SOME FACTS OF LARGE-SCALE ILLEGAL COVERT EAVESDROPPING AND SURVEILLANCE BY THE STATE SECURITY SERVICE: LEGAL ASSESSMENTS

2021

HUMAN RIGHTS CENTER

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TABLE OF CONTENTS

GENERAL OVERVIEW

On September 13, 2021, the secret files were leaked allegedly from the State Security Service. According to the files spread on the Internet, it turns out that media outlets, civil society organizations[1], representatives of opposition parties, members of the Synod of the Georgian Orthodox Church, the patriarchal locum tenens, priests, patriarch's assistants, bishops, nuns, monks and their associates, religious associations - both that of the patriarchate and non-dominant religious groups are being wiretapped and surveilled in the country. The authorities control movements, bank transfers, and the personal life of the above individuals.

In thousands of files we encounter, there is information about the persons through whom some clergymen were to be converted as an agent for the authorities. The documents also include information on priests who are addicted to drugs or associated with criminals[2]. Further, within the thousands of files leaked from the State Security Service - there are many documents, reports relating to the staff of diplomatic missions accredited in Georgia[3].

Some other information about covert surveillance was later also spread on the Internet. The leaked documents, allegedly released by a former State Security officer specifically describe the private lives of particular individuals. Particular emphasis is placed on the sexual orientation of high-ranking clergymen and their past activities[4]. All of these documents list high-ranking clergymen who have 'intimate relationships' with specific individuals. The name, surname, personal number of these citizens are indicated, as well as photos are attached to the file. It is in these materials that several clergymen accused of pedophilia are mentioned by names[5].

In addition to the above, some files are indicating the connections with Russia. There is a whole Word file with short information, as well as a folder named: "Russian Orientation", where background materials of 15 clergymen are included. However, such information is much scarcer than, for example, information about the sexual relationships of specific individuals[6].

Initially, the leaders of the ruling Georgian Dream party described the leaked files as a war against the church and the State, blaming for this the opposition party National Movement. However, a few days later, another version appeared in the narratives by the ruling party namely that the team of the former Prime Minister Giorgi Gakharia released the information

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[1] Representatives of civil society organizations mentioned in the files (Giorgi Oniani, Guram Imnadze and Giorgi Mshvenieradze) confirm the authenticity of one of the communications discussed in the TV show, which referred to the summoning of one of the directors of the Social Justice Center, Tamta Mikeladze, to the Security Service. Giorgi Mgeladze, an investigative journalist of Radio Liberty, also confirms the authenticity of other information aired. See: https://transparency.ge/ge/post/samokalako-organizaciebi-xelisupleba-sus-s-totaluri-kontrolis-mekanizmad-igenebs?fbclid=IwAR1eBYW9ar8uFC3lTyap6CBw3Z_9d1bZsx6u6sZ9u0mbS2QnEJeYoJZLams

[2] see more information: https://formulanews.ge/News/56536

[3] see more information: https://mtavari.tv/news/56558-saertashoriso-skandali-sus-i-diplomatebsats

[4] see more information: https://mtavari.tv/news/56304-sasuliero-pirebis-seksualuri-orientatsia-carsuli

[5] see more information: https://bit.ly/3Bq7R0e

[6] see more information: https://bit.ly/3Bq7R0e

referred to by the authorities as "half true-half lie".

According to the official reports[7], on September 14, 2021, the Prosecutor's Office of Georgia launched an investigation concerning the released files. The legal proceedings are pending on the fact of violating the secrecy of private communication under the first Article 158(1)[8](2)[9] of the Criminal Code of Georgia.

UNCONTROLLED POWER OF THE STATE SECURITY SERVICE: MAJOR PROBLEMS OF LAW AND PRACTICE

For some years now, civil society organizations have been demanding real reforms of the State Security Service to be streamlined with the requirements of the international standards. However, on the background of fragmented reforms, a weak judiciary, and insufficient parliamentary accountability, the State Security Service with its excessive powers and strong leverages, evolved into a toll of illegal covert eavesdropping and surveillance of the masses. Another fact is also disturbing that the Parliament of Georgia continues to strengthen the operational and technical capabilities of the State Security Service, as evident by the amendments to the Law *on Information Security*. In particular, the Parliament, by 77 votes against 2, approved in the third reading the amendments to the Law *on Information Security* coming into contradiction with some of the requirements of the EU Directive on Networks and Information Systems (NIS).

As a result of the above amendments, the Operational Technical Agency (OTA) of the State Security Service is allowed to have direct access to the information systems of the legislative, executive, or judicial authorities, as well as that of the telecommunication sectors and indirect access to personal and commercial information stored in the systems. The security agency is officially allowed to access personal data, as the ambiguity of the wording of the legal provisions creates a tangible threat that personal data would be unlawfully and disproportionately processed[10].

According to the Law of Georgia on the State Security Service of Georgia, the Security Service has the functions of analysis, law enforcement, use of force, prevention, and investigation. Granting such a broad mandate to the State Security Service carries with it the risks of both overlapping of the functions as well as uncontrolled and unlawful use of the powers by the security services. Such functions are even more dangerous because the Article 12 of the Law on the State Security Service, concerning the powers of the Agency, fails to specify particularly which measures the Security Service may apply to exercise this or that powers; furthermore, the Law does not specify the mechanisms to be used for the exercise of the measures. For

[7] see more information: https://ssg.gov.ge/news/717/saxelmtsifo-usafrtxoebis-samsaxuris-gancxadeba

[8] Paragraph 1 of Article 158 of the Criminal Code (violation of the secrecy of private communication).

[9] Paragraph 2 of Article 158 of the Criminal Code (unlawful use, dissemination of or otherwise making available of recordings of private communication, or information or computer data obtained through technical means).

[10] see IDFI: "The Parliament of the 10th convocation passed in the third reading the problematic draft law on information security."
https://idfi.ge/ge/the_parliament_of_the_10_convocation_adopted_the_problematic_draft_law_on_information_security

example, the agency may use one of the measures such as bugging to perform analytical functions for the purposes of prevention, investigation, etc.

Excess of power in the hands of the State Security Service of Georgia is in direct conflict with the guidelines of the Parliamentary Assembly of the Council of Europe *(Recommendation 1402 from1999)*, according to which: "Internal security services should not be authorized to carry out law-enforcement tasks such as criminal investigations, arrests, or detention as this creates risks of abuse of powers"[11].

The excessive powers concentrated in the security agency are particularly problematic given the transparency standards the security services follow in general, including the Georgian State Security Service. In particular, the Law on Personal Data Protection and consequently the supervision by the Personal Data Protection Inspector does not apply to the information processed for state security purposes when such information is classified as a state secret. The vast majority of information about the activities of the State Security Service constitutes a state secret. Such a standard of transparency poses a particularly high risk of human rights violations and unjustified interference with privacy, as evidenced by files/reports leaked from the State Security Service.

As mentioned, one of the most acute problems is the weak external control of the activities of the State Security Service. In particular, although Article 45 of the Law of Georgia on the State Security Service of Georgia provides for accountability to the Parliament of the State Security Service under the rules established by the Constitution of Georgia and the Rules of Procedure of the Parliament of Georgia, however, the provision bears only a formalistic nature. The requirement to report to the Parliament by the head of the security agency fails to ensure actual oversight by the Parliament, as the vast majority of information in the security service is classified. Therefore, such information could not be reflected in the reports for the Parliament. Further problems stem from the fact that as a result of the amendments the notion of "an officer in security issues" was abolished without however creating a legal mechanism that would ban the security agency from having a permanent representative in various public as well as private institutions.

The biggest problem up to date is the high risk of using the technical equipment of the State Security Service in an abuse of power. While the State Security Service has both preventive investigating and law enforcing objectives and the agency as such is officially interested in obtaining as much information as possible, it poses a particularly high risk for human rights violations and unjustified interference with privacy.

[11] "Internal security services should not be authorized to carry out law-enforcement tasks such as criminal investigations, arrests, or detention. "Due to the high risk of abuse of these powers, and to avoid duplication of traditional police activities, such powers should be exclusive to other law-enforcement agencies." – Recommendation 1402 (1999) of Parliamentary Assembly of the Council of Europe on Control of Internal Security Services in Council of Europe Member States.

COMPLIANCE OF LEGISLATIVE REGULATIONS OF COVERT INVESTIGATIVE ACTIONS WITH CONSTITUTIONAL AND INTERNATIONAL STANDARDS OF PRIVACY PROTECTION

One of the fundamental human rights is the right to private life under Article 15 of the Constitution of Georgia. However, private life does not belong to the category of the rights wherein interference is not allowed; The Constitution[12] and other international instruments, such as the UN Universal Declaration of Human Rights[13], the Covenant on Civil and Political Rights[14] , and the European Convention for the Protection of Human Rights and Fundamental Freedoms[15] determine the grounds for such interference.

According to Article 15 of the Constitution of Georgia[16], the personal space and communication of individuals are inviolable. No one may enter a residence or other property against the will of the owner and conduct a search. Interference with the right shall be allowed only in accordance with the law, with or without a court order, in cases of urgency under the law to ensure the necessary state or public security in a democratic society or to protect the rights of others. In case of urgency, the restriction of the right must be notified to the court no later than 24 hours, while the court shall admit the legality of the interference no later than 24 hours after receiving the notification.

The fundamental right to private life is the substantive component of the right to free development of the individual, which includes the intimate, private, and social spheres of the life of an individual[17]. Article 15 of the Constitution of Georgia also protects the rights of an individual to personal and family space, as well as the inviolability of personal communications. The above rights should be considered as specific rights *vis-a-vis* the fundamental right[18].

The Article 15 also protects the right to inviolability of conversations via telephone and other technical means of communication and that of the messages received through technical means. Conversation via telephone and other technical means is the verbal communication of two or more persons using telephone, radio, or Internet software intended for communication, while the messages received through technical means include written communication by telephone, telefax, telegram, telex, e-mail, other relevant Internet software, pager, and other similar technical tools[19]. Moreover, Article 15 also protects the right to inviolability of residence or other property. Residential apartment and other property is any immovable or movable property used for dwelling, property that has been transferred

[12] Paragraph 2 of Article 15 of the Constitution of Georgia.
[13] Article 12 of the UN Universal Declaration of Human Rights.
[14] Article 17 of the International Pact on Civil and Political Rights.
[15] Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:
[16] First and second paragraphs of Article 15 of the Constitution of Georgia.
[17] Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D. ., Jorbenadze S., *Commentary on the Constitution of Georgia*, Chapter Two Citizenship of Georgia. Fundamental human rights and freedoms, Tbilisi, 2013, p. 22.
[18] Ibid, p. 180
[19] Ibid, p. 185

to an individual into ownership or in permanent or temporary usage[20].

According to the case-law of the Constitutional Court of Georgia, *"the right to private life is one of the most important fundamental rights ... Under the right to private life, individuals are guaranteed the right to physical and moral privacy, inviolability of name, personal data, residence, family and sexual life secrets, correspondence, and telephone conversations. In determining the essence of the right to inviolability of private life, each of the rights at the same time carries an independent content."*[21] Further, the court also clarified that *the right to privacy, on the one hand, implies the ability of a person to lead his/her private life independently and, on the other hand, to be protected from interference on the part of the State or any other person in his/her private sphere*[22].

The constitutional right to privacy is an integral part of the concept of freedom. This is the right of a person to form and develop relationships with other people, to determine his/her place, attitude, and connection with the external world. The right to privacy provides the basis for the independent development of each individual. The European Court of Human Rights has iterated that the inviolability of private life is a precondition for the autonomy, independent development, and protection of the dignity of the individual[23].

Further, the right to privacy is vitally important to human identity, freedom, and self-realization. The privacy, private space of individuals shall be protected by the inviolability of private life. This includes a specific area, place (for example a dwelling, personal vehicle, or other personal property), as well as the circle of persons with whom the person wants to communicate, further, the issues the person chooses to leave anonymous and inviolable or to release the issues only among a specific circle of persons [24].

Interference with basic human rights occurs during investigative actions, especially when covert investigative actions take place. Such investigative actions, as a rule, deep intervene into the right to privacy. Therefore, when interfering with a right, it must be determined whether there is a formal basis for the interference and the limits of the interference must be identified[25]. According to the principle of proportionality, interference with fundamental rights must serve a legitimate aim. The means chosen to achieve the goal must be useful, necessary, and proportionate.

Unlike the old version, this article does not distinguish the inviolability of telephone conversations in the list of protected rights, but generalizes it, as the term 'communication' in Article 15(2) includes telephone communications. More specifically, "personal space and

[20] Ibid, p. 186

[21] Judgment N1/3/407 of December 26 2007 of the Constitutional Court of Georgia on the case "Georgian Young Lawyers Association and citizen of Georgia Ekaterine Lomtatidze versus the Parliament of Georgia", II-4.

[22] Ibid.

[23]Judgment of the Constitutional Court of June 10, 2009 on the case "Citizens of Georgia–Davit Sartania and Aleksandre Macharashvili versus the Parliament of Georgia and the Ministry of Justice of Georgia," II-4.

[24] Judgment №1/2/519 of October 24, 2012 of the Constitutional Court of Georgia on the case "Georgian Young Lawyers Association and citizen of Georgia Tamar Chugoshvili versus Parliament of Georgia'', II-3.

[25]The Commentaries on the Constitution of Georgia, Chapter Two, Citizenship of Georgia. Fundamental human rights and freedoms, Tbilisi, 2013, p. 22.

communication fully cover those aspects of human freedom that require protection under the given article of the Constitution."[26] Unlike the old version, Article 15 of the new version specifies the legitimate purposes of interfering in the protected area. In particular, these are the needs to ensure the necessary state or public security in a democratic society or to protect the rights of others serving for the upgrade of the constitutional standards in protecting the rights. The new version of the Constitution stipulates that interference in the field protected by Article 15 shall be permissible under a ruling of a judge issued under the law or without such a ruling in cases of emergency. As for the cases of emergency, the new version of the Constitution provides for the requirement for *post-factum* judicial review of the legality of the interference in cases of emergency[27].

CONSTITUTIONAL GROUNDS FOR INTERFERENCE IN THE PROTECTED AREA

The right to privacy protected by Article 15 of the Constitution is not absolute, the basic law of the country allows interference in the right and defines the grounds for such interference[28]like this is done by other international instruments such as The UN Universal Declaration of Human Rights (Art. 12), the UN Covenant on Civil and Political Rights (Article 17) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8).

In accordance with Article 15 of the Constitution of Georgia, interference in the field protected by the Article is allowed only in accordance with the law, in order to ensure the necessary state or public security in a democratic society or to protect the rights of others. According to the Constitutional Court of Georgia, the right to privacy is not absolute and it may be restricted to achieve the legitimate goals provided for by the Constitution, provided this is necessary for a democratic society. Moreover, it is necessary that the interference with the right is carried out through the means that are necessary and proportionate for achieving the legitimate aims[29]. The Constitutional Court also interpreted that *"protection of the constitutional order, state, and national security, as well as public order in the country, further, prevention of crime ultimately serving the effective protection of human rights, is the obligation of a democratic and constitutional state. These are exactly the public goods the provision of which the restriction of the right serves for. "[30].*

Interference with the right to privacy is brought by covert investigative actions. Article 143^2(2) of the Criminal Procedure Code enlists the cases where covert investigative actions are allowed, in particular, covert investigative action has to be carried out if it is necessary to meet one of the legitimate goals in a democratic society:

a) to ensure national security;

[26]Khodeli M., Covert Interception of Telephone Conversations in Criminal Procedure (According to Georgian and German Law), Tbilisi, 2018, p. 201.
[27] Ibid, p. 202.
[28] Article 15(2) of the Constitution of Georgia.
[29] Judgment №1/2/519 of October 24, 2012 of the Constitutional Court of Georgia on the case "Georgian Young Lawyers Association and citizen of Georgia Tamar Chugoshvili versus Parliament of Georgia'', II-8.
[30] Ibid, II-9.

b) to ensure public safety;
c) to prevent disorder;
d) to prevent crime;
e) to protect the interests of the economic welfare of the country;
f) to protect the rights and freedoms of other persons.

In this regard, the Constitutional Court has clarified that the mere existence of public interest does not justify interference with the right to privacy, however, the necessity to protect that interest must be obvious: *"Because of the covert nature, the interference with the right creates the risk of exceeding and abusing the power which might have detrimental consequences for the entire democratic society. Therefore, in a democratic society, interference with the right can be justified only where the legislation provides for effective mechanisms protecting against the abuse of power. A State that exposes its citizens to the risk of covert control should not enjoy unrestricted powers. Otherwise, unbalanced legislation, motivated by the protection of democracy, might cause the democracy itself to become extremely fragile and conditional.*[31]

GROUNDS FOR INTERFERENCE INTO THE PROTECTED AREA UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms governs the right to respect for private and family life. According to the first paragraph of Article 8, everyone has the right to respect for his/her private and family life, his/her residence, and his/her correspondence. The European Convention allows for the interference with these rights when such interference is lawful and necessary in the interests of national security, public safety, or economic prosperity in a democratic society, to the prevention of disorder or crime, to the protection of health or morals or the rights and freedoms of others.

According to the case-law of the European Court of Human Rights, the concept of respect for private life includes the right to free development of the person, as well as the establishment of relations with others[32]. The European Court of Human Rights held that the concept of 'private life' is a broad one and is not susceptible to exhaustive definition[33]. Further, for a restriction to be considered 'in accordance with the law', the restriction must have a legal basis, the law must be sufficiently precise and public authorities must not be allowed to act arbitrarily[34].

The European Court in the case *"Kennedy versus The United Kingdom"* assessed the concept

[31] Judgment №1/2/519 of October 24, 2012 of the Constitutional Court of Georgia on the case "Georgian Young Lawyers Association and citizen of Georgia Tamar Chugoshvili versus Parliament of Georgia'', II-11.

[32] Kilkelly U., The right to respect for private and family life, implementation of Article 8 of the European Convention on Human Rights, Guide, L. Chelidze, b. Bokhashvili, translated by T. Mamukelashvili, edited by L. Chelidze, Council of Europe, 2005, p. 14.

[33] CASE OF COSTELLO-ROBERTS v. THE UNITED KINGDOM, March 25, 1993, para 36.

[34] Kilkelly U., The right to respect for private and family life, implementation of Article 8 of the European Convention on Human Rights, Guide, L. Chelidze, B. Bokhashvili, translation by T. Mamukelashvili, edited by L. Chelidze, Council of Europe, 2005, p. 79.

of "foreseeability" in the field of covert eavesdropping, namely: "The foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he/she can adapt his/her conduct accordingly[35]." However, when the activities of the intercepting person are being conducted covertly, the risk of arbitrariness is obvious[36]. Therefore, it is necessary to have clear and detailed rules on covert eavesdropping. Especially since the technology used for this purpose is constantly evolving[37]. At the same time, the domestic law of the country should be clear enough and adequately explain to citizens the circumstances and conditions under which the state authorities may carry out such measures[38]. The law should define the scope of powers granted to the competent authority and the methods of its implementation to protect the individual sufficiently from arbitrary interference on the part of the State.

THE RULE OF STORAGE AND DESTRUCTION OF INFORMATION OBTAINED AS A RESULT OF COVERT INVESTIGATIVE ACTIONS

The Criminal Procedure Code of Georgia obliges the body conducting covert investigative actions and the relevant investigative authorities to properly safeguard and register the information obtained as a result of covert investigative actions[39], in particular, to report about: Type of covert investigative action; the time of commencement and completion of the covert investigative action; the object of covert investigative action; when carrying out a covert investigative action provided for in subparagraphs (a) - (c) of the first paragraph of Article 143^1 of this Code - technical identifier of the object of covert investigative action; details of the judge's decision and/or the prosecutor's motivated decision, in particular, the type of covert investigative action; the time of commencement and completion of the covert investigative action; object of covert investigative action[40].

Article 143^8 of the Criminal Procedure Code envisages the rule of storage and destruction of information/material obtained as a result of covert investigative action. The obtained information/material can be classed as follows:

1. Information that is not valuable to the investigation;
2. The prosecution has not furnished them as evidence at the court hearing the case on the merits;
3. The material does not relate to the criminal activity of a person concerned;
4. The court found it as inadmissible evidence;
5. The material has been entered into the criminal case file as material evidence.

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35 Kennedy v. the United Kingdom, [2010] ECHR 682 (18 May 2010). https://www.hrlc.org.au/human-rights-case-summaries/kennedy-v-united-kingdom-2010-echr-682-18-may-2010

36 Malone, p. 32, para 67, Huvig pp. 54-55, para 29 and Rotaru

37 Kopp v. Switzerland, judgment of March 25, 1998, reports 1998-2. Pp. 542-43, para 46.

38 Huvig. Pp. 54-55, para 29.

39 Paragraph 1 of Article 143^5 of the Criminal Procedure Code.

40 Papiashvili L., Tumanishvili G., Kvachantiradze D., Liparteliani L., Dadeshkeliani G., Guntsadze Sh., Mezvrishvili N., Toloraia L., Commentary on the Criminal Procedure Code of Georgia as of October 1, 2015, Tbilisi, 2015, 441.

The decision to destroy the information obtained as a result of covert investigative action is made by a judge or prosecutor. If the information was found to be inadmissible evidence or was entered into the criminal case files as material evidence, the decision about the destruction shall be made by the judge, and in other cases, by the prosecutor. The information obtained as a result of a covert investigative action shall be destroyed by the prosecutor supervising the investigating process, or the prosecutor in court, or the prosecutor supervising the mentioned prosecutors, while such decision shall be made in the presence of the judge or before the court of the judge having made the decision to conduct the above-mentioned covert investigative action, or having declared the covert investigative action *post factum* as lawful or unlawful in cases of emergency[41]. The report on the destruction of the material obtained as a result of the covert investigation shall be submitted to the State Inspector's Office with the signatures of the relevant prosecutor and the judge, while the report of the criminal case in the proceedings of the State Inspector's Office shall be handed over to the supervising judge and shall be reflected in the court register of covert investigative actions[42]. The destruction of information that falls within the jurisdiction of a judge shall be destroyed by the judge or the court of the judge having decided to conduct the covert investigative action or to declare the covert investigative action conducted without a judge's ruling lawful or unlawful in cases of emergency[43].

According to the case-law of the European Court of Human Rights, the legislation on covert investigative actions should describe in detail the procedure of destroying the data obtained as a result of surveillance. In the case, *Weber and Saravia v. Germany,* the European Court of Human Rights found that the relevant procedure was sufficiently detailed and that the data-keeping agency was obliged to review every six months whether it was still necessary to keep the data for the purpose for which it was obtained or transmitted. Otherwise, the data would have to be destroyed, deleted, or at least restricted in access[44]. Further, the European Court in its decision on the case *ROMAN ZAKHAROV v. RUSSIA*, pointed out: "The Court considers that the manner in which the system of secret surveillance operates [...] gives the security services and the police technical means to circumvent the authorisation procedure and to intercept any communications without obtaining prior judicial authorisation. Although the possibility of improper action by a dishonest, negligent or overzealous official can never be completely ruled out whatever the system, the court finds that [...] a system which enables the secret services and the police to intercept directly the communications of each and every citizen without requiring them to show an interception authorisation to the communications service provider, or to anyone else, is particularly prone to abuse."[45]

41 Ibid., 444-445.

42 Article 143[8](5) of the Criminal Procedure Code.

43 Article 143[8](6) of the Criminal Procedure Code.

44 Transparency International-Georgia, Assessment of Georgian Interception Legislation in Accordance with the Standards of the European Convention on Human Rights, p.15, https://bit.ly/2Wo07eQ.

45 Roman Zakharov v. Russia (Application no. 47143/06). Para 270. https://policehumanrightsresources.org/roman-zakharov-v-russia-47143-06

THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

Regarding the practice of indiscriminate mass surveillance by governments, noteworthy is the judgment of the Court of Justice of the European Union (CJEU) from October 6, 2020[46]. The CJEU underlined that the issue of national security does not preclude the fulfillment of the commitments of the EU Member States to comply with the general principles of the EU law; including the obligation of respect for fundamental human rights that of the principle of proportionality, inviolability of private life, personal data protection and freedom of expression. At the same time, the CJEU did not rule out the possibility to derogate or deviate from the norm and clarified that an acute threat to national security could justify the collection and storage of limited and temporary mass data.

According to the CJEU, insofar as the protection of public safety or the prevention of serious crime may also be a prerequisite for purposeful collection and storage of data, it should be accompanied by "effective safeguards" to protect the data and rights of individuals. This information collection/storage procedure shall be subject to strict control by a court or independent body.

The judgment by the CJEU also points to the fact that the indiscriminate retention of traffic and location data by the authorities may become a legitimate basis for overturning individual criminal convictions built on such information.

THE PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA:

In 2016, the Public Defender of Georgia and the organizations participating in the "This Affects You" campaign, including HRC, appealed to the Constitutional Court to declare unconstitutional the Code of Criminal Procedure and the Law on Electronic Communications granting the rights to the agency (the State Security Service) authorized to carry out covert investigative actions to have recourse to the real-time collection of traffic and location data from the physical lines of communications and to install respective hardware and software for these purposes[47].

On April 14, 2016, the Constitutional Court of Georgia granted the constitutional claim and declared unconstitutional the rules of retention, copying, and storing of the real-time personal identification data. In the opinion of the Constitutional Court, although the impugned norms serve the attainment of legitimate aims, they do not constitute a less restrictive, proportionate means of attaining those aims. The disputed norms allow the State Security Service, using modern technologies, to obtain personal information about the

[46] ECJ: Judgment in cases C-511/18 La Quadrature du Net, C-512/18 French Data Network, C-520/18 Ordre des barreaux francophones et germanophone and C-623/17 Privacy International https://twitter.com/EUCourtPress/status/1313379250511196164, EU Court of Justice (@EUCourtPress) October 6, 2020.

[47] The constitutional claims of the citizens of Georgia: Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze; and Open Society Georgia Foundation, Transparency International Georgia, Georgian Young Lawyers Association, International Society for Fair Elections and Democracy and Human Rights Center against the Parliament of Georgia.

indefinite group of persons[48].

At the same time, as the proper enforcement of the judgment, rendered by the Constitutional Court, apart from fundamental legislative amendments, required the institutional and technical support of the system introduced under the new legislation, the Constitutional Court deemed it reasonable to allow a sufficient timeframe to enforce the judgment. Therefore, the Constitutional Court set March 31, 2017, as a sufficient timeframe for the enforcement of the judgment[49].

In order to enforce the judgment of the Constitutional Court and bring the Georgian legislation in line with the Constitution of Georgia, a working group was set up in the Parliament of Georgia in January 2017. Within the working group, the party with the majority seats in the Parliamentary brought a rather controversial draft law for the discussion according to which the so-called 'key' for traffic and location data retention remained with the State Security Service. In particular, according to the draft law submitted by the ruling party, the powers to conduct covert surveillance over telephone and Internet communications, as well as covert video and audio recording was to be transferred to the newly established legal entity under public the Operative and Technical Agency of Georgia operable within the State Security Service [50]. Despite the questions concerning the draft law and the severe opposition against the draft law from the civil society organizations, in March 2017, the Parliament of Georgia adopted the package of bills in the third reading. On March 20, the President of Georgia Giorgi Margvelashvili vetoed the draft law on wiretapping[51]. The Parliament of Georgia did not agree with the President's motivated comments putting in a veto on the package of legislative amendments titled "on Covert Investigative Actions" and left the adopted law unchanged[52].

As a result of legislative changes, these functions are performed by the Operative and Technical Agency of Georgia LEPL operating under and accountable to the State Security Service. Under the new regulation, the Operative and-Technical Agency provides services to all the agencies that, within their authority, carry out covert investigative actions. Thus, the powers acknowledged to be unconstitutional by the Constitutional Court were transferred from the State Security Service to the legal entity of public law with the same institution, so the court judgment was not actually enforced. Such opinion is affirmed by the substance and structural arrangement of the Agency, as well as by the fact of appointing a high-ranking official of the State Security Service as historically the first head of the Agency[53] and, in general, the leading role of the head of the Security Service in the process of assigning the

[48] see more information: http://www.humanrights.ge/index.php?a=main&pid=18723&lang=geo

[49] http://www.constcourt.ge/ge/news/sakonstitucio-sasamartlomarakonstituciurad-cno-piradi-xasiatis-informaciis-realur-droshi-mopovebis-damaidentificirebeli-monacemebis-kopirebis-da-shenaxvis-wesebi.page

[50] "This Affects You" Campaign, Statement: https://www.interpressnews.ge/ka/article/416770-es-shen-gexeba-paruli-mosmenebis-sakitxze-mmartveli-partiis-kanonproekti-kmnis-riskebs-adamianis-uplebebshi-usapuzvlo-charevistvis/

[51] see more information: https://netgazeti.ge/news/181605/

[52] https://netgazeti.ge/news/181856/

[53] The Statement of the State Security Service from June 17, 2017: http://bit.ly/2us9kkV

head of the Agency[54].

The extent of the institutional relationship of the head of the Agency towards the head of the State Security Service is also significant.[55] The head of the SSS retained the functions of state supervision over the activities of the Agency[56].

Yet under such conditions where the large powers are granted to the Agency in terms of covert surveillance, wiretapping, recording the communications, and conducting covert investigative actions and counterintelligence activities[57], the State Security Service enjoys unrestricted access to massive interceptions and surveillance. Beyond such powers, the Agency is the competent body to overlap the job of the National Communications Commission in the areas of licensing and checking the companies providing electronic communications and imposing mandatory technical requirements on such companies.

Therefore, the position of HRC remains unchanged[58] and HRC believes that by adopting the above Law and the new regulations, the authorities managed to avoid the actual enforcement of the judgment by the Constitutional Court. The reason for such a position is the fact that the Agency not only retained the function of and access to collecting the data in real-time through the means of electronic communications but acquired some multifunctional powers creating opportunities and interests for the Agency to collect and process massive data and information. . The mentioned data and information often contains also personal data the risks of abusing which are still uninsured. Eventually, due to the nominal role of the State Inspector in the process[59] and due to the impossibility of effective control, the powers concentrated in the hands of the single Agency without the need to have authorizations on various levels induce us to conclude that the severe situation in terms of inviolability of the private life in the country is maintained.

Meanwhile, the reform process that had begun at the demand of civil society sector and the general public supposed to bring tangible positive changes following the judgment of the Constitutional Court unfortunately failed. While the goal of the reform was to minimize the risks inherent in the collection and processing of mass data and information and to raise the standard of human rights, on the contrary as an outcome of the process we have obtained the Agency with even more authority, financial or technical resources, and influence. The Agency was established not as a technical provider of wiretapping/eavesdropping of electronic communications, but it has retained the operative and investigative functions, and above this, the Agency acquired the right to set up new territorial bodies[60] and has acquired additional leverages against the private communication providing companies, and the funding

[54]Article 19 ofthe Law of Georgia on Legal Entity under Public Law – the Operative and Technical Agency of Georgia.
[55]Articles 20 and 22 of the Law of Georgia on Legal Entity under Public Law – the Operative and Technical Agency of Georgia.
[56] Ibid: Article 29.
[57]Article 8 of the Law of Georgia on Legal Entity under Public Law the Operative and Technical Agency of Georgia.
[58]see more information: https://bit.ly/3a5nnCH.
[59]Article 2 of the Law of Georgia on Legal Entity under Public Law the Operative and Technical Agency of Georgia.
[60] Ibid: Article 4.

of the Agency was even more increased[61]. In fact, following the 2015 'reforms' the excessive powers gathered in one strong institution were distributed into two structural units, again with excessive powers and overlapping functions. All the above indicates the fact that on the background of the vague definition of the mandate and powers of the Security Service, further, under the conditions of having the access to top secrets and under weak supervision, the risks of unlawful utilization of the resources of the Agency are in no way reduced but on the contrary increased.

The failure of the reforms is precisely the reason why the inviolability of private life in the country is vulnerable and the illegal practice of using personal files for various purposes (including political) is being continued.

CONCLUSIONS

Despite numerous attempts by civil society organizations, various types of campaigns, and demands, the State has not yet taken real and effective steps to fundamentally reform the control tools of the State Security Service and to review the mechanisms of wiretapping/surveillance. The State is still approving and legitimizing the function of the Agency to mass interceptions and control at the expense of gross violations of fundamental human rights. This is mainly carried out through illegal covert eavesdropping and surveillance, as evidenced by the thousands of files leaked from the State Security Service this year.

Further, we may say that the main problem of large-scale human rights violations - the technical equipment, with a high risk of abuse of power - still remains in the hands of the agency that is professionally interested in obtaining as much information as possible including through illegal means facilitated by the weak external control of the security service.

Moreover, for years, there have been reasonable doubts that the main resources of the State Security Service are spent on the control of specific groups which are interesting for the State in political terms, whereas the resources of the agency are not deployed to identify and respond to significant threats to the country's sovereignty as evidenced by the files/reports released on September 13, 2021.

The total control of citizens by the State, illegal wiretapping, obtaining and processing the materials on private lives violate the fundamental human rights protected by the Constitution and international instruments; further, this violates the right to private life indicating the collapse of democratic institutions of the State and total control.

HRC calls on:

The Georgian authorities:

- To take on political responsibility for large-scale covert illegal eavesdropping, surveillance, covert control of citizens, and breaches of inviolability of private lives;

[61] Ibid: Article 8.

- Government officials, following the high public interest, to immediately start real reforms of the State Security Service in accordance with international standards;
- To respect the Constitution of Georgia and the Constitutional Agreement.

The Parliament of Georgia:

- To take responsibility for monitoring the State Security Service and start discussions on the fundamental reforms of the security sector in a timely manner so that the agency does not have the opportunity to abuse its authority and exercise total control;
- To carry out legislative changes allowing to exclude often overlapping functions of investigation, prevention, analysis, and law enforcement to be granted to a single agency ensuring the effectiveness of the agency acting in accordance with human rights principles, and becoming a democratic institution.

The Prosecutor's Office of Georgia:

- To immediately launch investigative actions into the alleged covert wiretapping and identify all potential offenders;
- To constantly provide information to the public about the investigation, which is especially important in the current political context, when the public does not have confidence that the State would properly, timely, and objectively investigate all possible cases of abuse of official powers;
- To investigate all alleged criminal offenses as captured in the leaked files;
- To pay special attention to the facts of pedophilia in the spread files and immediately start investigative actions and constantly inform the public about the results of the investigation, identify all potential offenders.

The Patriarchate of Georgia:

- To immediately investigate the facts of pedophilia allegedly committed by the clergymen and take appropriate action;
- To respect the principle of secularism (constitutional agreement), which implies the institutional separation of the State and religion and the neutral attitude of the State towards the religious groups, so as not to influence the legal and political decisions of the State.