest-level State official being held accountable for his criminal deeds". As to what exactly constituted the "criminal deeds" of the applicant, N.B. referred, in the same statement, to his role in the purported instigation of the international armed conflict between Georgia and the Russian Federation in August 2008. Thus, in her opinion, the applicant's actions in his capacity as head of State were to blame for the start of the war that had ravaged Georgia.

67. In a press interview of 5 December 2014, N.B. reproached the law-enforcement authorities for having allowed the applicant to evade the ongoing criminal investigations by fleeing the country (see paragraph 5 above). She stated that the applicant "and a dozen of his former political allies deserve to be in jail for various serious criminal offences [that they] committed while in public office."

68. As regards I.O., he was the applicant's close ally and a member of the latter's government between January 2004 and November 2006, successively holding a number of ministerial posts, including that of Minister of Defence (in 2005). On 17 November 2006, I.O. resigned from his post as Minister for

the Economy; almost a year later, on 25 September 2007, he made public accusations against the applicant, the then President of the country, accusing him of being involved in a number of serious criminal offences, including conspiring to murder political opponents.

69. In particular, in a television interview of 25 September 2007, I.O. stated that he had received orders from the applicant to assassinate a businessman, B.P, as well as to “exemplarily punish” V.G. – criminal orders that I.O. had refused to execute; with respect to the incident involving V.G., I.O. gave in the same interview details that were identical to those that he subsequently gave during the trial (see paragraph 12 above).

70. On 27 September 2007, that is, two days after I.O.’s public accusations against the applicant, the former was arrested on suspicion of having committed a number of criminal offences while holding public office. Subsequently, he was released on bail and managed to flee Georgia and to obtain political asylum in France. It was only after the handover of power by the UNM to Georgian Dream in 2012 (see paragraph 5 above) that all the criminal charges against I.O. were dropped, and he was formally granted the status of a victim of persecution on political grounds and so was able to return to Georgia.

71. In a press interview dated 20 November 2012, I.O. – who at that time was about to return to Georgia – stated that “I have had two dreams in recent years ...: for us [that is, the country] to get rid of Misha [the applicant] and for me to return home.”

72. During a press conference on 14 March 2018, I.O. told journalists: “I have said in the past that I wish to destroy Misha [the applicant]; however, that does not mean that I intend to play with the truth ... All I have ever wanted is to cooperate with the investigation and to share with them my knowledge of various facts ...”.

73. During another press conference of 27 November 2018, I.O. stated – referring to the fact that he had been the applicant’s political opponent many years before the creation of Georgian Dream – that “I have nothing to thank Georgian Dream for ...; on the contrary, it is they who should be thanking me”. He explained in the same interview that he considered himself to be one of the pioneers in the political struggle against the applicant, and further complained that the current ruling forces – the Georgian Dream coalition – had already disappointed him on many occasions.

74. The case file also contains a number of public statements made by N.B. and I.O. between 2013 and 2019 expressing their critical opinions of the ruling Georgian Dream coalition that had governed the country since October 2012 (see paragraph 5 above).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Constitution

75. The relevant provisions of the Constitution of Georgia read, at the time when the applicant held the office of President of Georgia, as follows:

Article 69

“1. The President of Georgia is the head of the Georgian State.”

Article 73

“1. The President of Georgia shall have the power to: ...

(n) pardon convicts. ...”

Article 75

“1. The person of the President of Georgia shall be inviolable. The President cannot be arrested or be subjected to a criminal prosecution during [his or her] tenure of office.

2. The Parliament of Georgia can remove the President from his or her office under Article 63 of the Convention [the constitutional provision that regulates the impeachment procedure] in the event that the President has either violated the Constitution or committed high treason or another criminal offence if (i) the relevant breach of the Constitution has been confirmed by the Constitutional Court of Georgia or (ii) the commission of high treason or another criminal offence has been confirmed in a special [impeachment] opinion issued by the Supreme Court of Georgia.”

B. Criminal Code

1. Relevant provisions

76. At the time when the applicant held the office of President of Georgia, the relevant provisions of the Criminal Code of Georgia read as follows:

Article 78 – Pardon

“1. The President of Georgia may grant a pardon with respect to an identifiable individual.

2. Under an act of pardon, the convicted person may be released from further serving [his or her] prison sentence, or the prison sentence [in question] may be reduced or replaced with a more lenient punishment.

3. If the convicted person has already served his or her prison sentence, an act of pardon may extinguish that person’s criminal record.”

Article 117 §§ 1 and 5 – Wilful grievous bodily harm

“1. Wilful grievous bodily harm ... which is life-threatening ... shall be punishable by three to five years’ imprisonment. ...

5. Wilful grievous bodily harm committed ...;

(e) by a group ... shall be punishable by seven to nine years' imprisonment.”

Article 332 § 1 and 2 – Abuse of official authority

“1. Abuse of official authority by a public official or a person of equivalent status – [which has been committed] to the detriment of public-service requirements and in order to gain any personal profit or privilege or any profit or privilege for another person, and which has substantially affected the rights of a legal or natural person, or the legal interests of society or the State – shall be punishable by a fine or a term of up to three years' imprisonment, or a bar on holding public office or ... on engaging in professional activities for a period of up to three years.

2. The same action committed by a highest State official shall be punishable by a term of imprisonment of between three and five years, accompanied by a bar on holding public office ... for a period of up to three years.”

Article 333 §§ 1, 2 and 3 – Misuse of authority

“Misuse of authority by a public official ... [holding a political office] which substantially adversely affects the rights of a natural person or other legal entity or the legal interests of society or of the State ... and which has been committed by resorting to violence ... shall be punishable ... by a term of imprisonment between five and eight years, and up to three years' disqualification from holding public office ...”

Article 372 § 1 – Meddling with a witness, victim, expert or interpreter

“Meddling with a witness, victim, expert or interpreter for the purposes of either obtaining false statements or a fake opinion or translation or securing a testimony or information ... concealed from the investigation ... shall be punishable ... by a term of imprisonment of between one and three years.”

77. At the time when the two sets of criminal proceedings were pending against the applicant, Article 370 of the Criminal Code provided that perjury or the offence of wilfully telling an untruth or making a misrepresentation under oath at trial was punishable by imprisonment from two to eight years, depending on (i) whether the offence had contributed to the obstruction of justice in a less serious, serious or particularly serious criminal case and (ii) whether the offender had acted with the profit [motive] or [any] other undue motive.

2. Judicial practice

78. A number of constituent principles underlying the application of Article 332 of the Criminal Code – abuse of official authority (see paragraph 76 above) – followed from the decisions of the Supreme Court of Georgia dated 15 January and 27 June 2001, 7 December and 26 December 2005 and 8 November 2006, namely:

- while Article 332 was a “blanket” provision, in order to assess whether or not an abuse of official authority had been committed, it had to be read in conjunction with other relevant legislative principles, including those listed in the Constitution and ordinary statutes, which provided specific legal content;

- the perpetrator of a criminal act under Article 332 could be any public official, including, under paragraph 2 of this provision, those holding the highest State offices – such as, by virtue of the definition contained in section 1(3)(a) of the Law on public service, a member of the Government or the President of the country;

- for an act to qualify as “criminal” under Article 332, it had to be committed with forethought and with the aim of obtaining either pecuniary or non-pecuniary benefits/privileges;

- apart from being committed with forethought and for the benefit of the perpetrator, an act punishable under the said criminal provision had to result in substantial damage being inflicted either to the legitimate interests of another individual or to a legitimate public/State interest.

C. Code of Criminal Procedure

1. Relevant provisions

79. Section 53 of the Code of Criminal Procedure of 20 February 1998, as worded at the time of the trial in respect of the Girgvliani murder case in 2006 (see paragraph 36 above), read as follows:

Article 53 – Judicial Assistant

“A judicial assistant shall prepare a criminal case file for examination during a trial in accordance with instructions emanating from the judge, inform the parties to the proceedings of the dates and venues of the scheduled hearings, prepare draft court decisions, make copies of the relevant case-material items and hand them over to the parties, ensure that pieces of material evidence are well protected and provide other technical assistance to the judge.”

80. The relevant legal provisions of the Code of Criminal Procedure of 9 October 2010 concerning the weight of witness statements, as worded at the time of the criminal proceedings against the applicant in application no. 22394/20, read as follows:

Article 13 §§ 1 and 2 – Evidence

“1. Evidence has no predetermined probative value.

2. ... Conviction shall be based on a body of consistent, clear and convincing evidence that establishes, beyond reasonable doubt, the guilt of a person.”

Article 75 § 1 – Witness statement

“1. A witness statement shall not be admitted as evidence if the witness is unable to indicate the source of the information provided ...”

Article 76 – Hearsay witness statement

“1. Hearsay is the restatement by a witness of another person’s statement.

2. Hearsay shall be admissible as evidence only if the witness giving the evidence specifies the source of the information and if that source can be identified and confirmed to exist.

3. Hearsay may be admitted in evidence at the trial if it is corroborated by direct evidence.”

2. Judicial practice

81. In its judgment of 22 January 2015 (*Zurab Mikadze v. Parliament of Georgia*, no. 1/1/548), the Constitutional Court of Georgia held that, while the Code of Criminal Procedure (as in force at the material time) allowed to a certain extent for the admission of hearsay evidence, it did not contain the adequate safeguards necessary to ensure the fairness of a trial. The relevant parts of the judgment read:

“28. The Code of Criminal Procedure lays down a rule which, on the one hand, treats a hearsay witness statement (if an identifiable source [of information] is indicated) as admissible for the purpose of bringing charges or reaching a conviction, and [on the other hand] provides an additional precondition at the stage of the examination on the merits: that the hearsay witness statement be corroborated by other evidence that is not in itself hearsay. At the same time, the provisions regulating the admissibility of evidence do not contain any additional ... rules as to how a hearsay statement may be used when bringing charges or reaching a conviction. Accordingly, it is possible for [a person] to be charged or convicted on the basis of evidence which does not solely consist of a hearsay statement, but which is primarily hearsay in essence ...

29. A court’s admission as evidence of statements that are based on information provided by others entails many risks ...

52. Hearsay witness statements are, in general, less reliable as evidence. Allowing such evidence at a trial entails the risk of misconception ...; therefore, it should only be admitted in exceptional circumstances strictly prescribed by law and should be accompanied by adequate constitutional safeguards, [which do] not exist within the framework of the Code of Criminal Procedure as it currently stands.”

D. The Law of 4 December 2009 on common courts

82. Section 58 of the Law on Common Courts read as follows:

Section 58 – Judicial assistant ...

“1. A judicial assistant shall communicate with parties, register requests and applications submitted by them, prepare case files for a hearing, conduct legal research, draft court documents and discharge any other duties relevant to court proceedings, under instructions from a judge.”

E. The Law of 31 October 1997 on public service

83. Section 1(3)(a) of the Law of 31 October 1997 on public service, as worded at the material time, included the President of Georgia (or the head of State) in the definition of the “highest State officials”.

F. The Law of 21 November 1997 on Impeachment

84. At the time when the applicant held the office of President of Georgia, the Law on Impeachment – in particular its section 22 – provided that if the President of Georgia had committed a criminal offence during his or her tenure of office, he or she ought first to be removed from the office by the Parliament of Georgia under the impeachment procedure, in accordance with Articles 63 and 75 of the Constitution. After that, the question of whether or not the already former President should be subjected to criminal prosecution was to be decided in accordance with applicable criminal law.

G. Legal rules and judicial practice on the scope of the power of presidential clemency

1. Relevant provisions

85. Presidential Decree no. 277 on rules on presidential clemency was issued on 19 July 2004. In its original version, it provided strict rules on how pardon proceedings ought to be conducted. One of the major requirements that it provided was that a written application for a pardon should be lodged by the convicted person in question. That written application, together with the relevant individual's prison file and certain other supporting documents, ought first to be examined by the Presidential Clemency Commission (a consultative body within the Office of the President of Georgia). However, on 30 May 2005 Presidential Decree no. 277 was amended by the addition of paragraph 7 to Rule 2: Rule 2 § 7 stated that although the normal procedure in respect of the examination of written applications for a pardon remained in place (including the need for the President to be first advised by the Commission), the President of Georgia could nevertheless (if he or she deemed it necessary) issue a pardon "at any stage of the pardon proceedings, without having abided by any of the rules on procedure contained in the Decree."

2. Judicial practice

86. In a decision of 11 July 2000 (case no. 35/500-74-3 - the exact circumstances in which this decision had been issued was examined by the Court in the case of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 21-32, ECHR 2004-II)), the Supreme Court of Georgia – by upholding the decision of a lower court in the same case – which concerned the question of whether or not the President of Georgia had breached certain procedural rules in pardoning a convicted – stated that:

"Even if there were to have been a breach of [rules concerning the exercise of clemency contained in statutes that were hierarchically subordinate to the Constitution], in the process of issuing a decision on [the granting of a] pardon, this could not

constitute valid grounds for quashing the contested presidential pardon in the present case because the Constitution of Georgia has vested the President of Georgia with that power unconditionally [უპირობოდ ანიჭებს]. The cassation court endorses in this respect the relevant legal findings of the first-instance court [ამ საკითხთან დაკავშირებით საკსაციო სასამართლო იზიარებს პირველი ინსტანციის სასამართლოს მოსაზრებას]. ...

The President's unconditional power (უპირობო უფლება) of clemency cannot be limited by any [statutes that are hierarchically inferior to the Constitution]. ... The President cannot be constrained in his or her decision to pardon any individual."

87. While the Supreme Court described, in the above-mentioned decision, the presidential power of clemency to be of an "unconditional" nature, in the relevant first-instance court's decisions (whose findings were endorsed by the Supreme Court), the power of clemency was additionally characterised as constituting "an absolute constitutional right vested in the President of Georgia" (see *Assanidze*, cited above, § 28).

II. INTERNATIONAL MATERIAL

88. A report entitled "Georgia in Transition" issued by the European Union Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, Mr Thomas Hammarberg (the former Council of Europe Commissioner for Human Rights) and published in September 2013, stated (pp. 8-9, footnotes omitted):

"Thousands of complaints from individuals were filed with the Prosecutor's Office after the October 2012 election. Other complaints were handed in to the Parliament and others again to the Public Defender. Some frustrated citizens addressed all these institutions.

The complaints were, for instance, about unlawful or otherwise unjustified deprivation of liberty as well as ill-treatment. Misuse of the plea bargain system was raised by many. Others dealt with the pressure to 'donate' property to the State or other heavy-handed behaviour of prosecutors or other officials. Among the many complaints there may well be those with unsubstantiated facts, but it is still imperative that all of them be considered and replied to. This has started within the Prosecutor's Office but the procedures need to be further systematised and a full report on this review – and the responses – should be made public.

The political intention appears to have been to charge the ones most responsible for serious crimes – including those related to human rights violations and abuse of power – and give some form of 'amnesty' to those who only followed order.

The [Georgian Dream] coalition gave a pledge prior to the 2012 parliamentary elections to 'restore justice'. While on the one hand it is important to fight impunity not least in relation to crimes committed by public officials, it is on the other hand necessary to ensure absolutely transparent and fair proceedings free from political interference.

The Prosecutor's Office has initiated investigations against a number of office-holders in the previous administration. Prosecutors have questioned 6,156 persons, most of them UNM party activists, as witnesses in the framework of investigations into different suspected crimes, including misuse of the State funds and money laundering. The

opposition party considers this questioning to be a politically motivated attack on the opposition. Currently, 35 former central officials are charged of whom 14 are in pre-trial detention, 14 have been released on bail, one is released without restrictive measure, one has been pardoned by the President after conviction and five have left the country. Other former civil servants have also been charged or were convicted. ...

There are signs that the courts are more independent than earlier in relation to requests from the prosecutors. For instance, there was an acquittal in a case against another former Minister, and the request for pre-trial detention was refused in another case against a leading UNM politician.

There have been discussions on how to handle complaints of injustice caused in the judicial proceedings, not least the unfair plea bargain decisions. The European Commission for Democracy through Law (Venice Commission) was consulted on the idea of establishing a Commission which would review complaints on alleged miscarriage of justice cases and give recommendations whether a case should be reopened in court or not. No conclusion has yet been reached. However, one point has been made clear: any reopening of a court case must be decided by the judiciary itself – other bodies can only propose.

Also, no final proposal has been brought to the Parliament in regard to protecting those actors from charges who only obeyed orders and became used as instruments in acts which abused power or violated the law. It has been recognised that such an ‘amnesty’ law would be extremely complicated to draft without undermining basic legal principles. For the moment, it is left to the prosecutors to decide on what and against whom to start an investigation.

The response to the complaints regarding confiscation or other transfers of property will be particularly delicate, not only in the sense of assessing the true facts. Even when it would be established that property rights were indeed violated, the land or the building may have been put to other use, a situation which might be very difficult to undo. Financial compensation may be a fair solution but such measures are estimated to be extremely costly for the State budget.

This is not only a matter of law and legal procedures; the political dimension is obvious. The disappointment with the performance by the previous Government was demonstrated through the election result in 2012 and has been manifested in opinion polls thereafter. It is obvious that many people were deeply angry and wanted abusers to be punished. ...

The [Georgian Dream] alliance is faced with several challenges in this context:

- to respond in the true spirit of justice to all those who have filed complaints;
- to ensure absolutely correct procedures in the cases against former high officials suspected of crime – no politicisation or ‘selective justice’;
- to put the focus on cases in which impunity would undermine the sense of justice in society but spare those in the less serious cases who only obeyed orders or were squeezed into cooperation in wrongful activities;
- to convince the majority supporters to avoid any undemocratic moves against the UNM party, including any disturbances of its campaign meetings – and take effective action against those who undermine the freedom of expression and assembly.

Lessons should be learned from past mistakes. This requires a comprehensive description of what really happened in the past which is factually correct, relevant and related to the true circumstances at the time as well as presented in an objective and

credible manner. Experience has told us that such assessments and reports are better done by impartial experts than by committees with party political interests. ...

It is important that steps are taken to close the chapter of the past – and in a way that sets an example for the future in the sense of justice, fairness and transparency. This will hopefully release political energy to look more actively towards the future.”

89. The report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (PACE doc. 13588, 5 September 2014) said, among other things (footnotes omitted):

“60. Many interlocutors have reported that there seems to be less political interference in the work of the courts and that the judiciary has become increasingly more independent, including in relation to the prosecution, which has been a point of concern in previous reports. This seems to be confirmed by the court proceedings against former government members, where requests of the prosecution have regularly been denied. There has been a decrease in the granting of pre-trial detention by the courts, combined with a decline of requests by the prosecution service. ...

90. Following the 2012 parliamentary elections, more than 20 000 complaints were lodged with the prosecutor general by citizens claiming to have been victims of concern allegations of torture and ill-treatment in prisons, while more than 1 200 concern violations of property rights and approximately 1 000 complaints were filed against in total 322 prosecutors by persons claiming that they were forced to accept plea-bargain agreements.

91. The authorities announced that the ‘restoration of justice’ would be one of their key priorities and underscored that there would be no impunity for former officials for past abuses. In the following months a number of leading members of the former governing party and ministerial officials were arrested for alleged crimes committed under their responsibility during their tenure in office. The United National Movement has decried these arrests as political prosecutions and as revanchist justice. For its part, the authorities have stressed that no selective or political motivated justice is taking place, or will take place, in Georgia, but that these people are accused of serious ordinary crimes, for which the authorities have sufficient proof to warrant an investigation or initiate prosecution.

92. In support of their position, the authorities point to the fact that both the Minister of Defence and the Minister of Justice left the country in a hurry the day after the elections, as did a number of high-level officials from the Ministry of the Interior. While the former Minister of Defence voluntarily returned to Georgia, the others are still on the run and are the subject of an Interpol Red Notice.

93. There has been some confusion regarding the number of former officials concerned by these investigations. Until now, 35 officials of the former authorities have been charged with criminal offences. Of these, 14 are in pre-trial detention, 13 have been released on bail, one was released without restrictive measures, five have fled the country and three have been convicted, one of whom was pardoned by President Saakashvili. In addition, charges have been brought against a considerable number of former civil servants.

94. The allegations of selective and politically motivated justice and revanchist policies by the new authorities are of concern. In addition, they considerably raise emotions and tensions in an already politically tense climate, which is not beneficial for the political environment and democratic development of the country.

95. The most publicised cases against former UNM government officials are those against former Minister of Defence ..., former Prime Minister and Interior Minister – and current UNM Secretary General ..., and former Tbilisi Mayor ..., who were all influential members of former President Saakashvili's inner circle. ...

102. We wish to emphasise that there cannot be any impunity for ordinary crimes including, or even especially, for government members and politicians, whether current or past. However, especially in the current political context, it is important that in the criminal cases against former government officials, any perception of politically motivated or revanchist justice is avoided. The authorities should therefore ensure that the legal processes are conducted transparently and in a way which fully respects Georgia's obligations under Articles 5 and 6 of the European Convention on Human Rights. Not only should selective or politically motivated justice not take place, it should also be seen as not taking place."

90. At its 94th Plenary Session (Venice, 8-9 March 2013), the European Commission for Democracy through Law (the Venice Commission) issued a document entitled "Report on the Relationship between Political and Criminal Ministerial Responsibility", the relevant excerpts from which read (footnotes omitted):

"1. As part of its process for preparing a report on "Keeping political and criminal responsibility separate", the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly (PACE) has asked the Venice Commission for an opinion on this topic from a comparative constitutional law perspective, by letter of its chairman dated 28 June 2012.

2. According to the request, the purpose of the report is 'the elaboration of objective criteria for distinguishing cases in which elected officials should only be held politically responsible for their actions from those cases in which criminal responsibility would be in order'. ...

5. There are three main categories of elected officials that may in principle be held politically (as well as legally) responsible: (i) heads of state, (ii) government ministers (including prime ministers and all members of government), and (iii) members of parliament (MPs). The rules and procedures on responsibility, both legal and political, are in most constitutional systems different for each of these three categories. Both heads of state and MPs often (though for different reasons) enjoy a higher degree of immunity from legal liability than what government ministers usually do. Most cases in which there has been controversy over the relationship between legal and political responsibility have concerned ministers, and the Venice Commission understand this to be also at the core of the PACE request. The present report will therefore confine itself to the issue of ministerial legal and political responsibility. ...

44. In most European countries there are certain offences under the ordinary criminal code that by their nature only apply to public officials, but which in principle both cover administrative officials (civil servants) and politically elected officials (including ministers). An important example is corruption. Another important example is the category of provisions that prohibit official "misuse of powers" or "abuse of office" or similar formulations.

45. The inherent problem with such provisions is that in order to cover all situations that may potentially be serious enough to warrant penal sanctions they either have to be very detailed or very wide and vague, and therefore potentially harmful to legal certainty, as well as open to misuse for political reasons.

46. Out of the thirty countries that replied to the request, five have no provision at all on abuse of office or similar offences in their criminal legislation. The provisions in force in Belgium and Greece do not apply to government ministers.

47. But all the rest have provisions that in effect criminalise “abuse of office” in one form or another, and which are applicable in principle (though rarely in practice) to government ministers. The wording of such provisions differs. In France and Germany, for example, the offences are defined as illegal taking of interests, i.e. interference of a private interest in an administrative process. In Romania, three offences are provided for: malfeasance and nonfeasance against a person’s interest; malfeasance and nonfeasance by restriction of certain rights; malfeasance and nonfeasance against public interests. In the United Kingdom, misconduct in public office is a common law offence committed by a public officer acting as such who wilfully neglects to perform his/her duty and/or wilfully misconducts him/herself to such a degree as to amount to an abuse of the public’s trust in the office holder. ...

102. On this basis the Venice Commission considers that national criminal provisions on “abuse of office”, “excess of authority” and similar expressions should be interpreted narrowly and applied with a high threshold, so that they may only be invoked in cases where the offence is of a grave nature, such as for example serious offences against the national democratic processes, infringement of fundamental rights, violation of the impartiality of the public administration and so on. They should be related only to the exercise of public power, and to the extent possible it should be defined to what sorts of actions they refer, either in the statutes themselves, in the preparatory works or through relevant case law by the courts, ombudsmen and other institutions. Furthermore additional criteria should be required, such as for example a requirement of intention or gross negligence. For cases of “abuse of office” or “excess of authority” involving economic interests a requirement of intent of personal gain, either for the person concerned or for example a political party, may also be considered appropriate. Finally the minimum and maximum penalties of such “blanket” provisions should be moderate, and should be below the penalty ranges provided by more specific offenses, like for example corruption.

103. When interpreting and applying provisions on “abuse of office”, “excess of authority” against government ministers (in contrast to non-elected officials) the special nature of politics should also be taken into account. Actions that may not be proper for an ordinary civil servant may sometimes be a legitimate part of ministerial political decision-making. Furthermore, a government minister is subject to political responsibility, which ordinary officials are not. To the extent that criminal provisions on “abuse of office”, “excess of authority” is invoked against ministers for actions that are primarily of a political nature, then this should only, if at all, be done as the last resort (*ultima ratio*). Furthermore, the level of sanctions should be proportional to the legal offence committed, and not influenced by political considerations and disagreements.

104. The Venice Commissions holds that the responsibility not to misuse provisions on “abuse of office” against incumbent or former ministers for political reasons falls upon both the political system and the national prosecutor and courts, and regardless of whether the minister is charged under special rules of impeachment or under ordinary criminal procedures.

105. The Venice Commission considers that the ability of a national constitutional system to separate and distinguish political and criminal responsibility for government ministers (past and present) is a sign of the level of democratic well-functioning and maturity as well as the respect for the rule of law.

106. Criminal proceedings should not be used to penalise political mistakes and disagreements. Political actions by ministers should be subject to procedures for political responsibility. Criminal procedures should be reserved for criminal acts.

107. At the same time, the Venice Commission considers that government ministers should not be exempt from legal punishment, unless covered by clearly defined and limited rules on immunity. A minister who commits a criminal offence should be subject to criminal sanctions. It may be that the problem in some countries is not the government ministers are held criminally responsible too often, but the opposite – that it is too difficult to hold them responsible in such a way.”

III. COMPARATIVE LAW AND PRACTICE

91. The following comparative legal information is available to the Registry of the Court on the topics of (i) the criminal prosecution of former heads of State for acts committed during their respective terms of office and (ii) the nature and scope of the head of State’s power to grant a pardon to a convicted person.

A. Prosecution of heads of State for acts committed during their respective terms of office

1. Countries in which heads of State cannot be prosecuted for such acts

92. In twenty-three out of the thirty-five member States surveyed during the comparative research, the head of State cannot be criminally prosecuted for acts which are committed during his or her term of office and which fall within his or her discretionary powers. Of those member States whose heads of State cannot be prosecuted, all the monarchies (Belgium, Denmark, Liechtenstein, Luxembourg, The Netherlands, Norway, Spain, Sweden and the United Kingdom) provide constitutional protection of the head of State (in their case, the monarch) from criminal proceedings. Such protection is usually associated with the hereditary nature of power on the one hand and with the assumption by ministers of responsibility for the monarch’s actions on the other hand.

93. A broad spectrum and level of protection from criminal prosecution afforded to the head of State in respect of acts performed in the exercise of his or her functions is also found in all of the surveyed republics (namely, Albania, Azerbaijan, Bulgaria, the Czech Republic, Finland, France, Greece, Iceland, Italy, Latvia, Malta, Romania, the Slovak Republic and Slovenia). In some of these States, the relevant protection clearly applies to former heads of State too.

94. For example, in Azerbaijan, a former President cannot be held administratively or criminally liable for acts or omissions committed during the exercise of his or her powers as President.

95. In Bulgaria, under Article 103 of the Constitution, the President and the Vice-President shall not incur liability, civil or criminal, for any actions

performed in discharging the functions of their respective positions. Moreover, they continue to enjoy the protection extended by this wording after the end of their mandate.

96. In France, the President of the Republic is not responsible for acts committed in his or her official capacity. This presidential immunity, as laid down by Article 67 of the Constitution, is absolute, perpetual and personal: it therefore holds good in the political, criminal, civil and administrative spheres.

97. In Latvia, the “non-liability” of the President only pertains to actions taken in his or her official capacity and actions that do not contain elements of a criminal offence. It is not limited in time and continues to be applicable even after the end of his or her term of office.

98. In Romania, a former President cannot be prosecuted for acts committed during his or her term of office that fall within the President’s discretion under the Constitution (Article 84 (2) of the Constitution). Therefore, a former President cannot be prosecuted for acts committed during his or her term of office that fall within the President’s discretion under the Constitution (Article 84 (2) of the Constitution).

99. In Albania, under Article 90 § 1 of the Constitution, the President is not criminally liable for acts carried out in course of exercising his or her duties. It has been recently held by the Constitutional Court of Albania that such “immunity” or “protection” accorded to the President continues after the end of his or her term.

100. In the remaining member States, there is uncertainty as to whether such protection extends to former heads of State once they have left office. For example, in Iceland, Article 11 of the Constitution states that the President of the Republic may not be held accountable for executive acts. The President may not be prosecuted for a criminal offence except with the consent of Parliament (*Althingi*). However, the Constitution and other relevant laws are silent as regards whether it is possible to prosecute former Presidents for crimes committed while in office. In the absence of any legal precedents, it is unclear whether the protection enjoyed by Presidents under Article 11 of the Constitution extends to former Presidents in respect of acts committed during their respective terms of office.

101. Likewise, the question of presidential immunity in the Czech Republic appears to be under debate. Under Article 54 § 3 of the Constitution, the President of the Republic shall not be held liable for the results arising from the performance of his or her duties. A rewording of Article 65 of the Constitution, following a constitutional amendment, opened up a debate regarding the extent to which the amended wording would restrict the meaning of Article 54 § 3. Under its current wording, Article 65 § 1 of the Constitution states that the President may not be detained, prosecuted for committing a crime or misdemeanour or some other administrative offence *while in his or her office*; however, he can be prosecuted after his presidential

term has expired. Previously (that is, under the previous wording of Article 65 § 1) the President could not *ever* (that is, either during or after his term as President) be detained or prosecuted for any offences committed while in office.

2. *Countries in which heads of State can be prosecuted for such acts*

102. In twelve out of the thirty-five member States surveyed, (Bosnia and Herzegovina, Croatia, Estonia, Germany, Hungary, Montenegro, Poland, Portugal, San Marino, Serbia, Switzerland and Ukraine) constitutional provisions allow for the prosecution of the head of State for acts committed in his or her official capacity. It should, however, be noted that specific examples of criminal proceedings initiated against a head of State with regard to acts committed in his or her official capacity appear to be extremely rare, and they have been reported only in respect of two States – namely, Ukraine and Bosnia and Herzegovina. Of particular interest is the precedent that occurred in the latter country. Thus, in 2013 the President of the Muslim-Croat Federation, one of the two autonomous regions of Bosnia-Herzegovina, was indicted on charges of abuse of authority on account of granting pardons to people convicted of particularly grave offences without appropriate legal reasons to do so. After he was tried, the President was finally acquitted of all charges in 2020.

103. In Germany, Hungary and San Marino, criminal proceedings can be instigated only after the termination of the mandate of the President in question. For example, in Germany, the Federal President enjoys immunity from prosecution only during his or her term of office; however, to date no criminal proceedings have been opened against former heads of State in respect of acts that they have carried out while serving in their official capacity. Although in 2013 criminal proceedings were instituted against a former Federal President in respect of charges of “accepting benefits” (*Vorteilsnahme*), those charges did not concern acts committed in his official capacity, and the proceedings ended in 2014 with an acquittal. In Hungary, the President of the Republic during his or her term of office is criminally liable for criminal acts committed while he or she is serving in his or her official capacity; Article 13 of the Fundamental Law provides that criminal proceedings can only be brought against the head of State after the termination of his or her mandate. In San Marino, the functions generally invested in a head of State are exercised collegially by the *Capitani Reggenti* (two citizens elected by Parliament), whose respective mandates last simultaneously for six months; the *Capitani Reggenti* cannot be criminally prosecuted or held civilly liable during the period of their mandate. However, this immunity is only temporary: once their mandate expires, they can be prosecuted, both civilly and criminally, for acts performed during the period in which they held the office – irrespective of whether or not such acts fell within their discretionary powers.

B. The head of State’s power to grant a pardon

104. In republics, the power to grant a pardon has often been presented as a remnant of the monarchy. It must be distinguished from the power to grant an amnesty. In general, the power to grant a pardon (sometimes also referred to as “clemency” or “mercy”) is an executive act that is applied in respect of an individual case; its main effect is that of remitting a sentence or other criminal penalties imposed by a court. By contrast, an amnesty applies, collectively, to a whole class of offenders. While the power to grant a pardon is generally exercised after a sentence is pronounced and becomes final, in some rare cases (as in Iceland) the power to grant a pardon (*náðun*) – accorded to the President under Article 29 of the Constitution – has the effect of discontinuing criminal proceedings.

105. In thirty-two out of the thirty-five member States surveyed during the comparative research (see paragraph 92 above), the power to grant a pardon is constitutionally granted to the head of State. In the remaining three responding States, this power is vested either in Parliament (San Marino and Switzerland) or forms part of the responsibilities of all government ministers (Sweden). In six out of the said thirty-two countries (Greece, France, Italy, Latvia, Montenegro and Poland), the head of State can exercise the power to grant a pardon with no or minimal limitations.

106. For instance, in Greece (under Article 47 § 1 of the Constitution), the power to grant pardon is a “right” – that is, a discretionary power of a judicial nature (according to the Council of State’s well-established case law) that is vested in the President of the Republic, who can commute or mitigate penalties imposed by criminal courts as well as revoke all legal consequences of penalties already imposed and executed. A decision to grant a pardon is taken following a recommendation given by the Minister of Justice – but only after the Minister has been given an advisory opinion by the Council of Pardons, which the majority of whose members are judges. Its exercise appears not to be subject to any substantive requirements set out either by the Constitution or by legislation.

107. Likewise, in France (where the possibility of a collective pardon was abolished by the constitutional reform of 23 July 2008), the possibility of granting an individual pardon is at the discretionary prerogative of the President, who does not have to justify or give reasons for his or her decision. The decree granting the pardon is signed by the President and must be countersigned by the Prime Minister and the Minister of Justice. A presidential pardon is not subject to any judicial review – firstly, because it has been considered by the *Conseil d’Etat* as constituting an “act of government”, and secondly, because it is a “dispute relating to the nature and limits of a sentence pronounced by a judicial court” (*contestation relative à la nature et aux limites d’une peine prononcée par la juridiction judiciaire*), which an administrative judge cannot hear.

108. In Italy, in 2006, the Constitutional Court scrutinised the nature of the presidential power to grant a pardon, as enshrined in Article 87 § 11 of the Constitution. The court acknowledged that, within the pardon procedure, the Minister of Justice has the authority to carry out a preliminary inquiry in order to be able to either (i) present a reasoned proposal to the President, or (ii) decide to terminate the inquiry (without any pardon being issued). However, if the President requests that the preliminary inquiry be completed or decides to grant a pardon on his or her own initiative, the Minister of Justice is under a duty to commence and conclude a preliminary inquiry and may only inform the President of the procedural or substantive grounds which, in his or her opinion, prevent the granting of a pardon. Any refusal to act on the part of the Minister would in essence preclude the exercise of the power to grant a pardon that the Constitution confers on the President. The Minister of Justice will then countersign the presidential decree of pardon, as required by Article 89 of the Constitution; however, his or her political and legal liability will be limited to his or her level of participation in the procedure resulting in the granting of a pardon.

109. In some States, the absence of substantial limitations in respect of the exercise by the head of State of his or her power to grant a pardon has raised a number of debates. It was the object of discussion in the Parliament of Montenegro in 2012, when the Pardons Act was being adopted. In particular, the lack of any legal, judicial and other institutional restrictions on the President's power to grant a pardon was criticised. The discussion also focused on the fact that an opinion given by the Ministry of Justice to the President regarding a prospective pardon had no binding force, and that the power to grant a pardon could therefore be interpreted as constituting the personal decision of the President. The parliamentary debate opened a number of problematical questions, such as the potential for abuse of the freedom to decide whether to grant a plea for pardon. Likewise, in Poland, the scope of the power to grant a pardon has been the subject of discussion in recent years; for example, it has long been debated whether the President may pardon an accused before that person has been sentenced with final effect. Indeed, such a decision was taken, for the first time in Polish history, by the President in 2015: a Polish politician sentenced by a trial court was pardoned when the proceedings were pending before the appellate court. The domestic legal doctrine is currently divided on the subject.

110. In the remaining twenty-six member States, the head of State's power to grant a pardon is subject to significant limitations with regard to various parameters, such as the stage of the criminal proceedings at which the head of State can intervene, the involvement of other State organs in the pardon proceedings, the nature of the offences in question and the justiciability of the power to grant a pardon. For instance, in such countries as the United Kingdom, Iceland, Norway, Belgium, Liechtenstein and Luxembourg, the Heads of State exercise their power to pardon with

significant deference to the guidance offered either by the executive (Ministers) or legislative bodies. In Albania, Bulgaria, the Czech Republic and Germany, presidential pardon could be granted with respect to specific types of criminal offences only. Finally, in France and Germany, a presidential pardon could not be subject to judicial review (see also paragraph 107 above).

THE LAW

111. In its decision of 1 March 2022, the Court declared the case, consisting of the complaints under Articles 6, 7 and 18 of the Convention set out below, admissible in its entirety (see *Saakashvili v. Georgia* (dec.) nos. 6232/20 and 22394/20, §§ 32-66, 1 March 2022).

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

112. The applicant complained under Article 6 §§ 1 and 3 (d) that his convictions of 5 January and 28 June 2018 had been based on untested hearsay and other otherwise unreliable evidence. As regards application no. 22394/20, he additionally complained that the judge who had examined the case at first instance, G.A., had lacked independence and impartiality. The relevant parts of Article 6 of the Convention read:

Article 6

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

A. The parties’ arguments

1. *As regards application no. 6232/20*

113. In respect of application no. 6232/20, the applicant argued that (i) his conviction of 28 June 2018 (see paragraph 31 above) had breached Article 6 §§ 1 and 3 (d) of the Convention in two respects: it had been solely based on the hearsay evidence of two of the witnesses for the prosecution (N.B. and I.O.), and (ii) there had been no other evidence in the file directly implicating him in the commission of the crime in question. The applicant contested the reliability and credibility of those statements, arguing that the two witnesses, who had initially been his close allies, had subsequently turned into fierce political foes who would not hesitate to falsely accuse him in order to have him imprisoned and thus be stripped of the possibility of participating in the

political life of the country. In support of his arguments regarding the two witnesses' alleged bias and untrustworthiness, the applicant referred to a number of their public statements (see paragraphs 62-73 above), which in his opinion had demonstrated their personal animosity against him. The applicant also argued that there had been a number of inconsistencies in the two witnesses' statements, for which reason the domestic courts should have disregarded those statements as unreliable.

114. The Government replied that the statements of N.B. and I.O. could not be deemed to constitute hearsay evidence because those two people had personally witnessed a number of events directly implicating the applicant in the instigation of the physical assault on V.G. The fact that those witnesses had been political opponents of the applicant was not sufficient for the reliability of their statements to be called into question, given the fact that they had been questioned under oath during the trial, on pain of committing the criminal offence of perjury (see paragraph 77 above). The Government also referred to the fact that N.B. and I.O. had been in political opposition not only to the applicant but also to the then ruling forces (see paragraph 74 above). Furthermore, those statements had not constituted the only evidence against the applicant, as the statements of another important witness (V.Z.) had also confirmed the applicant's involvement in the offence. Apart from the statements given by those three key witnesses, there had also been a body of other – circumstantial – evidence that supported the reliability of the statements of the three witnesses in question. The Government also referred to the fact that the applicant had been afforded his right to a fully adversarial trial at two levels of jurisdiction, during which a qualified lawyer of his choosing had had ample opportunity to question all the witnesses and otherwise contest the evidence contained in the criminal case file. Lastly, the Government submitted a number of arguments contesting the applicant's assertion that the statements of N.B., I.O. and V.Z. had been lacking in consistency. All in all, the Government submitted that the criminal proceedings in application no. 6232/20 had been fair and in full compliance with the guarantees contained in Article 6 §§ 1 and 3 (d).

2. As regards application no. 22394/20

115. Without submitting any arguments in respect of the “independence” aspect of his original complaint concerning Judge G.A. (see paragraph 112 above), the applicant limited his submissions to those that only contested the latter judge's alleged lack of impartiality. Thus, he submitted that the judge had been biased against him because G.A. had previously participated in the Girgvliani murder case in the capacity of an assistant to the judges who had examined the latter case in 2006 at first instance. The applicant stated that G.A.'s previous clerical functions had allowed him to be “widely involved in the determination of the criminal charges against the four police officers” who had subsequently become witnesses in the criminal case against the

applicant. He thus feared that Judge G.A.'s previous involvement in the Girgvliani murder case had allowed him to form an opinion about the credibility of those four witnesses' statements. Furthermore, the fact that he had previously been involved in the Girgvliani murder case (the faulty judicial examination of which had been the target of widespread public criticism) should have been perceived as constituting grounds for fearing that Judge G.A. would find it difficult to cope with public pressure and might thus – in an attempt to rehabilitate his own reputation – find the applicant guilty. All in all, the applicant submitted that Judge G.A. could not be considered, from an objective point of view, to have been an impartial arbiter in his case; that impartiality had been in breach of Article 6 § 1 of the Convention.

116. The applicant further complained that his conviction of 5 January 2018 had been based on untested hearsay evidence only (see paragraph 50 above), in breach of Article 6 §§ 1 and 3 (d), since all of the witnesses questioned during the trial had provided accounts of events that they had heard from third parties, without having personally witnessed any of the events in question. Thus, none of the witnesses could be said to have possessed first-hand knowledge of the applicant having ever issued a promise to pardon the four police officers convicted of murder. The applicant also argued that the statements of the witnesses in question had contained inconsistencies; for that reason those statements should not have been accepted by the domestic courts as reliable evidence. The applicant also reiterated his previous arguments about the unreliability of the statements given by I.O. and N.B., given the fact that they had been his political opponents.

117. The Government stated that the mere fact that Judge G.A. – who had convicted the applicant at first instance on 5 January 2018 of abuse of official authority – had been an assistant to the judges who had examined the Girgvliani murder case in 2006 could not be regarded as constituting sufficient grounds for an objective observer to conclude that the judge had lacked impartiality in respect of the applicant's case. They referred in this connection to the fact that, under the relevant domestic law, a judicial assistant did not participate in the judicial decision-making process, but rather provided purely technical assistance to judges. As to the fear that the judge had not been able to cope with the public pressure in respect of the applicant's case because of his previous connection with the above-mentioned murder case, the Government noted that (i) the fact that G.A. had assisted (in the capacity of a clerk) the judges who had examined the former case had never been within the domain of the public knowledge, and (ii) his name had never been publicly associated with the Girgvliani murder case. The Government concluded that the allegations regarding a lack of impartiality on the part of Judge G.A. were not based on any reasonable argument, apart from the applicant's one-sided misinterpretation of the reality. The Government also noted that after Judge G.A.'s involvement in the proceedings had ended the

criminal case against the applicant had been examined by courts at two higher levels of jurisdiction, the independence and impartiality of which had never been questioned by the applicant.

118. The Government further submitted that courts at three levels of jurisdiction had carefully examined the applicant's objections and had found that his conviction of 5 January 2018 had been based on either direct evidence (such as the statements given by I.O.) or on a concordant body of circumstantial evidence. The evidence available in the case file confirmed beyond a reasonable doubt that the applicant had issued promises that he would abuse his presidential power to exercise clemency, for the purposes of contributing to perverting the course of justice in respect of the Girgvliani murder case. The Government also submitted extensive arguments as to why the applicant's allegations about inconsistencies in the relevant witnesses' statements were ill-founded and why the domestic courts had been correct in seeking to establish the relevant issues of fact. All in all, they concluded that the relevant domestic proceedings had been carried out in full compliance with the relevant guarantees under Article 6 §§ 1 and 3 (d).

B. The Court's assessment

1. General principles

(a) As regards independence and impartiality

119. In determining whether a body can be considered to be "independent" – notably of the executive and of the parties to the case – regard must be had, *inter alia*, to the manner in which its members are appointed and to the duration of their term of office, the existence of guarantees against outside pressures and the question of whether that body presents the appearance of independence (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 78, Series A no. 80; *Findlay v. the United Kingdom*, 25 February 1997, § 73, Reports of Judgments and Decisions 1997-I; and *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts)).

120. The Court reiterates that "impartiality" normally denotes the absence of prejudice or bias, and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined (i) according to a subjective test whereby regard must be had to the personal conviction and behaviour of a particular judge – that is, whether the judge held any personal prejudice or bias in respect of a given case, and (ii) according to an objective test – that is to say by ascertaining whether the tribunal itself and (among other aspects) its composition offered sufficient guarantees as to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII; *Micallef v. Malta*

[GC], no. 17056/06, § 93, ECHR 2009; *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015; and *Ilseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 287, 4 December 2018).

121. As regards the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see the above-cited cases of *Kyprianou*, § 119; *Micallef*, § 94; and *Morice*, § 74). The personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86, and *Morice*, cited above, § 74). As regards the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts that may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96).

122. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings. It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Morice*, cited above, § 77). In this connection even appearances may be of a certain importance; in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence that the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, Reports 1998-VIII; *Micallef*, cited above, § 98; and *Morice*, cited above, § 78).

(b) As regards administration of evidence

123. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 46, Series A no. 140; *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX; and *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, § 83, 11 July 2017). It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question that must be answered is whether the proceedings as a whole (including the way in which the evidence was obtained, were fair) This involves an

examination of the “unlawfulness” in question and – where a violation of another Convention right is concerned – the nature of the violation found (see *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009; *Lee Davies v. Belgium*, no. 18704/05, § 41, 28 July 2009; and *Prade v. Germany*, no. 7215/10, § 33, 3 March 2016).

124. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be established, in particular, whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use (see *Szilagyi v. Romania* (dec.), no. 30164/04, 17 December 2013). Indeed, under Article 6 § 3 (d), before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him – either when that witness makes his statement or at a later stage of proceedings (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR). In addition, the quality of the evidence must be taken into consideration – including the question of whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see, among other authorities, *Bykov*, cited above, § 90, and *Lisica v. Croatia*, no. 20100/06, § 49, 25 February 2010). While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see *Lee Davies*, cited above, § 42; *Bykov*, cited above, § 90; and *Bašić v. Croatia*, no. 22251/13, § 48, 25 October 2016).

2. Application of these principles to the circumstances of the case

(a) As regards the independence and impartiality of Judge G.A. (application no. 22394/20)

125. As regards the “independence” limb of the complaint concerning Judge G.A. (which was made in the application form in a general and abstract manner), the Court observes that the applicant did not elaborate on this particular aspect in his submissions after the Government had been given notice of the application (see paragraph 115 above). The Court thus cannot discern from the case file that the judge’s independence could arguably be called into question on any grounds – including those linked to the requisite appearances (see the general principles cited in paragraph 119 above).

126. Having regard to the arguments submitted by the applicant, the Court rather considers that the complaint could only be understood as constituting a challenge to Judge J.A.’s impartiality on the grounds of the functions that

the latter exercised during the judicial examination of the Girgvliani murder case that took place in 2006. These arguments convey the applicant's fear that when Judge G.A. had started his examination of the criminal case he had already believed that the applicant was guilty. In this connection, the Court reiterates that even where a trial judge has made previous decisions concerning the same offence and/or the same accused person, this cannot be held as in itself justifying fears as to his/her impartiality. Likewise, the mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not in itself sufficient to cast doubt on that judge's impartiality in a subsequent case (see *Meng v. Germany*, no. 1128/17, § 47, 16 February 2021, with further references).

127. In the present case, as was rightly mentioned by the two higher domestic courts which examined in detail the applicant's challenge to the impartiality of Judge G.A., out of which the Tbilisi Court of Appeal had full jurisdiction to review all questions of fact and law (see paragraphs 56, 57 and 60 above), there was no sufficient link between the criminal charges examined by the trial court in the *Girgvliani* murder case in 2006, which concerned the question of whether or not the relevant police officers had committed homicide (see *Enukidze and Girgvliani v. Georgia*, no. 25091/07, §§ 144-93, 26 April 2011), and the charge of abuse of official authority brought against the applicant, which was examined by Judge G.A. The applicant was not a party to the criminal proceedings in respect of the *Girgvliani* murder case, and it has not been argued that those proceedings concerned the applicant in any manner. Nor can it be said that Judge G.A. reached any findings regarding the applicant's guilt on the basis of the facts that had been established by the courts in the *Girgvliani* murder case (contrast *Khodorkovskiy and Lebedev v. Russia* (no. 2), nos. 51111/07 and 42757/07, §§ 521 and 522, 14 January 2020). There thus could not possibly have been any objectively justified fear that the establishment of the facts or the legal assessment of the events that had constituted the offence in relation to which Judge G.A. found the applicant guilty had in any manner been prejudged during the proceedings in respect of the *Girgvliani* murder case (contrast *Meng*, cited above, §§ 58-56; see also *Poppe v. the Netherlands*, no. 32271/04, § 26, 24 March 2009, and *Schwarzenberger v. Germany*, no. 75737/01, § 42, 10 August 2006).

128. Neither does the Court find convincing the applicant's argument that Judge G.A.'s previous involvement in the *Girgvliani* murder case (in the capacity of a judicial assistant) had allowed him "to be widely involved in the determination of the criminal charges against the four police officers" and thus form an opinion about the very same individuals who had subsequently been questioned as witnesses during the applicant's trial. Firstly, it would not be correct to say that being an assistant to a criminal judge amounted to, under the relevant domestic law and practice, "participation" in the judicial

decision-making process. Indeed, as was explained by the higher domestic courts (the Tbilisi Court of Appeal and the Supreme Court) which were obviously best placed to read domestic law, G.A.’s previous professional functions in 2006 – during the examination of the Girgvliani murder case – were limited to his providing purely clerical and otherwise technical assistance to the judges hearing that case; it would thus be a clear overstatement to suggest, as the applicant does, that G.A. was involved “in the determination of the criminal charges”. If the applicant is to be understood to be challenging Judge G.A.’s impartiality simply because the latter came across (at an earlier stage of his professional life) the witnesses in question, this is also not sufficient to justify, from an objective standpoint, the fear that Judge G.A. was necessarily prejudiced in favour of believing those witnesses’ testimony. Indeed, the applicant has failed to explain how G.A.’s knowledge of the witnesses in question was of such a nature and degree as to indicate a lack of impartiality on his part (compare *Pullar v. the United Kingdom*, 10 June 1996, § 38, *Reports* 1996-III; *Hanif and Khan v. the United Kingdom*, nos. 52999/08 and 61779/08, § 141; and *Peter Armstrong v. the United Kingdom*, no. 65282/09, §§ 39-45). From the perspective of the general fairness of the criminal proceedings, it should further be noted in this connection that the witness statements of the four police officers were not the only or the decisive evidence against the applicant (see paragraphs 44-47 above). Lastly (and this consideration should also concern the applicant’s fears regarding whether Judge G.A. was capable of coping with public pressure – see paragraph 115 above), the Court attaches importance to the fact that the judge in question was a professional, trained judge who could thus be considered to be more equipped than, for instance, a lay judge or juror to disengage himself from previous personal or professional experiences and to examine with the requisite detachment high-profile cases attracting heightened public attention.

129. The Court thus concludes, so far as application no. 22394/20 is concerned, that the single-judge composition of the Tbilisi City Court (comprising Judge G.A.) that examined the criminal case against the applicant and convicted him of abuse of official authority on 5 January 2018 could not be said to have lacked either independence or impartiality. There has accordingly been no violation of Article 6 § 1 of the Convention on this account.

(b) As regards the question of administration of evidence by the domestic courts

130. The Court notes that the applicant’s complaints regarding the administration of evidence by the domestic courts in both sets of criminal proceedings are based on the same allegations – notably that the evidence that led to his two convictions constituted untested hearsay and could not be considered as reliable. To probe these allegations, the Court deems it necessary first to clarify what is normally understood as hearsay within the

meaning of the Convention. In this regard, it observes that according to both legal theory and the Court's case-law, two limbs of the concept (which are complementary to each other) can be traced. Thus, hearsay evidence can be a statement made by the declarant (at a time or place other than while he or she was testifying at the trial or hearing) that was offered by way of affirming the truth of a particular assertion; legal problems associated with the question of how to assess the credibility of an account read from a written transcript only (in the absence of a cross-examination of the witness during the trial) normally stem from this limb of the hearsay concept (see, among many other cases, *Al-Khawaja and Tahery*, cited above, §§ 120-25; *Scholer v. Germany*, no. 14212/10, §§ 52-63, 18 December 2014; *Kostovski v. the Netherlands*, 20 November 1989, §§ 38-44, Series A no. 166; *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 132-60, ECHR 2015). However, even if a witness was available for cross-examination by the defence and gave statements at the trial, his or her testimony could still be deemed to constitute hearsay evidence – and this constitutes the second limb of the concept – if those statements conveyed facts not actually perceived by the witness with his or her own senses but rather constituted an account of what someone else had been heard to say (see, for instance, *Tsonyo Tsonev v. Bulgaria* (no. 3), no. 21124/04, § 43, 16 October 2012; *Okropiridze v. Georgia*, nos. 43627/16 and 71667/16, § 84, 7 September 2023; *Pichugin v. Russia*, no. 38623/03, §§ 199-200, 23 October 2012; *Mirilashvili v. Russia*, no. 6293/04, §§ 217-18, 11 December 2008; and *Strassenmeyer v. Germany*, no. 57818/18, § 78, 2 May 2023).

131. Having regard to the circumstances of the present case, the Court observes that the statements of the key witnesses, which were referred to by the domestic courts when upholding the applicant's two convictions, cannot fall under either of the limbs of the above-noted definition. Thus, all of those important witnesses were heard in person during the trials in question, and the defence party was at liberty to confront them during the hearings. As regards the applicant's assertion that two of the key witnesses (namely I.O. and N.B.) had given statements during the trial regarding facts that they had not perceived of their own senses but had rather heard about from other sources – that assertion is not supported by the verbatim records of the examinations of the witnesses during the trial. Thus, the Court holds that, so far as application no. 6232/20 is concerned, the statements given by the two witnesses in question constituted first-hand testimony because they gave an account of their personal conversation with the applicant, during which the latter had clearly expressed, in the domestic courts' assessment, his wish (and even order) that V.G, the victim, be punished (see paragraphs 23-25 above). The same holds true with respect to the statements given by V.Z. (the third key witness), who gave an account of another direct interaction with the applicant, during which the latter had expressed gratitude for V.Z. having had

the victim assaulted by the above-mentioned officers of the riot police (see paragraph 29 above).

132. As regards application no. 22394/20, while it is true that the statements of N.B. could indeed be understood to constitute hearsay (because she referred to “the rumours” concerning the key question of whether the applicant had issued prior promises to pardon the four convicted police officers – see paragraph 46 above), the Court has no doubt that the statements of I.O. constituted, on the contrary, direct evidence, because the latter witness gave an account of how the applicant had repeatedly confided in him (during private conversations) that he had indeed promised to pardon the officers in question and had fully intended to fulfil those promises (see paragraph 45 above). Furthermore, in addition to the existence of the direct evidence given by I.O., the trial court had before it an extensive body of circumstantial evidence. That evidence did not directly indicate that the applicant had made the above-mentioned promises (the key finding of fact in the eyes of the domestic courts – see paragraph 53 above); however, it nevertheless helped the domestic court to establish a number of other important elements, such as the applicant’s motive for committing the offence of abuse of official authority by trading on his power of presidential clemency, as well as the opportunity to commit that offence (see paragraph 54 above). In this respect, the Court reiterates that even where, unlike the situation in the present case, the circumstantial evidence was the only evidence used to form the basis for a conviction, this does not necessarily amount to a breach of Article 6 § 1 of the Convention, provided that such indirect evidence was substantial, unambiguous and produced in the presence of the accused party with a view to adversarial argument, and provided that the domestic courts sufficiently explained the relevance of such evidence in their decisions (compare, among many other cases, *O’Donnell v. the United Kingdom*, no. 16667/10, §§ 52-58, 7 April 2015; *Český and Kotík v. Czech Republic* (dec.), no. 76800/01, 7 April 2009; *Trifontsov v. Russia* (dec.), no. 12025/02, 9 October 2012; *Lawless v. United Kingdom* (dec.), no. 44324/11, 16 October 2012; and *Sellick and Sellick v. United Kingdom* (dec.), no. 18743/06, 16 October 2012). Indeed, answering the question of whether circumstantial evidence under the specific circumstances of a particular case sufficed for the conviction should normally be the prerogative of the domestic courts (see *Lisica*, cited above, § 59 *in fine*), the Court’s role being to examine whether the proceedings were fair as a whole.

133. Lastly, as regards the applicant’s complaint that the statements of N.B. and I.O. were not credible because they were his political opponents, the Court notes that the Tbilisi Court of Appeal and the cassation court dealt with this issue in detail and gave reasoned decisions. Like the domestic courts, the Court does not consider that the alleged personal animosity between the witnesses and the applicant – be it based on a difference in political opinions or on other grounds – constitutes sufficient grounds for it

to gainsay the domestic courts' assessment of the credibility and reliability of those witnesses' statements, unless that assessment was arbitrary or capricious (compare, *mutatis mutandis*, *Tsonyo Tsonev*, cited above, §§ 25, 28 and 43). It is significant in this connection that (i) the applicant was able to confront the two witnesses during the trials in both sets of criminal proceedings and to challenge the credibility of the statements that they gave before the domestic judges, and (ii) the domestic courts duly addressed those concerns in their reasoned rulings by explaining why the statements of N.B. and I.O. ought to be trusted. In this connection, the Court does not find any arbitrariness in the reasons given by the domestic courts for dismissing the applicant's challenge to the witnesses, because the fact that both witnesses were questioned under oath – and thus on pain of committing perjury in the event that they gave untrue statements – constituted a sufficient guarantee for the domestic courts to treat those witnesses' statements as reliable evidence (for examples of how the questioning of a witness under oath and on pain of criminal liability positively affects the evidentiary strength of that witness's statements see *Pichugin*, cited above, §§ 199 and 200; *Vladimir Romanov v. Russia*, no. 41461/02, § 102, 24 July 2008; *Jannatov v. Azerbaijan*, no. 32132/07, § 76, 31 July 2014; and *J.M. and Others v. Austria*, nos. 61503/14 and 2 others, § 120, 1 June 2017).

134. The above-noted considerations are sufficient for the Court to conclude that, given the limits that constrain it in respect of this particular supervisory function (see the general principles cited in paragraph 123 above), the manner in which the domestic courts administered evidence in both criminal cases against the applicant (including the testimony given by I.O. and N.B.) could not be said to have violated Article 6 §§ 1 and 3 (d) of the Convention as regards the two applications at stake.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

135. As regards application no. 22394/20, the applicant also complained, under Article 7, that it had not been possible for him to foresee that the exercise of the plenary power of presidential clemency, which had been conferred on him by virtue of his office as President and head of State, could attract criminal liability. This provision reads in so far as relevant:

Article 7

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. ...”

A. The parties' arguments

136. The applicant argued that the presidential power of clemency, which was based on the Constitution, was absolute under domestic law and thus not

subject to any limitations. In support of this argument, he referred to Presidential Decree no. 277 on rules on presidential clemency which, although providing that a President should follow a specific procedure whereby he or she would consult the Presidential Clemency Commission before granting a pardon, also expressly stated that the President was free to pardon a convict at any stage of the clemency procedure and without strict adherence to the rules set out by the Decree (see paragraph 85 above). The applicant also referred to the Supreme Court's judicial practice, which confirmed the fact that the presidential power of clemency was absolute and not prone to any checks (see paragraph 86 above). Thus, given that the power to grant a pardon was a discretionary and absolute power vested in the President by the Constitution, it was unlawful to hold him criminally liable for misuse of that power under Article 332 of the Criminal Code. He could not possibly have foreseen that the exercise of absolute and unconstrained presidential power might be interpreted as a criminal offence. The applicant also stated that he had never issued any prior promises to pardon the four convicted police officers – contrary to what the domestic courts had determined. Even if he had issued such promises, those ought to be regarded as constituting not an abuse of authority but a legitimate, preparatory step in the pardon proceedings. In any event, he continued, pardons granted by the executive should be considered to constitute discretionary acts that could not be subject to ordinary judicial review. In that connection, the applicant referred to the Court's judgment in the case of *Lexa v. Slovakia* (no. 54334/00, § 95, 23 September 2008). He further asserted, from a comparative-legal point of view there was a constitutional consensus among many Western democracies that heads of State enjoyed immunity from jurisdiction for the exercise of their discretionary powers – such as the power to grant a pardon (which was considered to be unlimited/absolute in many jurisdictions around Europe). It was thus unthinkable, in his opinion, that the domestic courts had the right to introduce the various qualitative requirements for the exercise of the presidential power – such as, for instance, their statement that the power should only be resorted to out of “humanitarian considerations” (see paragraph 54 above).

137. The applicant further complained that the wording of Article 332 of the Criminal Code was too general and vague and that the domestic courts' application of that overly broad provision to actions committed while holding public office could hardly satisfy the clarity and foreseeability requirements under Article 7 of the Convention. Drawing parallels with the Court's judgment in the case of *Liivik v. Estonia* (no. 12157/05, §§ 99-103, 25 June 2009), he complained that the interpretation and application of Article 332 involved (as with the legal provision questioned in the *Liivik* case) the consideration of notions that were so broad and criteria that were so vague that the criminal provision in question was not of the quality required under the Convention. He added that Article 332 was, by its legal nature, a “blanket”

legal provision that could therefore only be read, in his case, in conjunction with Article 73 § 1 (n) of the Constitution, which vested in him the power to grant a pardon. However, such a logical chain of legal reasoning only served to further prove that he had been convicted in relation to the presidential power of pardon, which was absolute and not subject to judicial control; therefore, his conviction had been unlawful within the meaning of Article 7 of the Convention. The applicant emphasised that his criminal case was the first and (so far) only domestic precedent involving judicial oversight of the presidential power of clemency, so prior to the initiation of the criminal proceedings against him, he could not have foreseen that that power was subject to judicial control under the relevant domestic law and practice; moreover, he added that it was common knowledge among legal professionals that the power of clemency exercised by the heads of State in various jurisdictions was, as in Georgia, of an absolute nature.

138. The Government replied that the applicant had been convicted not for exercising the constitutional power of presidential clemency as such but for abusing that power within the meaning of Article 332 of the Criminal Code. As regards the clarity and foreseeability of the latter criminal provision, they firstly referred to the fact that in the majority of the European countries there existed similar provisions criminalising the “abuse of official authority” in one form or another (see paragraph 90 above); the application of Article 332 of the Criminal Code to the circumstances of the applicant’s case satisfied all of the other relevant “foreseeability” criteria that the Venice Commission had enumerated in its above-mentioned Report on the Relationship between Political and Criminal Ministerial Responsibility. That is to say the extent of the abuse by the applicant of the presidential power in question had undoubtedly been of a particularly grave nature, given that it had been aimed at the obstruction of justice in respect of a particularly high-profile murder (and had, moreover, been committed with the aim of realising personal gain); the applicant had wished to minimise the damage that the investigation into the murder case could cause to the public image of his political team. Referring to the reasons given in the domestic court’s decisions, the Government emphasised that the major constituent element of the crime in question was the fact that the applicant had issued prior promises to pardon the four police officers in exchange for their silence (see paragraph 59 above). Had the domestic courts not established the existence of such prior promises, the fact that a presidential pardon had been granted – while remaining morally reprehensible, given the particular circumstances of the Girgvliani murder case – would hardly have been sufficient to attract, in the Government’s opinion, criminal liability. In reply to the applicant’s contention that the constitutional power of presidential clemency was absolute and not subject to any limitations, the Government submitted that it would be irrational to suggest that the President of the country – the head of State – could be entitled under the Constitution to enter into a deal with the dangerous criminals who

had committed the above-mentioned murder, and to promise them early release from prison in exchange for them not implicating his closest friends and political allies in the commission of the gruesome crime.

139. While the fact that the applicant had issued advance promises to pardon the four police officers was an important factor in the applicant's conviction, the Government submitted that that fact should not be considered in isolation from other important elements. Accordingly, they asked the Court to note that the offence of abuse of official authority consisted equally of two additional significant factual aspects – (i) the fact that the applicant had known from the very beginning of the criminal investigation into the Girgvliani murder case that his two most trusted associates – D.A. (the director of the CSD) and I.M. (the then Minister of the Interior) – had been implicated in that serious crime and (ii) the fact that the applicant had been driven by the desire to shield at all costs the latter two men from the investigation. The combination of those two additional factual elements made it clear, in the Government's opinion, that by issuing prior promises to exercise his power of presidential clemency the applicant had wanted to buy the silence of the four police officers and contribute to the obstruction of justice in the murder case. The Government further submitted that long before the applicant had committed the impugned act in question, the domestic courts had already developed a comprehensive body of judicial practice clarifying the constituent elements of an offence that could be prosecuted under Article 332 of the Criminal Code. In support of their arguments, they referred to the relevant practice of the Supreme Court of Georgia (see paragraph 78 above).

140. Having regard to the applicant's background, the Government argued that – given that he held a legal degree and had, moreover, held (prior to becoming the President of the country) the posts of head of the Constitutional and Judicial Affairs Committee of the Parliament of Georgia and Minister of Justice – the applicant had been perfectly capable of foreseeing that the manner in which he exercised his power of presidential power would attract criminal liability under Article 332 of the Criminal Code. In the same vein, the Government continued, the applicant should also have been aware of the Court's relevant and well-established case-law under Articles 2 and 3 of the Convention, according to which the granting of an amnesty or pardon with respect to State agents who had committed crimes involving homicide, torture or ill-treatment was not permissible. Lastly, the Government also asked the Court to draw parallels between the present case and its judgment in the case of *Haarde v. Iceland* (no. 66847/12, §§ 127-32, 23 November 2017), where the Court had found that the offence for which the applicant – the former Prime Minister of Iceland – had been convicted had been sufficiently defined in domestic law, as required by Article 7 of the Convention.

B. The Court's assessment

1. General principles

141. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts that previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment –, for instance by analogy (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013; *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 154, ECHR 2015; and *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, § 67, 26 April 2022). The principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018). This requirement is satisfied where the individual can know from the wording of the relevant provision – if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice – what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Del Río Prada*, cited above, § 79; *G.I.E.M. S.R.L. and Others*, cited above, § 242; and *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V). Even when a point is ruled on for the first time in an applicant's case, a violation of Article 7 of the Convention will not arise if the meaning given is both foreseeable and consistent with the essence of the offence (see *Khodorkovskiy and Lebedev*, cited above, § 570, 14 January 2020, and the *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, § 62, 29 May 2020).

142. The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. This is particularly true in relation to persons carrying out a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see the above-cited case of *Vasiliauskas*, § 157, and the *Advisory opinion concerning*

the use of the “blanket reference” etc., cited above, § 61). Particular caution in assessing whether specific conduct may incur criminal liability may be required from professional politicians or holders of high office (*ibid.*, § 68). However clearly drafted a legal provision may be, in any system of law (including criminal law) there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances (see *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 239, 26 September 2023). Again, while certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances (see *Del Río Prada*, cited above, § 92, and *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 59, 3 December 2019). Moreover, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, § 36, Series A no. 335-B, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II).

143. The Court reaffirms that in principle, it should not substitute itself for the domestic jurisdictions. Its duty, under Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court’s function to deal with alleged errors of fact committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary (see *Kononov v. Latvia* [GC], no. 36376/04, § 189, ECHR 2010, and *Vasiliauskas*, cited above, § 160). More generally, the Court points out that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015, and *Jidic v. Romania*, no. 45776/16, § 83, 18 February 2020). However, the Court points out that its powers of review must be greater when the Convention right itself (Article 7 in the present case) requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant’s conviction; in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention – even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of purpose (see the above-cited cases of *Kononov*, § 198; *Rohlena*, § 52; and *Vasiliauskas*, § 161).

2. *Application of these principles*

144. At the outset, and in the light of the above-mentioned principles, the Court observes that its role is not to call into question the domestic courts' findings but rather to consider, from the standpoint of Article 7 § 1, whether the acts for the commission of which the applicant was sanctioned fell within the definition of a criminal offence that was sufficiently foreseeable, given that the accessibility aspect has not even been contested by the latter. In other words, the examination of the complaint under Article 7 § 1 rests on the premise that the applicant committed all the acts established in the domestic courts' findings of fact. As to the standard to be applied for this particular scrutiny of the "foreseeability aspect", the Court reiterates that the "foreseeability" should normally be appraised from the perspective of the individual; it must be assessed whether it was possible for the applicant – if need be after taking appropriate legal advice – to know from the wording of the relevant provisions what acts and omissions would make him criminally liable (see the general principles in paragraph 141 above).

145. The Court further observes that the parties seem to be in disagreement as to the relevant domestic legal provisions applicable to the committed acts – that is, whether the offence of which the applicant was convicted carried in itself only the general elements of abuse of official authority, within the meaning of Article 332 of the Criminal Code, or whether it specifically stemmed from the exercise of the presidential power of clemency. In this regard, it is true that the applicant's conviction was based on Article 332 § 2 of the Criminal Code, which criminalised the offence of abuse of official authority. However, having regard to (i) the wording of this criminal provision, (ii) how it was interpreted and applied in domestic judicial practice (see paragraphs 76 and 78 above), and (iii) how similar criminal provisions are normally viewed from the comparative-legal perspective (see paragraph 90 above), the Court observes that the criminal provision in question represents an example of the legislative technique of "blanket reference" or "legislation by reference". In other words, the criminal provision in question was intentionally couched by the legislature in general and abstract terms in order for it to be complemented by specific legal content – including that which can be found either in constitutional provisions or in other fields of law from outside the criminal-law domain (compare *Advisory opinion concerning the use of the "blanket reference" etc.*, cited above, §§ 65-74). That being so, the Court cannot agree with the applicant's argument that the foreseeability requirement has not been met in his case because of the "too general and vague" wording of Article 332 (see paragraph 137 above). Using the above-mentioned general-wording "blanket reference" technique for criminalising acts or omission cannot raise an issue under Article 7 § 1 as such (*ibid.*, § 70).

146. The above-mentioned finding (concerning the legislative "blanket reference" technique) thus prompts the Court to include in its foreseeability

appraisal not only the referencing provision (namely, Article 332 of the Criminal Code – see paragraph 145 above) but also the legal standards referred to – a body of constitutional rules governing the exercise of the presidential power of clemency, which are not limited to constitutional provisions, but may also include relevant constitutional customs and pieces of subordinate legislation and jurisprudence.

147. As regards the foreseeability of the former, the Court attaches significance to the fact that paragraph 2 of Article 332 of the Criminal Code made it perfectly clear that even the highest-ranking State officials – including the President of the country – could be subject to prosecution for abuse of official authority (see paragraphs 76 and 83 above, and the judicial practice summarised in paragraph 78 above). It also notes that the Law on Impeachment clearly provided, at the material time, for the possibility to hold a former President criminally liable for an offence committed during his or her tenure of office (see paragraph 84 above). Therefore, the applicant could not possibly expect to enjoy immunity from criminal liability under the said referencing provision.

148. As to the foreseeability of the complementary legal content referred to in Article 332 of the Criminal Code – namely the extended constitutional framework governing the exercise of the presidential power of clemency – the key question before the Court is whether or not the applicant could have legitimately not expected to be criminally prosecuted for having granted a pardon. In this regard, the applicant's assertion that there existed, from a comparative-legal perspective, a presumption that the head of State's power to grant a pardon was unlimited/absolute in the sense of being immune from any liability and responsibility (see paragraph 136 above) does not correspond to the reality. Thus, among the thirty-two member States – of the thirty-five member States surveyed by the Court – where the power to grant a pardon is vested – as in the case of Georgia – in the head of State, in only six States (Greece, France, Italy, Latvia and Montenegro) is that power subject to no or minimal limitations; in the remaining twenty-six constitutional regimes, however, the exercise of this power by the head of State appears to be subject to significant limitations imposed by different branches of State power (see paragraph 110 above). More pointedly, as regards the question of whether the head of State can be held criminally liable for acts committed by him or her during his or her term of office and which fell within the category of discretionary powers (as in the situation examined in the present case), the Court observes that this question of immunity is regulated differently from one member State to another. Thus, in at least twelve out of the thirty-five countries surveyed, the head of State can be prosecuted for acts committed during the tenure of his or her office, and this lack of immunity is extended to former heads of State. As regards those countries whose heads of State (both acting or former) enjoy immunity from criminal prosecution, these are either (i) constitutional monarchies, where the

immunity of the monarchs is rooted in long-standing constitutional traditions associated with the hereditary nature of power and in the full assumption by ministers of responsibility for monarchs' actions, or (ii) republican regimes where – and this particular constitutional feature becomes particularly important when viewed through the lenses of legal foreseeability – immunity from prosecution is explicitly guaranteed in constitutional provisions (see, for instance, the examples summarised in paragraphs 93-99 above).

149. In the light of the above-mentioned comparative constitutional overview, the Court finds that the applicant's argument that he had expected pan-European constitutional custom to shield him from criminal liability for acts committed during the exercise of his discretionary presidential powers is unfounded. Therefore, because the situation varies so considerably from one member State to another (depending on unique constitutional features of each country), the focus of the Court's scrutiny of the foreseeability issue should rather be shifted towards the question of whether or not the domestic constitutional framework (as applicable at the material time in the respondent State) could have allowed the applicant to legitimately expect immunity from criminal liability.

150. The applicant referred, in this connection, to the relevant piece of subordinate legislation and to the Supreme Court's judicial practice (see paragraph 136 above). The Court observes that it follows from Presidential Decree no. 277 on rules on presidential clemency (namely, its Rule 2 § 7) and the Supreme Court's decision of 11 July 2000 (case no. 3s/სკ-74-3) that the applicant – as the then President of the country (that is, head of State), was not bound by any subordinate rules and had complete discretion as to whether to exercise the power to grant a pardon (see paragraphs 85 and 86 above). However, the issue at stake is whether the mere confirmation of the fully discretionary nature, or – to employ the exact language of the Supreme Court of Georgia (see paragraph 86 above) – “the unconditional nature” of the presidential power to grant a pardon could be seen as amounting to immunity from criminal jurisdiction in respect of an act committed during the exercise of that particular power or whether the two respective legal concepts are distinct from each other. In this regard, the Court observes that, unlike the constitutional frameworks in those member States in which immunity from criminal liability is explicitly provided under the relevant legislation (see paragraph 93-99 above), there was no provision in either the Constitution of Georgia or in Georgian law or in any other piece of subordinate legislation that could at least remotely suggest that former or current heads of the Georgian State could enjoy immunity from individual criminal responsibility for an act committed during the exercise of their mandate that fell within the scope of their discretionary powers; nor have the parties brought to the attention of the Court any domestic constitutional custom or jurisprudence capable of supporting such a conclusion.

151. Insofar as the applicant may be understood to be arguing that the concept of abuse of official authority under Article 332 of the Criminal Code is incompatible with the discretionary nature of the presidential power of clemency because, in the applicant's understanding, a fully discretionary power is unlimited/absolute by definition and thus cannot possibly be abused, the Court notes that the domestic courts dealt with this argument in detail. They stated that "the unequivocal assertion that the President's constitutional power is limitless ... is dangerous and could encourage [him or her] ... to get involved in corruption ... [T]he power to grant a presidential pardon cannot be limitless and is, on the contrary, limited by the relevant constitutional principles and [by] legal rationalism". They also confirmed that despite the presidential power in question being of a fully discretionary nature, this did not mean that "the power in question could not be abused" (see paragraphs 51 and 56 above). This interpretation of the relevant domestic law and of the associated legal concepts does not appear, in the eyes of the Court, to be arbitrary or otherwise unreasonable. Having regard to the principle of subsidiarity, the Court considers that due deference must be given to the manner in which the domestic courts addressed, by applying the relevant concept of checks and balances, the constitutional dimension of the seeming dichotomy between the absolute nature of the presidential power of clemency and the possibility for that absolute power to become the object of abuse (for the importance of subsidiarity considerations, when assessing national courts' reading of domestic law for the purposes of Article 7, see *Drélingas v. Lithuania*, no. 28859/16, § 105, 12 March 2019). In addition, the fact that the presidential power of clemency was amenable to judicial review in Georgia (see *Assanidze v. Georgia* [GC], no. 71503/01, § 158, ECHR 2004-II), can be taken as a further indication of that power not being immune to judicial scrutiny under Georgian law. The Court thus finds that the domestic constitutional framework, as it stood at the material time, did not enable the applicant to have a legitimate expectation that he would enjoy immunity from criminal jurisdiction for acts committed while in office in the exercise of his discretionary powers – including the power of presidential clemency.

152. While acknowledging that the applicant's case had no precedent in Georgia (it constituted the first criminal proceedings for abuse of official authority instituted against a former head of State in relation to an act committed while in office and in the exercise of a discretionary power), this fact alone cannot suffice to call into question the foreseeability of the relevant criminal provisions (compare, for instance, *Berardi and Mularoni v. San Marino*, nos. 24705/16 and 24818/16, §§ 44 and 53, 10 January 2019). Indeed, where the domestic courts are called on to interpret a provision of criminal law for the first time, an interpretation of the scope of the offence that was consistent with the essence of that offence must, as a rule, be considered as foreseeable. Even a new interpretation of the scope of an

existing offence may be reasonably foreseeable for the purposes of Article 7, provided that it is reasonable in terms of domestic law and is consistent with the essence of the offence (see *Jorgic v. Germany*, no. 74613/01, § 109, ECHR 2007-III, and *Khodorkovskiy and Lebedev*, cited above, §§ 791-821). The Court has already addressed the latter aspects in its reasoning above and has confirmed that the interpretation of the relevant domestic law by the courts in the criminal proceedings at issue was both reasonable and consistent with the essence of the offence (see paragraphs 145-147 and 150-151 above).

153. Furthermore, the Court attaches significance to the fact that the applicant's conviction was not based only on his having performed the act of pardon; rather, the domestic courts also established, by reference to the relevant evidence, that the applicant had issued prior promises to pardon the four former officers of the CSD in exchange of them remaining silent about decisive facts related to the Girgvliani murder. On this basis, the courts explored the applicant's state of mind during the commission of the act in question and found that his decision to grant a pardon had been prompted by his aim of perverting the investigation and otherwise obstructing the administration of justice in the Girgvliani murder case (see, as regards the importance of *mens rea* for the purposes of Article 7, *Yüksel Yalçınkaya*, cited above, §§ 264-67, and *G.I.E.M. S.r.l. and Others*, cited above, §§ 241-42 and 246).

154. The Court thus concludes that, if nothing else, it should have been a matter of common sense for the applicant to have been able to foresee that there would be serious consequences arising from his decision to collude with the people who had either directly committed the homicide or had conspired to cover up the scope of that very serious crime (for the importance of common-sense considerations under Article 7, see, for instance, *Kuolelis and Others v. Lithuania*, nos. 74357/01 and 2 others, § 121, 19 February 2008, and *Berardi and Mularoni*, cited above, § 54, with further references therein). Moreover, the applicant, a leading politician – who had an extensive legal background and wide experience in juridical and public-administration matters, and who had risen over his career to the highest public office in the State – should have proceeded with degree of caution higher than that which could have been expected of an ordinary person and could have been expected to exercise special care in assessing the severity of the risks that might arise from his collusion with the criminals who had stood behind the Girgvliani murder case (compare *Kononov*, cited above, § 235 and *Kuolelis and Others*, cited above, § 120). This collusion – that is, the applicant's wish to employ his presidential power of clemency for the purpose of contributing to the perversion of justice in the homicide case – goes against the pre-eminence accorded to the right to life in all international instruments aimed at the protection of human rights (including the Convention itself and the Court's relevant case-law under Article 2), and the applicant cannot pretend that he could not have understood the criminal nature of the act of his using his power

of clemency for the purposes of perverting the course of justice (compare the above-cited cases of *Streletz, Kessler and Krenz*, §§ 85-87, and *Lexa*, § 139).

155. In the light of the foregoing considerations, the Court finds that the conclusions drawn by the domestic courts as regards the scope of the relevant domestic provisions (namely Article 332 of the Criminal Code and the complementary constitutional framework governing the exercise of the presidential power of clemency) and as regards the application of those provisions to the conduct of the applicant must be considered to have fallen well within the courts' remit to interpret and apply national law, and the applicant could reasonably have foreseen that his conduct would render him criminally liable under those provisions (see *Haarde*, cited above, §§ 128-32).

It follows that there has been no violation of Article 7 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

156. Lastly, the applicant also complained, with respect to both applications, that the authorities' hidden agenda had been to use the criminal-law machinery against him for the purposes of subjecting him to political persecution, in breach of Article 18 of the Convention read in conjunction with Articles 6 and 7. The former provision reads:

Article 18

"The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. The parties' arguments

157. The Government lodged two preliminary objections to the admissibility of the complaints under Article 18. Firstly, they argued that Article 18 of the Convention could not be applied to the case together/in conjunction with either Article 6 or Article 7, because neither of the latter provisions contained any implicit limitations. Secondly, the Government submitted that the applicant's assertion that he had been excluded from political life by virtue of his having been subjected to criminal prosecution was unsubstantiated and thus manifestly ill-founded because it was not supported by any facts and thus fell short of the very high standard of proof normally applied by the Court with respect to claims lodged under Article 18 of the Convention. As regards the statements of the leaders of the various above-mentioned international organisations, the Government submitted that all those statements had constituted pure politico-legal assessments of a general character that had not been based on a judicial examination of the factual circumstances of the applicant's case.

158. The applicant firstly argued that Article 18 of the Convention could, as a matter of principle, be held to be applicable in relation to complaints under Articles 6 and 7 of the Convention, given that the latter two provisions in themselves set out implicit limitations on the rights protected therein. He complained that his criminal prosecution and punishment had been politically motivated and that his fair-trial rights had been improperly restricted for an extraneous purpose, contrary to Article 18. He argued that he had been targeted because of his activities as a major opposition leader and that the criminal proceedings against him had served the improper purpose of silencing and excluding him from the political life of the country. In support of those allegations, he submitted a copy of public statements made by various leading figures in the international community (namely, the US Secretary of State and several senators of the United States of America, the Secretary General of the North Atlantic Treaty Organization, various European Commissioners) that had expressed concern over the initiation of criminal proceedings and the arrest of various former high-ranking government officials (including the applicant) and had called for independent justice in all such high-profile criminal cases. The applicant also referred to media statements made by domestic political figures from the ruling Georgian Dream coalition, which, in the applicant's opinion, had expressed belief in a need to remove the applicant and his UNM allies from the political life of the country. Moreover, the applicant referred to the Court's judgment in the case of *Merabishvili v. Georgia* ([GC], no. 72508/13, §§ 9-13, 28 November 2017), in which the Court found a violation of Article 18 of the Convention, read in conjunction with Article 5 of the Convention, in relation to the pre-trial detention of I.M., a former Minister of the Interior and one of the applicant's closest allies at the time of the events of that case (*ibid.*, §§ 318-54).

B. The Court's assessment

159. The Court refers to the general principles concerning the interpretation and application of Article 18 of the Convention – as set out in its judgments in *Merabishvili* (cited above, §§ 287-317) and *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 others, §§ 164-65, 15 November 2018) (see also *Selahattin Demirtaş v. Turkey* (no. 2) [GC], no. 14305/17, § 421, 22 December 2020).

160. Applying these principles to the circumstances of the present case, and reiterating that the question of the scope of the applicability of Article 18 was joined to the merits of the present case (see *Saakashvili*, the decision cited above, §§ 60-61, 1 March 2022) and that, as a matter of principle, a breach of Article 18 can be found even if there is no breach of the Article(s) in conjunction with which it applies (see, for instance, *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, no. 16812/17, § 315, 18 July 2019), the

Court notes that its first task should normally be to rule, in reply to the Government's first objection to the admissibility (see paragraph 157 above), on whether Articles 6 and 7 of the Convention contain any express or implied restrictions that may form the subject of the Court's examination under Article 18. However, it considers that there is no need for it to take a stance on this complex legal issue – which has not been definitively settled in its case-law (see *Ilgar Mammadov v. Azerbaijan* (no. 2), no. 919/15, § 261, 16 November 2017) – because, in any event, as the Government have suggested in their second objection, the applicant has not sufficiently substantiated, by reference to specific facts, his complaint. In this connection, the Court reiterates that Article 35 § 4 of the Convention *in fine* enables it to dismiss an application it considers inadmissible “at any stage of the proceedings”. Thus, even at the merits stage the Court may reconsider a decision to declare an application admissible if it concludes that it should be declared inadmissible for one of the reasons set out in the first three paragraphs of Article 35 of the Convention (see, for example, *Jovićić and Others v. Serbia*, nos. 37270/11 and 7 others, § 28, 13 January 2015, with further references therein).

161. The Court observes that in support of his allegations regarding the allegedly ulterior motive behind the initiation of the criminal cases him, the applicant referred to (i) various statements by international and domestic political actors, and (ii) to the domestic political context. However, with respect to the former, the Court reiterates that in its task of establishing whether the domestic authorities had improper motives in restricting a politician's human rights, it must base its scrutiny on the specific facts of individual cases in question and needs to treat with particular caution statements that may have been influenced by political considerations (compare *Akhalaia v. Georgia* (dec.), nos. 30464/13 and 19068/14, § 66, and *Khodorkovskiy v. Russia*, no. 5829/04, § 259, 31 May 2011). In the absence of evidence that the judicial authority had not been sufficiently independent of the executive branch in the case at hand, the Court considers that the prejudicial statements made in public by the above-mentioned domestic political figures from the ruling Georgian Dream coalition concerning the criminal proceedings against the applicant cannot, as such, lead to the conclusion that the courts that dealt with the applicant's criminal cases were driven by the improper ulterior purpose of removing him from the political scene (compare *Batiashvili v. Georgia*, no. 8284/07, § 102, 10 October 2019, with further references therein). No such evidence has been put forward in the present case. As regards the reference made by the applicant to the general political context, in view of the various political events that took place in Georgia between 2012 and 2014 (see paragraphs 88-89 above), the Court understands that there might be a degree of suspicion that there was a political impetus behind the charges against the applicant – even if the charges themselves were not overtly political. However, there is no right as such

under the Convention not to be criminally prosecuted, for which reason the factors deriving from the broader political context in which the criminal case was brought against the applicant are insufficient to be regarded as constituting proof in that respect (see, for a similar conclusion regarding the same political context, *Merabishvili*, cited above, §§ 320 and 322).

162. Indeed, although the criminal prosecutions against a number of former ministers and other high officials from the UNM (including the applicant) might suggest a wish to harm that party, they could equally reflect a desire to deal with alleged wrongdoings under a previous government whose members could not be held to account while in power (see, in this connection, the observations expressed by the European Union Special Advisor on Constitutional and Legal Reform and Human rights in Georgia as well as the report issued by the relevant Committee of the PACE, cited in paragraphs 88 and 89 above). The Court has stated in the past, albeit in a different context, that the mere fact that a politician is facing criminal prosecution – even during an electoral campaign – does not necessarily thwart that politician’s right to stand for election effectively (see, *mutatis mutandis*, *Uspaskich v. Lithuania*, no. 14737/08, §§ 90-100, 20 December 2016). In the present case, although the criminal proceedings against the applicant took place against the backdrop of bitter political antagonism between the UNM and Georgian Dream, in the absence of any other specific arguments or evidence (in the legal sense) capable of substantiating the applicant’s fears, the mere reference to the domestic political context (to which any person in the applicant’s position would be able to refer) cannot prove in and of itself that the predominant purpose of the opening of the criminal cases against the applicant was to hinder his participation in Georgian politics (rather than to ensure that he could be brought to justice for criminal misdeeds). Indeed, high political status cannot, as a matter of principle, grant immunity against criminal liability (compare *Merabishvili*, cited above, § 323, and *Ugulava v. Georgia*, no. 5432/15, § 128, 9 February 2023, with further references therein). The Court also reiterates that it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former political regime (see, albeit in a different context, *Streletz, Kessler and Krenz*, cited above, § 81). It also attaches significance to the circumstances surrounding the criminal proceedings against the applicant – namely, the fact that (i) the charges brought against him were serious and well-founded, (ii) there was a significant body of both direct and concordant circumstantial evidence in the case file, (iii) the domestic courts conducted fully adversarial proceedings during which the applicant’s lawyer was able to confront all the major witnesses and otherwise contest the evidence against the applicant and (iv) the domestic court decisions were duly reasoned.

163. In such circumstances, the Court, having regard to the criminal case material in its possession (in particular the reasoning contained in the

domestic court decisions), finds that the authorities' honest desire was to bring the applicant to justice for his wrongdoing and that, in the absence of sufficient evidence to the contrary, the allegation of an ulterior motive is unsubstantiated. Upholding the Government's second objection (see paragraph 157 above), it thus concludes that the complaints under Article 18 of the Convention in respect of both applications are manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, inadmissible the applicant's complaints under Article 18 of the Convention as regards both applications nos. 6232/20 and 22394/20;
2. *Holds*, unanimously, that, as regards application no. 22394/20, there has been no violation of Article 6 § 1 of the Convention in so far as the independence and impartiality of the single-judge composition of Tbilisi City Court (Judge G.A.) was concerned;
3. *Holds*, unanimously, that, as regards both applications nos. 6232/20 and 22394/20, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention in so far as the administration of evidence by the domestic courts was concerned;
4. *Holds*, by five votes to two, that, as regards application no. 22394/20, there has been no violation of Article 7 of the Convention.

Done in English, and notified in writing on 23 May 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytschik
Registrar

Georges Ravarani
President

SAAKASHVILI v. GEORGIA (MERITS) JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Ravarani and Šimáčková is annexed to this judgment.

G.R.
V.S.

JOINT PARTLY DISSENTING OPINION OF JUDGES RAVARANI AND ŠIMÁČKOVÁ

1. Whereas we are in full agreement with the majority in finding no violation of Article 6 § 1 of the Convention and in declaring the complaint under Article 18 of the Convention inadmissible, we respectfully disagree with the majority in their finding that there has been no violation of Article 7 as regards application no. 22394/20.

2. In our opinion, the presidential pardon for murderers in the present case very clearly demonstrates that it is inappropriate, in systems governed by the rule of law, to provide that the Head of State can enjoy unconditional powers to grant clemency and amnesty. In our view, the entire concept does not belong in the 21st century at all and is instead reminiscent of medieval monarchical prerogatives. If there *is* to be some system of pardon or commutation of sentences on humanitarian grounds, then it should be entrusted to a different body or, as a minimum, there should be a different procedure, providing for safeguards against its abusive use by the Head of State.

3. Nonetheless, we must accept that this power is often part of the constitutions of the Member States of the Council of Europe and is used by European Heads of State (see paragraphs 104 to 110 of the judgment), and that this unconditional presidential power is enshrined in the Georgian Constitution.

4. We do not consider, however, that it is possible to punish a former President for exceeding his prerogative by using his power to pardon if that power is unconditional. It must be emphasised that the national authorities have themselves recognised that this is an unconditional constitutional power enjoyed by the President. And if words have any meaning, then “unconditional” means absolute, not subject to any condition.

5. Having regard to the relevant judicial practice, which was closely examined in the case of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 21-32, ECHR 2004-II), we can agree with the applicant that the Supreme Court’s decision of 11 July 2000 (particularly when read in conjunction with the legal findings reached by the first-instance court within the framework of the same case) effectively categorised the power of presidential clemency as “unconditional” – that is, fully discretionary, and also “absolute” (ibid., §§ 28 and 29; see also paragraphs 86 and 85 of the present judgment). An additional advisory opinion was issued by the then President of the Supreme Court of Georgia, which confirmed that the President did not have to account for or justify decisions taken under his presidential power of clemency (ibid., §§ 92-93). That being so, we cannot understand how it would have been possible for the applicant, with or without the assistance of legal advice, reasonably to foresee that he might be held answerable for a misuse or abuse

of the power that – by virtue of the above-mentioned well-established constitutional framework – he had legitimately considered to be of an unchecked nature.

6. We would underline that since the applicant’s case had no precedent (in that it constituted the first criminal proceedings for abuse of official authority instituted against a former head of the Georgian State in relation to an act committed while in office and in the exercise of a discretionary power), it was all the more important for the domestic courts to address with particular care the scope of the complementary legal content referred to in Article 332 of the Criminal Code, namely, the extended constitutional framework governing the exercise of the presidential power of clemency. Having regard to the reasons given by the domestic courts at all three levels of jurisdiction (see paragraphs 51-52, 56 and 59 of the judgment), we note that, while those courts addressed the constitutional dimension of the dichotomy between the absolute nature of the presidential power of clemency and the possibility for that power to be the object of abuse, specifically taking into account the relevant constitutional checks and balances (see the reasons given by the Tbilisi City Court and the Tbilisi Court of Appeal in paragraphs 51 and 56 of the present judgment), they did not sufficiently address the implications regarding the interpretation to be given in criminal law to the notion of the abuse of a discretionary power. They did not explain how the two seemingly conflicting notions could be reconciled from the point of view of the substantive criminal law, namely: how (i) the fact of holding an individual with such a power accountable for abuse (or misuse or any other type of improper exercise) of a power that had been clearly proclaimed to be of an absolute and unaccountable nature could be consistent with (ii) the essence of the offence prosecuted under Article 332 of the Criminal Code. In other words, the domestic courts’ interpretation of the complementary legal content referred to in Article 332 of the Criminal Code was not fully consistent with the essence of the offence proscribed by that Article (contrast *Berardi and Mularoni v. San Marino*, nos. 24705/16 and 24818/16, §§ 44 and 54, 10 January 2019; *Jorgic v. Germany*, no. 74613/01, §§ 109-14, ECHR 2007-III; and *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 791-821, 25 July 2013).

7. It is true that when examining the acts imputed to the applicant the domestic courts (in particular, the Supreme Court of Georgia) attached decisive significance to the fact that he had previously promised to pardon the four former CSD officers in order to “buy” their silence in respect of the Girgvliani murder case. That particular aspect was, as a matter of principle, valuable, in that it afforded an insight into the applicant’s state of mind when he had been about to commit the offence in question; certainly the importance of the requirements of *mens rea* for the purposes of Article 7 of the Convention is not to be downplayed (compare, *mutatis mutandis*, *Yüksel Yalçinkaya v. Türkiye* [GC], no. 15669/20, §§ 264-67, 26 September 2023,

and *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06, 34163/07, 19029/11, §§ 241-42 and 246, 28 June 2018). However, if the domestic courts' reasoning in this respect is to be understood (in the light of the Government's arguments above; see paragraphs 137-138 of the judgment) as an attempt to show that the applicant had been convicted not only because he had granted the impugned pardons but (mainly) because he had sought to influence those witnesses and thus obstruct the investigation into the Girgvliani murder case, it is unclear why the applicant was held liable for an abuse of the otherwise absolute and unaccountable presidential power, rather than indicting him for an offence against justice *per se*; the latter course of procedural action would have meant that the impugned act of pardon would not constitute the crux of the offence (as was the case when prosecuting the applicant for abuse of the constitutional power of clemency), but would rather be merely a consequence or constituent element of the strategy employed by the applicant in his attempt to pervert the course of justice in respect of the murder case. At the material time the Criminal Code specified an offence that perfectly encapsulated the essence of both the *actus reus* and *mens rea* imputed to the applicant – namely, meddling with a witness (Article 372 § 1, see paragraph 76 of the present judgment). However, the case before the Court concerned only the offence of which the applicant was actually convicted, namely abuse of official authority under Article 332 of the Criminal Code, and the compatibility of that conviction with Article 7 of the Convention.

8. In the light of the foregoing considerations, we consider that the domestic courts' interpretation of the scope of the complementary legal content referred to in Article 332 of the Criminal Code – namely the extended constitutional framework governing the exercise of the presidential power of clemency – was not foreseeable for the applicant and was thus at variance with the object and purpose of Article 7 of the Convention.

9. In conclusion, we were unable to join the majority and consequently voted against their finding that there has been no violation of Article 7 of the Convention as regards application no. 22394/20.