



him to become the object of surveillance. Photos taken by the HRC monitor demonstrate that the aforesaid individuals were standing close to Jumber Bachaliashvili and Beka Grigoriadis.<sup>6</sup> Moreover, after the careful examination of photos, the HRC monitor observed that one of the individuals – allegedly engaged in surveillance of the protest participants – was standing side by side with the police officers, gathered near the Tbilisi Gymnasium #1.<sup>7</sup> This might indicate that Jumber Bachaliashvili and Beka Grigoriadis were subjected to covert investigative action.

Given that the HRC monitors do not possess evidence that would suffice for making the claim, the alleged covert surveillance against specific participants of public assemblies will be reviewed in the light of a “reasonable doubt”. The doubts regarding alleged surveillance are grounded on the information provided during the interviews by participants and organizers of public assemblies, as well as the photo and video documentation made by HRC monitors during assemblies.

Ensuring public order and the safety of protest participants is one of the key functions of the police and, when exercising respective duties, the law enforcement bodies shall act with high responsibility, with due respect for human rights – both, collectively and individually.<sup>8</sup> Under Georgian legislation, when performing preventive functions, the police ensure the safety of participants of assemblies, manifestations, or other mass gatherings.<sup>9</sup> Within their competence, the police respond to the instances of breaches of law in accordance with the Criminal Procedure Code of Georgia, and have the authority to conduct covert investigative actions: “electronic surveillance using technical means, and discreet video and audio recording, or filming and photographing that cause no harm to life and health of individuals, or to the environment”.<sup>10</sup> Procedural-legal norms concerning operative-investigative action are defined in the Criminal Procedure Code of Georgia.<sup>11</sup> On the other hand, such activities are partially regulated by the Law of Georgia on Operative-Investigative Activities as well.<sup>12</sup>

Since “storing (processing) of data relating to the private life of an individual by the authorities, even though it may not use the processed data, directly affects the interest of personal life of an individual”,<sup>13</sup> the law lists the types of covert investigative actions, among which is the covert

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<sup>6</sup> HRC Monitor’s report on the monitoring of the public assembly: 28.05.2023.

<sup>7</sup> Ibid.

<sup>8</sup> Amnesty International Dutch Section, *Policing Assemblies*, Police and Human Rights Program – Short paper series No. 1, 2013, p. 5.

<sup>9</sup> Police Law of Georgia, Article 17 (1) (d).

<sup>10</sup> Ibid, Article 17 (2) (f. b).

<sup>11</sup> Criminal Procedure Code of Georgia, Chapter XVI<sup>1</sup>.

<sup>12</sup> Law of Georgia on Operative-Investigative Activities.

<sup>13</sup> *S. and Marper v. The United Kingdom*, no. 30562/04 and 30566/04, § 67,121, 4 December 2008.

eavesdropping or/and audio-recording, photographing,<sup>14</sup> and determines the rules of covert investigative actions, or the procedural standard when it is admissible to conduct similar action.<sup>15</sup>

Covert investigative action can be conducted against the individual, who is an object of investigation or/and criminal prosecution for the crimes provided by the law,<sup>16</sup> or if “there is a reasonable cause to believe that a person against whom a covert investigative action is to be carried out has committed any of the crimes, or a person receives or transmits information that is intended for, or is provided by, a person directly related to the crime, or a person directly related to the crime uses the communication means of the person”.<sup>17</sup> In addition, covert investigative actions are carried out due to urgent public necessity and are a necessary, adequate, and proportional means for achieving legitimate goals in a democratic society.<sup>18</sup> Additionally, “covert investigative actions can be applied as *ultima ratio*, in case of urgent necessity”.<sup>19</sup>

Rendering a ruling to start an investigation or expand the scope of the investigation falls within the authority of the Court.<sup>20</sup> In case of urgent necessity, the covert investigative actions shall be carried out based on the motion of the prosecutor.<sup>21</sup> The operative-technical agency is the body with exclusive authority to conduct covert investigative actions.<sup>22</sup> The Personal Data Protection Service shall control and supervise covert investigative actions in accordance with the Law of Georgia on Personal Data Protection.<sup>23</sup>

Having reviewed the abovementioned legal basis, doubts arise regarding the appropriateness of alleged covert investigative action against the protest participants. In addition, it is questionable whether there was any urgent necessity and need to conduct the surveillance in the abovementioned cases, and what the grounds for the investigative bodies to start covert investigative actions concerning the said persons. The law lays grounds for the use of similar investigative action for the following legitimate purposes – “to ensure national or public security, to prevent riots or crime, to protect the country’s economic interests and the rights and freedoms of other persons”.<sup>24</sup> At the

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<sup>14</sup> Criminal Procedure Code of Georgia, Article 143<sup>1</sup>.

<sup>15</sup> Ibid, Article 143<sup>3</sup>.

<sup>16</sup> Ibid, Article 143<sup>3</sup> (2) (a).

<sup>17</sup> Ibid, Article 143<sup>3</sup> Par 2 (b).

<sup>18</sup> Ibid, Article 143<sup>3</sup> Par. 2 (c).

<sup>19</sup> Akubardia I., *Control Mechanisms on Covert Investigative Actions*, Revaz Gogshelidze 65<sup>th</sup> edition, Ivane Javakhishvili Tbilisi State University, Law Faculty, “Meridiani”, Tbilisi, 2022, p. 200.

<sup>20</sup> Criminal Procedure Code of Georgia, Article 143<sup>3</sup>(1).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid, Article 32 (a).

<sup>23</sup> Ibid, Article 143<sup>4</sup> (2).

<sup>24</sup> Ibid, Article 143<sup>2</sup>.

same time, “it shall be used only when other investigative actions are ineffective to resolve the offense, to identify the perpetrator, to obtain evidence”.<sup>25</sup>

Considering the fact that, the participants of the protest demonstrations, allegedly, were subjected to covert investigative action, the risk of processing personal data of individuals unrelated to the investigation was at hand – while, *prima facie*, no threats to the national security, public safety or other protected legal good or/and other grounds prescribed by the law were evident. The Criminal Code of Georgia obliges the body carrying out covert investigative actions, as well as other investigative authorities or persons, to limit, as much as possible within their powers, the monitoring of communications and persons that are not related to the investigation.<sup>26</sup>

Hence, when carrying out covert investigative actions, the Prosecutor’s Office, the judiciary, the Operative-Technical Agency, and the Personal Data Protection Service shall act with the human rights-centered approach. Covert investigative actions may be conducted only in the instances set forth by the law and in accordance with applicable rules so that they are limited to such instances “when the evidence essential to the investigation cannot be obtained through other means or it requires unreasonably great effort”.<sup>27</sup>

Taking into account the aforementioned, we recommend:

*The Prosecutor’s Office of Georgia and Operative-Technical Agency:*

- to abstain from carrying out covert investigative actions against the participants of assemblies and manifestations, except for cases prescribed by law.

*The Common Courts:*

- to authorize and/or extend covert investigative actions in due respect to the national legislation and allow similar actions only in exceptional cases, as prescribed by law.

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<sup>25</sup> Laliashvili T., *Conflict between Covert Investigative Actions and Basic Human Rights*, Law and World Journal N6, “Meridiani”, Tbilisi 2017, p. 40.

<sup>26</sup> Criminal Procedure Code of Georgia, Article 143<sup>7</sup> (1).

<sup>27</sup> Ibid, Article 143<sup>2</sup> (4).

*The Personal Data Protection Service:*

- to examine the instances of alleged covert investigative actions against the participants and organizers of public assemblies and take respective measures within his/her competence if the breach of law is identified.

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