CONSTITUTIONAL LAW REVIEW

PRINCIPLE OF COMPLEMENTARITY AND JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT IN LIGHT OF THE KENYAN CASES

INTERNATIONAL CRIMINAL COURT AND INVESTIGATION INTO THE SITUATION IN GEORGIA

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2019

ILIA STATE UNIVERSITY

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ISSN 1987-9962 უაკ (UDC) 34
ს-396

Please cite as follows:

Last, F. M., & Last, F. M. (Year Published). Article title. *Journal Name*, Volume (Issue), pp. Pages.

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ABSTRACT

The Rome Statute, one of the most complex international instruments, became effective in 2002, establishing the International Criminal Court and creating an international legal system with the aim to punish the perpetrators of international crimes and preventing the gravest crimes. For the purpose of achieving this aim, the Rome Statute envisages the complementarity principle, which is in place to ensure an effective response to international crimes by the member states to the fullest extent possible. In this context, the International Criminal Court (hereinafter, ICC) is a court of the last resort, stepping in only when a State Party with jurisdiction is `unable` or `unwilling` to investigate or prosecute international crimes. This article provides detailed explanations about the nature of the complementarity principle, the necessity and purpose of including it in the Rome Statute, along with the analysis of Kenyan Cases – the first case examined by the ICC, in which the ICC Prosecutor used its power granted under the Statute to initiate an investigation, but the State challenged the jurisdiction of ICC and requested to find the cases inadmissible before the Court under the complementarity principle.

INTRODUCTION

In 1998, after several years of negotiations, the Rome Statute - a treaty establishing the first permanent International Criminal Court, was adopted in Rome. The Rome Statute entered into force in 2002 and the ICC began functioning. The main purpose of establishing the ICC was to hold individuals criminally accountable for committing grave crimes, crimes committed with particular cruelty, and to deter and prevent such crimes in the future.

Unlike the *ad hoc* tribunals established by the UN Security Council under Chapter 7 of the UN Charter, with primary jurisdiction over national courts, the ICC is a treaty-based institution, created as a result of long-term negotiations between the States. Thus, it is unsurprising that the States were less prone to unconditionally yield the most important right – the right to sovereignty – in favour of the ICC; hence, the principle of complementarity was incorporated in the Rome Statute and the principle is often named as the cornerstone of the Statute.

The complementarity principle grants the States the primary jurisdiction over investigating and prosecuting the individuals, who committed international crimes, and the ICC is authorized to exercise its jurisdiction only where it has been established that a State Party of the Statute is `unwilling' or `unable' to investigate and prosecute perpetrators. "As explained by the former UN Secretary General Kofi Annan, the purpose of the complementarity provision in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order".[1]

The ICC's Kenyan Admissibility Cases played an important role in determining the importance of the principle of complementarity. This was the first case in history, where the State challenged the jurisdiction of the ICC and, as the State with jurisdiction, requested to find a case concerned inadmissible based on the complementarity principle. On the other hand, this was also the first case when the Prosecutor of the ICC used his power to launch an investigation granted under the Rome Statute.

This article discusses the issues related to the principle of complementarity. The first part of the article is dedicated to a brief overview of how the ICC was established, followed by the definition of the complementarity principle, the necessity, and purpose of including this provision in the Rome Statute.

With regards to the admissibility of Kenyan Cases, the article provides prehistory of the case, in particular, the circumstances that served as a ground and necessitated the use of *proprio motu* authority by the Prosecutor to start investigation, also overview of the legal arguments used by the government of Kenya to support its motion to find the cases inadmissible, and the important

1 See, UN Secretary General's press release dated September 1, 1998: *Secretary-General urges 'like-minded› States to ratify Statute of International Criminal Court,* SG/SM/6686,https://www.un.org/press/en/1998/19980901.sgsm6686.html (21.03.2019)

explanations provided by the Pre-Trial Chamber and the Appeals Chamber of the ICC regarding the principle of complementarity.

The article concludes with the arguments about the importance of ICC decisions in Kenyan Admissibility Cases in understanding the principle of complementarity.

1. INTERNATIONAL CRIMINAL COURT (ICC)

When discussing creation of the International Criminal Court, it should be noted that the idea of establishing such a court first originated in the 19th century, but with no success.[2] As a result of the 1937 Geneva Conference of the League of Nations, the draft Convention for the Creation of International Criminal Court was prepared, but the draft never entered in force due to the lack of the signatories.[3] The Tokyo and Nuremberg tribunals, established after World War II, created a realistic expectation of introducing the culture of responsibility, although the Cold War reality seriously hindered implementation of this expectation into real life.[4]

Actual efforts for establishing a permanent institution followed only after the creation of the United Nations. In 1948, the UN General Assembly adopted a "Resolution on the Prevention and Punishment of the Crime of Genocide". Article 6 of the same document provides that persons charged with genocide "…shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." In the same resolution, the General Assembly urged the International Law Commission to study the reasonability and the opportunities of establishing international judicial authority with the jurisdiction to try the persons charged with genocide.[5] This act amounted to the acknowledgement of the need to have an international court by the General Assembly.

After the International Law Commission deemed the creation of such a court reasonable and possible, the General Assembly established a Committee for the purpose of drafting the proposals on the establishment of the court.[6] In 1951-1953, the Committee prepared the draft statutes,

2 C.K. Hall, "The First Proposal for a Permanent International Criminal Court", 322 *Int. Rev. of the Red Cross*, (1998), p.57.

3 William A. Schabas, *An introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 4 edition, 2011), p.5.

4 Philippe Kirsch Q.C., "The International Criminal Court: Current Issues and Perspectives", *The United States and the International Criminal Court, Law and Contemporary Problems, Vol. 64, No. 1,* (winter, 2001): pp.3-4.

5 UN General Assembly Resolution on the Prevention and the Punishment of the Crime of Genocide, dated December 9, 1948; http://www.un-documents.net/a3r260.htm (21.03.2019)

6 *The International Criminal Court: Global Politics and the Quest for Justice* edited by William Driscoll, Joseph P. Zompetti, Suzette Zompetti, (New York: The International Debate Education Association, 2004), p.24.

although the General Assembly decided to postpone the discussion of the draft statutes until the definition of aggression was adopted.[7] In reality, the political tensions of the Cold War made it impossible to make further steps forward in this direction.[8]

In the following years, the issue of establishing international criminal court was raised on several occasions. At the beginning of the 1990s, the developments in Yugoslavia and Rwanda, and the creation of *ad hoc* tribunals by the UN Security Council clearly convinced the international society in the necessity to have a permanent international criminal court and sped up the process of establishing such a court.[9] In 1994, the International Law Commission finished the draft of the statute and submitted it before the General Assembly for discussion.[10] In turn, the General Assembly created a Preparatory Committee to work on establishing the court. Finally, after six meetings of the Committee, the Rome Statute regarding International Criminal Court was open for signatures[11] and became effective on July 1, 2002.[12] As a result, the Statute, "one of the most complex international instruments ever negotiated, sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of the State concerns with their own sovereignty"[13], has been adopted.

The ICC is a treaty-based court unlike the *ad hoc* tribunals for former Yugoslavia and Rwanda, which have been created on the basis of the UN Security Council Resolutions.[14] There is a significant difference between the jurisdiction of the ICC and that of the *ad hoc* tribunals, as the tribunals were granted primary jurisdiction over national courts. Notably, the primary jurisdiction of the tribunals was not a subject of harsh critique and discussions due to a very narrow and specific mandate of the tribunals.[15] The experience of these two tribunals clearly showed that there would be serious issues with the jurisdiction of a permanent criminal court, as most of the States would be less prone to give consent on restricting their own sovereignty. Therefore, a new type of relationship was required in order to preserve State sovereignty without detriment to the goal of reducing impunity.[16]

7 *Ibid*.

8 William A. Schabas, *An introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 2001), p.9.

9 *The Law and Practice of the International Criminal Court edited* by *Stahn*, *Carsten.* (Oxford: Oxford University Press, 2014), p.5.

10 In 1989, upon the request of Trinidad and Tobacco, the General Assembly charged the International Law Commission to resume its works on the establishment of an international criminal court. See, the Resolution: http://www.un.org/documents/ga/res/44/a44r039.htm (21.03.2019).

11 Ketevan Khutsishvili, "Competitive and Complementary Competences of the UN Security Council and the International Criminal Court" (doctoral dissertation, Iv. Javakhishvili Tbilisi State University, 2010), p.29;

12 For information about the Signatory States of the Rome Statute, please, follow the link: https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en (21.03.2019).

13 Schabas, *An introduction to the International Criminal Court*, p.20.

14 In accordance with Article 39, the UN Security Council determined that the developments in the former Yugoslavia and Rwanda represented the threat to international peace and security, and therefore established the tribunals for the purpose of restoring the peace. For relevant Security Council Resolutions, please, follow the links:
http://www.un.org/en/ga/search/view_doc.asp?symbol=s/res/827(1993) (21.03.2019).
http://www.un.org/en/ga/search/view_doc.asp?symbol=S/res/955(1994) (21.03.2019).

15 Llewellyn, Jennifer, "A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?" *Dalhousie Law Journal, vol. 24, no. 2* (Fall 2001): 2.

16 Oscar Solera, "Complementary jurisdiction and international criminal justice", *IRRC Vol. 84 No 845*, (March 2002), p.156.

This is the reason why the Preamble of the Rome Statue emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[17] It is also noteworthy, that the Statute does not explicitly use or define the term "complementarity" as such; however, the term has been adopted and discussed by the negotiators of the Statute, and later on by commentators to refer to the entirety of provisions governing the complementary relationship between the ICC and national jurisdictions.[18] The next chapter of the article is dedicated to the complementarity as such.

2. COMPLEMENTARITY

In order to understand the complementarity principle we shall read the preamble of the Rome Statute, which lists the principles and purposes that the ICC relies upon with the view to achieving its aims and tasks. In the preamble, the State parties to the Statute agreed that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"[19], and the purpose of their cooperation is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[20] At the same time, the Statute recognizes that the States have a primary obligation of investigating and prosecuting international crimes, whereas the ICC is a complementary institution to national criminal jurisdictions.[21]

Article 17 of the Rome Statute provides the list of preconditions for the admissibility of a case, which in entirety form the complementarity principle. According to Article 17 (1), the Court shall find a case inadmissible where:

a) *The case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*

b) *The case has been investigated by a State which has jurisdiction over it and the State has*

https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/complementary-jurisdiction-and-international-criminal-justice/F4A3F7F979031FDFB9B70A67FFF4B192 (21.03.2019).

17 "The Rome Statute, Preamble, § 10." For Georgian translation of the Rome Statute, please, follow the link: https://www.legal-tools.org/doc/8afbd3/pdf/ (21.03.2019).

18 Markus Benzing, „The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", *Max Planck Yearbook of United Nations Law Online, Volume 7* (2003), p.592.

19 The Rome Statute, Preamble, § 4.

20 *Ibid*, § 5.

21 The Rome Statute, Article 1;

decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;[22]

c) *The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*

d) *The case is not of sufficient gravity to justify further action by the Court.*

In light of the foregoing, it may be concluded that the ICC plays a role of a "permanent court of last resort",[23] taking over the cases only where the "State is unable or unwilling genuinely to carry out investigation or prosecution".

Therefore, the Rome Statute not only established the International Criminal Court but also created an international legal system involving both the Court and the States.[24] As a former Prosecutor of the ICC, Mr. Luis Moreno-Ocampo once said:

"*The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.*"[25]

Therefore, the basic philosophical element of the complementarity is to create an international order, wherein the States will effectively respond to international crimes on a national level and, thereby, avoid criminal proceedings before the ICC.[26] This is an ultimate goal for the Court and for the entire international society.

At the Kampala Conference held in 2010, the ICC presented a concept of "positive complementarity" – an approach aimed at enhancing cooperation between the States, while offering additional support on the part of the ICC and the NGO sector, in order to comply with their respective commitments under the Rome Statute. In turn, the ICC should refrain from interfering and facilitate national courts to deal with the criminal cases.[27] Positive complementarity was actually used in practice only in 2011 with regard to the Libya Case, in which the ICC stated that it would yield the cases to Libya,

22 *Ibid*, Article 17;

23 Kleffner, J.K., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford/New York: Oxford University Press, 2008), 101.

24 Sang-Hyun Song, „The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law", *UN Chronicle Vol. XLIX No. 4* (2012).
https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law (21.03.2019)

25 A statement made at the ceremony for the solemn undertaking of the Prosecutor of the ICC, (The Peace Palace, The Hague, The Netherlands, and 16 June 2003). https://www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf (21.03.2019)

26 International Criminal Court, Informal expert paper: The principle of complementarity in practice, https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf (21.03.2019)

27 Gegout, Catherine, "The International Criminal Court: limits, potential, and conditions for the promotion of justice and peace." *Third World Quarterly, 34 (5),* (2013), p.813.

if the State would allow the Court's judges to participate in the proceedings; however, in 2013, the Libya government was demanded to transfer the Head of Intelligence Service Abdulla Al-Sanus.[28]

3. THE KENYAN CASES

The Kenyan Cases are important for several reasons. First of all, this was the first situation where the ICC Prosecutor used his discretionary power to initiate investigation granted under Article 15 of the Rome Statute[29] (*proprio motu* authority)[30], giving rise to a number of issues such as the scope of the ICC Prosecutor's discretion, independence from political influences, etc.[31] Nonetheless, for the purposes of this article, the Kenyan Cases are important in a different way – this was the first situation when the ICC had to consider the complementarity issue.[32] After the Kenyan government challenged the admissibility of the cases, the Appeals Chamber of the ICC issued two decisions that played a crucial role in defining the complementarity principle;[33] although, before discussing these decisions, it is important to briefly summarize the developments and preconditions that led to the case proceedings in the ICC.

3.1 Preconditions

In 2007, presidential and parliamentary elections were held in Kenya. In result, the Kenyan President Mwai Kibaki was re-elected for another term; however, the opposition leader and another presidential candidate Raila Odinga also claimed victory, and the civil unrest broke out resulting in the deaths of at least thousand people and the displacement of several hundred thousand.[34] Ad-

28 *Ibid*.

29 According to Article 15(1) of the Rome Statute: the Prosecutor has the *proprio motu* power to commence an investigati9on based on the information about the crimes falling within the jurisdiction of the ICC.

30 Simeon P. Sungi, „The Kenyan Cases and the Future of the International Criminal Court's Prosecutorial Policies", *African Journal of International Criminal Justice (1) 2* (2015), p.172.

31 Vincent Sarara Robi, „Prosecutorial Discretion within the International Criminal Court (ICC): A Critical Legal Analysis and Preliminary Reflections on ICC intervention into Kenya", (2012), p.8;
https://www.academia.edu/6261697/Prosecutorial_discretion_within_the_ICC_Case_study_of_kenya. (21.03.2019)

32 Steven Kay QC, „COMPLEMENTARITY AND KENYA AT THE INTERNATIONAL CRIMINAL COURT – LESSONS TO BE LEARNT UNDER ARTICLE 17 & 19(2)(B)", International Criminal Law Bureau.
http://www.internationallawbureau.com/wp-content/uploads/2011/10/COMPLEMENTARITY-AND-KENYA-AT-THE-INTERNATIONAL-CRIMINAL-COURT-%E2%80%93-LESSONS-TO-BE-LEARNT-UNDER-ARTICLE-17.pdf. (21.03.2019)

33 Hansen, Thomas Obel, „A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity, *Melbourne Journal of International Law, Vol. 13, No. 1*, (2012), 218.

34 Chandra Lekha Sriram, Olga Martin-Ortega, *War, Conflict, and Human Rights: Theory and Practice*, (New York: Routledge, Second Edition, 2014), 233.

ministration under Kibaki was failing to take actual measures to stop the civil unrest and violence until the international society publicly interfered in the matter and the UN Secretary-General Kofi Annan facilitated the National Accord and Reconciliation Act between the opposing parties.[35] The same Accord resulted in the Commission of Inquiry into Post-Election Violence (CIPEV), a.k.a. the "Waki Commission",[36] with the sole purpose of investigating the post-election developments and draw up recommendations with the view to preventing similar situations in the future.

The 2008 report issued by the Commission contained several thousands of property destruction incidents, and the death of 1133 individuals (police identified as the party accountable for the death of half of them at least); the report also included evidence supporting the claim of the failure to act by the police and the security services. The Commission also drafted a recommendation on the creation of an *ad hoc* tribunal for trying the persons responsible for the violence.[37] The Commission report also set deadlines for establishing the tribunal. After none of the deadlines were met, and the State failed to start an investigation, Kofi Annan handed over the materials and evidence submitted by the Commission to the ICC.[38]

In November 2009, the ICC Prosecutor requested the authorization to start an investigation from the Pre-Trials Chamber based on Article 15 of the Statute.[39] In March 2010, the Chamber established that the Kenya situation was within the ICC jurisdiction and there were sufficient grounds for commencing an investigation. As a result of the investigation, the Prosecutor identified six suspects; on March 8, 2011, the ICC issued the summonses to appear for the mentioned six persons.[40] After the court decision on the issuance of summonses, the Kenyan government addressed the Court and as a State with jurisdiction filed an application before the Pre-Trial Chamber to find both Kenyan Cases inadmissible based on Article 19(b)[41] and Article 1(a) of the Rome Statute.[42]

35 Christopher Totten, Hina Asghar, Ayomipo Ojutalayo, "ICC Kenya Case: Implications and Impact for Proprio Motu and Complementarity", *Washington University Global Studies Law Review, Vol. 13*, *Iss. 4* (2014), 706.

36 Chairman of the Commission was the Judge of Kenyan Appels Court, Mr. Philip Waki, and the Commission itself was often referred to as the "Waki Commission";

37 Results and findings of the Commission - International Center for Transitional Justice: The Kenyan Commission of Inquiry into Post-Election Violence: https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf (21.03.2019)
For the full report of the Commission, please, follow the link:
http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (21.03.2019)

38 Sriram, Martin-Ortega, *War, Conflict and Human Rights,* 233.

39 For additional information, please, follow the link:
https://www.icc-cpi.int/pages/record.aspx?uri=785972; (21.03.2019)

40 For the Pre-Trials Chamber decisions regarding the issuance of the summons, please follow the link:
https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-1
https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-1 (21.03.2019)

41 According to Article 19 of the Rome Statute, challenges to the admissibility of the case may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted it.

42 Cases of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sangand, The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali . Application on behalf of the Government of The Republic of Kenya, ICC-01/09-01/11, and ICC-01/09-02/11, (2011), §1.

3.2 ICC's merits about the Complementarity Principle

It should be noted again, that the Kenyan situation was different, being the first case when the Prosecutor initiated the investigation and, also, where the State challenged the admissibility of the cases referring to the complementarity principle. Therefore, decisions issued by the Pre-trial Chamber and the Appeals Chamber were of utmost importance.

In its decision, the Pre-trial Chamber considered the complementarity principle and noted that "the Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so, as explicitly stated in the Statute's preamble paragraph 6."[43] The significant complementarity issues addressed in the ICC decisions are discussed below.

3.2.1 The Twofold Test

By citing the decision of the Appeals Chamber against the Prosecutor Katanga with regard to Article 17 of the Statute, the Pre-Trial Chamber once again emphasized that "the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned".[44] It is only when the answers to these questions are in the affirmative that one has to examine the question of "unwillingness" and "inability". However, the inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible.[45]

The Appeals Chamber upheld these arguments, noting that determining the existence of an investigation must be distinguished from assessing whether the State is "unwilling or unable genuinely to carry out the investigation or prosecution", which is the second question to consider when determining the admissibility of a case. For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps had been taken.[46]

Application of the twofold test in Kenya situation was important, because as a rule the test was always applied for pragmatic reasons; in particular, it allowed the ICC to extend its jurisdiction to the

43 Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11, (2011), § 44.

44 *Ibid*, § 48.

45 Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", TCC-01/04- 01/07-1497, (2009), § 78.

46 Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled „Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute», (2011), § 40.

cases in which the States supported the ICC's involvement, but the Kenya situation was fundamentally different since in this case, the State was against the ICC's involvement.[47]

3.2.2 Degree of Evidence

In its Application, the government of Kenya argued, in principle, that the Chamber should have made its determination with a full understanding of the fundamental and far-reaching constitutional and judicial reforms, *inter alia* the adoption of a new constitution in August 2010 which incorporated a Bill of Rights that strengthened "fair trial rights and procedural guarantees" in the criminal justice system.[48] According to the government, the new constitution empowers Kenyan national courts to try the post-election crimes, including the crimes involved in the ICC criminal cases, without needing to pass legislation establishing a special tribunal.[49]

At the same time, the government of Kenya claimed that the investigation was already ongoing with regard to the matters concerned and that it would require months to obtain results and submit a report about the investigation findings to the Chamber.[50]

The Prosecutor did not agree with the mentioned arguments and noted that at that stage when the summonses had already been issued for the persons concerned, the government of Kenya had a higher burden of proof to determine that the case was inadmissible and that the State was conducting a proper investigation.[51]

The Pre-Trial Chamber welcomed the desire of the government of Kenya to investigate the crimes but noted that when examining the admissibility of a case, the important issue is to determine that there is an ongoing national investigation against the same suspects.[52] At the same time, the Chamber noted that "the Government of Kenya does not provide the Chamber with any details about the asserted, current investigative steps undertaken."[53]

The Pre-Trial Chamber also explained that a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible.[54] To discharge that burden, the

47 Hansen, Obel, *„A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity"*, p.221.

48 The Prosecutor v Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-02/11, (2011), § 13.

49 *Ibid.*

50 The decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11, (2011), § 13.

51 Jake Spilman, "Complementarity or Competition: The Effect of the ICC's Admissibility Decision in Kenya on Complementarity and the Article 17(1) Inquiry", *Richmond Journal of Global Law and Business Online,* (2013)*,* 12. https://rjglb.richmond.edu/files/2013/10/Spilman1.pdf (21.03.2019)

52 The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute. ICC-01/09-02/11, (2012), § 59.

53 The decision on the Application by the Government of Kenya Challenging the Admissibility of the Case, ICC-01/09-02/11, (2011), § 64.

54 Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-02/11,(2011), § 61.

State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case.[55]

In its explanations, the Court established a specific degree of evidence to be submitted to the Court, stating that the States must provide convincing evidence to prove that the investigation actions are actually taking place, including but not limited to police reports, witness interview records, etc.[56]

3.2.3 The Same Person/Same Conduct Test

The second test discussed in the decisions related to the Kenyan Cases is the same person/same conduct test.

In its application, the government of Kenya argued that when examining the admissibility issue, the Pre-Trial Chamber should apply the same admissibility test used for the purposes of authorising an investigation under Article 15 in respect of the Kenya Situation (Authorization Decision issued by the Chamber), according to which admissibility of the case before the ICC is determined by whether (i) the groups of persons that to be the object of an investigation by the ICC and (ii) the crimes that are likely to be the focus of such an investigation, are being investigated or prosecuted before the national courts.[57] At the same time, the government of Kenya accepted that that national investigations must, therefore, cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC.[58]

In response to this argument of the government of Kenya, the Pre-Trial Chamber noted that it considered this interpretation misleading. The Chamber, in its Authorisation Decision, was deciding admissibility of the case (s)[59], within the context of a "potential" case, as at the preliminary stage of an investigation, the suspects are not identified. However, the test is more specific when it comes to an admissibility determination at the `trial' stage when the summons to appear have already been issued, and one or more suspects have been identified. Therefore, during the 'trial' stage, the Court should establish whether investigation at domestic level is launched and related to the same persons that are subject to the Court's proceedings.[60]

The Appeals Chamber agreed with the argument of the Pre-Trials Chamber and noted that at this stage of a case, when a specific case is examined with alleged actions and suspects, for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover

55 *Ibid*.

56 *Ibid,* § 68.

57 ICC-01/09-01/11 and ICC-01/09-02/11, Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute. ICC-01/09-01/11-1942, (2011), § 32.

58 *Ibid.*

59 The decision on the Application by the Government of Kenya Challenging the Admissibility of the Case, ICC-01/09-01/11, (2011), § 54.

60 *Ibid.*

the same individual and substantially the same conduct as alleged in the proceedings before the Court.[61]

Notably, this was the first time when the Court considered the "same person" component within the same person/same conduct test.[62] The Court ascertained that when determining admissibility of a case at different stages of proceedings, Article 17 of the Rome Statute should also be applied differently, according to the stage of proceedings.

However, with regard to this issue, the Judge Anita Usacka expressed a dissenting opinion, practically agreeing with the position of the government of Kenya. In her dissenting opinion, the Judge mentioned that complementarity is the foremost guiding principle in the relationship between a State and the Court, guaranteed by the Statute as well as the history of working on the creation of the Statute.[63] In her opinion, the Court did not take it in consideration that this was the first case when the Court was examining the application of a State on challenging admissibility of a case, and that the Court has never before examined a number of related legal issues. Therefore, the judge concluded that the Court failed to find a proper balance between various factors, which resulted in the improper use of discretionary power.[64]

Both of these understandings find some historical grounding in the Rome Statute and unsurprisingly, therefore, were invoked by each of the opposing sides. The position of Kenyan Government and Judge Usacka is reflected in the Rome Statute, as well as the drafting history of its provisions, where the preservation of national sovereignty was a primary goal.[65]

The Appeals Chamber has placed extremely high and perhaps even unrealistic demands on States Parties in terms of the same person/same conduct test, which might work in conflict with the aims of the complementarity principle.[66] At the same time, defining the test as "the same person, essentially the same crime" limits the discretion of the local prosecutor – if the goal of the ICC is to ensure that states dispense justice for heinous crimes committed in a given situation, the Court should have no particular Interest in which crime the person will be charged with at domestic level, If the national authorities are investigating or prosecuting him/her for criminal conduct.[67]

Despite the fact that, it might be assumed that the test requires from the investigation at the national level to draw particular attention to the same suspect and the crime same/similar to the ones prosecuted by the ICC, with such an approach it is less likely that the local prosecutor will charge the

61 The Appeals Chamber Judgment, ICC-01/09-02/11, § 39.

62 *Ibid,* § 34.

63 *Ibid,* § 19.

64 *Ibid,* § 30.

65 Charles C. Jalloh, International Decision: Situation in the Republic of Kenya. No. ICC-01/09-02/11-274- Judgment on Kenya's Appeal of Decision Denying Admissibility. *American Journal of International Law, Vol. 106* (January 2012), p.121.

66 Charles C. Jalloh, Kenya vs. the ICC Prosecutor, *Harvard International Law Journal. Volume 32 (August 2012), p.*278.

67 *Ibid,* 279.

suspect with an international crime, such as crimes against humanity, that is much harder to prove, when he/she can charge a person concerned with a premeditated murder instead.[68]

As Professor William Schabas has argued, it seems unnecessary to reduce admissibility challenges to "a mechanistic comparison of charges in the national and the international jurisdictions, in order to see whether a crime contemplated by the Rome Statute is being prosecuted directly or even indirectly."[69] He suggested that the better approach would be to make "an assessment of the relative gravity of the offenses tried by the national jurisdiction put alongside those of the international jurisdiction".[70]

4. CONCLUSION

This article aimed at identifying the most important explanations provided by the ICC with regards to the complementarity principle while examining the admissibility of Kenyan Cases. This was the first case, where the Pre-Trial Chamber and the Appeals Chamber of the ICC had to contemplate and define the nature and scope of the complementarity principle.

To summarize, it should be noted that the Pre-Trial and Appeals Chambers set extremely high standards in their decisions. Moreover, in a way the ICC even exceeded its complementary jurisdiction and got engaged in an actual "fight for jurisdiction" with the government of Kenya.

The rightfulness of such an approach by the ICC is highly disputable. Perhaps, it would be more reasonable for the ICC to use the "positive complementarity" approach and support the developments in Kenya, monitor the process, and after reasonable time period, if it is needed, to get involved in the situation. However, it is a fact that the Kenyan Cases cleared up and explained a number of very important issues, but it also raised some questions as to the application of the complementarity principle in the future.

68 Jalloh, "International Decision: Situation in the Republic of Kenya", p.122.

69 Schabas, *An introduction to the International Criminal Court,* p.182.

70 *Ibid.*

Nika Jeiranashvili

INTERNATIONAL CRIMINAL COURT AND INVESTIGATION INTO THE SITUATION IN GEORGIA

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ABSTRACT

Over three years have passed since the Pre-Trial Chamber of the International Criminal Court (ICC) has authorized Prosecutor Fatou Bensouda to open investigation into crimes allegedly committed during the 2008 conflict between Georgia and Russia. The matter had already been subject to a preliminary examination by the ICC Office of the Prosecutor (OTP) since 2008.

In the meantime, human rights defenders have carried out numerous efforts to seek justice for the victims. However, these efforts turned out mostly ineffective as national investigations in Georgia and Russia failed due to political unwillingness and inability to prosecute potential perpetrators. In addition, no progress had been made in regional human rights courts despite hundreds of complaints lodged to the European Court of Human Rights on behalf of thousands of victims from all sides.

The 2008 conflict appeared to be an issue that was too big and serious to be confronted at the local or even regional, level. Consequently, the ICC investigation had become the only viable option for the victims to seek justice. After almost eight years of waiting, the ICC investigation has brought a hope for victims that justice would prevail. It was perhaps a pivotal moment for the court as well because this was the first time the ICC was going to investigate a situation outside Africa. It was also the first time the court was going to deal with an international armed conflict involving a powerful UN Security Council member state, which is not a party to the Rome Statute.

Over three years have passed since the opening of the investigation. During this time the ICC has not been able to issue an arrest warrant against any individual from either side. This is a considerable delay compared to any previous situation that the court has dealt with.

Last year, the international community celebrated the 20th anniversary of the Rome Statute, marking a significant achievement of establishing a permanent institution to deal with the world's most horrendous crimes. At the same time, the victims of the 2008 conflict commemorated 10 years since the violence occurred. Throughout the last decade, many victims have passed away, thousands of displaced people are living in dire conditions, and civilians are living in fear. Families of the lost ones and the remaining victims are losing hope that they will ever get justice.

The following article aims to shed light on the ICC investigation of the Georgia Situation. It will entail discussion on the legal basis and scope of the investigation, unique nature of the process, accompanying challenges, progress made and the most recent developments. By doing so, hopefully it can help to raise awareness amongst the international community and to bring the much-needed attention to the situation, while there is still time to make the ICC investigation meaningful for those who are supposed to be in the center of the process.

INTRODUCTION

In October 2015, the Prosecutor Fatou Bensouda of the International Criminal Court (ICC) submitted a request[1], pursuant to article 15(3) of the Rome Statute, to the Pre-Trial Chamber I for authorization to open investigation into the Situation of Georgia.

The ICC investigation stems from crimes that allegedly occurred during the 2008 conflict in South Ossetia – a region of Georgia that had been under the control of pro-Russian separatists since the early 1990s. A fresh outbreak of hostilities between South Ossetian separatists and Georgian forces led to Russian military intervention in August 2008, with Georgian troops forced to retreat after a week of fighting. During the conflict, hundreds of people were killed and both sides were accused of using disproportionate force that endangered civilians. Human rights groups reported that ethnic Georgians living in South Ossetia were deliberately pushed out of their homes by a campaign of terror that included scores of murders and around 27,000 have been unable to return since. Georgian forces were also accused of attacking Russian troops who had been deployed in the region as peacekeepers under an earlier peace agreement with the separatists.

ICC's Office of the Prosecutor (OTP) has been conducting a preliminary examination into the Situation since August 14th of 2008. On the basis of the gathered information, the Prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in Georgia in the context of the armed conflict. One of the latest phases of the

OTP's assessment examined whether effective national investigations were taking place in Georgia and Russia. The OTP has concluded that obstacles and delays hampered investigations in both countries and that an ICC investigation was necessary as national proceedings in Georgia have stalled.

The OTP's request to the PTC contains 9 confidential, ex parte and 11 public annexes, including the letter[2] of Georgia's Minister of Justice, dated 17 March 2015. The Prosecutor cited this letter as a confirmation of the Government of Georgia that the domestic proceedings have indefinitely suspended and that there is no prospect of further progress domestically "until the threats disappear". The latter refers to the Government's claim that there is "a fragile security situation in the occupied territories in Georgia and in the areas adjacent thereto, where violence against civilians is still widespread"[3]. According to the Prosecutor, conditioning of national proceedings on future and hypothetical factors, in particular those that are external to the control of competent authorities, would be too abstract and remote[4]. Consequently, the Prosecutor has interpreted Georgia's response as indefinite suspension of national proceedings and addressed the Pre-Trial Chamber to authorize her office open investigation into the Situation.

Following the request, the Prosecutor has in compliance with rule 50, on 13 October 2015, provided a notice[5] to victims of alleged war crimes and crimes against humanity committed in Georgia from the period of 7 August 2008 until 10 October 2008 that she has requested authorization from the Pre-Trial Chamber to open investigation into such alleged crimes and that pursuant to regulation 50(1) of the Regulations of the Court, they have 30 days to make representations to the Chamber.

By the end of 2015, the ICC had received representations by and/or on behalf of over 6000 victims from all three sides, including Georgia, Russia, and South Ossetia. The victims supported the prosecutor's decision and some have requested widening the scope of investigation to include additional crimes within the court's jurisdiction.

On January 27, 2016, Pre-Trial Chamber I authorized[6] the prosecutor to open investigation and expanded the scope of the investigation to include additional crimes allegedly committed within the jurisdiction of the ICC.

The pre-trial chamber's decision signifies a very important first step in recognizing the harm suffered by the victims and the fight against impunity for the crimes committed in relation to the 2008 conflict. According to the PTC decision, such crimes include: a) the crimes against humanity of murder, forcible transfer of population, and persecution, and b) war crimes, including attacks against the civilian population, willful killing, intentionally directing attacks against peacekeepers, destruction of property, and pillaging allegedly committed in the context of the conflict between July 1 and October 10, 2008.

In addition, the chamber has taken into consideration the Georgian victims groups' request to broaden the scope of investigation. As a result, it decided not to limit investigation to the aforementioned crimes, but to allow the prosecutor to examine all crimes allegedly committed within the jurisdiction of the ICC, including sexual violence, arbitrary detention of civilians, and torture of prisoners of war.

A UNIQUE INVESTIGATION

This is the first time that the court has launched a full-scale investigation of crimes emerging from a conflict outside the African continent. For almost thirteen years the ICC has been operating in eight African countries, thus acquiring a certain level of expertise in the region. However, the ICC has been strongly criticized for opening investigations only in Africa. While the trend has now been broken, this new development also brings up a big question: what happens next?

It is hard to compare the situation of Georgia to others with an aim to predict the outcome of the investigation. Of the eleven ongoing investigations, five relate to member state referrals in the context of internal armed conflicts between the government and rebel groups. The two referrals from the UN Security Council relate to the civil uprising against Gaddafi regime in Libya and the armed conflict among the Sudanese government, militia, and rebel forces in Darfur. Three of the *proprio motu* situations, which the ICC Prosecutor initiated independently, relate to post-election violence in Kenya, Cote d'Ivoire and Burundi.

In Georgia's situation, which was also authorized as a *proprio motu* investigation, the court is investigating crimes committed during an international armed conflict for the first time. As noted earlier, the investigation covers the 2008 conflict between Georgia and Russia. The former has been an ICC member since 2003 and officials have previously made statements demonstrating their willingness to cooperate with the investigations. The latter is a permanent member of the UN Security Council and has already declared of its intentions not to cooperate with the ICC, culminating in the withdraw of its signature from the Rome Statute in November 2016[7].

In addition, in Georgia there was a gap of over seven years since the crimes were committed and the opening of the ICC investigation. In contrast, in most of the court's previous experiences, an investigation was opened just one to two years after crimes occurred. Such considerable time delay creates problems for the OTP due to a potential loss and contamination of evidence.

The situation in Georgia is unique in many ways and brings new challenges related to a lack of knowledge of the new region, inexperience of dealing with international conflict, and non-cooperation of a very powerful non-member state involved in the conflict.

The ICC investigation in Georgia will be an important test case for other situations, and the way it proceeds will tell much about what could happen in Ukraine or Afghanistan, as well as in Palestine or Iraq, which are currently under preliminary examination by the OTP.

CHALLENGES

Many challenges remain. This is the first time an ICC investigation has brought it into a potential confrontation with a powerful, UN Security Council member state that is not a party to the Rome Statute. In addition, the separatist administration of South Ossetia is only recognized by Russia and a handful of other states, and it remains under the political sway of Moscow, raising further difficulties for the investigation. Despite the ICC's hopes on Russia's cooperation during the early stages of investigation, Russia has shown no signs of cooperation. The spokeswoman of the Foreign Ministry, Maria Zakharova has declared that Russia is disappointed with the chamber's decision to support the case. By the end of 2016, Russia has withdrawn signature from the Rome Statue, clarifying any doubts that court officials might have had about the cooperation. Due to these developments, there is a general fear among ethnic Georgian victims, that the court might not be able to arrest alleged perpetrators as Russia does not cooperate with the investigation.

Georgia, meanwhile, has been a member of the ICC since 2003 and has an obligation to cooperate fully with the court in this investigation. This does not automatically guarantee effective cooperation between the two throughout the entire process. For example, execution of arrest warrants for Georgian citizens may become problematic if the investigation progresses to this stage. So far, however, the official statements from Georgia are rather supportive and gives one hope that the cooperation will continue in this spirit. The pre-trial chamber's decision to proceed with the investigation was widely welcomed by Georgian victim groups, as well as by high level officials including the former Prime Minister Giorgi Kvirikashvili and the Minister of Justice, Tea Tsulukiani. The latter has emphasized the importance of the chamber's decision and stated that Tbilisi will continue to actively cooperate with the court.

The decision to open an investigation has implications for the work of civil society, victims, and the local media in both Russia and in Georgia. Neither country has been subject to an ICC investigation before. Until now, this has remained a distant issue for the region, perceived only as an 'African problem.' As a result, there is locally a very little knowledge of past experiences and of the international context. This increases the risk of undermining the overall process and its outcomes.

Victims' groups have a huge role to play as the investigation further progresses. The past experience shows that civil society organizations are the key gate openers for different sections of the ICC, including OTP and Outreach. Donor support from the initial stage is essential to contribute to the court's investigations and to fill in the gap created by the general lack of knowledge and experience, as well as by lack of funding and coordination in this area.

Managing public expectations and balancing the timeframe are two of the biggest anticipated challenges. Communication with victims' communities and their engagement is challenging, especially when it comes to individual examination of their stories. Providing incorrect information and creating high expectations will surely damage the process and undermine respect for international justice, rule of law and culture of accountability for grave crimes.

Understanding how to engage in the process was particularly problematic for civil societies in other ICC Situations. Lack of knowledge on how to deal with different sections of the Court, in particular with the OTP, and putting lots of expectations on the Court turned out devastating for the civil society.

Capacity building at the local level is necessary, and, ideally, there should be public debates and proactive information sharing to educate victims and the general public on the issues. In this regard, much will depend on donor's assistance to victims' groups to ensure adequate information, protection and participation before the court.

Lastly, Georgia is located in a highly volatile region, where a number of secessionist conflicts have been festering for decades and temptation to resolve them by force is high, including a temptation to change the status quo in a swift military operation. In this regard, the ICC investigation in Georgia and possible accountability for grave international humanitarian law violations could serve as a deterrent for future conflicts and advance greater respect for international justice and the rule of law.

LITTLE PROGRESS

During the first year of the investigation, the ICC appeared to have little engagement in the Georgia situation. The country and the region were unfamiliar to the court, as much as the institution of the ICC was unfamiliar to Georgians. Most of the people within the court involved in the investigation had no knowledge or experience working in this region. This has resulted in various misconceptions from the court's side about the new situation and delays in the investigative process. For almost a year, there was scant evidence that the OTP had undertaken any activities on the ground.

This improved during the second year of the investigation. During this time, the OTP set up a team of investigators and launched various activities. However, due to the confidential nature of these activities, the public did not get sufficient information about the OTP's efforts.

Last year, civil society organizations have visited the victim settlements throughout Georgia. The goal was to provide information to the victims on the ICC's investigation, while at the same time, gather information on their current needs and living conditions. The majority of victims that the organizations have interacted with have not heard about the ICC investigation. This is largely because of the court's failure to provide outreach activities throughout the last three years.

Furthermore, there appears to be no involvement from the Trust Fund for Victims (TFV) which could help make the process more meaningful to those harmed in the conflict by initiating assistance mandate. As defined in Rule 85 of the Rules of Procedure and Evidence, TFV 's assistance mandate enables victims of crimes and their families who have suffered physical, psychological

and/or material harm as result of war crimes, to receive assistance separately from, and prior to, a conviction by the court. Such support may include physical and psychological rehabilitation, as well as material support to address the care and rehabilitation and to improve the economic status of victims as a means to assist in their recovery.

TFV's engagement at this stage might be the crucial element for the victims of the Georgia Situation as it is not linked to a conviction, which might be particularly problematic due to the non-cooperation challenges discussed above. However, even after a decade of the conflict, TFV still has a long way to go before reaching the affected communities, starting with its needs assessment which is a pre-requisite to the implementation of the assistance mandate.

After two years of opening the investigation, the ICC has managed to open a field office in Tbilisi. However, the office has remained largely inoperative throughout 2018 as it consisted of only a head of the office and a temporary staff member, both unable to speak Georgian. This has caused further delays in the process, once again leaving the victims and public at large in an informational vacuum.

The lack of outreach and incapacity of the country office has been fused with silence from the OTP's side regarding the investigative activities. Due to the confidential nature of the investigation there is little known about the activities being implemented by the prosecutor's office. This has led to further ambiguity in the process, providing space for misinterpretation and incorrect information about the ICC, damaging its credibility.

In the context of the recent and highly contested presidential elections, Georgian politicians have been trading accusations about who is responsible for the 2008 armed conflict with Russia and about improperly influencing the ICC's investigation. Although a lack of information is a root cause of this situation, the ICC has repeatedly failed to provide updated, neutral information about the Georgian investigation. In the current, tense political environment, the ICC's continued silence puts it at risk of becoming a delegitimized and politicized tool for destabilization in Georgia.

The recent discussions have revealed that the public is not well informed about the ICC proceedings in Georgia. The public does not know the details of the ICC process - not even basic facts, such as who is under investigation or for what acts. This ignorance of the ICC proceedings is not limited to the general public, but also extends to government, academia, and legal communities.

For example, many, if not most, government officials have made statements excluding Georgian forces as part of the investigation. This is untrue, as Georgian forces stand accused of alleged war crimes against Russian peacekeepers and of alleged indiscriminate and disproportionate attacks against civilian targets. Senior officials and politicians have also mixed up the ICC investigation with proceedings[8] initiated at the International Court of Justice (ICJ) by the former Government of Georgia against the Russian Federation in 2008.

The ICJ proceedings finished in 2011, when the ICJ found that it had no jurisdiction to decide the dispute. But the ICJ is also located in The Hague, and the ICC has not conducted any outreach to explain the difference between the courts and their respective proceedings. Therefore, the Georgian public confuses the two processes and often thinks there is an inter-state claim being discussed at the ICC.

Public information and outreach activities could help to avoid the spread of misinformation, and could fill in the informational vacuum and minimize misinterpretations of the process from various stakeholders. Unfortunately, the ICC field office has remained detached and appears to ignore local developments. There follows a similar pattern of silence from the OTP and the Trust Fund for Victims. This has contributed to extreme politicization of the ICC investigation, to the extent that the whole process now stands at the risk of losing legitimacy. There is a risk that this may be used to foment disagreement within the armed forces and destabilize the country.

Senior officials from the OTP and the ICC Registrar, Peter Lewis, made statements during their visit to Tbilisi in last October. OTP representative Phakiso Mochochoko has assured Georgians that "the process will be free from political influence and the evidence collected by the OTP is aimed at revealing responsibility of individuals, and not on who started the war." According to Mochochoko, "political opinions are not relevant for the OTP's aims." According to the Registrar, statements made by politicians must be verified before being considered evidence during the trial.

Despite these comments, the statements of politicians have an enormous effect on the ongoing process and need to be taken seriously by the court. There is a critical need for information as the discussions continue and the way the investigation proceeds will have an effect on the political developments within the country. If the ICC continues ignoring the local developments, it may risk becoming irrelevant and an untrustworthy institution for Georgian public.

ENDNOTES

1. https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF
2. https://www.icc-cpi.int/RelatedRecords/CR2015_19548.PDF
3. Ibid, para. 1, p.2.
4. OTP Request for authorization of an investigation pursuant to article 15, para. 303, available on: https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF
5. https://www.icc-cpi.int/iccdocs/otp/Article_15_Application--Notice_to_victims-ENG.pdf
6. https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF
7. https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute
8. https://www.icj-cij.org/en/case/140

Onisime Tskhomelidze

ENVIRONMENTAL CRIMES THROUGH THE PRISM OF THE CASE-LAW OF THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

Environmental protection is one of the challenges facing international community today and it is gaining particular importance for the International Criminal Court (hereinafter, ICC). According to the Policy Paper on Case Selection and Prioritisation published by the ICC Prosecutor in 2016, destruction of environment and inflicting environmental damage, as means of committing a crime, are new priorities for the Office of the Prosecutor. However, criminalisation of the destruction of environment internationally has not yet been studied comprehensively. It is debatable whether the ICC can be effective in prosecuting perpetrators responsible for the destruction of environment within the existing legal framework. The aim of this article is to explore the possibilities of the development of ICC case-law regarding destruction of environment and environmental damage through the analysis of the limitations imposed by the Rome Statute. The article, in particular, underlines jurisdictional limitations of the Rome Statute regarding criminalisation of the damage caused to the environment. The study also looks into the extent to which environmental protection interests can become relevant for the ongoing ICC investigation into the situation in Georgia.

1. INTRODUCTION

According to the founding document of the International Criminal Court (hereinafter, ICC), the Court's jurisdiction covers four main crimes: genocide, crime against humanity, war crime and, since 17 July 2018, crime of aggression. As of 21 January 2019, the ICC investigates 11 situations. Moreover, the Office of the Prosecutor (hereinafter, OTP) has 10 more situations under preliminary examination.[1] However, until now, environmental protection interests have been only superficially and indirectly reflected in the Court's case-law. For example, in the second arrest warrant against the Sudanese President Omar Al-Bashir, the Court considered that the contamination of wells and water pumps is a crime.[2] Accordingly, the boundaries of ICC jurisdiction regarding damage caused to the environment are not clear and the scholarly discussion about the theoretical possibility of prosecuting destruction of environment is a novelty.

20 years after the adoption of the Rome Statute and 16 years after the ICC started functioning, the OTP tries to interpret the jurisdictional grounds more widely and respond to the modern challenges facing the international community, such as international criminalisation of the damage to environment and consideration of environmental protection interests within criminal justice systems.[3] In September 2016, the Court Prosecutor issued a new Policy Paper on Case Selection and Prioritisation, which lays ground to the interpretation of the crimes foreseen by the Rome Statute through the prism of environmental protection.[4] Though the policy paper is not legally binding, it reveals the future plans of the Court and the priorities within the existing legal framework.

Present article aims to establish the relationship of the Rome Statue, in particular, war crimes and crimes against humanity given therein, with the environmental damage. The first part of the article will explore the historic and legal grounds for qualifying environmental damage as a crime under international criminal law. Afterwards, it will be established whether massive fires within Borjomi-Kharagauli National Park and oil spill near Poti Port during 2008 international armed conflict in Georgia fall within ICC jurisdiction. The study is concluded by the evaluation of the legal prospect of the development of the case-law on genocide, war crimes and crimes against humanity within environmental context.

1 Web-site of the International Criminal Court: https://www.icc-cpi.int/pages/situation.aspx [last accessed on 5.05.2019]

2 Second Decision on the Prosecution's Application for a Warrant of Arrest, *Al Bashir* (ICC-02/05-01/09-94), Pre-Trial Chamber I, 12 July 2010, § 36-38.

3 About the threats to international peace and security, emanating from crimes against environment, see C. Nellemann (ed.), *The Rise of Environmental Crime – A Growing Threat to Natural Resources, Peace, Development and Security* (2016), p. 7; 15; 39 and 77; according to the UN, the damage to the environment is declared as one of key challenges facing modern international community, see GA Res. 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development,* 21 October 2015, § 31 and 55.

4 Policy Paper on Case Selection and Prioritisation, OTP, ICC, 15 September 2016, available at: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, §41 [last accessed on 5.02.2019]

2. ENVIRONMENTAL DESTRUCTION AS A WAR CRIME

a) Historical context

The environmental damage following nuclear attacks on Hiroshima and Nagasaki in 1945 demonstrated that nuclear pollution can have impact on generations. Environmental pollution is linked to continuous risks, and the catastrophic damage to the environment can "shock the humanity" just as much as the four crimes established by the Rome Statute. While at the end of World War II humanity's concerns were focused on those who have fallen in the war, today the attention should also be paid to the generations who have suffered from ecological damage and deteriorating health. It is interesting to observe what kind of ecological damage can alarm the international community and prompt the request to criminalise such damage internationally.

According to the report co-ordered by UNEP and INTERPOL published in 2016, grave ecological crimes threaten not only the environment, but also development, international peace and security.[5] Ecological crimes are manifold: destruction of forests, depreciating lands, illegal mining and trade in gold and other minerals, trade with endangered animals, illegal fishing, polluting environment with particularly hazardous waste, and illegal trade with particularly hazardous chemicals and so on. Following such acts, there is a dangerous trend of financing armed non-state actors and terrorist groups.[6] Nevertheless, the actions underlined above are mostly ecological crimes at the national level and criminalising them at international level would require much higher threshold for damage. Though contemporary international law does not offer universal definition of the "ecological crime", in 1996 the International Court of Justice defined the environment as:

> "The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[7]

The above definition of the environment is quite broad. However, it is arguable whether the legal definition of the environmental damage as an international crime is broad enough. The first indirect attempt to criminalise environmental destruction internationally was at Nuremberg Military Tribunal, within the case *List and Others* (the Hostages Trial), whereas General Lothar Rendulic was accused of "scorching the earth" in occupied Norway with the aim to contain the advance of Russia. The Military Tribunal acquitted General Rendulic, as his actions were considered as military necessity.[8] However, the Military Tribunal found General Jodl guilty of similar charge (alongside other

5 Nellemann, *supra* note 3, p. 7.

6 *Idem*. p. 7, 15 and 39.

7 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Report 226, International Court of Justice (ICJ), 8 July 1996, §29; *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 7, 25 September 1997, § 53.

8 Brady H. and Re D., "Environmental and Cultural Heritage Crimes: The Possibilities under the Rome Statute", in M. Bose et al. (eds.), *Justice without Borders: Essays in Honour of Wolfgang Schomburg* (Leiden, Boston, Brill Nijhoff, 2018): 103, p. 116.

charges) and sentenced him to the execution by hanging. His case can be considered as a precedent of international individual criminal responsibility for the environmental damage.[9]

Following the World War II, the issue of environmental protection during hostilities became relevant within the context of Vietnam War, whereas the US destruction of forests and harvest through widespread use of herbicides sparked negative reactions from the environmentalists. While assessing the above events, biologist Arthur Galston used the new term "ecocide", which he defined as intentional and permanent destruction of the environment.[10] In 1973 the international law expert Richard Falk offered to adopt a convention about the crime of ecocide, which would apply both during peacetime and armed conflict and would apply in the cases of partial or total destruction of human ecosystem as a result of intentional criminal act.[11] Unfortunately, at that time environmental law was only taking its first steps within the framework of international law (for example, 1972 Stockholm Declaration on the Human Environment) and the international community was not prepared to criminalise environmental damage internationally.[12]

In the UN Security Council Resolution 687 adopted in 1991, the Council found Iraqi Government liable for the environmental damage inflicted as a result of invasion of Kuwait and the UN Compensation Commission imposed Monterey sanctions over Sadam Hussein government for the ecological damage caused.[13] Before withdrawing from Kuwait, Iraqi army set fire to oil wells, which were burning for the entire year and produced thick, dark smoke. In addition to smoke and air pollution, Iraqi army intentionally spilt oil into the Persian Gulf to prevent naval attack from the Unites States Armed Forces.

The environmental damage within the context of the armed conflict became relevant again in 1999, during NATO bombing of oil refinery and chemical factory in the Serbian town of Pancevo. However, the International Criminal Tribunal for Former Yugoslavia has not proceeded with respective investigation and noted that there was no "widespread", "long-term" and "severe" damage to the environment.[14] Ecological damage was inflicted during 2006 Lebanon conflict as well, when during Israeli bombing of Lebanese strategic objectives (including Jiyeh Station), large amount of oil was spilt into the environment and the coastline.[15] This has not triggered any legal follow up. ICC has not yet assessed environmental damage (as an environmental crime) within the criminal law context at international level. Therefore, it is interesting to analyse international humanitarian law

9 Smith T., "Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law", *in* W. A. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (New York, Routlege, Taylor & Francis Group, 2013): 45, p. 53.

10 Eliana Teresa Cusato, "Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC," *Juornal of International Criminal Justice* 15 (2017): 491, p. 494.

11 Hough P., "Defending Nature: The Evolution of the International Legal Restriction of Military Ecocide", in G.Z. Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2014* (Oxford, Oxford University Press, 2015): 137, p. 137-139.

12 UN GA Res. 2994 , *United Nations Conference on the Human Environment*, 15 December 1972

13 UN SC Res. 687, 8 April 1991; see also Hough, *supra* note 11, p. 147.

14 Hough, *supra* note 11, p. 148.

15 Oeter S., "Methods and Means of Combat", in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2013): 121, p. 212.

for its qualification of war crimes within the environmental context and the prohibition of environmental damage during hostilities.

b) Limits of prohibition of environmental destruction within international humanitarian law

According to Article 25.3 of 1977 Additional Protocol I to 1949 Geneva Conventions, it is prohibited to employ methods and means of warfare which are intended, or maybe expected, to cause widespread, long-term and severe damage to the natural environment. According to Article 55 of Additional Protocol I it is prohibited to cause damage to the natural environment, to attack against natural environment by way of reprisals and thereby prejudice the health of the population. Rules 43, 44 and 45 of Customary International Humanitarian Law elaborated by the International Committee of the Red Cross further specify the environmental protection guarantees. Namely, according to the said Rules, it is prohibited to attack natural environment unless it is a military objective; however, the possibility of partly destructing the natural environment is also foreseen. The exception is allowed only in case of imperative military necessity and only if all feasible precautions are taken.[16] It should be noted that according to Rule 43, launching an attack against military objective which may be expected to cause incidental damage to the environment that would be excessive in relation to the concrete and direct military advantage anticipated is prohibited. However, when balancing the damage caused to the environment with the military advantage, the customary humanitarian law does not require apparent incompatibility of these two aims and contents itself with the requirement of proportionality of the damage caused.

1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), defines the latter as "any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space".[17] It is important to note that ENMOD foresees the three criteria of "widespread", "long-lasting" and "severe" effect alternatively and not cumulatively.[18] Accordingly, it creates different and more favourable conditions for protecting natural environment than the Additional Protocol I to Geneva Conventions. However, it is interesting to understand how each criterion of environmental impact is defined. UN Committee on Disarmament considers the damage "widespread" when it is spread across hundreds of square kilometres; the ecological damage is "long-lasting" if it lasts for several months or approximately one season; damage is "severe" if it causes serious detriment or degradation (loss) to

16 ob. ICRC, Customary IHL Database, Rules 43-45, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule43 [last accessed 5.02.2019].

17 Article 2, Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1977, 31 UST 333, 1108 UNTS 152.

18 *Idem*. Article 1.

human life, natural or economic resources.[19] According to *travaux préparatoires* of Additional Protocol I Relating the Protection of Victims of Armed Conflict, "long-term" damage to the environment is defined as the decades-long negative ecological effect.[20] Accordingly, the duration test under ENMOD established by the UN Committee on Disarmament considerably decreases the "longevity" criterion of the ecological damage foreseen under Additional Protocol I and requires not the negative ecological effect lasting for decades, but ecological degradation for several months or a season. Moreover, Additional Protocol I fails to define the criteria of "widespread" and "severe" damage. Therefore, it is possible to rely on the interpretation of these criteria offered by the UN Committee on Disarmament.

Furthermore, we should take into consideration 1980 Convention on Prohibitions on the Use of Certain Conventional Weapons and the conventions prohibiting chemical, biological or nuclear weapons, which ban weapons of mass destruction.[21] In principle, the prohibition of weapons of mass destruction implies the ban on causing environmental damage through the use of such weapons. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice established that the use of nuclear weapons violates the principles of international law and humanitarian law. Nevertheless, the Court was not prepared to declare nuclear weapons completely illegal and upheld the exception of self-defence, when the very survival of the state is at stake.[22] In his Dissenting Opinion Judge Weeramantry explicitly underlined that the use or threat of use of nuclear weapons is illegal under any circumstances within contemporary international law. As the judge known for his environmental considerations, he characterized the negative effect of nuclear weapons as the disaster causing "nuclear winter", which should by no means be tolerated as an exception under international law.[23] Based on the above, it is interesting to understand which of the standards prohibiting environmental destruction have been reflected in the Rome Statute and which qualifying factors define individual criminal responsibility for the environmental damage internationally.

c) Standard of individual criminal responsibility for environmental damage under the Rome Statute

According to Article 8 of the Rome Statute, ICC "shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". According to the Statute, war crimes mean "grave breaches of the Geneva Conventions of 12 August 1949", "serious violations of the laws and customs applicable in international

19 Oeter, *supra* note 15, p. 127-128.

20 Cusato, *supra* note 10, p. 496.

21 Oeter, *supra* note 15, p. 212.

22 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 7, § 103-105.

23 Dissenting Opinion of Judge Weeramantry in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 226, International Court of Justice (ICJ), 8 July 1996, p. 294-295 and 331.

armed conflict", when respective actions prohibited by the Rome Statute are committed. Article 8 (2)(b)(iv) of the Statute prohibits "intentionally launching an attack", "when such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[24] First of all, the Rome Statute repeats the same standard of environmental damage prohibition as given in Additional Protocol I to Geneva Conventions, adding the elements of proportionality and intent, which further complicate the task of establishing individual criminal responsibility for the environmental damage caused.

Moreover, the ICC can establish individual criminal responsibility for severe damage to the environment only in case of international armed conflict as the Rome Statute does not criminalise environmental damage in the context of non-international armed conflict. In addition, there should be a direct intent from the perpetrator and the knowledge that the attack will cause "widespread", "long-term" and "severe" damage to the environment. Similarly to Additional Protocol I to 1949 Geneva Conventions, the Rome Statute requires that the above three elements of damage are found cumulatively, thus, rejecting more progressive alternative standard under ENMOD. Furthermore, neither Rome Statute, nor its preparatory works, nor "the Elements of Crime" provide guidance as to how the three elements of ecological damage should be interpreted by the Court. Considering the similarity between Article 8 (2)(b)(iv) of the Rome Statute with the definition of environmental damage under Additional Protocol I to 1949 Geneva Conventions, we should assume that the ICC will interpret ecological damage similarly to Additional Protocol I.[25] Therefore, for the ICC, the criterion of "long-term" damage would mean continuous ecological damage lasting for decades and the criterion of the ecological damage lasting for several months is not relevant. The interpretation of the remaining two criteria ("widespread" and "severe" damage) is not contested as they are interpreted in the same manner both under ENMOD and Additional Protocol I.

Professor Steven Freeland holds opposing view from the author of this article and invites ICC judges to take into account environmental protection considerations, distance themselves from political aspects and interpret environmental damage in light of the criterion of "long-lasting damage" under ENMOD. Professor Freeland thinks that, within the established framework, the Rome Statute does not restrict judges from broadly interpreting vague notions that leave room for unclarity.[26] Accordingly, it is advisable that the Court clearly interprets the three criteria of environmental damage and forms uniform approach to the subject. Until then, scholarly opinions might continue to differ.

The Rome Statute excludes criminalisation of unintentional environmental damage and explicitly requires the element of intent. Namely, the material elements should be accompanied by "intent and knowledge".[27] Even more so, the intent should be direct. In *Lubanga* case the Pre-Trial Chamber

24 Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

25 For the rules of interpretation of an agreement see Article 31(3)(c), Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

26 See Steven Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (Cambridge, Intersenntia, 2015), p. 209.

27 Article 30, Rome Statute, *supra* note 25.

I of ICC excluded the concept of unintentional crime (*dolus eventualis*) from the remit of Article 30 (2)(b) of the Rome Statute and found that in order to establish individual criminal responsibility the intent of at least the 2nd degree should be present (*dolus directus*).[28]

The Rome Statute increases the threshold for criminalising environmental damage in the course of armed conflict established by the rules and customs of international humanitarian law, by introducing proportionality principle to the assessment of environmental damage. Namely, Article 8 (2)(b)(iv) of the Rome Statute explicitly requires that the damage to the natural environment is clearly excessive in relation to the anticipated military advantage.[29] Therefore, if the clear excess of the environmental damage vis-a-vis military advantage is debatable, the Court will not be able to establish individual criminal responsibility. For example, if the belligerent party decides to bomb the military naval ship of the adversary and foresees the inevitable possibility of large oil spill into the sea as a result of such bombardment, the damage caused to the environment as result of such attack will not be considered clearly excessive in relation to the military advantage. Contrary to this, clear inconsistency will arise between the anticipated military advantage and the damage to the natural environment if the perpetrator of the attack had knowledge that there were only few soldiers on the adversary's ship and based on technical characteristics, the ship would not be able to play decisive role during hostilities, while the oil spill would cause the destruction of large amount of sea mammals and fish.

Moreover, the "Elements of Crime" – the main complementary document for the interpretation and application of the crimes under the Rome Statute – specify that the alleged perpetrator should balance the military advantage against the environmental damage based on the information available to them when undertaking an action.[30]

To conclude, the environmental destruction standard established by the Rome Statute is more liberal to the alleged perpetrators than the prohibition foreseen under Additional Protocol I to 1949 Geneva Conventions, customary international humanitarian law or the prohibition extended to the contracting states of Environmental Modification Convention (ENMOD).

The ICC can elaborate on the environmental destruction as a war crime within the context of the investigation into 2008 international armed conflict in Georgia. It is interesting to discuss whether the ecological damage inflicted upon Georgia as a result of armed hostilities carried out by the Russian Federation meets a very high threshold established under war crimes provision (Article 8 (2)(b)(iv)) of the Rome Statute.

28 Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, § 1011-1012.

29 Antonio Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2003), p. 60; Elements of Crimes of the International Criminal Court 2002, UN Doc. PCNICC/2000/1/Add.2 (2000), p. 19.

30 See Elements of Crimes of the International Criminal Court, *supra* note 30, Article 8(2)(b)(iv), definition given in note 37 below

d) Ecological damage inflicted upon Georgia in 2008 as a war crime

On 15 August 2008, after the termination of active hostilities and after signing a ceasefire agreement, the Russian Federation launched an attack in Borjomi gorge, causing fire in Borjomi-Kharagauli National Park. It took 5 days to extinguish the fire. As a result, 250 hectares of forest was destroyed completely (including endemic species) and the fire ravaged 950 hectares. The World Bank, the World Wildlife Fund and other environmental organisations expressed concern regarding such ecological damage, while international organisations called upon the investigation into the environmental damage as a result of the war.[31] Furthermore, during the armed conflict, the Russian Federation armed forces sank Georgian military vessels near port of Poti. As a result, up to 50 tons of oil was spilled into the Black Sea and the flora and fauna of Kolkheti National Park were damaged.[32]

Nevertheless, the need of respective investigation was never mentioned in either ICC Prosecutor's request for an investigation into the situation in Georgia or, respectively, in 27 January 2016 decision of ICC Pre-Trial Chamber I about authorising such investigation.[33] First of all, oil contamination of Poti Port aquatory and Kolkheti National Park cannot be regarded as a war crime under Article 8 (2)(b)(iv) of the Rome Statute, as the "long-term damage" criterion required by Additional Protocol I to 1949 Geneva Conventions is not met. Moreover, bombing of Georgian military vessels in the port vicinity satisfied the criterion of military necessity and the environmental damage in this case is collateral, which in itself is not a crime under the Rome Statute.

Furthermore, when it comes to 15 August attack against Borjomi-Kharagauli National Park, it should at least be further investigated. It is possible that the intent to destroy environment can be found, which is key for the ICC to qualify an action as a war crime under Article 8(2)(b)(iv) of the Rome Statute. Moreover, the damage to the natural environment was "widespread" (endemic flora and fauna were destroyed across hundreds of hectares), it was also "long-term" (the damaged forest and endemic species will take over 10 years to recover) and "severe" (the recreational area was devastated, smoke was propelled into human settlements, it took considerable material and human resources to extinguish the fire). The military necessity criterion is not present in this case, as the armed hostilities were over and damage to the natural environment was clearly excessive in relation to the anticipated military advantage. Accordingly, there are reasonable grounds to believe that the action criminalised under Article 8 of the Rome Statute (environmental damage as a war crime within the context of international armed conflict) did take place. Consequently, the OTP should include this issue into further investigation. On the other hand, if it can be established that the fire caused in Borjomi-Kharagauli National Park was not intentional, the Rome Statute does not foresee criminal liability for unintentional crimes.

31 See the report published by the Government of Georgia about the environmental damage caused by the war, 10 November 2008, available at: http://georgiaupdate.gov.ge/doc/10006878/Microsoft%20Word%20-%208%20Environmental%20Desctruction_111008.pdf [last accessed on 5.02.2019]

32 *Ibid.*

33 See Request for Authorisation of an Investigation pursuant to article 15, *Situation in Georgia* (ICC-01/15-4), Office of the Prosecutor, 13 October 2015; Decision on the Prosecutor's Request for authorization of an investigation, Situation in Georgia (ICC-01/15), Pre-Trial Chamber I, 27 January 2016.

3. ENVIRONMENTAL DAMAGE AS MEANS FOR COMMITTING CRIMES UNDER THE ROME STATUTE

When issuing the second arrest warrant against the Sudanese President Omar Al-Bashir, Pre-Trial Chamber I of the ICC elaborated on the issue of water contamination (damage to the environment) as means of committing genocide. Specifically, the Chamber ruled that there were "reasonable grounds to believe" that contamination of wells and water pumps across villages and cities primarily inhabited by the ethnic groups of Fur, Masalit and Zaghawa, taken together with other criminal acts, constituted the criminal act of intentionally inciting the policy of genocide.[34] The specific intent (*dolus specialis*) to destroy above groups was evidenced through the combination of various attacks and crimes committed against them.

Similarly to the alleged genocide described above, crimes against humanity can also be committed through the means of environmental destruction, contamination or illegal exploitation of natural resources. On certain occasions, widespread and systemic attacks against civilian population can be carried out through inflicting damage to the environment both during war and peacetime. For example, "extermination" as defined under Article 7(2) of the Rome Statute can be expressed though deprivation of access to food (for example, intentionally poisoning, devastating and contaminating fields and agricultural land plots). Further, "deportation or forcible transfer of population" under the same provision can be evidenced through intentional state or individual policy of expulsing civilian population from the specific area and with this aim, turning to environmental destruction, burning villages and adjacent forests through fire, etc. The above can be achieved through intentional flooding of certain settlements, creation of fire and landslide zones, coercion of population with various methods to forcibly remove them from their homes (illegal eviction) in the interest of oil and natural resources corporations, cyber-attacks against nuclear and electric power plants and respective radiation contamination. All the above serve as examples of carrying out widespread attacks against civil population through the means of environmental damage, when such policy exists.

a) Policy Paper on Case Selection and Prioritisation and national legislation

According to the new priorities published by the Prosecutor in 2016, when choosing, investigating and prosecuting incidents, persons and conduct, the OTP will take into account environmental protection considerations and respective contemporary challenges. Namely, the Office will cooperate with State Parties on the issues of exploitation of natural resources, land dispossession and environmental protection as criminalised under national legislation.[35] Particular and even revolutionary significance should be given to the part of the Policy Paper where the OTP speaks about the gravity

34 Second Decision on the Prosecution's Application for a Warrant of Arrest, *supra* note 2, § 36-40.

35 Policy Paper on Case Selection and Prioritisation, OTP, *supra* note 4, p. 5.

(importance of the case) criterion under Article 17 (1)(d) of the Rome Statute, which is an admissibility ground before for the Court. Namely, upon assessing the gravity criterion, among others, the OTP will take into consideration not only the crimes committed by the means of damage to the environment, but also the ones that caused destruction of the environment.[36] The Paper further specifies what the ecological damage inflicted upon the victimized community means for the purposes of the ICC. This entails destruction of environment, illegal exploitation of natural resources and illegal dispossession of land.

It is apparent that the Court wants to better reflect environmental protection considerations in its case-law. The preamble of the Rome Statute refers to, *inter alia*, the interests of future generations and highlights the preventive role of the Court.[37] The cornerstone principle of environmental protection, sustainable development, is also based on the prevention of damage to future generations.[38] Both international environmental and international criminal law, to a certain extent, are preventive in their nature and the protection of interests of future generations in the long-term perspective is the further point of convergence between them. The basis and precondition for criminalising environmental destruction internationally is the increased tendency of criminalising environmental crimes nationally.[39] For example, Article 409 of the Georgian Criminal Code refers to ecocide and stipulates that it could be committed both during peacetime and armed conflict.[40] The Georgian legislation provides the following definition and sanction for ecocide:

,,Article 409. Ecocide

1. Ecocide, or the contamination of atmosphere, land and water resources; mass extermination of animals or plants; or any other conduct that could lead to ecological disaster, -

   is punished by detention from 12 to 20 years.

2. The same conduct committed during armed conflict,-

   is punished by detention from 14 to 20 years or life sentence.“

Accordingly, the Georgian Criminal Code provides for greater sanction for ecocide committed during armed conflict. The crime of ecocide is foreseen within the Criminal Code of Moldova as well, however, it does not distinguish the ecocide committed during armed conflict and stipulates that ecocide is “intentional mass extermination of flora or fauna; contamination of atmosphere or water resources; or any other conduct that led to or will lead do ecological disaster”.[41] The definition of ecocide is missing from the Ukrainian Criminal Code Article 442 (though Ukraine is not a party to the Rome Statute, it accepted ICC jurisdiction on 17 April 2014 in line with Article 12 (3) of the Rome Statute).[42]

36 *Idem*. p. 14.

37 Preamble of the Rome Statute *supra* note 25.

38 *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia*), *supra* note 7, § 140.

39 See for examples Articles 287-306, Criminal Code of Georgia, 13 August 2019

40 *Idem*. Article 409.

41 Article 136, The Criminal Code of the Republic of Moldova, No. 985-XV, 18 April 2002

42 Article 441, Criminal Code of Ukraine, 1 September 2001

The ICC cannot go beyond the Rome Statute and the legal principle of *nullum crimen sine lege* and cannot extend its jurisdiction over the damage caused to the environment, which is not related to either genocide, or war crimes or crimes against humanity. The desire of the OTP to criminalise crimes against environment is most welcome, together with the tendency of introducing respective sanctions nationally. However, given the high threshold for prosecuting environmental damage under the Rome Statute, the potential for prosecuting this crime on a national level is more likely than before the ICC.

4. CONCLUSION

21 years after the adoption of the Rome Statute, ICC still considers the environmental protection interests as secondary. This could be due to the lack of widespread incidents intentionally diverted against the environment throughout past 17 years. On the other hand, the reluctance of the Court to deal with the environmental issues might be explained by the jurisdictional limitations imposed by the Statute. There is only provision within the Rome Statute, Article 8 (2)(b)(iv) that criminalises damage to the environment as a war crime. However, even this provision sets such a high threshold for prosecution that in practice it is quite difficult to carry out effective criminal justice based on it. Namely, the Prosecutor can rely on this provision only during international armed conflict, with the preconditions that the environmental damage is intentional, "widespread", "long-term" and "severe"; and at the same time – in the process of inflicting damage to the environment – the alleged perpetrator should have knowledge that the environmental damage caused would be clearly excessive in relation to the military advantage anticipated.

Though the Prosecutor tries to reflect modern environmental challenges into the work of the ICC through new priorities declared in 2016, given the existing legal framework, this attempt looks more like a desire to win over the international community than real "green justice".

To conclude, according to international criminal law, the environment is considered more as means of committing a crime, than a victim of an international crime. In light of the Rome Statute, direct damage inflicted upon individual is legally more significant than the indirect damage inflicted upon future generations through environment. This stands true for the genocide and crimes against humanity committed by means of environmental pollution. However, given respective political will, ICC possesses very limited but still existent leverage in the form of Article 8 (2)(b)(iv) of the Rome Statute to prosecute perpetrators of environmental damage during international armed conflict.

Saba Brachveli

THE CRIMINAL STRATEGY FOR COMBATING THE INVASION OF PERSONAL PRIVACY – A ROAD TO NOWHERE

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ABSTRACT:

The present article relates to the crime of invasion of personal privacy, a widely spread crime in Georgia. According to the article, this crime has become an extremely grave problem for the country, which was addressed by the state with the legislative amendments of 2016. Nowadays, in fact, all individuals who have had the slightest relation to the materials entailing a secret of personal life may be punished. Despite the unlimited scope of the modified norm (in terms of storing, as well as – disseminating the unlawful material), aggravation of the punishment and mobilization of the law enforcement bodies, the fight against crime still proceeds without significant results. This is attested by the release of secret recordings from time to time and analysis of a particular case.

The article discusses the components of the Article 157[1] of the Criminal Code of Georgia in the international context which constitutes the clearest example of the state policy on fighting against the crime. In the view of the author, the reason for the failure of the criminal law norm and the state's action is multifaceted and indicates the necessity for a systemic revision of the outlined strategy. The article will present argumentation with regard to the need for a new strategy on combatting the crime and will suggest legislative and practical reforms for the implementation of the suggested changes.

INTRODUCTION

In recent years, the spread of secret video recordings of personal life has become an unfortunate characteristic to the everyday life of Georgian society. Despite the varying intervals, the practice of disseminating such videos has not terminated as of yet. Therefore, the state strategy devised to prevent this crime deserves attention, in order to determine whether we fight properly or not against the dangerous crime of leaking secret video recordings.

The aim of the present article is to describe the criminal legal steps taken by the state with regard to the crime of such type and identify the key problems in this regard. The reasoning outlined in the article will clearly show the necessity of changes on a strategic level, including adopting legislative amendments.

Initially, the article will outline the structure of the relevant norm from the criminal code of Georgia which will evidently demonstrate the criminal law resources existing for the fight against this crime. The analysis of the law will be presented in light of comparative analysis of the other state legislations which will make the Georgian state position even more clear. Afterwards, based on a particular example, it will be discussed why the state approach is problematic. Finally, a distinctive view on the fight against this crime will be suggested.

1. THE PERMANENT INCREASE IN THE ACTUALITY OF THE CRIME.

Along with the technological development, retrieving and disseminating of secret recordings have become an endless headache for Georgian society. At first, private conversations of various politicians and other public figures were used to be spread by means of mass media and by the governmental command.[1] Identification of the individual spreading the mentioned material was not difficult – the government used them for discrediting the opponents.[2]

This practice changed gradually. The spreading of secret audio recordings transferred from mass media to the Internet, where the identification of the person(s) behind the leaks, authenticity and

1 For instance the audio recording spread on 6 November of 2007 of the conversation between the former Defence Minister Irakli Okruashvili and formed Chief of the Department of Corrections Bacho Akhalaia, see: https://civil.ge/ka/archives/141851 [retrieved on 31.3.2019].

2 For instance the audio recording spread on November 7 of 2007 of the conversation between Shalva Natelashvili, Levan Berdzenishvili and Giorgi Khaindrava with people who, according to the MIA's information "were operative officers of the Russian counter-intelligence service", see: https://civil.ge/ka/archives/141870 [retrieved on 31.3.2019].

the source of the recordings was impossible.[3] Moreover, the recordings were uploaded from the websites that were not registered in Georgia. It is notable, that the multiple investigations initiated on these occurrences did not reach any result.[4] In parallel, exceptionally grave infringements of the right to private life occurred frequently.[5]

However, it can be stated freely, that a real pandemic of leaking secret recordings started in 2016. On March 11 and 14 of 2016, as well as on 12 of April[6] and 12 of June[7] of the same year video recordings were published by various social networks. These videos contained shots depicting the sexual life of politicians and public persons. One of the recordings involved a direct threat towards other socially active citizens to stop their activities if they wanted to avoid such material concerning their private life becoming public.

The intimate content of the secret recordings became the ultimate straw on camel's back, which resulted in unprecedented resonance and evident steps from the Government. The mentioned case was the first on which the initiated investigation more-or-less ended with some results. The prosecution detained several former high-ranking officials who were found guilty for illegally retrieving the recordings.[8] In addition, several individuals were detained, who were charged for storing the recordings.[9] However, it is noteworthy that the individuals who published the recordings were not identified and the named recordings were disseminated again after the detention of the people mentioned above.[10]

Besides the investigation on concrete cases, the significant change was made in the Criminal Code of Georgia. By virtue of the law of 3 of June of 2016, the relevant legal norm which regulated the retrieval and usage of the information depicting private life was amended. The new article 157^1 was introduced in the Criminal Code of Georgia which envisaged significantly higher sanctions for the offence. Namely, the article 157^1 represents the go-to weapon in the arsenal of the law-enforcement agencies for fighting against the crimes of this category.

Leaking recordings of private nature did not terminate even after this reform.[11] The prosecution investigated some of the offences with success.[12] However, at the end of January 2019, a new

3 For instance secret audio recordings spread on 24 and 29 October of 2015 of the conversation between Mikheil Saakashvili and Nika Gvaramia, also between Mikheil Saakashvili and Giga Bokeria; As well as, secret audio recordings spread on 2 November of 2015 of the conversations between Mikheil Saakashvili and Nika Gvaramia, and between Mikheil Saakashvili and singer Sopho Nizharadze. http://www.tabula.ge/en/node/101333 [retrieved on 31.3.2019].

4 Parliamentary report of the Public Defender of Georgia of 2016, 406-407.

5 For instance, the so called "case of butts" – video recording spread on 17 October of 2015, which entailed the sexual violence committed by the law enforcement bodies and which was shown publicly in Zugdidi and Tbilisi, see: https://ipress.ge/new/15597-sakhalkho-damcveli-tsamebis-kadrebis-sajaro-chveneba-mdzime-kanondarghvevaa [retrieved on 31.3.2019].

6 http://netgazeti.ge/news/105215/ [retrieved on 31.3.2019].

7 http://www.newspress.ge/sazogadoeba/84899-piradi-ckhovrebis-amsakhveli-kadrebi-isev-gavrcelda.html [retrieved on 31.3.2019].

8 http://pog.gov.ge/geo/news?info_id=1283 [retrieved on 31.3.2019].

9 http://pog.gov.ge/geo/news?info_id=885 [retrieved on 31.3.2019].

10 http://www.newspress.ge/sazogadoeba/84899-piradi-ckhovrebis-amsakhveli-kadrebi-isev-gavrcelda.html [retrieved on 31.3.2019].

11 http://netgazeti.ge/opinion/352460/; also http://pog.gov.ge/geo/news?info_id=1825 [retrieved on 31.3.2019].

12 http://pog.gov.ge/geo/news?info_id=1585 [retrieved on 31.3.2019].

secret recording of intimate nature involving one of the politicians was leaked again which resulted in arresting 17 individuals.[13] On March 27 of 2019, one more person was arrested who allegedly uploaded this recording on the social network Youtube.com.[14]

The detained individuals were charged with the crime envisaged under the article 157^1 of the Criminal Code – unlawful storing and disseminating of the private life secrets. Some of the detainees claim that they received an online link of the recording through the "Messenger" application and did not open it or did not see the content. Others claim that they shared the link to several friends.[15] No particular person is charged with the crime of manufacturing/obtaining the material as of yet.

The arrest of 18 individuals in this case serves as an illustration of the new strategy against the crimes of this category. The whole scope of the article 157^1 of the Criminal Code adopted in 2016 become clear by virtue of this case. As it stands the state intends to punish any person who obtains, stores (or even receives a link through the internet and does not delete the message) or distributes (even among "friends") any material containing a secret of private life of another person.

The previous, unused provision regulating the offences against private life, was in fact, substituted by a new, executable provision, which along with the "initial disseminator", provides an avenue for punishing any person who had a slight connection to the material of such category. Because of the wide scope of application, the constitutionality of Article 157^1 is disputed in the Constitutional Court. Therefore, it is necessary to determine, what this regulation implies in reality.

2. CONTOURS OF THE POLICY OF FIGHTING AGAINST CRIMES

According to Article 157^1 of the Criminal Code:

> "1. Unlawful obtaining, storage, use, dissemination of or otherwise making available secrets of personal life, shall be punished with imprisonment from four to seven years.
>
> 2. Unlawful use and/or dissemination of secrets of personal life through a piece of work disseminated in a certain way, through the internet, including social network, mass media or other public appearance, shall be punished with imprisonment from five to eight years."

The current norm at the same time relates to qualitatively diverse several actions, namely: (1) obtaining, (2) storage and (3) usage, dissemination or otherwise making available. There is no con-

13 http://netgazeti.ge/news/33790f2/ [retrieved on 31.3.2019].

14 https://police.ge/ge/dakavebulia-piri-romelmats-piradi-tskhovrebis-amsakhveli-videochanatseri-/12416 [retrieved on 31.3.2019].

15 http://go.on.ge/1050 [retrieved on 31.3.2019].

troversy with regard to the obtaining element of the offence; as for the second and third elements, they are a subject to public debate.

It is interesting that after introducing Article 157[1] in the Criminal Code, Article 157 still remains in the Code. It prohibits analogous actions towards the information representing private life. This became an issue for critics, as far as, according to the views of the Public Defender (Ombudsman), neither in the Code, nor in the explanatory notes there is any indication on the criteria for making a distinction among the legal goods protected under the mentioned norms. In the opinion of the Public Defender (Ombudsman), the ambiguity of the new norm gave "possibility for broad interpretation and arbitrariness", which, considering the differentiation between the sanctions, should have been precluded.[16]

In addition, the ambiguity of norms is deriving from the circumstance that the legislator did not stipulate clearly, either in the norm, or in the explanatory note, the form in which the infringement of the private life secret or invasion of personal privacy takes place. Legislations of all the states, which will be discussed below, pay significant attention to the legal goods protected by the norm (information representing private life), as well as – the definition of invasion. The current formulation of the norm simply does not contain the answer to the question, whether it is possible to commit a crime, for instance, in the form of words, animation or image multiplication.

Article 157[1] of Criminal Code has other and more crucial gaps which will be discussed below. However, it shall be noted, that by now there are two norms in the Code, similar in the content, among which the sentence of imprisonment for four years represents maximal[17] punishment for the one norm, and - minimal[18] for the other. The amount of the sentence is the additional particularity of this norm and will be discussed separately in terms of the disposition of both parts.

2.1. Unlawful storage of the private life secret

Unlawful storage of the private life secret represents a type of a "risk-based possession" offence. The feature of similar offences (such as, for instance, unlawful possession of fire gun, or plundering tools) is the fact that by virtue of the possession of an item, a person creates the threat of committing the future possible crime.[19] The core critic of the existence of such crimes is the factual disregard of the element of intention which emerges in the reversion of the presumption of innocence.

The element of intention in the composition of the crime implies the requirement that the person must have knowledge of the committed action.[20] Theoretically, if a person will be found carrying

16 Parliamentary report of the Public Defender of Georgia of 2016, 408.

17 Criminal Code of Georgia, second paragraph of the Article 157.

18 Criminal Code of Georgia, first paragraph of the Article 1571.

19 Ashworth, A. (2011). The Unfairness of Risk-Based Possession Offences, Criminal Law and Philosophy, Vol.5(3), 239.

20 Simester, A. P., & Sullivan, G. R. (2010). Criminal law: Theory and doctrine (4th ed.). Oxford: Hart Publishing, 161.

the drugs in the pocket or having fire gun at home, the prosecution will be obliged to prove that this person was keeping these items intentionally and knowingly.

In the crimes of possession this principle is not fully realized. As the possession of an item, nearly, represents a crime if inaction,[21] it is almost impossible to determine the intent of a person. The usual solution in such cases is to bring in a presumption, as for instance the doctrine of constructive possession. It decreases the role of fault in the decision-making process on the guilt of a person significantly and declares that if the unlawful item is in the possession of a person, this person is presumed to be the possessor of the item.[22] The analogue of this American doctrine is used in the United Kingdom as well, where a person will be declared innocent only if he or she clearly proves that he/she could not have known about the item in his/her possession.[23]

Therefore, in such crimes, in order to punish a person, it is only enough to prove the fact that he/she had access to the item. Such a resolution of a problem is caused by the fear that offenders may abscond justice. However, this result in undermining of the presumption of innocence as the individual has to refute the *prima facie* evidence against him/her.[24]

The presented reasoning is fully applicable to this part of the disposition of Article 157[1] of the Criminal Code. If a person has access to the secret of private life (for instance, has access to the internet-link, where the respective video is uploaded), it is considered that he had possession over this information and the burden of refuting this presumption is transferred to the defendant.

The similar structure of disposition of an offence represents the classical case of strict liability.[25] This concept is unfamiliar to Georgian theoretical literature on criminal law. By the impact of German law where the principle of correspondence has ა constitutional status,[26] it is considered that one of the elements of the fault/intention, however weak it may be,[27] shall correspond to and be linked with each element of the factual composition of the action.

By itself, the criminal law norms entailing strict liability are not unconstitutional or unfair. By virtue of such methods as the presumption of innocence and reversion of the burden of proof,[28] exclusion of one of the elements of guilt or intention with regard to one or several (sometimes all) ele-

21 Ashworth, The Unfairness of Risk-Based Possession Offences, 242-243.

22 Dubber, M. D., & Kelman, M. G. (2005). American criminal law: Cases, statutes and comments. New York: Foundation Press, 263–272.

23 In this regard, the leading decision is of the House of Lords on the case Warner v. Commissioner of Police for the Metropolis [1969] 2A.C. 256. The defendant was proclaimed guilty for unlawful storage of drugs, however he argued that he did not know what was in the closed box that he was given.

24 Ashworth, The Unfairness of Risk-Based Possession Offences, 245.

25 Fletcher, G. P. (1978). Rethinking criminal law. Boston: Little Brown., 198–199, also Robinson, P. H., & Cahill, M. T. (2006). Law without justice. New York: Oxford University Press., 28–31.

26 Spencer, John R., Pedain A., (2010). Approaches to Strict and Constructive Liability in Continental Criminal Law, In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 267-275.

27 Ibid. 237.

28 Green, Stuart P. (2010) Six Senses of Strict Liability: A Plea for Formalism. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005, 3.

ments of the crime,[29] is used not only in the common law countries,[30] but also in France and other countries of continental legal order.[31] The only exception is Germany, where similar to Georgia, this principle evolves only on the level of presumptions rooted in the jurisprudence.[32]

Moreover, it is noteworthy that the doctrine of strict liability has its own margins. Crimes without any form of guilt are remarkable with the small sentences.[33] For instance, in France fine of 3000 euros represents such limit,[34] in Canada – any crime, which foresees imprisonment,[35] and in the US and United Kingdom courts use so-called test of "constitutional innocence".[36] Most of the scholars agree that the strict liability doctrine is admissible only in case of non-stigmatic crimes which do not result in putting a label of a serious criminal on the offender.[37]

In Georgia, on the one hand there is an offence where the intention of a person has not an important significance (because it is nearly impossible to objectively prove it) and the burden of proof is transferred to the defendant; while on the other hand, there is a punishment, which envisages at least 4 years imprisonment and the court that has no specific test in place for limitations.

It is significant, that the argument of individuals arrested in 2019 under the article 157[1] was exactly the same: that they did not know what kind of video they were watching, or they did not know if it was necessary to delete the link from the Messenger application. Some of them also claimed that even while watching the video they could not perceive the aspects, which theoretically are necessary for punishing a person – for instance, they did not know who was in the video, whether the video was obtained unlawfully or not, etc.[38]

According to the discussion presented above, the strict liability doctrine would give state the possibility to punish those individuals anyway. However, this would have been admissible only in case if these individuals could not be at risk of (long term) imprisonment. [39] In the current situa-

29 Simester, A. P. (2010). Is Strict Liability Always Wrong? In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 44.

30 For instance 40% of crimes prescribed under the legislation of England and Wales have the named or other procedural mechanisms characteristic to the strict liability.

31 Spencer, Pedain, Approaches to Strict and Constructive Liability in Continental Criminal Law.

32 Ibid.

33 LaFave, W. R., and Scott A. W. (1986). Criminal Law. Second Edition, Student Edition / by Wayne R. LaFave and Austin W. Scott.. ed. Hornbook Series. St. Paul, Minn: West Publishing, 242.

34 Spencer, Pedain, Approaches to Strict and Constructive Liability in Continental Criminal Law, 256-262.

35 Michaels, Alan C. (2010). Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 224.

36 Michaels, Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience, 223.

37 See: Simester, A. P. (2010). Is Strict Liability Always Wrong?, Husak, D. (2010). Strict Liability, Justice, and Proportionality. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 10. Green, Stuart P. (2010) Six Senses of Strict Liability: A Plea for Formalism. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, Oxford University Press.

38 http://go.on.ge/1050 [retrieved on 31.3.2019].

39 According to the European Court on Human Rights , which represents binding law, the limit lies on the imprisonment. See: Ziliberberg v. Moldova, 61821/00, 2005.

tion, the state does maintain and actively use the possibility to punish citizens by the reversion of presumption of innocence.

2.2. Unlawful dissemination of the secret of private life

The first paragraph of the Article 157[1] deems guilty those who unlawfully use, spread or otherwise make secret of private life available to others. According to the second paragraph, the liability is aggravated if the dissemination was committed by means of the Internet, social network, mass broadcasting, or any other public appearance. The ground for the critics toward the norm is that it does not differentiate the "initial" and "following" disseminators of the prohibited material from each other.[40]

Where should the link between the "initial" and "following" disseminators of the material break, how it should occur and is it necessary or not at all? There is no clear answer to these questions. The approaches differ depending on the legislations of various states. Some countries, similar to Georgia, consider that sharing prohibited material with the third person is enough for criminalization. Such states are Bosnia,[41] Bulgaria,[42] Croatia,[43] Germany[44] and others.[45] The Criminal Code of Canada directly stipulates that the motive of a person during the spreading is irrelevant.[46]

Other states try to elaborate some kind of filter to decrease the number of people to be punished for dissemination. For example, the legislation of Lithuania[47] punishes dissemination only in case when this is committed with the motive of profiteering. It is frequent to require the presence of a specific intent from the person's action in the disposition, – legislations of Finland,[48] United Kingdom,[49] also in US - Virginia,[50] Pennsylvania,[51] Colorado[52] and other states, punish dissemination only when the offender intended to cause psychological harm to the victim. There are some legislations where the offender is punished only when the factual damage was caused.[53] In Czech

40 https://www.facebook.com/GirchiParty/videos/vl.1039638722908022/457746581629945/ [retrieved on 31.3.2019].

41 Criminal Code of Bosnia, article 175.

42 Criminal Code of Bulgaria, article 171.

43 Criminal Code of Croatia, article 144.

44 Criminal Code of Germany, article 201a.

45 For instance, New Jersey Code 2C:14-9.

46 Criminal Code of Canada, article 162.

47 Criminal Code of Lithuania, article 168.

48 Criminal Code of Finland, section eight.

49 The Act of Criminal Justice of 2015, section 33.

50 Virginia Code 18.2-386.2.

51 Pennsylvania Consolidated Statutes Title 18 3131.

52 Colorado Revised Statutes 18-7-107.

53 For example, Legislation of the US state Utah, see: Utah Code 76-5b-203.

Republic and Estonia the requirements of a special intent and factual damage exist as aggravating circumstances.[54]

Therefore, the determination of the circle of persons who will be punished for disseminating the prohibited material, purely depends on the priorities and opinions of the state. The states decide on their own to what extent they want to criminalize the chain of dissemination. However, it is obvious that if deemed necessary, it is possible to differentiate among the initial spreader of the material and other individuals.

As an example, if Georgia had had the same disposition as the United Kingdom, then the people arrested in 2019 would have avoided the liability. Despite forwarding the material received via the Internet to others, they would not have been punished, unless as it had been determined that their aim was to cause psychological harm to the person in the video. Contrary to this, the explanatory note of the article 157[1] stipulates that there is no need to indicate the damage as "the invasion already causes significant damage."[55]

Hence, prosecuting dissemination in all forms as well as rejecting any kind of filtration in the disposition by imposing requirements for the special purpose, motive or factual damage, represents an evident will of the State. Arresting the mentioned individuals in 2019 is nothing more than a practical execution of the legislative amendments adopted in 2016.

2.3. Punishment for the invasion of personal privacy

The main purpose of the reform implemented in 2016 was toughening the sentence.[56] After imposing the new norm, article 157[1] currently envisages minimal term for imprisonment for 4 years; the punishment for disseminating the material via the Internet is imprisonment from 5 to 8 years, and if other aggravating circumstances are present this term may increase up to 10 years.

Such severe sentences cannot be found in any of the abovementioned legislations. Majority of European countries imposes a fine, or minimum term of imprisonment for such offences. One year of imprisonment is the highest sentence in the legislations of Bosnia, Croatia, Czech Republic, Estonia, Germany and Serbia. The sentence does not exceed 2 years in Finland and the United Kingdom, and 3 years of imprisonment in Lithuania and Bulgaria. In the US, this crime does not exist as a federal crime while the sentences established in 38 states and Washington, D. C. more or less fall in the mentioned limits. Among the countries discussed above, the most severe sentence is prescribed by Canada where the maximal term of imprisonment is 5 years.

54 For example, Criminal Code of Czech Republic, article 183, Criminal Code of Estonia, article 157.

55 Explanatory note to the Draft Law of Georgia "on amendments to the Criminal Code" from June 3, 2016.

56 Ibid.

It is obvious that the criminal law policy chosen by other states is not mandatory. In the Georgian context, this crime, beside its frequent repetition, brings exceptional psychological harm to the victim. However, it shall be noted that dissemination of non-consensual pornography, i.e. revenge porn, occurs often in other countries too. For instance, a comprehensive research held in 2017 in the US ascertained that every eighth user of social media represented a victim of this crime.[57]

Toughening of sentences had some side effects as well. As the invasion of personal privacy became a serious crime, failure to report it represents a separate offence and is punished by imprisonment from 2 to 6 years.[58] This means that the criminal liability may be imposed on those individuals who did not save the link spread via the Internet, did not forward it and deleted it, but did not inform the police about receiving the link.

3. FIGHT AGAINST CRIME IN PRACTICE

The previous subchapters create a clear image of policy on fighting against the dissemination of material involving personal privacy. By means of legislative reform, which was also implemented in practice, the State empowered itself with absolute means to fight against the crime. Article 157[1] of Criminal Code is formulated in a way that not even one potential criminal could nip off from the dredge of law enforcement agencies. This is evidenced by the following:

- The legal goods protected by the norm is formulated ambiguously in the disposition and not mentioned at all in the explanatory note which creates a possibility to hold a person liable for not only disseminating the material itself, but also for disseminating it in animated, cartooned or other form;
- Unlawful storage of the secret of private life is a crime of possession, which puts the burden of proof on the defendant. In comparison to other legislations, these sentences are not small and there is no special judicial test for limiting the boundaries of strict liability doctrine;
- The disposition of the offence of unlawful dissemination of a secret of private life prescribes the most all-encompassing circle of punishable persons. The legislator refused to differentiate among the "initial" disseminators, the persons acting in mal intention, the other individuals on the basis of special intention and refused to require indication of damage, or any other limit;

57 Eaton, Jacobs, Ruvalcaba, (2017) Nationwide Online Study of Nonconsensual Porn Victimization And Perpetration, A Summary Report, available at: https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf [retrieved on 31.3.2019].

58 Criminal Code of Georgia, article 276, paragraph 2.

- Sentences foreseen for the invasion of personal privacy are significantly high in comparison to other states. Besides, the harshness of prescribed sentences results in criminalizing failure to report a crime, which widens the all-encompassing circle of possible offenders even further.

Together these circumstances create a possibility to strictly punish any person, who had any, in certain cases – even unintentional relation with the spread material, Harshly punishing as many individuals as possible by the most comprehensive, wide and unpredictable norms – this is the criminal law strategy for with regard to the combatting the invasion of personal privacy nowadays.

It is obvious that this strategy is not by itself unconstitutional or unlawful. Depending on the content and graveness of the crime, it is up to the state to decide by which methods it will prevent the crime. As the law has a wide scope of application and readiness of law enforcement bodies for the implementation, it should normally result in possible offenders abstaining to commit a crime. Generally, people should refrain from committing an action for which the punishment is practically inevitable. In addition, unforeseeability and ambiguity of the norm create an additional stinging effect for dissuading a potential criminal.

Based on the frequency and permanency of leaking the video and audio recordings, it is possible to assuredly claim that this approach simply does not work and the result of a practical application of the norm is quite different. Events that took place on 26 of March of 2019 serve as a shred of clear evidence to this.

On 26 of March, at 23:00, by the public statement of one of the politicians, it became clear that recordings of private life, which were spread at the end of January 2019, were uploaded to the Youtube.com and were accessible to everyone.[59] The video was not deleted until the morning of 27 of March. Therefore, in the night of 26 of March, for several hours it was possible to observe the reactions of the society and state with regard to this crime.

The only measure taken by the state was the announcement made by the MIA, which was broadcasted at 00:57. According to the announcement, "the MIA was properly reacting" to the spreading of the video material, however what was implied under the reaction, or what was the particular plan for limiting the access to the video, was not elaborated further.[60]

Owing to the inaction of the law enforcement bodies, the number of viewers of video increased rapidly. Whereas at 00:15 the number of viewers was about 4600, at 01:15 the numbers increased up to 5024. At 02:15 the video was seen by 5786 viewers, at 03:15 – 7980 viewers, and at 04:15 – 9076 viewers. For 05:00 the number exceeded ten thousand viewers.

Users of the social networks emphasized the simplicity of the accessibility of video. For accessing the video, they just recommended to each other to search the name of the politician on You-

59 https://www.facebook.com/watch/?v=344590756171287 [retrieved on 31.3.2019].

60 https://www.interpressnews.ge/ka/article/538979-shss-saministro-socialur-kselshi-piradi-cxovrebis-amsaxveli-kadrebis-gavrcelebastan-dakavshirebit-reagirebas-axdens [retrieved on 31.3.2019].

tube.com Indeed, it was possible to find the video by such a simple search. Users were aware that their action could have been prohibited. They did not know exactly which action was prohibited in particular, but they realized that signs of a crime could have been found in their action. Instead of facilitating the prevention of spreading this video, the response of addresses of the norm was two sided:

Firstly, users elaborated the mechanism of learning, which was the direct outcome of the State's punitive measures. Instead of sending the link of video directly, they taught others how to find the video, and this way they tried to minimize the limits of personal responsibility. Therefore, we can simply assume that additional punishing measures, overall, may be unproductive. The society may only learn out of this, that they shall not repeat the same actions for which other individuals were charged and share information in other manner to avoid the punishment.

In addition, the possibility of a harsh punishment had no preventive use. On the contrary, it promoted deviant behavior and became a kind of a solidarity action. Users encouraged each other with different phrases, which reinforced the legitimacy of their actions and incited repetition of such behavior. The reason behind this might lie in an ambiguous formulation of the legal norm, which punishes everybody, but at the same time it cannot act as a preventive tool towards anybody.

Finally, the existing strategy on combatting the invasion of personal privacy is not only ineffective, but also counterproductive. Increase of the sentence and its application against a particular group does not entail a general preventive function. On the contrary, the doubts existing in regard to the legitimacy of the harsh sentences boosted the increase of the feeling of solidarity towards defendants, attraction towards "forbidden fruit" and repetition of the crime.

The only evident outcome of the reform of 2016 was the arrest of particular individuals, which was an action of reactive nature and did not relate to the reduction of damage. Only reactive, punitive measures do not fulfill the obligation to protect the private life. Fighting against this crime requires a substantively different approach.

4. A NEW STRATEGY FOR FIGHTING AGAINST THE CRIME

As we have discussed, the existing legislation allows unlimited authority to the police to fight against the crime, but practical results cardinally differ from the expectations. One of the reasons for that is the criminological axiom – the police cannot be effective, if people consider that it uses its

authority illegitimately and unjustifiably.[61] Democratic police cannot be effective and cannot resolve crises in such a manner, which exceeds the ideas, expectations and the moral framework of the society.[62] In a State with liberal values strong-armed police will not yield positive results, if it does not derive legitimacy from societal consensus.

Moreover, prevention of crime does not represent the exclusive obligation or capability of the police anymore. in order to effectively combat crime the police are obliged to have close cooperation with international organizations, the private sector, citizens and diverse social groups.[63] Relationship of the society towards police is determined by political, social, cultural, demographic and other factors,[64] but law enforcers have resources to make their actions more legitimate and come closer to people.[65]

As counterintuitive it may be, the trust of the society is less related to the decrease in criminal offending statistics. Even more so, the decrease of offending does not automatically translate into the reduction of fear and increase of the trust towards the police.[66] The trust in police historically,[67] as well as in the modern context,[68] was always based on reaching societal consent. Crucial components of the societal consent and legitimacy are use of minimal force, legality, impartiality and uniformity.[69]

It is necessary for the Georgian law enforcement bodies to consider these components. In the current context, mistrust towards police represents a grave problem. So-called signaling crimes are precipitated in the memory of society, which create a cumulative image of the police. Georgian police have stepped over the principle of application of minimal force,[70] legality[71] and other principles necessary for the legitimacy in various rumored cases. In particular, the so-called "practice of planting evidence", which caused the loss of trust towards police in certain segments of society is noteworthy. There are questions regarding the uniformity of applying the law in this case as well. Among individuals arrested at the end of January 2019, some were political activists.[72]

61 Smith, D. J. New challenges to Police Legitimacy, in Smith D. J. and Henry A. (eds), (2007) Transformations of policing, Aldershot: Ashgate Publishing Ltd., 273-305. ასევე: Reiner, R. (2000), The Politics of the Police, 3rd edn, Oxford: Oxford University Press. See Sanders, A. and Young, R. (2003), Police powers, in T. Newburn (ed.), Handbook of Policing, Cullompton: Willan, pp. 228-58.

62 Smith, D. J. (1983), Police and People in London, vol. I: A Survey of Londoners, London: Policy Studies Institute, No. 618. 10-13.

63 Dixon, D. (2005). Why Don't The Police Stop Crime? Australian And New Zealand Journal Of Criminology, Apr, Vol.38(1), pp.4-24, 5-6.

64 Zedner, L. (2006), 'Policing before and after the police: the historical antecedents of contemporary crime control', British Journal of Criminology, 46(1), 78-96.

65 Reiner, R. The Politics of the Police 51-59.

66 Dixon, Why Don't The Police Stop Crime? 5-6.

67 Loader, I. and Mulachy, A. (2003), Policing and the Condition of England. Oxford UP. Chapter 1 – 'Losing faith? The desacralization of English policing since 1945'.

68 Zedner, L. (2006), Policing before and after the police: the historical antecedents of contemporary crime control, British Journal of Criminology, 46(1), 78-96.

69 Emsley, C. (2008), 'The birth and development of the police', in Newburn, T. Handbook of Policing. Willan.

70 For instance, case of Zviad Ratiani.

71 For instance, case of "Birzha Mafia".

72 http://www.tabula.ge/ge/story/143717-eka-beselias-piradi-kadrebis-youtube-ze-atvirtvis-gamo-erti-piri-daakaves [retrieved on 31.3.2019].

Therefore, law enforcement bodies stand before a dilemma. If they roughly continue to apply article 157[1] of the Criminal Code, they will lose support and legitimation from the society even more. Similarly, the overwhelming and absolute nature of the norm causes a decrease of its own preventive force – as much as the State will use the repressive power, it will be considered as selective and unfair to the greater extent.

On the other hand, if the repressive measures are not taken, the article 157[1] will lose its existing minuscule preventive force. In fact, this would be a sign of capitulation in the fight against crime, which would harm the right to private life additionally. Both ways are fated to failure. This is the showcase, which has no real outcome. This is a road to nowhere.

Additionally, it would not have been reasonable to assume that the crime of the invasion of personal privacy would decrease in number. Considering the speed of technological progress, the opposite is more likely. It is not necessary to overcome physical barriers to obtain material describing a person's intimate space. Sending viruses to smartphones or laptops is easier and more manageable than entering somebody's flat. Moreover, in the digital world individuals give out such material by themselves and in case they delete the material, it still remains at other person's server, or just on the server of a webpage.

Consequently, it is crucial to come up with a substantively new policy, which mainly will be focused on zemiological perspective. The change of the approach shall be expressed by accentuating decrease of the damage and introducing reassurance policies. Police must be not a frightening outsider with the cudgel, who may arrest citizen anytime (including by virtue of "planting evidence"), but the body coordinating the fight against crime, that will struggle alongside with the civil society and diverse professional (including technical) groups against the problem.

The main task of the police while fighting with the crime of such category must not be detention of a maximal number of individuals, as it creates the problem of selectiveness. On the opposite, the State must maximally refuse the 'low-hanging fruit' of punishing individuals that bring less social harm in order to increase the legitimacy for using power. Besides, it is necessary to take effective steps for reducing damage. On 26 of March, accessibility of particular material for 6 hours indicates to the unjustified inactivity of the State.

Despite the rich history of spreading the material describing private life, the mechanism for fast blocking of the accessibility to the content still does not exist. In order to interrupt the spreading of undesirable content, in the past the State Security Service had blocked accessibility to the social network entirely.[73] In all of these cases there was no legislative framework in place based on which the Service acted. These actions, besides having unclear legislative character, were also ineffective as the interested user was easily visiting mentioned portals through the VPNs.

Hence, we may outline several key recommendations, which are crucial to combat the pandemic of spreading the secret of private life:

73 https://www.mediachecker.ge/ka/analizi/article/47302-2018-02-28-18-17-36; also http://go.on.ge/1ow [retrieved on 31.3.2019].

- The State shall take responsibility for the caused harm. Dissemination of protected material must not result in detention of simple, "secondary" suspects. Instead of transferring the responsibility to citizens,[74] law enforcement agencies shall assume their own responsibility that these materials are accessible to everyone for hours;

- Taking responsibility shall be expressed in the establishment of the mechanisms for reducing harm. Legislation must prescribe the mechanism for blocking such materials, that will result in determining technical activities for prompt reaction by means of close cooperation with social networks and different groups;

- For the prevention it is also necessary to conduct a wide awareness raising campaign and actively cooperate with vulnerable groups. Victims of such crimes mostly are socially and politically active women, and it will be very important to help them;

- On the legislative level it is necessary to make cardinal changes to the article 157^1 of the Criminal Code, in order to narrow the scope of application. It will be naïve to expect cooperation from citizens, if they feel that every moment they may become next victims of the norm and be threatened with at least 4 years of imprisonment;

- Amendments to the article 157^1 must relate to the reduction of liability limits for storage of the object of crime and for its dissemination. As a result of introducing a requirement for a specific intent, motive, or other filters of harm, the focus of the State shall transfer to the initial obtainer and publisher of the forbidden material. It is necessary because if the scope of the norm is narrowed, law enforcement bodies will be tempted to avoid responsibility by arresting ordinary citizens;

- Narrowing the article 157^1 shall not mean abating the fight against this crime. Even though the envisaged sanction is quite high, this can be justified with the context of the country and its harsh experience. Change of the disposition and introducing filtering, also transmitting the focus from ordinary citizens towards the main culprits will halt the protest from society and the gravity of sentence will be justified.

Only in this way it is possible to retain the balance between the fight against crime and alienation of the society with police. Law enforcement bodies shall not forget that fighting for legitimacy in the mentality of society is not less important than combatting the crime.

74 http://netgazeti.ge/news/351786/ [retrieved on 31.3.2019].

CONCLUSION

In the present article there were discussed the forms of combatting a widely spread crime of invasion of personal privacy. The State now has a carte blanche and in fact, may punish any person who has had a slight, even accidental relation to the secret recordings. By introducing various positive obligations, the punishment of a person has been made possible despite his/her intention, the harm caused and other factors.

The State has mobilized police resources and wants to suppress the crime. However, it fails, because the ambiguous, all-encompassing nature of the norm and repressive actions of the State are perceived as selective and unfair. Fight against crime proceeds unsuccessfully, which is a result of the non-existence of the preventive mechanism, but also of an erroneous systemic approach.

Reoffending must be a sign for the state to change the systemic reaction. If police continue to use power roughly, without legitimation from society, it will be doomed for failure from the beginning. It is less probable that a number of such crimes will decrease and even in case it happens, without active policy from the State it will not increase the trust in police automatically, or vanish the fear related to this crime, as the signaling crimes remain in the collective memory for a long period.

Instead of this, the State must change the strategy for combatting the invasion of personal privacy. Instead of a high number of repressive actions, a lot of defendants and decrease in the statistics, the aim of the State must be to control the extent of harm and handling society's reaction. This will give the State possibility not to be seen as an aggressive oppressor, but rather as an ally combatting the crime together with the people.

Particular recommendations represented in the final part of the article will assist the State in limiting its powers and taking responsibility. By virtue of narrowing the scope of application of the norm, unrealistic expectations will become controllable. These changes are necessary not because the current legislation is unconstitutional, unlawful or unprecedented (however we may argue about this issues as well), but because the existing strategy does not lead to effective prevention and is a clear example of how the State transfers responsibility to citizens in order to cover failure to fulfill its obligations.

Goga Khatiashvili

HOW THE LEGISLATION AND PRACTICE ON REQUESTING INFORMATION FROM THE COMPUTER SYSTEM HAS DEVELOPED

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ABSTRACT

Requesting information from the computer system was a subject to discussion for a long period. Initially, only the prosecution side had the exclusive competence to conduct this investigative activity, which was viewed as breach of the principles of adversarial process and equality. Along with the legislation, inconsistent judicial practice created even more obstacles for the defense to obtain information from computer system (video recordings, information store in computer and mobile equipment, etc.). The mentioned challenges were partially addressed by the Constitutional Court in its decision of 27 January of 2017, however, number of legislative and practical gaps still remain, which creates difficulties for the parties in the process to obtain such evidence.

The article tries to discuss the legislation and practical approaches regarding retrieving information from computer system. For this reason, in the article there will be presented the analysis of the legislation and practice existing before the judgement of the Constitutional Court, as well as interpretations established after that judgement. Therefore, readers will have possibility to follow the tendency, which undergoes significant changes in recent couple of years and see clearly the role of the decision of Constitutional Court in enhancement of the circle of subjects who have title to conduct this investigative activity.

INTRODUCTION

In the criminal legal proceedings, it becomes more important to retrieve evidence from such channels, which exist in electronic form. Public institutions as well as private organizations/individuals widely use digital technologies, which afterwards become subject of interest for investigation. Electronic communication is important not only for establishing personal relationships, but also in terms of business communications. On the one hand, it is possible that the computer is a tool for committing crime, but on the other hand, computer system/electronic equipment stores evidence incriminating the conduct of crime. In the latter case, it is important that parties have equal and proper possibility to retrieve the data stored in computer system and present it before a court as an evidence.

The current article aims to evaluate legislation and subsequent practice on requesting information from computer data, which in recent years undergoes significant changes. For this purpose, analyses of relevant case-law of common courts will be presented considering the practice existing before the judgement of the Constitutional Court, as well as in light of tendencies developed after this judgement. Despite certain positive and well-grounded court decisions, there is still a problem not only in terms of unequal possibilities for retrieving this information, but also difficulties related to obtaining of such evidence.

1. ANALYSIS OF THE LEGISLATION

Because of the wide usage of scientific-technical progress and computer technologies in the criminal legal proceedings, the necessity emerged to regulate the rules for treating the data stored in computer system. For this purpose, from September 30, 2010, requesting documents or information, which is stored in the computer system or mean for storing the computer data appeared in the Criminal Proceedings as a separate investigative activity and the entitlement to implement this activity was given only to the prosecution. Also, legislation defined the computer system, computer data and respective definitions were introduced to the Code of Criminal Proceedings (hereinafter: CPC) in paragraphs 27 and 28 of Article 3. According to these definitions, computer system is any mechanism or group of inter-related mechanisms, which automatically process the data through the program. This mechanism may be personal computer, mobile phone and any other tool. As for the computer data, the law defines it as information/program expressed in any form accessible for processing in the computer system, and it ensures functioning of the computer system.

Procedures for carrying out this investigative activity were amended in August 2014 and requesting documents or information became possible only with the same rules and standard applicable to the secret investigative activities. Carrying out secret investigative activity is impossible on every category of crime. In particular, the secret investigative activity may be conducted only in case the investigation is initiated and/or prosecution is carried out for intentional serious and/or particularly serious crime. Moreover, on some of the less serious crimes, the comprehensive list of which is presented in the paragraph 2 subparagraph "a" of the Article 143[3] of CPC. This limitation is spread to the requesting information from the computer system. Therefore, for the prosecution side several restrictions were introduced, which entailed obliging investigative bodies to lead the secret investigative activities with respective standard. Hence, requesting information from computer data represents a special case of seizure, which exists as independent investigative activity[1] and is carried out according to the rules characteristic to secret investigative activities.

Initially, the possibility to carry out such investigative activities was given only to prosecution and the law did not let the defense to retrieve information stored in the computer system. Therefore, as it is defined in literature, if the defense side had the information that important data for the ongoing case was stored in the computer system, it should have filed a motion for the prosecutor, who on his/her own would address the judge with the motion on the request of this information.[2] Hence, the defense could obtain information stored in the computer system or computer data storing tool only through the prosecutor.

The fact that the defense had no right to obtain information stored in the computer system was assessed negatively by several lawyers and scholars. Such unequal approach with regard to the parties to the process was considered unjustified and substantial infringement of the principle of adversarial process.[3]

2. INTERPRETATIONS AND TENDENCIES ESTABLISHED IN THE COURT

In a well-established case-law of common courts, obtaining information from the computer data was interpreted widely. The majority of judges considers that any information stored in the

1 Commentaries to the Criminal Procedure Code of Georgia, edited by G. Giorgadze, of 1 October 2015, printing house "Meridiani", Tbilisi, 2015, 422.

2 Commentaries to the Criminal Procedure Code of Georgia, edited by G. Giorgadze, of 1 October 2015, printing house "Meridiani", Tbilisi, 2015, 423.

3 Democratic Initiative of Georgia, Report on the implementation of the I and II chapters of the Action plan, 13-14, http://bit.ly/2zLNmvH [20.03.2019]; Also see: Evidence in the criminal law process, Tbilisi, 2016, 153-154, http://bit.ly/2zCw7Q4 [20.03.2019]; Also see: Obtaining evidence by the defense side through the court, research and recommendations, Association of Law firms of Georgia, Tbilisi, 2015, 33,35.

computer system represents an object protected under the Article 136 of the CPC. Therefore, it was defined that Article 136 of the CPC is a special (exceptional) norm, which regulates the method of obtaining information stored in the computer system or tool for storage of computer data, and for that, instead of "seizure", "request" shall be carried out by relevant law enforcement agencies.[4] The different reasoning is presented by the judge of the Tbilisi Appellate Court in the ruling of 2015. In the opinion of the judge, Articles 136-138 of CPC stipulate procedural rules for investigating such crimes that may be committed by using computer system and not any information, which may be stored in the computer system/tool. Hence, according to the judge, mentioned provisions are only related to investigation of crimes committed through computer system, where the computer system was used. However, mentioned ruling had not a nature of tendency and neither had respective application in the practice.[5]

The Courts impose strict and high standards on requesting of information from computer system due to protect privacy and personal data.[6] In the view of the judges of investigative collegium of the Tbilisi Appellate Court, when there is an occasion of requesting information stored in the computer system by the investigating body, this activity shall be carried out in a manner as secret investigative activity and not ordinary investigative activity. Moreover, the court established that voluntariness does not cover the secret investigative activities, as far as this activity would lose the criminal law meaning that is needed for retrieving information in secret regime.[7] Consequently, courts put emphasis on the nature of evidence and indicate that in the information stored in the computer system shall be obtained by the investigation in any case based on the Articles 136 and 143^{2}-143^{10} of the CPC.

However, at the same time, the judges indicate that in cases when investigation is initiated for the fact of less serious crime, investigative bodies shall obtain information on the basis of Articles 125-126 of the CPC and conduct inspection. Hence, the court considers that if the category of crime does not let defense to obtain information from computer system, then the inspection shall be carried out and in such a way, the information necessary for the case shall be obtained. In addition, the court interprets that this procedure must not become similar to the request of information.[8] On one of the cases, the Appellate Court rejected the motion of prosecutor with the motive that the procedural requirement were not sustained during the obtaining of video recordings. In particular, the ground for transmitting video recording on the CD by the private individual to the investigation was the application of the investigator and not a court ruling (or ordinance of the prosecutor in urgent necessity). The Appellate Court defined that it is inadmissible to request the information prescribed under the Article 136 of the CPC based on the application for the side of investigator.[9]

4 Ruling of the Tbilisi Appellate Court, N1g/960-17, 19 July, 2017.

5 Obtaining evidence by the defense side through the court, research and recommendations, Association of Law firms of Georgia, Tbilisi, 2015, 25-27.

6 Ruling of the Tbilisi Appellate Court, N1g/1537-16, 4 October 2016.

7 Rulings of the Tbilisi Appellate Court: №1g/118, 5 February 2015; №1g/119, 7 February 2015; №1g/548, 30 March 2016.

8 Ruling of the Tbilisi Appellate Court, N1g/1537-16, 4 October 2016.

9 Ruling of the Tbilisi Appellate Court, N1g/337-17, 9 March 2017.

Therefore, according to the practice established in common courts, for receiving information stored in computer system the court required from the prosecution to follow certain criteria:

- Prosecutor must ask for the request of information from computer data and not "seizure";
- Prosecutor shall obey the regime defined for the secret investigative activities, and also consider the category of the crime;
- In the motion, prosecution must indicate as a legal basis the respective norms: Articles 136, 143^{2}-143^{10} of the CPC.

Hence, the judge calls upon the prosecution to pay attention to the type of information and procedural rules for its obtaining when initiating a motion.[10]

As for the motion of the defense, the court explained that according to the legislation defense did not have possibility to file a motion on the request of information from computer system, as far as the law gave such competence only to prosecutor.[11] Thereby, in case if the defense asked for seizure of the information stored in the computer system, as a rule, such motion was not admissible and the judge indicated that obtaining information from the tools storing the computer data must be carried out through requesting. In addition, judges defined that the author of the motion for such an investigative activity (requesting) may not be the defense.[12] Though, courts gave right to the defense to conduct inspection if the motion was properly justified.[13] Consequently, in most cases, the defense had access to the information store in the computer system, only by means of inspection. In light of the established restriction on one hand, and wide definition of computer system in practice on other hand, defense had possibility to receive information in material form (for instance recording on CD) and in certain cases only exercise the right for inspection.

It should be noted that although video recordings are considered as data stored in computer system, there were exceptions when the court did not consider the video recordings filmed by the badge video eye of patrol police and vehicle video registrar as information stored in computer system. Therefore, the court entitled the defense to conduct seizure.[14]

10 Ruling of the Tbilisi Appellate Court, N1g/1497, 20 September 2016.

11 Ruling of the Tbilisi Appellate Court, N1g/1430, 6 September 2016.

12 Obtaining evidence by the defense side through the court, research and recommendations, Association of Law firms of Georgia, Tbilisi, 2015, 23.

13 Obtaining evidence by the defense side through the court, research and recommendations, Association of Law firms of Georgia, Tbilisi, 2015, 21-24.

14 Obtaining evidence by the defense side through the court, research and recommendations, Association of Law firms of Georgia, Tbilisi, 2015, 23-24.

2.1. Inspection of the information stored in the computer system

According to the Article 125 of the CPC, for the purpose of finding out trace of crime, discovering physical evidence, finding out other conditions relevant for the criminal law case, a party has right to inspect the place of incident, storage, dwelling place, storeroom, human corpse, item, document or other object containing information. Inspection may be conducted by using three different regimes: by prior permission from the court, in the circumstance of urgent necessity or on the basis of a written consent of owner (possessor).

The Courts had made an interesting interpretations with regard to the obtaining of information relevant for the case during the inspection. In particular, during the inspection, a person conducting this investigative activity has the right to seize the item, document, substance or any other object containing information after the inspection. However, such reservation does not relate to cases, which are connected to computer system or inspecting tool for storing computer data. Hence, when a judge issues permission for inspection, automatically this permission spreads over the seizure, taking place during inspection, but investigative collegium explains that similar permission may not be spread on the seizure of information existing in the form of computer data. Judges call upon prosecution that in case the scheduled inspection may in perspective involve necessity to obtain computer data the prosecutor must file a motion with the court on inspection, as well as on requesting the information.[15]

Also, the Courts made interesting interpretations with regard to the inspection of the information obtained unlawfully. In the case concerned, the witness introduced to the investigation the video recording voluntarily. The prosecutor addressed the court with the motion on requesting permission to inspect the information "given voluntarily". A Judge from the investigative collegium stated that the information for inspection of which the prosecutor requested permission was not obtained in accordance of procedural provisions. Therefore, Investigation obtained this information from the voluntary introduction from the witness and attached to the case with the inspection report, however the court indicates, that voluntary introduction of the DVD disk was not a lawful way for its obtaining and it was necessary from the side of investigation to follow the rules established for the request of information from computer data. Hence, the judge makes a conclusion that issuing permission by the court for inspecting such information which is obtained by significant infringement of law, opposes to the principle of legality and the court is not entitled to approve the query for issuing a ruling for inspection of those evidence that were obtained through the significant breach of the law.[16]

15 Ruling of the Tbilisi Appellate Court, N1g/1497, 20 September 2016.

16 Ruling of the Tbilisi Appellate Court, N1g/109, 25 January 2017.

2.2. Voluntary transmission of information stored in the computer system

In practice, the issue of voluntarily transmit of the information stored in the computer system to the investigative bodies was out high on the agenda. As the courts define, in comparison to the Criminal Procedure Code from 1961, voluntary introduction as an investigative or procedural activity does not exist. Therefore, existing legislation does not recognize the investigative activity titled as "voluntary introduction". The judge points out that if the transfer of the object containing information is carried out voluntarily, an investigator must file a report on particular investigative activity or considering specifics of the investigative activity – must be out under the court control.[17] In the court ruling of 16 February 2017 N1/552-17 it is stated – instead of obtaining the court ruling for requesting information stored in the mobile phone, the defense directly applied to the owner and obtained the recording in a way which infringes requirements of the Article 136 of the CPC. The rules envisaged for the secret investigative activity factually excludes possibility to conduct investigative activity in conditions of one-sided communication, because of what in all cases, deriving from the question specifics, the high standard and possibility of judicial control shall be preserved.

3. ANALYSIS OF THE DECISION OF CONSTITUTIONAL COURT FROM 27 JANUARY 2017

The Constitutional Court has deliberated on the constitutionality of the Article 136 of the CPC, and assessed the constitutionality of the impugned provision with regard to the paragraph 3 of the Article 40 and paragraph 1 and 3 of the Article 42 of the Constitution.

According to the definition of the Constitutional Court, impugned provision does not directly point to the restriction on filing motion by the defense, however, as the special subjects for filing such motion are comprehensively defined in the law, the will of the legislator in relation to granting such authority only to the prosecution.[18] In addition, the court concludes that such regulation creates procedural reality where the defense does not have possibility to confront with the prosecution, present justified counterarguments and justifiable evidence on the prosecutions side. Hereby, the judges consider that obtaining computer evidence by the defense entirely is related to the "good will" of the prosecution.[19] It is unclear for the court what is the legitimate aim of restricting the possibility of the defense to file a motion before the court and obtain the justifiable evidence,

17 Ruling of the Tbilisi Appellate Court, N1g/109, 25 January 2017.

18 Decision of the Constitutional Code of Georgia "Citizens of Georgia Natia Khurtsidze and Dimitri Lomidze v. Parliament of Georgia", 27 January 2017, N1/1/650,699,12.

19 Decision of the Constitutional Code of Georgia "Citizens of Georgia Natia Khurtsidze and Dimitri Lomidze v. Parliament of Georgia", 27 January 2017, N1/1/650, 699, 20.

when the legislation give the defense right to search and seize, which in certain cases may create threat to interfere in the private life and personal sphere of third persons with higher intensity.[20]

Therefore, the court assesses as unconstitutional the normative content of the regulation which restricts the right of defense to obtain, independently from the prosecutor, information stored in the computer system.

4. HOW THE JUDICIAL PRACTICE DEVELOPED AFTER THE JUDGEMENT OF THE CONSTITUTIONAL COURT?

After the decision of the Constitutional Court, the common courts started to examine requests on obtaining the computer data for the defense, although, subsequent practice developed extraordinarily. Initially, it is important to emphasize the practice of interpreting constitutional court decisions by the judges of common courts. Mainly, the approaches of judges are homogenous, however there are exceptions too, which were not implemented or used widely in practice. Mostly, the approach of judges is based on proper analysis of the constitutional court decision and they indicate that constitutional court have discussed only in the context of subjects[21] entitled to file a motion at court with regard to conduct of investigative activity - requesting information and the Constitutional Court did not declare unconstitutional the first and third paragraphs entirely of the Article 136 of the CPC. According to the definition of the court, only the normative content of the impugned provision was considered as unconstitutional, and other normative contents, including introducing restrictions for prosecutor still remained constitutional.[22] Besides, extremely controversial interpretations of the constitutional court were stated. In one of the rulings of the Tbilisi City Court which was reflected in later ruling of the appellate court, it is indicated that the defense is entitled to file a motion on requesting to conduct investigative activities envisaged in the Article 136 of the CPC, however at the same time, the court explains, that, as far as for the request of information is covered by the secret investigative activity procedures, the defense does not have the right to request such information.[23] Hence, the court has admitted the right of the defense to obtain the information stored in computer data, but, in fact, refused the realization of this right.

20 Decision of the Constitutional Code of Georgia "Citizens of Georgia Natia Khurtsidze and Dimitri Lomidze v. Parliament of Georgia", 27 January 2017, N1/1/650, 699, 22.

21 Ruling of the Tbilisi Appellate Court, N1g/263-17, 22 February, 2017.

22 Ruling of the Kutaisi Appellate Court, N1g/289, 16 June, 2017.

23 Ruling of the Tbilisi Appellate Court, N1g/334-17, 7 March, 2017.

The investigative collegium of Appellate Court did not agree with this reasoning of the first instance court and approved the claim of the defense on the granting permission for conducting request. There is one more interesting ruling which also was not the basis for changing primarily established tendency in the courts. By virtue of this decision, the judge from the investigative collegium of the appellate court explained that declaring unconstitutional certain normative content of the norm is equivalent of declaring the norm itself as unconstitutional, therefore, in the view of the judge, paragraphs 1 and 4 of the Article 136 of the CPC were declared unconstitutional and void entirely. Moreover, the investigative collegium states that by virtue of the judgement of the Constitutional Court this investigative activity returned to its own margin as far as the existing procedure for requesting information and documents never represented the secret investigative activity, hence it was not correct to spread the application of the regulations on secret investigative actions on this investigative action.

> "It is true that request of information and documents may restrict the private property, possession or inviolability of personal privacy, but not in such extent and standard, as it is during the secret investigative activities."

In light of the given reasoning, the judges established that requesting information stored in the computer system by its nature represents ordinary investigative activity and not the secret one. Therefore, while requesting such information, parties must not follow the reservation in paragraph 4 of the Article 136 of the CPC (as far as it does not exist anymore, it is void and unconstitutional) and norms of secret investigative activities.[24] Despite this exceptional approach, according to the mainstream opinion, the prosecution is still not entitled to retrieve the information stored in the computer system by omitting rule defined for the secret investigative activity.[25] In particular, for the crimes of less serious nature (not including exceptions) the prosecution was not and is not entitled to conduct secret investigative activity, including requesting information stored in the computer system.[26]

Therefore, after the judgement of the Constitutional Court, the prosecution still is guided by the same rules and the court still requires the prosecutor to fulfill the same criteria, as it was before the judgement. In this regard, approaches of the legislation and practice toward the prosecution, have not been significantly changed. In certain occasions, the restrictions toward prosecution to retrieve the information on all categories of crime are considered unjustified by the judges but they assess it as a gap of the legislation. In particular, in view of the judge, there shall be no obstacles for the investigation in retrieving evidence due to the gap in legislation, however, at the same time judge considers that the court is obliged to follow the requirements of the law. Therefore, as assessed by the judge, evaluating the adequacy of the law and searching for an outcome passing by the law or by virtue of improper interpretation does not fall within the competence of the court.[27] The judge

24 Ruling of the Tbilisi Appellate Court, N1g/757, 2 June, 2017.

25 Ruling of the Tbilisi Appellate Court, N1g/858-17, 21 June, 2017.

26 Ruling of the Tbilisi Appellate Court, N1g/552-17, 16 February, 2017.

27 Ruling of the Tbilisi Appellate Court, N1g/109, 25 January, 2017.

made such explanation in the context that the prosecution does not have possibility to request information stored in the computer system on the less serious crimes category (if there are no exceptions).

In many court rulings, the prosecution express dissatisfaction because of the fact that defense has a possibility to retrieve information from the computer system on all categories of crime, while the prosecutor is not entitled to do so. Hence, prosecutors indicate that nowadays, defense may request information according to general rules established for the investigative activities and apply to the court with motion on less serious crime as well.[28] It is interesting that there is no consistent practice and case-law with regard to obtaining information by the defense.

In particular, city/district court judges indicate that provision of secret investigative activities still apply to the requesting of information stored in the computer system with only distinction that defense also has the right to address the court on this matter. Moreover, the court considers that realization of this right given to defense must be implemented according to the general provision of the CPC.[29]

There is an interesting discussion in the rulings of Kutaisi City Court, in particular, the Court stated that standards established by the legislation to conduct secret investigative activities, which is related to the filing motion and discussing it in line with the principles of secret legal proceeding, cannot be applied to defense.[30] We may find different interpretations in one of the city court rulings, according to which, the defense has no authority with regard to the secret investigative activities, however, at the same time, it defines that deriving from the judgement of the Constitutional Court, defense is restricted in requesting such information with categories of crimes.[31]

The same approach is shared in the collegium of the Tbilisi Appellate Court. According to the interpretation of the Appellate Court, the judgement of the Constitutional Court and existing legislation does not put any of the parties in preferential position, therefore, there are restrictions and permissions set for both parties equally while requesting information stored in the computer system.[32]

Hence, based on the court interpretation, in case of the less serious crime category, neither defense nor prosecution has the right to file a motion on requesting such information.[33]

28 For instance, the prosecutor indicates about this in several appellate complaints, which later on are reflected in the appellate court rulings. See: Rulings of the Tbilisi Appellate Court: Ruling N1g/859-17 of 21 June 2017, Ruling N1g/975-17 of 20 July 2017, Ruling N1g/757 of 2 June 2017.

29 Rulings of Zugdidi District Court: 9 May 2017, 19 May 2017.

30 Ruling of the Kutaisi City Court: 28 March 2017, 18 May 2017.

31 Ruling of the Poti City Court of 29 March 2017.

32 Ruling of the Tbilisi Appellate Court, N1g/858-17, 21 June, 2017.

33 Ruling of the Tbilisi Appellate Court, N1g/975-17, 20 July, 2017.

In case the investigation is initiated for the fact of less serious crime, information must be obtained on the basis of Articles 125 and 126 of the CPC and the inspection must be conducted.[34] As it is indicated in the decision, based on the conduct of inspection it will be defined whether the crime was committed and/or the information imprinted there is relevant for important circumstances of the criminal case.[35] Therefore, according to the established case-law of common courts, despite the possibility of the defense to obtain an information stored in the computer system, he/she is obliged to pay attention to the crime qualification, which is characteristic to the secret investigative activities.

The Appellate Court additionally points out that the Constitutional Court along with granting the right to the defense to obtain information stored in the computer system, imposed an obligation to refrain from creating threat of interference in the private life and private property of third persons. The court indicates that this obligation of the defense will be measured by the level of justification of the motion.[36]

In addition, according to the court's ruling, the motion on retrieving the evidence must be based on the certain objective information, as far as without any justified ground it is prohibited to transfer the computer information. Hence, the court points to the defense that it must consider features of the video recording, existence of the information on the third person and in conditions of special justification retrieve such information. Thus, according to the court assessment, in the computer system there are plenty of personal data of individuals, however in case of firm justification, when this information has a value for the criminal case, it is possible to interfere in the private life or private property.[37] Consequently, the court mainly asks the defense to maintain the criteria mentioned below, which must be considered while presenting the motion:

- The motion must be presented within the scope of regulation prescribed by law (Article 136 of the CPC);
- In the motion, there must be indication/justification that the requested information really exists and is stored in the computer system. For instance, in case of requesting video cameras, the defense must provide information on whether there are CCTV situated in the respective area and recording;
- In particular cases, the judge points to the defense to request information from the body controlling CCTV/authorized person, whether the CCTV provides recording and fixing the data.[38]
- Requested information must be important for the defense and having the evidential significance for the case concerned.

34 Ruling of the Tbilisi Appellate Court, N1g/975-17, 20 July, 2017.

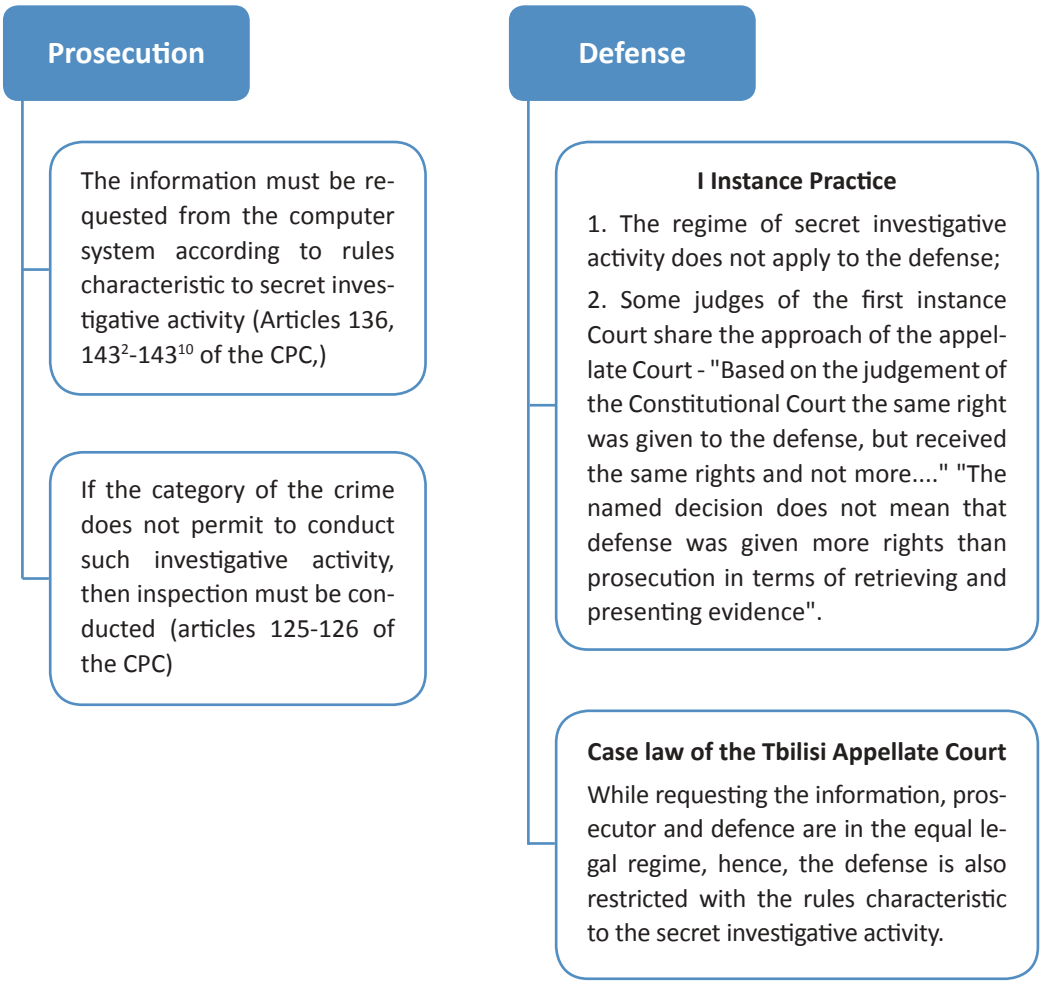
35 Ruling of the Tbilisi Appellate Court, N1g/858-17, 21 June, 2017.

36 Ruling of the Tbilisi Appellate Court, N1g/406-17, 21 March, 2017.

37 Ruling of the Tbilisi Appellate Court, N1g/536-17, 13 April, 2017.

38 Ruling of the Kutaisi City Court, N11/a-117, 18 May 2017.

The diagram below demonstrates approaches of courts with regard to requesting information stored in the computer system



CONCLUSION

In conclusion, existing legislation and subsequent practice developed by common courts, requires that information stored in the computer system must be retrieved in any case in line with the Articles 136 and 143²-143¹⁰ of the CPC. However, when the investigation is initiated on the fact of committing less serious crime, retrieving information related to the computer data is possible under the Articles 125-126 of the CPC by conducting inspection.

For the adversarial proceeding and equality, it is important that parties have equal/similar possibilities to obtain evidence. The principles of equality and adversarial proceedings are infringed when the legislation and practice put one party in a preferable situation and gives insufficient tools to the other party in relation to activities of similar nature.

Requesting information from the computer system does not involve personal data to such extent that the high standard of secret investigative activity shall be used and information shall be limited to the certain categories of crimes only. Moreover, information stored in the computer system is frequently needed while dealing with less serious crimes, therefore the parties shall not have significant obstacles to receive it.

In this regard, not only legitimate interests of investigation are damaged, but also the right of the defense to retrieve and present to the court the evidence proving the innocence of the defendant. Therefore, legislative amendments should be adopted to classify requesting information stored in the computer system as an independent investigative activity and must not take over the standard characteristic to the secret investigative activity. Such legislative regulations will give both parties an equal opportunity to retrieve information stored in the computer system in cases of all categories.

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ROLE OF THE COURT IN EXAMINING CRIME PROVOCATION (ENTRAPMENT) COMPLAINTS

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ABSTRACT

This article provides an extensive analysis of one of the guarantees under the right to fair trial – prohibition of crime provocation (entrapment), and the role of the court in the process of examining complaints related to the crime provocation (entrapment complaints).

The article provides a brief overview of the European Court of Human Rights (hereinafter: ECtHR) case law related to the crime provocation, a summary of basic principles of the Court and the approaches for revealing the essence of the prohibition of entrapment.

The European Court examined the entrapment complaints based on substantive test and procedural test.

Under the substantive test, the ECtHR assesses whether the government representatives acted "in an essentially passive manner", whether without their involvement the subject would commit the crime concerned, and, accordingly, ascertain if the entrapment actually took place.

Under the procedural test, the ECtHR assesses the procedure of national courts for examining the entrapment complaint. The Court requires the procedure in question to be adversarial, thorough, comprehensive and conclusive on the issue of crime provocation. The burden of proof to rebut the entrapment complaint is on the prosecution. Herewith, the ability of the prosecution to successfully carry this burden of proof does not excuse national courts from their obligation to effectively examine the entrapment plea.

The present article also analyses the legislative framework of Georgian Courts for examining the entrapment complaints. In addition, the article provides assessment of the interdependence of the laws governing the conduct of operative-investigative activities and the effective examination of the entrapment complaints by the courts. In this regard, the first Georgian case examined by ECtHR – *Chokhonelidze v Georgia* – is also discussed below.

In the end, the article offers a conclusion that Georgian legislation and legal practice (especially considering the decision of the Constitutional Court of Georgia dated September 29, 2015) allow Georgian courts to be proactive and assess the issues necessary for the examination of the entrapment complaint upon their own initiative. Such an initiative on the part of the courts should not be deemed a violation of the principle of adversarial process under the Criminal Procedure Code of Georgia since in this case, the initiative serves the purpose of providing the defendant with an opportunity to enjoy the fair trial right.

Herewith, the article assesses significant gaps and shortcomings in Georgian legislation – absence of the notion of crime provocation or entrapment, non-existence of proper judicial or prosecutorial supervision over the operative-investigative activities that are "vulnerable" to entrapment, as well as the legislative restriction to access the information obtained in result of such operative-investigative activities, which quite frequently makes it impossible for domestic courts to effectively examine the entrapment complaint.

1. INTRODUCTION

The prohibition of crime provocation (entrapment) is one of the integral components of the right to trial right. The ECtHR examined a number of cases that discuss and explain the idea and the scope of this prohibition.

The standard of the prohibition of crime provocation identified in Georgian legal practice is in no compliance with the prohibition of entrapment standards established by European Convention for the Protection of Human Rights and Fundamental Freedoms (Hereinafter: ECHR). The main reason for this incompliance is the flawed legislation, outdated tactics, and methodology deployed by the law-enforcement agencies conducting operative-investigative activities, and the general practice of Georgian law-enforcement agencies and judicial authorities, developed in this flawed environment. The existence of serious issues with regard to the prohibition of entrapment in Georgia was once again emphasized by the ECtHR in the first Georgian case examined by the Court – *Chokhonelidze v Georgia*.[1]

1 Application #31536/07, 28.06.2018.

The prohibition of entrapment is a very complex matter, inclusive of the issues such as the laws governing the conduct of crime-intelligence activities, tactics, the methodology of and supervision over such activities, substantive and procedural criminal legislation, the role of the court in examining the entrapment complaints, etc. However, we will not be able to cover all of these issues in one article.

Thus, the article aims at analyzing one important aspect of the prohibition of entrapment – the role of the courts in examining the entrapment complaints.

2. CRIME PROVOCATION AND PROHIBITION OF ENTRAPMENT IN THE ECTHR CASE LAW – BASIC PRINCIPLES

The ECtHR provided detailed definition of the entrapment in the case *Ramanauskas v Lithuania*, according to which entrapment is a situation where the officers involved – whether members of the security forces or persons acting on their instructions – "*do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed*".[2] Herewith, the Court noted that such conduct shall be deemed as entrapment only when it is carried out in order to make it possible to establish the offense that is to provide evidence and institute a prosecution.[3]

Despite the fact that the ECtHR has repeatedly recognized the use of undercover agents on a number of occasions as the legitimate investigative technique for the fight against grave crimes, at the same time the Court considers that it should be subject to clear, adequate and proper procedural guarantees and safeguards as public interest cannot justify the use of evidence obtained as a result of incitement.[4]

In the light of the above mentioned standards, the ECtHR's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement.[5]

2 *Ramanauskas vs Lithuania (Grand Chamber)*, Application #74420/01, 05.02.2008, §55.

3 Ibid.

4 *Teixeira De Castro vs Portugal,* Application #44/1997/828/1034, 09.06.1998, §36.

5 See, Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017).

2.1. The Substantive Test

Under the substantive test, the ECtHR assesses whether the government representatives acted "in an essentially passive manner", whether without their involvement the subject would commit the crime concerned, and, accordingly, ascertain if the entrapment actually took place.[6]

At the initial stage, the ECtHR studies the reasons underlying the covert operation. In particular, the State is obliged to prove that it possessed specific, objective evidence that the criminal act was already commenced by the time the police got involved in it.[7]

Where the authorities claim that they acted upon information received from a private individual, the ECtHR draws a distinction between an individual complaint and information coming from a police collaborator or informant.[8]

The participation of a collaborator or an informant in an operation under the supervision of the law-enforcement agencies is often vulnerable to the risk of representing the collaborator or the information as an agent provocateur, leading to a possible violation of Article 6 (1) of the ECHR. Therefore, it is of crucial importance to ascertain in each and every case that the criminal act was already commenced when the source started cooperating with the police.[9] When examining an entrapment complaint it is equally important to determine if a private person, who informed the law-enforcement agencies about possible illegal conduct, had any covert interest in the matter.[10]

The ECtHR determined that a line between the legitimate infiltration of undercover agents and the provocation of a crime will always be crossed unless the national legislation includes foreseeable rules and procedures for authorization and conduct of covert operations under proper supervision. The Court stated that judicial oversight is the most adequate form of supervision over the covert operations;[11] although, the Court does not exclude the possibility of carrying out supervision by other public authority.

In cases, where the lack of case files or the conflicting interpretations of factual circumstances by the opposing parties obstructs the court from determining the fact of entrapment, procedural aspects of the case gain the crucial importance.[12] Herewith, the ECtHR deems the examination of procedural aspects even if the substantive test failed to determine that inciting actions on the part

6 See, *Morari vs the Republic of Moldova*, Application #65311/09, 08/03/2016, §37.

7 *Furcht vs Germany,* Application # 54648/09, 23/01/2015, §51.

8 See, Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 12; *Gorgievski vs Former Yugoslav Republic of Macedonia, Application #*18002/02. §§52-53.

9 *Vanyan vs Russia,* Application #53203/99, 15/03/2006, §47.

10 *Miliniene vs Lithuania,* Application #74355/01, 24/09/2008, §39.

11 *Khudobin v Russia,* Application#59696/00, 26/01/2007, §135.

12 *Tchokhonelidze v Georgia,* Application #31536/07, 28/06/208, §46.

of the State authorities[13] or if the substantive test results are sufficient for proving violation of Article 6 of ECHR.[14]

2.2. The Procedural Test

The ECtHR has not determined a specific procedure for examination of the entrapment complaints.[15] The important criteria are the adversariality, comprehensiveness and conclusiveness with regard to the incitement to commit a crime.[16] Since test purchases and other similar investigative methods are generally associated with the risk of police entrapment, the ECtHR requires existence of firm procedural safeguards in this regard.[17]

When a person filed an entrapment complaint which, in turn, is not clearly unsubstantiated, the burden of proof rests with the prosecution.[18] Moreover, examination of the matter by domestic courts should include an examination of underlying reasons of the covert operation, also the understanding of the degree of law-enforcement involvement and the analysis of any incitement or influence exercised on the person concerned.[19]

The obligation of national courts to ensure respect of the principle of fairness requires, *inter alia*, the cross-examination of undercover agents and other witnesses by the defense, or at least a detailed explanation of the reasons as to why it was impossible to hear the testimonies of those individuals.[20]

Under the procedural test, conclusions of national courts are of utmost importance for determining whether Article 6 of the ECHR has been violated or not.[21] If the entrapment is proved, the national courts must draw inferences in accordance with the ECHR.[22]

13 See, Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 16-17; *Ramanauskas,* §61.

14 Ibid. Compare to *Scholer v Germany,* in which based on the substantive test the ECHR determined that there was no violation of Article 6 of the Convention (Application #14212/10, 18.12.2014, §§84-91).

15 For example, in cases against the United Kingdom, the ECHR has not granted a particular primacy to any of the regulations of English legislation (see, *Edwards and Lewis v the United Kingdom,* Applications #39647/98 and #40461/98, 22.07.2003, §46). Despite the fact that according to English laws the incitement to commit a crime is not a direct precondition for removing charges against the subject, the judges are still obliged to terminate case proceedings or exclude all evidence obtained as a result of the incitement from the case Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 17; See, also *Rajcoomar v the United Kingdom*, Application #59457/00, 14.12.2004).

16 *Bannikova v Russia,* Application #18757/06, 04.11.2010, §§57-58.

17 *Lagutin and Others v Russia,* Applications #6228/09, #19123/09, #19678/07, #52340/08, and #7451/09, §115.

18 *Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal Limb)* (Council of Europe/European Court of Human Rights, 2014), available at www.echr.coe.int, P. 29.

19 *Ramanauskas,* §§70-71.

20 *Bulfinsky v Romania,* Application #28823/04, 01/06/2010, §45.

21 *Sepil v Turkey,* Application #17711/07, §§37-40.

22 *Ramanauskas,* §70; *Sepil,* §37.

Acknowledgment of the violation of the right or mitigation of a sentence[23] is insufficient – all evidence obtained as a result of entrapment (crime provocation) must be excluded or a procedure with similar consequences must apply.[24] It is noteworthy, that even if the prosecution fails to discharge the requisite burden of proof, that omission does not excuse domestic courts from the need to address effectively the plea of entrapment.[25]

3. GEORGIAN LEGISLATION – OPPORTUNITIES OF GEORGIAN COURTS IN THE PROCESS OF EXAMINING THE ENTRAPMENT COMPLAINTS

3.1. Supervision over Operative-Investigative Activities

The Georgian legislation differentiates between operative-investigative activities and covert investigative activities.

The regulations and provisions on operative-investigative activities are governed by the 1999 Law of Georgia on Operative-Investigative Activities, whereas the covert investigative activities are governed by the specific provisions of the Criminal Procedure Code of Georgia (CPC).[26]

With regard to the prohibition of crime provocation, the specific types of covert investigative activities envisaged by the CPC are less problematic, due to their nature, compared to the operative-investigative activities. Among various types of operative-investigative activities, there are the ones that are more susceptible to the risks of entrapment; these are, for example: test purchase, controlled delivery, infiltration of undercover officials or operative officers in a criminal group and some other activities. As mentioned above, the ECtHR standard requires for such operations to be controlled, and the most adequate form of the control is judicial oversight. Contrary to the aforesaid, Georgian legislation does not envisage judicial control over operative-investigative activities.

Pursuant to the Law of Georgia on Operative-Investigative Activities, Prosecutor General of Georgia and his subordinate prosecutors are in charge of supervising the correct and uniform application of the law in the course of conducting operative-investigative activities as well as the lawfulness of the decisions made in the process of conducting operative-investigative activities. Pros-

23 See, *Furcht,* §§65-71.

24 *Ramanauskas,* §60; *Khudobin,* §§133-135; *Banikova,* §54.

25 *Chokhonelidze,* §52.

26 CPCG, Chapter 16', Covert Investigative Actions.

ecutorial supervision, as established by the law, has a significant legislative flaw which is discussed below in a detailed manner.

3.2. Opportunities to Effectively Examine the Entrapment Complaint at the Merits Hearing

As mentioned above, according to the ECtHR case law, even if the prosecution fails to discharge the requisite burden of proof that omission does not excuse domestic courts from the need to address effectively the plea of entrapment. The effectiveness of the court in addressing the entrapment plea is assessed based on the evaluation of the submitted reasoning and arguments. Domestic courts must examine through adversarial procedural action the grounds for conducting a covert operation, and the scope of influence or incitement exerted on the person concerned. As noted by the ECtHR, court proceedings should be adversarial, thorough, comprehensive and conclusive on the issue of incitement.

However, a question may be raised: is a conflict between the aforementioned conclusion from the ECtHR case law and the principle of adversarial process deployed under CPC? Is it justified and possible for the domestic court to take an initiative while the prosecution is passive and demand and examine in the participation of the parties the evidence that is important for examining the entrapment plea?

In its decision of September 29, 2015, the Constitutional Court of Georgia explained the idea of the equality of arms and adversarial process secured under Article 85(3) of the Constitution of Georgia.[27] In particular, the Constitutional Court had to decide on the following issue: if the cassation and appeals courts were authorized to go beyond the scope of cassation or appeals complaints and render a decision on a matter which had not been raised by the defense in its complaint. This issue concerned two basic constitutional principles – the retrospective application of the law revoking criminal liability and double jeopardy clause. The Constitutional Court needed to decide if the adversarial process guaranteed under the CPC and the Constitution of Georgia would be violated if the court upon its own initiative would go beyond the scope of the cassation or appeals complaints, and ensure that the two constitutional principles were applied in relation to the convicted person.

First of all, the Constitutional Court marked the difference between the adversarial model of criminal proceedings as the historically developed and formed model and the adversarial principle as one of the elements of the right to fair trial.[28]

The adversarial model of criminal proceedings is characterized by a specific system of conducting procedural actions and specific separation of the roles of parties to the proceedings. In contrast

27 The decision of the Constitutional Court of Georgia, #3/1/608-609.

28 See, the decision of the Constitutional Court of Georgia, §14.

to the inquisitorial system, where a judge is granted the authority to examine the case-related circumstances upon his/her own initiative, the fundamental principle of the adversarial system is that the establishment of objective truth in the case is trusted to the parties' initiative, while the judge remains neutral.[29]

As for the adversarial principle, it is the integral component of the right to fair trial, representing a part of both inquisitorial and adversarial models of criminal proceedings.[30] It was clear for the Constitutional Court that Article 85 (3) of the Constitution of Georgia refers to the closely interrelated elements of adversarial process and equality of arms and not the adversarial model of criminal proceedings.[31]

Considering the requirements of Article 85 (3) of the Constitution of Georgia, it is groundless to claim that by enforcing the principles of the retrospective application of the laws revoking liability or the double jeopardy clause upon its own initiative, when the request has not been raised by the appellant *per se*, the court violates or restricts the adversarial principle. The adversarial principle, along with other procedural guarantees, is the mean and instrument to ensure a right to fair trial and the "right and fair decision" in a criminal case. Legislative obligation, which restricts the judge from applying fundamental and imperative constitutional principles merely because the parties have not initiated a request to do so, excludes the possibility of enforcing the right to fair trial and rendering a fair decision in the case concerned. Thus, to argue that the rule which excludes the achievement of the aim, can be justified by enforcing the means of achieving this goal, in this case – the adversarial principle – is groundless and unsubstantiated.[32]

Therefore, according to the judgement of Constitutional Court, if the issue at hand is related to the risk of violating a constitutional principle,[33] courts are obliged to enforce the constitutional principle, and in doing so there will be no violation of the equality of arms and the adversarial principle.

This legal logic developed by the Constitutional Court is in full compliance with the principle of effective examination of the entrapment complaint by the court as established by the ECtHR. The prohibition of crime provocation (entrapment) is one of the guarantees under the right to fair trial along with other components. Hence, in situations where the state prosecution is unwilling or unable to fulfil its obligation to carry the burden of proof with regard to the entrapment plea, courts – upon their own initiative – will be obliged to fully and effectively address the entrapment complaint in the participation of the parties to the proceedings concerned. In any other case, the constitutional principle – the defendant's right to a fair trial – will be violated.

29 Ibid, §15.

30 Ibid, §16.

31 Ibid, §19.

32 Ibid, §20.

33 Notwithstanding the fact that in this decision the Constitutional Court discussed only two constitutional principles – double jeopardy and retrospective application of the law revoking criminal liability, the rationale behind the reasoning provided by the court is a clear indication that such an approach may be applied to any constitutional right.

The ECtHR underlined an importance of effective examination of the entrapment plea by the court in the case *Chokhonelidze v Georgia*. In the context of entrapment, this is the first case from Georgia examined by the ECtHR, in which the Court held that the right to a fair trial had been violated based on the procedural test of the incitement to commit a crime.

3.3. Chokhonelidze v Georgia

The applicant, Eldar Chokhonelidze, was the Deputy Governor of Marneuli District. According to the official version of events, the applicant told Ms. K. that she needed to make a pay-off (bribe) of a certain amount in exchange for issuing a permit necessary for the construction of a petrol station. Ms. K. contacted the law-enforcement authorities and reported the fact of demanding a pay-off on the part of the applicant for issuing the construction permit. She expressed her readiness to cooperate with law enforcement agencies on this matter. The authority immediately opened a criminal case into Ms. K.'s allegations and planned the conduct covert investigative actions, including secret video-audio surveillance. At one of the meetings, Ms. K. handed over 10,000 USD in cash to the applicant. The banknotes had been pre-marked with a special substance by the law-enforcement. As soon as the applicant touched the cash, he was arrested.

Later, at the court hearing, the applicant claimed that he had not taken a bribe (pay-off) and explained that 10,000 USD was intended for the construction company which was supposed to build the petrol station.

At the court hearings, Ms. K. initially changed her statement of facts given to the investigation and supported the testimony of the applicant, additionally admitting that she generally cooperated with the law-enforcement agencies and had worked on 4 other cases with the Constitutional Security Department (CSD). Later, Ms. K. once again changed her testimony and supported her previous statements given to the investigation, i.e. claiming that the applicant requested a bribe from her.

Herewith, the domestic court was unable to locate and summon one important prosecution witness, who was also a person secretly cooperating with the law-enforcement authorities and who had a land plot purchase agreement concluded with Ms. K. (the same land plot, where the petrol station should have been constructed). The mentioned agreement was annulled shortly afterwards as it was a part of the cover story elaborated by law enforcement agencies.

The applicant claimed that he was a victim of law-enforcement entrapment (i.e. crime provocation).

The ECtHR examined the applicant's claim using two tests designed by the Court – the substantive test and the procedural test of incitement.

Under the substantive test, the ECtHR was unable to determine if the entrapment took place as the case files and the conflicting interpretation of the factual circumstances of the case by the defense and prosecution did not allow the Court to conclude if the crime at issue had been com-

mitted as a result of the crime provocation. Herewith, the ECtHR took in consideration the fact that the applicant himself initiated the discussion about financial issues stating that he actually received 10,000 USD, although he said it was never intended to be taken as a bribe.[34]

In these conditions, the procedural test had the decisive power.

The ECtHR assessed if the applicant actually had an effective opportunity to submit his entrapment plea. The ECtHR determined that the state prosecution failed to discharge the requisite burden of proof as the party did not make any argument throughout the proceedings in an attempt to refute the applicant's allegations of entrapment.[35]

Herewith, the Court observed that the DCS sending Ms. K., the infiltrated agent, to the applicant on an undercover mission was never ordered or supervised either by a court, which is considered by the Court's case-law as the most appropriate form of supervision in such matters, or any other independent public authority competent in criminal matters.[36] The ECtHR also emphasized that under the national legislation it was not required that infiltration by an undercover agent – unlike certain other investigative techniques – be ordered and supervised by a court. In other words, the domestic law did not provide for the adequate regulation of the conduct of such a covert operation.[37] Lastly, the ECtHR assessed the effectiveness of the domestic court's procedure for examining the entrapment plea. The Court observed as follows:

> *"Even if the Prosecutor's Office had failed to discharge the requisite burden of proof, that omission could not have excused the domestic courts from the need to address effectively the applicant's plea of entrapment. The effectiveness of the judicial review should be assessed by having due regard to the reasons contained in the domestic courts' decisions. The courts were expected to establish, after having conducted adversarial proceedings, the reasons why the undercover operation had been mounted against the applicant, the extent of the DCS's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected (see, for instance, Ramanauskas, cited above, § 71). However, the Court observes that the domestic courts, confronted with the applicant's well-substantiated allegations, did not provide any single reason in their decisions as to why those allegations ought to be dismissed… In such circumstances, it cannot be said that the judicial review of the allegations of entrapment was either conducted with sufficient respect for the principle of adversarial proceedings or that it established adequate reasons for dismissing the applicant's defense"*.[38]

Accordingly, the ECHR established that there has been a violation of Article 6 of ECHR – the right to fair trial.

34 *Chokhonelidze,* §49.

35 Ibid, §51.

36 Ibid.

37 Ibid.

38 Ibid, §52.

In the *Chokhonelidze Case*, the ECtHR also concluded that the law of Georgian governing special investigative activities included a fundamental flaw. Even if the above-mentioned assessment by the ECtHR was referred to the law valid as of 2005, it is still applicable to the legislation currently in force as much as no amendments or additions have been made to the law since then to reflect the issues related to the prohibition of entrapment. This issue is directly linked to the problem of effective examination of the entrapment plea by the courts and, therefore, will be discussed below.

3.4. Laws Governing the Special Investigative Activities and Its Interdependence with the Effective Examination of the Entrapment Plea

As mentioned above, in the case *Chokhonelidze v Georgia*, the ECtHR observed that Georgian legislation (Law of Georgia on Special Investigative Activities) did not provide for adequate regulation of the cover operation. In particular, Article 7(3-7) of the Law did not require judicial supervision over the activities of undercover agents.[39]

To this day, no amendments have been made to the Law of Georgia on the Operative-Investigative Actions, specifically in the model of planning and conducting covert actions. Today, just as well as in past, domestic courts have no control over the sensitive activities with regard to the entrapment, such as the infiltration of an undercover agent in a criminal group, test purchase, controlled delivery, etc.

In 2005, and same is true for today, the only authority supervising the correct and uniform application of the law in the course of operative-investigative activities, as well as over the lawfulness of the decision made in the course of operative-investigative activities were the Chief Prosecutor of Georgia and his subordinate prosecutors.[40] Yet, such supervision is general and does not include the substantive issues related to the effective examination of the entrapment plea. In particular, information about the persons who provide confidential assistance to, and cooperate or used to cooperate with the law-enforcement agencies, also methods, tactics, and organization of the process of obtaining operative-investigative information are not subject to prosecutorial supervision.[41] The Law of Georgia on the Prosecution Service of Georgia also includes a similar provision.[42] In the case *Chokhonelidze v Georgia*, the ECtHR apparently considered such prosecutorial supervision insufficient, as it concluded that the legislation of Georgia did not regulate adequately the conduct of the cover operation.

Herewith, the absence of adequate control over the special investigative activities is not the only problem – restrictions to access significant information is also an issue. In general, if under the

39 *Chokhonelidze,* §51.

40 Law of Georgia on Operative-Investigative Activities, Article 21 (1).

41 Ibid, Article 21 (2).

42 Organic Law of Georgia on the Prosecution Service of Georgia, Article 25 (4).

law the prosecutor does not have access to the methods, tactics, and organization of the obtaining operative-investigative information, such information cannot be submitted to the court at the hearing about the entrapment complaint.

Is it possible for the court to examine the entrapment plea effectively and in line with the European standards in the absence of the aforementioned information?

As mentioned earlier, an effective examination of the entrapment plea implies the examination of the underlying reasons for the action, ascertaining the details of any influence or oppression exercised on the person concerned. These issues clearly concern and include information about the methods, tactics, and organization of obtaining the operative information. For example, how was the so-called "cover story" developed for the purpose of obtaining the trust of the person of interest and how the first steps were planned to get closer to that person? In general, these initial activities show if the law-enforcement authorities got involved after the crime had already commenced or was the crime committed as a result of illegal pressure or influence exerted on the person concerned.

Thus, the current situation, in which neither judiciary nor effective prosecutorial supervision is carried out on the special investigative activities, the methodology, organization and tactics thereof, all of which are important for the examination of the entrapment plea. Herewith, as the prosecutors do not have access to this information, it cannot be submitted to the court at the hearing on examining the entrapment plea. Such analysis allows for the conclusion that even if the court starts examination of the entrapment plea upon its own initiative, in most cases the fact of incitement still cannot be effectively examined.

3.5. Absence of Entrapment and Crime Provocation Notions in the Legislation of Georgia

The Georgian legislation – the Law of Georgia on Operative-Investigative Activities, the CPCG or any other act – does not recognize the notion of entrapment or incitement to commit a crime. Only Article 145 of the Criminal Code of Georgia[43] has the disposition to cover the cases of entrapment, although the mentioned article is insufficient. The Association of Law Firms of Georgia (ALFG) also discussed this issue in its recent study.

In particular, the ALFG study states as follows:

> *"Absence of the special notion of entrapment in the CPCG and/or in the law governing the conduct of operative-investigative activities will restrict the court. Herewith, having one article in only the Criminal Code of Georgia with the entrapment disposition might be an obstacle for*

43 Article 145 of the Criminal Code of Georgia – "provocation of crime, i.e. persuading others into committing a crime for the purpose of his/her criminal prosecution."

the court in the course of examining the entrapment plea. There will always be some party to argue that a specific person – person who incited the subject to commit a crime – is not yet convicted for the crime under Article 145 of the Criminal Code – for inciting a crime, and that for the purposes of criminal proceedings it is impossible for the court to consider and determine the entrapment fact by such a person until the conviction."[44]

In the light of the foregoing, the ALFG concluded that there should be a

"Clear distinction between the operative-investigative and criminal procedure issues of the prohibition of entrapment, and the substantive-legal issues of the agent provocateur's criminal liability. European standards require to from the presiding judge to effectively address the entrapment plea, including, to find all evidence obtained through this illegal method inadmissible or any other result of the same effect in case if the fact of entrapment is established. Georgian courts should not wait for the finalization of criminal prosecution against the agent provocateur and respective conviction for inciting to commit a crime. While examining the entrapment plea, the court should access to effective instruments of criminal procedure in order to ensure the guarantee of the prohibition of entrapment, to find the evidence obtained through entrapment inadmissible and/or achieve any other result with the same effect."[45]

4. CONCLUSION

Thus, the role of domestic courts in the examination of the entrapment plea holds a special place in the ECtHR case law. Apart of the position of the prosecution, in particular, whether or not the prosecution was able to discharge the requisite burden of proof with regard to the entrapment complaint, the court should be proactive and effectively address the complaint upon its own initiative. The scope of effective examination of the complaint must include the reasons why the operative-investigative activity was mounted, the extent of the law enforcement authorities' involvement in the offense and the nature of any incitement or pressure to which the person concerned was subjected.

The Georgian legislation and subsequent practice (especially considering the decision of the Constitutional Court of Georgia dated September 29, 2015) allow Georgian courts to be proactive and assess the issues necessary for the examination of the entrapment complaint upon its own initiative. Such an initiative on the part of domestic courts should not be deemed a violation of the

44 See, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 48.
45 Ibid, PP. 48-49.

adversarial principle under the CPC of Georgia since in this case, the initiative serves the purpose of providing the defendant with an opportunity to enjoy the right to fair trial.

In addition, significant shortcomings and gaps of Georgian legislation – absence of the notion of incitement to commit a crime or entrapment, non-existence of proper judicial or prosecutorial supervision over the operative-investigative activities that are "vulnerable" to entrapment, as well as the legislative restriction to access the information obtained as a result of such operative-investigative activities, quite frequently makes it impossible for domestic courts to effectively examine the incitement complaint.