

Uncontrolled surveillance and inviolability of Personal life

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Human Rights Center



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INTRODUCTION

Human Rights Center has been providing the victims of illegal surveillance with free legal aid for years. While working on these cases, many problems were identified like violating the right to personal life, which were triggered by legislative and institutional shortcomings.

The analytical document below aims to summarize the problems and challenges related with systemic illegal surveillance, to assess Georgian legislation and practice and make respective conclusions and elaborate recommendations.

The Document explores the field protected by the right to personal life and related field of the Georgian legislation. The grounds to interfere in the right to personal life and freedom of communication is assessed as part of fundamental right to inviolability of personal life. The document underlines that mass covert eavesdropping and illegal surveillance significantly violate fundamental principles of human rights. Therefore, as a result of the analyzed legislative amendments, reasonability of the scope of investigative actions is evaluated. The Document also reviews legitimacy of the institution authorized to conduct covert surveillance as well as the need of effective oversight and control of similar actions. Additionally, the focus is on the need of investigation into so called surveillance cases.

In the conclusion, the analytical document summarizes important questions, which are related with the practice of the international and national legislations, judgments of the European Court of Human Rights, statements of local and international institutions and Human Rights Center. Additionally, the document lists recommendations necessary to resolve the identified problems.

THE FIELD PROTECTED BY THE RIGHT TO PERSONAL LIFE AND LEGISLATIVE FRAME

In accordance with the Constitution of Georgia, the right to personal life and family life, personal space and communication is inviolable.¹ Also, pursuant to the obligations taken by Georgia under the international agreements, protection of the right to personal life is ensured. Namely, Article 13 of the UN Universal Declaration on Human Rights; Article 8 of the Convention on Human Rights and Basic Freedoms, Article 17 of the International Pact on Civil and Political Rights guarantee protection of these rights.

The essence of the right to personal life is not exhaustively determined in the national legislation and judgments of the ECtHR², because in accordance with the ECtHR clarification, the right to personal life is so wide that it does not substitute comprehensive definition.³

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¹ Article 15, Constitution of Georgia

² D. Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights, 2014, 524.

³ Costello-Roberts v. the United Kingdom, 25 March 1993, § 36, Series A no. 247-C

The benefits protected by the right to private life include respect to a human being and dignity, personal data and other aspects.⁴ When discussing this right, it is very important principle to respect the personal space of every individual.⁵ Also, right to personal life is closely linked with the right to free personal development and refers to the intimate, private and social fields of an individual. As for the right to inviolable communication, it is envisaged as the special right of this basic rights.⁶

In accordance with the clarifications of the Constitutional Court of Georgia, the basic space of private life includes family life, sexual relationship, personal treats, information shared with the clergyman, results of medical examination, human emotions, feelings, etc. Hence, “forms of expression in private space shall be particularly protected from the oversight of the state and any third person.”⁷

When processing the data, the human rights and freedoms, among them the right to inviolability of personal life is protected under the law of Georgia on the Protection of Personal Data.⁸ Pursuant to the law, personal data is any information which is related with the identification of the physical person, for example such information may contain the physical, physiological, psychological, economic, cultural or social data.⁹ Moreover, there are special category data, which has higher standard of protection and is related with racial or ethnic belonging of a person, his/her religious or philosophical belief, sexual life, and health state and other.¹⁰

In recent years, the number of offences related with the violation of right to privacy by using internet has increased. Mostly, the victims of these crimes in Georgia are women, whose age ranges from 9 to 84. Threatening a person with disclosing information about his/her personal life is punishable under the Criminal Law,¹¹ though there is low awareness about it in the society and victims, because of hopeless situation, sometimes attempt to commit a suicide.¹²

Therefore, it is important to inform the society that **it is punishable under the Criminal Code of Georgia to disclose information about personal life, a secret about person life or to breach inviolability of personal data, to violate secrecy of personal communication, personal messaging, phone conversation or other kinds of communications.**¹³

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⁴ Besarion Bokhashvili, Konstantine Korkelia; “Right to personal and family life and state obligations,” 2017. P. 22-112, see [link](#)

⁵ Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 90, ECHR 2002-VI

⁶ Burduli I, Gotsiridze E, Erkvania T, Zoidze B, Izoria L, Kobakhidze I, Loria A, Matcharadze Z, Turava M, Pirtskhalashvili A, Putkaradaze I, Kantaria B, Tereteli D, Jorbenadze S, Comment to the Constitution of Georgia, Chapter II – Citizenship of Georgia,. Basic Human Rights and Freedoms, Tbilisi, 2013, 22.

⁷ Ruling N/1/1/625.640 of April 14, 2016 of the Constitutional Court of Georgia on the case Public Defender of Georgia, citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, Open Society Foundation – Georgia, Transparency International Georgia, Georgian Young Lawyers’ Association, International Society for Fair Elections and Democracy and Human Rights Center vs. Parliament of Georgia, II, 12, See [link](#)

⁸ Law of Georgia on the Protection of Personal Data, Article 1

⁹ Law of Georgia on the Protection of Personal Data, Article 2 (a)

¹⁰ Ibid, Article 2 (B)

¹¹ Publication of the Radio Liberty: “The youngest victim is 9 years old and the oldest is 8 – when you are threatened with publishing intimate photos,” 05.03.2024; see: [link](#)

¹² Publication of the Radio Liberty: “A girl in Guria region committed a suicide because of being blackmailed,” 18.08.2018; see: [link](#)

¹³ Articles 157, 157¹³, 158 and 159 of the Criminal Code of Georgia

Cases of covert surveillance and eavesdropping is the interference in the area protected by the right to personal life that is allowed only in the instances regulated by the law, based on the legal grounds and excludes all possibilities of selfishness from the side of public authority.¹⁴

GROUNDS TO INTERFERE IN THE RIGHT TO PRIVATE LIFE

With the developing technologies, the governments may have more leverages to conduct covert surveillance and eavesdropping. Hence, it is further important to check the legality of all interference in the areas protected under the right to private life from the side of the government.

Right to personal life is not absolute right and it can be restricted based on the grounds determined in the Constitution. **This right may be restricted only in accordance with law to ensure national security or public safety, or to protect rights of others, insofar as is necessary in a democratic society**¹⁵.

When assessing the reasonability of restricting the human rights, the European Court of Human Rights evaluates three main conditions. Namely, restriction of the right to personal life can be considered lawful if it is done in accordance with the law and has legitimate purpose, for example serves the interests of public safety and is necessary to achieve this goal in a democratic society, i.e. there is no other less restrictive method to achieve the same goal.¹⁶ For example, one of the legitimate goals to conduct video-surveillance equipped with artificial intellect may be protection of public safety but it does not mean that the action is legitimate in any case; just the opposite, it is necessary to provide respective verification why the protected area was interfered to achieve the concrete goal. The more the right is restricted, the better inevitability of this interference shall be verified.¹⁷ In accordance with the principle of proportionality, interference shall be logically linked with the action performed to achieve the legitimate goal and restrict right. If violation of this right does more harm than good, the interference in this right shall be assessed as disproportionate.¹⁸

In accordance with the clarification of the Constitutional Court of Georgia, both fundamental rights and the legitimate interests protected under the Constitution shall be protected. On the one hand, it is constitutional responsibility of the state to protect safety of the state and ensure investigation, but on the other hand, it shall not create threats to the perspectives of free development of individuals and must not violate the right to personal life. Thus, at the expense of the disproportionate restriction of area of personal life, the protection of state security contradicts the goal of the protection of democracy. This said, **while interfering in the**

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¹⁴ Kilkelly U; The right to respect for private and family life A guide to the implementation of Article 8 of the European Convention on Human Rights, Council of Europe, 2005, see: <https://rm.coe.int/168007ff47>

¹⁵ Article 15, the Constitution of Georgia.

¹⁶ Desara Dushi, "The use of facial recognition technology in EU law enforcement: Fundamental rights implications" [2020] p 5; FRA Focus, "Facial recognition technology: fundamental rights considerations in the context of law enforcement", 2019, p 22; Besarion Bokhashvili, Konstantine Korkelia; "Right to Respect Personal and Family Life and State Obligations," 2017; p 13-14; see [link](#)

¹⁷ FRA Focus, "Facial recognition technology: fundamental rights considerations in the context of law enforcement", 2019, p 22

¹⁸ European Data protection supervisor, "Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit", 2017, p 5

inviolable personal life, the authorities are obliged to use the least restrictive and proportionate methods of interference in this right.

Otherwise, the right to a personal life will be unlawfully violated.¹⁹

UNCONTROLLED SURVEILLANCE

In the light of the legislative or institutional challenges in Georgia, it is not strange that periodically the facts about unlawful eavesdropping are reported. Civil society organizations condemned illegal surveillance tendency in 2013 with the campaign *This Affects You – We Are Still Listed To*; the campaign aimed to restrict uncontrolled covert eavesdropping so that the surveillance process went under the effective oversight of the court.²⁰ However, effective institutionalized oversight and control on the illegal surveillance is still problem.²¹

The largest evidence about the uncontrolled surveillance were published in 2021, when unprecedented amount of files of surveillance and wiretapping of citizens - civil sector, journalists, politicians, clergy and diplomats - was leaked. The Public Defender stated that, spread of the information during the 2021 pre-election period raised reasonable doubts that illegally obtained personal life materials were used for the purpose of exerting illegal influence ahead of elections²².

In the criminal case on illegal eavesdropping/surveillance, the files were uploaded in public platforms, allegedly by the former employee of the State Security Service, who also left a message on the webpage: “There is no other cruel and awful job than where I worked several years! The name does not sound that horrible – just the opposite, it sounds very generous – State Security Service... in fact, nothing undermines the security of our state more than this service does! We are a cancer and I am one of the metastases! Here you will see the scopes of the disgusting work I did for years and God forgive me. I pray one day you wake up and destroy this system!”²³

Alongside the violation of the right to privacy, the leaked materials revealed violation of other fundamental rights too. For example, it demonstrated how the activities of religious organizations are controlled. For the purpose of collection or dissemination of the discrediting information, illegal surveillance of the clergymen is interference in the personal life of an individual as well as blatant violation of the religious freedom.²⁴

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¹⁹ Judgment N1/1/625,640 of April 14, 2016 of the Constitutional Court of Georgia – Public Defender of Georgia, citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, Open Society Georgia Foundation, Transparency International Georgia, Georgian Young Lawyers’ Association, International Society for Fair Elections and Democracy and Human Rights Center vs. the Parliament of Georgia, II, 31-32. See: [link](#)

²⁰ Human Rights Center, Report on the State of Human Rights in Georgia in 2014, p. 9-10, see: <https://hrc.ge/files/133annual%202014%20eng.pdf>

²¹ Public Defender of Georgia, The Public Defender of Georgia Presented the Annual Report to the Parliament of Georgia, 2022, see: [link](#)

²² Public Defender Presents Annual Report in Parliament, 2022, see: [link](#)

²³ *Tabula, Mtavari Arkhi: Person, who leaked the secret files from the State Security Service, Committed Suicide, 13.09.2021*; see [link](#)

²⁴ Report of the Public Defender of Georgia on the State of Human Rights and Basic Freedoms of Georgia in 2021, p 161; see [link](#)

The leaked materials showed that “surveillance started” without any court rulings.²⁵ In accordance with the evaluation of the Public Defender of Georgia, given the unprecedented volume of the files and the confirmation of the authenticity by a number of people, the Public Defender believes that **the materials were obtained as a result of illegal covert surveillance by state authorities. Unfortunately, this type of uncontrolled surveillance is based on the existing legislation that allows security authorities to directly access mobile operators' servers, without any control, which facilitates the possibility of illegal surveillance and reduces the risks of its detection**²⁶.

COVERT INVESTIGATIVE ACTIONS AND INVIOABILITY OF PERSONAL LIFE

Interference with basic human rights occurs during investigative actions, especially when covert investigative actions take place.²⁷ 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 determined.²⁸

Institution Responsible for Covert Investigative Actions

In 2016, the Constitutional Court of Georgia discussed which institution should be authorized to own technical capabilities necessary to conduct covert surveillance of phone calls and internet communication. Since the norms argued in the constitutional lawsuit envisaged direct access to the communication means in the frame of covert investigation and ability to obtain information in real time, the Constitutional Court determined the violation of the right protected by the Constitution.²⁹

More precisely, technical capability to have direct access to the personal information increases risks to selfishly interfere in the rights protected under the right to personal life. Particularly, if access to internet communication in real time is granted, a huge volume of information will be accessible. And if there are no control mechanisms in the law, it violates right to personal life and fundamental human rights.³⁰

The Court clarified, **there is such a high probability of violation of the right, when a State Security Service owns technical capability to have access to the information in real time, that it can conduct surveillance of unidentified circle of individuals.**³¹ Considering the nature and functions of the State Security Service, it is interested to collect as much information as

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²⁵ Radio Liberty, “Switch-it on quickly” how the State Security Service makes decision whom they should listen to,” 25.09.2021; see. [link](#)

²⁶ Statement of the Public Defender of Georgia on International Human Rights Day, 10.12.2021. See. [link](#)

²⁷ Human Rights Center: **SOME FACTS OF LARGE-SCALE ILLEGAL COVERT EAVESDROPPING AND SURVEILLANCE BY THE STATE SECURITY SERVICE: LEGAL ASSESSMENTS, 2021, p. 8** see: <https://hrc.ge/files/177mosmenebi-eng.pdf>

²⁸ The Commentaries on the Constitution of Georgia, Chapter Two, Citizenship of Georgia. Fundamental human rights and freedoms, Tbilisi, 2013, p. 22. [link](#)

²⁹ Ibid, Para,71

³⁰ Ibid, Para, 78, 112

³¹ Judgment N1/1/625,640 of April 14, 2016 of the Constitutional Court of Georgia – Public Defender of Georgia, citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, Open Society Georgia Foundation, Transparency International Georgia, Georgian Young Lawyers’ Association, International Society for Fair Elections and Democracy and Human Rights Center vs. the Parliament of Georgia, II, 53 See. [link](#)

possible because it will help them to perform their duties easier, which is investigation of crimes as well as prevention of these crimes. Consequently, naturally, for such state institution it is kind of temptation to have direct and permanent access to the data of the electronic communication providers. Furthermore, with the permanently developing technologies, accumulation of unrestricted technical means for the purpose of covert surveillance, becomes serious weapon to psychologically influence individuals.³²

Thus, equipping the State Security Service with the technical capability to get information in real time, made presence of effective external control almost impossible. In similar situation, people may have feelings that they are sharing their privacy with the state. And to protect private space from the control of strangers, permanent feeling of concern may correct the individual behavior. The latter is the example of the violation of fundamental human rights – personal life³³.

In accordance with the current national legislation in Georgia, LEPL Operative-Technical Agency is authorized body to conduct covert investigative activities,³⁴ which subordinates to the State Security Service.³⁵ Although after the ruling of the Constitutional Court of Georgia, **a new body was created in the form of the LEPL Operative-Technical Agency, still, it is the institution within the system of the State Security Service, which holds direct and uncontrolled access to telephone and online-communication. Similar amendment, obviously, fails to meet the standards determined by the 2016 ruling of the Constitutional Court.** Therefore, in 2017, the Public Defender lodged another constitutional lawsuit to the Constitutional Court of Georgia and again argued the constitutionality of the norms regulating the covert investigative actions (so-called key to the covert surveillance).³⁶ Unfortunately, the Constitutional Court of Georgia has not yet passed judgment with regard to the lawsuit of the Public Defender of Georgia.³⁷

In accordance with the Public Defender of Georgia, external parliamentary oversight of the Operational Technical Agency is ineffective. There are high risks associated with the process of obtaining both telephone and electronic/Internet data, which allows for arbitrariness and impunity.³⁸

Also, in its 2022 observations, the UN Human Rights Committee stated that Operative-Technical Agency lacks sufficient independence from the State Security Service, the supervision mechanism over the activities of the Agency is ineffective. The Committee noted that the existing oversight mechanism over the Agency's activities is not effective. It is

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³² Ibid, Para, 55

³³ Ibid, Paragraph 112

³⁴ Law of Georgia on Legal Entity of Public Law – Operative-Technical Agency of Georgia, Article 8 (1), (2), (3)

³⁵ Law of Georgia on Legal Entity of Public Law – Operative-Technical Agency of Georgia, Article 3 (1)

³⁶ Constitutional lawsuit N1231, Public Defender vs. the Parliament of Georgia, June 1, 2017 [link](#); also see: Constitutional lawsuit about the constitutionality of the legislation regulating the covert investigative activities, 2017; [link](#)

³⁷ *Public Defender's Report on Situation of Human Rights and Freedoms in Georgia – 2022*, 03.04.2023, available at: [link](#)

³⁸ *Public Defender's Statement on Alleged Illegal Wiretapping*, 03.08.2021 available at: [link](#)

particularly concerned by the fact that Operative Technical Agency, which conducts electronic surveillance, is granted both regulatory and monitoring powers.³⁹

Technical instruments of covert eavesdropping shall be under exclusive responsibility of such state institution, which is completely independent from the special security system. It means, it shall be completely independent from the crime investigation and prevention functions, from the identifying sources of state and public threats and, in general from the institutions responsible to perform state security policy.⁴⁰

Oversight on the Covert Investigative Activities

The Personal Data Protection Service is responsible to control and perform oversight of covert investigative actions in accordance with the Law of Georgia on Personal Data Protection,⁴¹ and the covert investigative actions shall be carried out under a court ruling upon a prosecutor's reasoned motion.⁴²

It can be assessed that the control of the Personal Data Protection Service over the covert investigative activities is ineffective, because the scope of oversight by the Personal Data Protection Service does not include covert measures when they concern the processing of data defined as a state secret for the purposes of state security (including economic security), defense, intelligence and counterintelligence activities.⁴³

In the light of the problems in the common courts of Georgia,⁴⁴ it is difficult to assess effective oversight on covert investigative activities. Furthermore, in the process of organizing demonstrations, based on the court ruling, the active citizens, among them members of the civil society organizations and opposition political parties, may become subjects of covert investigative activities.⁴⁵ More precisely, the prosecutor's motion lists circumstances under the Article 226 of the Criminal Code of Georgia, envisaging organization of group actions violating public order or active participation in such groups, when the judge is entitled to pass ruling on covert investigative activities.⁴⁶ However, considering the fact that in Georgia right to freedom of assembly and manifestation is unlawfully restricted, law enforcement officers use flawed practice of arresting protesters on the grounds of disobeying their lawful order of law enforcement officers, it is most likely that the covert investigative activities are applied against the active citizens while they are organizing various demonstrations.⁴⁷

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³⁹ United Nations, Human Rights Committee, Concluding observations on the fifth periodic report of Georgia, CCPR/C/GEO/CO/5 (13 September 2022) para. 39. see [link](#)

⁴⁰ Constitutional lawsuit N1231, Public Defender vs. the Parliament of Georgia, June 1, 2017; p. 30. [link](#);

⁴¹ Criminal Procedure Code of Georgia, Article 143⁴(2)

⁴² Criminal Procedure Code of Georgia, Article 143³(1)

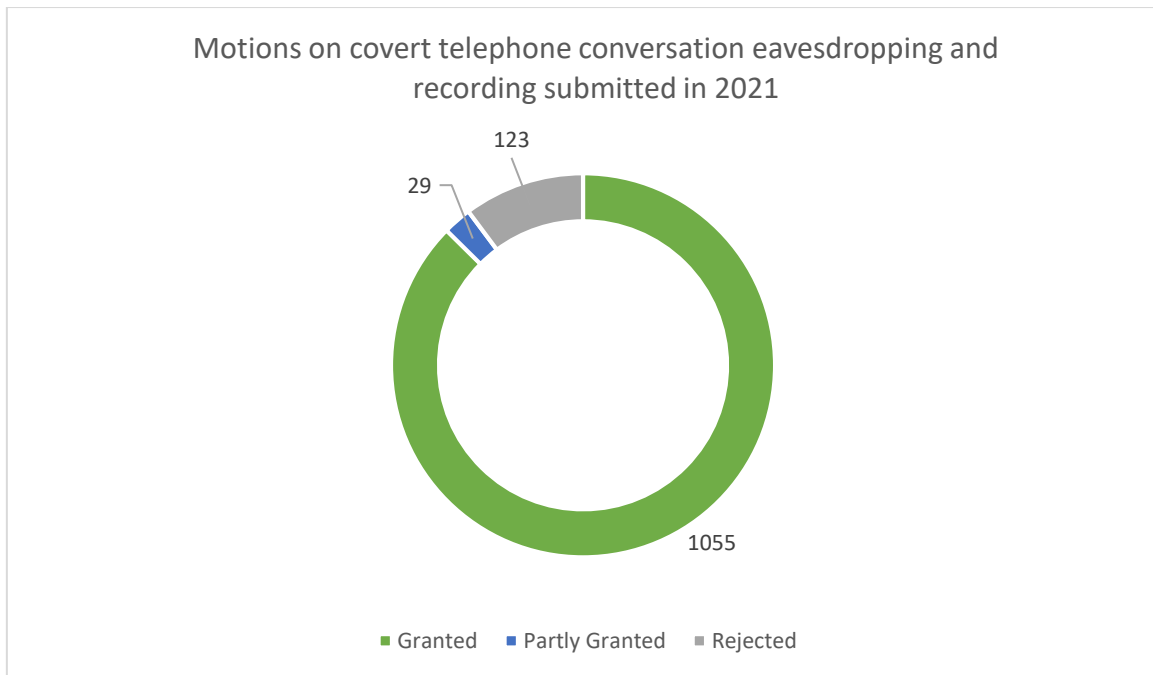
⁴³ European Commission for Democracy Through Law (Venice Commission) – Urgent Opinion on the Draft Law on the Amendments to the Criminal Procedure Code Adopted by the Parliament of Georgia on June 7 2022, CDL-PI(2022)028, Opinion no. 1092/2022 (2022) para. 27; [link](#); also see the Constitutional lawsuit N1231, Public Defender vs. the Parliament of Georgia, June 1, 2017; p. 35. [link](#);

⁴⁴ Human Rights Center, Report on the State of Human Rights in Georgia, 2023, p 19-21, [link](#)

⁴⁵ **Human Rights Center, Legislative Amendments with regard Covert Investigative Actions: Legal Analysis of the Legislation and Practice, 2022, P. 9, 10 [link](#)**

⁴⁶ Criminal Procedure Code of Georgia, Article 143³ (2)(a)

⁴⁷ Human Rights Center, Legislative Amendments with regard Covert Investigative Actions: Legal Analysis of the Legislation and Practice, 2022, P. 9, 10 [link](#)



For instance, in 2021, when the massive surveillance files were leaked, 1055 out of 1207 motions of the prosecutor on covert eavesdropping and recording of phone calls were granted; among them were the crimes like: intentional harm of other person’s health, cheating, membership of criminal world, etc. All these may indicate that most motions on covert investigative activities are granted and it is not difficult to verify the need of the state security protection.⁴⁸

This said, we can conclude that **oversight of the covert investigative activities is ineffective that increases risk of abuse of power and undermines inviolability of personal space of each member of the society.**

LEGISLATIVE AMENDMENTS

In 2022, legislative amendments were made in the Criminal Procedure Code of Georgia with regard to the covert investigative activities.⁴⁹ As a result, **the number of offenses for which covert investigative actions may be conducted were increased; the timeframes of covert investigative actions were extended; the timeframe for informing the person against whom the secret surveillance measure is conducted has been changed**⁵⁰. President of Georgia Salome Zurbishvili vetoed the draft law,⁵¹ clarifying that: “we still live in such a country, where when we enter somewhere and wish to talk, we think of leaving telephone outside or keep with us? Then we overcome these doubts and say – let me keep the telephone

⁴⁸ Ibid, p. 10

⁴⁹ Law of Georgia on the Amendments to the Criminal Procedure Code of Georgia, N1722- IXMS-XMP (06.09.2022) see [link](#)

⁵⁰ Human Rights Center, Legislative Amendments with regard Covert Investigative Actions: Legal Analysis of the Legislation and Practice, 2022, P. 9-12 [link](#)

⁵¹ Submission of the President of Georgia – Reasoned Remarks (23.06.2022), p 2. see [link](#)

and let them listen to me – it is not a European life, it is not protection of human rights, it is another system and we must leave this system. I want to say it with this veto.”⁵² However, the Parliament of Georgia overrode the veto on September 6.⁵³

On August 26, 2022, the Venice Commission published its *Urgent Opinion* about the legislative amendments and stated that the reasons for the inclusion of such offences like the crimes of “violation of human equality”(Article 142) or “racial discrimination”(Article 142¹) in the list are not evident and in the absence of any detailed analysis in the preparatory material. In its opinion, the Venice Commission noted that timely notification to the person concerned is a necessary condition for the effective use of remedies against surveillance measures as well as an independent oversight body with adequate powers and scope of review.⁵⁴ However, such an independent body was not established after the Parliament overrode the veto and the bill of amendments went in force.

UN Human Rights Committee regretted that the legislative attempt to extend the scope and duration of covert investigative actions, which may seriously infringe the right to privacy. The risks are higher when there were not sufficient guarantees in the country to protect the inviolability of personal life, to combat unlawful surveillance and access/interference in the personal data.⁵⁵

INVESTIGATION AND CASES PROCESSED BY HUMAN RIGHTS CENTER

In accordance with the European Convention on Human Rights, the states ensure protection of the rights and freedoms guaranteed by the Convention. Furthermore, the state is entitled to refrain from violating these rights and also to implement its positive obligation in the context of protecting these rights.⁵⁶ The positive obligation of the State is envisaged in many articles of the Convention, among them is the Article 8 of the Convention – right to respect personal and family life.⁵⁷ When the State fails to effectively protect the rights guaranteed under the Convention, the State itself bears responsibility for the violation.⁵⁸

In the case of leaked surveillance files, the Prosecutor’s Office of Georgia commenced investigation on September 14, 2021 in accordance with the Article 158 Part I, II and IV of the Criminal Code of Georgia. In the frame of the investigation, the people, who were related with the dissemination of the files, were interrogated.⁵⁹

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⁵² Tabula, President: We live in such a country, where when we wish to talk, we first think to leave telephone outside,” 02.09.2022; see: [link](#)

⁵³ Statement of Netgazeti; Parliament Overrode the President’s Veto on Disputed Law on Surveillance, 06.09.2022; nb. [link](#)

⁵⁴ European Commission for Democracy Through Law (Venice Commission) – Urgent Opinion on the Draft Law on the Amendments to the Criminal Procedure Code Adopted by the Parliament of Georgia on June 7 2022, CDL-PI(2022)028, Opinion no. 1092/2022 (2022) para. 45.& 53; see. [link](#)

⁵⁵ United Nations, Human Rights Committee, Concluding observations on the fifth periodic report of Georgia, CCPR/C/GEO/CO/5 (13 September 2022) para. 39. See. [link](#)

⁵⁶ D. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, 2014, 504.

⁵⁷ Gaskin v. the United Kingdom, 7 July 1989, § 42-49, Series A no. 160

⁵⁸ Besarion Bokhashvili, Konstantine Korkelia: “Right to Respect Personal and Family Life and State Obligations,” 2017, p. 6 see [link](#)

⁵⁹ See the statement of the Prosecutor’s Office of Georgia, 18.09.2021, see: [link](#)

In the case on covert surveillance, Human Rights Center defends legal interests of up to ten journalists and lawyers both in Tbilisi and in the regions. After the parties examined the leaked files, they recognized their conversations in them and confirmed authenticity of the disseminated materials. Covert surveillance against each of the victims may be linked with their professional activities. Namely, the lawyers worked on high-profile criminal cases and journalists reported about them. They worked on such a resonant cases like: protest demonstrations against the construction of the Namakhvan Hydro Power Station; case about the death of the late Prime Minister Zurab Zhvania, so called cyanide case, case of Tamar Bachaliashvili, etc.

Not only the leaked files blatantly violated the professional and personal lives of the victims by eavesdropping their phone conversations, but also there were cases, when covert surveillance was carried out directly in the private working room of one of the lawyers. The latter confirmed that the State Security Service performed total unlawful surveillance of his personal and professional conversations. In similar cases, it is worth to mention, that not only the right to personal life is violated, but it is also interference in the professional activities of the lawyer. Therefore, the lawyers of Human Rights Center petitioned the Tbilisi Prosecutor's Office to add Article 364 of the Criminal Code of Georgia to the case, which refers to unlawful interference in the professional activities of a lawyer. Unfortunately, the investigation did not requalify the criminal case with the additional provision of the law.

HRC petitioned the Prosecutor General's Office of Georgia with regard to each case and requested to interrogate beneficiaries and grant victim status to them. The Prosecutor's Office started processing the petition on victim status only after part of the victims appealed the European Court of Human Rights to defend their rights.⁶⁰ In the end, the prosecutor's office granted victim status to all HRC beneficiaries, the lawyers and journalists, under the Article 158 Part I, II and IV – a of the Criminal Code of Georgia, which envisages violation of the privacy of personal communications.

In the course of criminal proceedings, other miscarriages were also identified. Namely, the Tbilisi Prosecutor's Office denied the HRC lawyers and relatively the victims to give copies of the criminal case files to study them and granted top secret status to them. Although the lawyers could read the case materials in the premises of the prosecutor's office, but in accordance with the Criminal Procedure Code of Georgia, a victim has right to get information about ongoing investigation and study case materials unless it contradicts the interests of the investigation.⁶¹ As for the clarifications by the Constitutional Court of Georgia, getting information does not only mean to study the case files on the place because reading written information in presence of others and possibility to make notes cannot ensure full realization of the right.⁶² Additionally, by the judgment of the Constitutional Court holding the normative content of Article 57(1) (h) of the Criminal Procedure Code of Georgia, excluding the possibility of the victim to be informed on the progress of the investigation and review the materials of the

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⁶⁰ Radio Liberty, Ombudsman petitions to the European Court to examine the "surveillance case" as a priority, 20.09.2022, see: [link](#)

⁶¹ Criminal Procedure Code of Georgia, Article 57 (h)

⁶² December 18, 2020 Judgment No 1/3/1312 of the Constitutional Court of Georgia (2020) II, para.10

criminal case in the form of copies, unconstitutional. **In this light, Prosecutor’s Office is capable to provide in separate files the cases of the persons that are protected by HRC and in this manner provide the files to the lawyers without disclosing the personal data of third parties. The simple reference to the needs of protection of third persons’ personal data represents a blanket restriction. It contradicts the judgment of the Constitutional Court of Georgia.**⁶³

HRC lawyers sent application with regard to the surveillance case to the European Court of Human Rights and claimed violation of the Articles 8, 6 and 13 of the Convention. It is worth to note that ECtHR has already examined similar cases. For example, in the case, where Russian security service carried out unlawful surveillance of the applicant, the ECtHR held the violation of the right to respect personal and family life. In accordance with the Court, the Russian surveillance system, without respective permission, allowed the Security Service and police to start direct surveillance of the citizen. As the Court noted, similar systems very much tend to abuse their power.⁶⁴

In its June 9, 2022 Resolution, the European Parliament called on the Georgian authorities to conduct effective investigations into the wiretapping scandal and to put in place proper mechanisms for democratic oversight of surveillance and data collection by state institutions.⁶⁵ In accordance with the assessment of the Public Defender’s Office of Georgia, it is impossible to have a legitimate public purpose, which may justify such a large-scaled surveillance of private lives.⁶⁶

The State Security Service still continues total, uncontrolled surveillance and although many facts of covert eavesdropping were exposed, no complex investigation of the illegal surveillance has been conducted and neither perpetrators were ever punished. Therefore, neither legislative nor institutional framework regulating the covert surveillance process in Georgia ensures the protection of the inviolability of personal life.

CONCLUSION

The authority is entitled to protect state security as well as inviolability of personal lives and right to free development of citizens. These rights may be restricted only for legitimate purposes, with the minimum intensity and respecting principle of proportionality.

In the process of covert investigative activities, the human privacy is particularly interfered therefore it is important that similar interference were justified formally and materially, as well as contextually.

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⁶³ Human Rights Center, Legislative Amendments with regard Covert Investigative Actions: Legal Analysis of the Legislation and Practice, 2022. P. 13, see [Link](#)

⁶⁴ Roman Zakharov v. Russia [GC], no. 47143/06, § 270, ECHR 2015; see [link](#)

⁶⁵ European Parliament resolution on violations of media freedom and the safety of journalists in Georgia (2022/2702(RSP)), RC-B9-0300/202; Para 7; see [link](#)

⁶⁶ Radio Liberty, Ombudsman petitioned the European Court of Human Rights to grant priority status to the “surveillance case,” 20.09.2022, see: [link](#)

Years ago, the Constitutional Court of Georgia declared those norms unconstitutional, which could not secure risks of disproportionate interference in the right to personal life. As the Court clarified, the power of the State Security Service creates excessive risk of interfering in the personal life without justification, when they have access to technical means that enable the Service to obtain, possess and administrate personal information in real time. It is inadmissible because the State Security Service has professional interest to collect as much information as possible.

The fact that the LEPL Operative Technical Agency is the body responsible for the covert investigative activities contradicts the 2016 decision of the Constitutional Court of Georgia. As the Court clarified, the Operative Technical Department did not have investigative functions but since it was part of the State Security Service, it was not legitimate that the Department had access to communication means. The same problem is with regard to the Operative-Technical Agency, which is also part of the State Security Service system. As a result, again, the State Security Service is authorized to conduct investigative activities and also have access to the data provided by the communication operators. The latter particularly increases risks of interfering in the personal lives of citizens. Therefore, the Public Defender of Georgia lodged a constitutional lawsuit in the Constitutional Court of Georgia to claim unconstitutionality of the norms regulating the covert investigative activities but the Court has not yet made decision.

There is no effective control and oversight of the covert investigative activities in the country. It, on the one hand, is caused by the narrow authorities of the Personal Data Protection Service and on the other hand by the miscarriages in the judiciary system.

In 2022, the amendments introduced in the Criminal Procedure Code of Georgia with regard to the covert investigative activities further worsened the situation in relation with the inviolability of personal life. As a result of the amendments, the area of covert investigative activities widened that minimized the possibility to check legality of similar activities.

If the Article 8 of the European Convention on Human Rights is violated, the State shall implement its positive obligations, which, in this situation, is to conduct comprehensive, complex and impartial investigation. However, the cases related with the unlawful surveillance have not been investigated and perpetrators have not been punished yet in Georgia.

RECOMMENDATIONS

To the Parliament of Georgia:

Start consideration of fundamental reform of the State Security Service of Georgia. Elaborate legislative amendments, which will disable one and the same body to have the authorities like: access to the data owned by the communication service providers and conduct of investigative activities. Also, equip such an institution with the access to technical means of covert surveillance, which will be completely independent from the function of crime investigation and prevention, as well as from the institutions responsible for the implementation of state security policy.

- Elaborate legislative amendments in the norms regulating covert investigative activities, where the following issues will be considered: 1. The number of crimes shall be reduced, which may become subject to covert investigative activities; 2. reduce timeframe of the covert investigative activities and also limit the extension term of the investigation; 3. To reduce the timeframe for informing the person against whom the secret surveillance measure is conducted and also limit the extension term of it.

To the Government of Georgia

- In due respect to the observations of the UN Human Rights Committee, start real reform of the State Security Service, which will be harmonized with the international standards.
- Conduct prompt, effective, comprehensive, complete and impartial investigation of the surveillance cases and punish all perpetrators responsible for the unlawful surveillance of citizens in accordance with the law.

To the Constitutional Court of Georgia

- Timely make decision with regard to the constitutional law suit of the Public Defender of Georgia on uncontrolled surveillance, whose examination on merits finished in 2018 but the decision has not been made yet.