About Tacis and GEPLAC

The Georgian Law Review (GLR) is a publication which is funded by the Tacis Programme through the Georgian-European Policy and Legal Advice Centre (GEPLAC).

Launched by the EC in 1991, the Tacis Programme provides grant financed technical assistance to 13 countries of Eastern Europe and Central Asia (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgystan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan), and mainly aims at enhancing the transition process in these countries.

When Tacis was initiated, technical assistance was a standalone activity, whereas the programme is now part of a complex and evolving relationship with each of the 13 countries concerned. Politicians and officials from the partner countries and the EU meet now on a regular basis. With the implementation of PCAs as well as the EU enlargement process, Tacis also becomes a more strategic instrument in the co-operation process between EU and partner countries.

A new Regulation concerning the provision of assistance to the partner states in Eastern Europe and Central Asia replaces the former legal basis (Council Regulation (EC, Euroatom) No. 1279/96, which expired on 31st of December 1999). This new Regulation covers the years 2000-2006 (Council Regulation (EC, Euroatom) No. 99/2000 of 29th of December 1999).

The new Regulation is based on an understanding that cooperation is a reciprocal process, encouraging a move from “demand-driven” to “dialogue-driven” programming. More flexibility in the way that Tacis is structured will allow potential technical assistance to be mobilised and implemented according to the capacity of each partner country.

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- institutional, legal and administrative reform;
- private sector and economic development;
- consequences of changes in society, infrastructure networks;
- environmental protection;
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This is the eleventh edition of Georgian Law Review, which is prepared in Georgian and English languages. It enables legal specialists and other interested persons to become informed on the development of Georgia's legal system and the legal systems of the EU and its Member States. Georgian Law Review is free of charge and also available through the Internet:

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For any additional information please contact Georgian European Policy and Legal Advice Centre at:

42, Al. Kazbegi Avenue
380077 Tbilisi, Georgia
Tel: (+995 32) 53 71 43
Fax: (+995 32) 53 71 38

E-mail: tushuri@geplac.org

The following persons participated in the elaboration of this edition of Georgian Law Review:

Zurab Bekaia, Tamar Cherkezishvili, Nino Chokheli, David Kereselidze, Tea Ketishvili, Ana Loria, Maka Machkhaneli, Martin Naughton, Alexander Tushuri, Tato Urjumelashvili, Ketevan Vakhtangadze, Vakhtang Zaalishvili.

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INTRODUCTION

Dear Reader,

In the introductory article of the current edition of the Georgian Law Review, the Head of the Information Bureau for Property and Financial Standing of High-Ranking Officials, ***Nunu Ovsianikova***, presents an overview of the mechanisms for the verification of the authenticity of the property and financial declaration of high-ranking officials. This issue is widely discussed by society. Rather often, the actual property and standard of life of a high-ranking official exceeds his/her declared income potential. With due consideration of the legislative and practical experience of foreign countries in this field, the author puts forward a number of proposals, the implementation of which would enhance the full-range and actual operation of the institution of declaration.

Zurab Ezugbaia, the Deputy Minister of Justice of Georgia, provides an analysis of the Scandinavian model of local self government. Starting with a general overview of the essential peculiarities of the national models of local self government of the northern European countries, the author presents a detailed analysis of the main trends characteristic of the municipal development of the mentioned region, and highlights the difficulties arising during the reform process.

Konstantin Korkelia, the Deputy Director of the Institute of State and Law, explores the crisis in the European Court of Human Rights. The author outlines the measures to be implemented on a national and international level and suggests several recommendations regarding the actions that will override the present situation most efficiently.

The next contribution to the present edition also covers the challenging issue of the protection of human rights. ***Lali Papiashvili***, the First Assistant to the Chairman of the Parliament of Georgia, presents a detailed analysis of the minimum procedural guarantees as per Article 6.3 of the European Convention on Human Rights and Fundamental Freedoms, that are to be granted to a person accused of committing a criminal offence. With a view to clarifying the scope and conditions of application of the procedural guarantee as per Article, and the commitments of the High Contracting Parties to the Convention, the author provides a comprehensive overview of the practices of the European Court of Human Rights.

In their contribution "The Place and the Role of the Economic Security in the Formation of the Georgian State" ***Jemal Gakhokidze***, the Deputy Secretary of the State Security Council of Georgia, and ***Zurab Garakanidze***, the Deputy Minister of State Property Management of Georgia, study the state security of Georgia from an economic point of view. The authors survey the most important branches of the economy, the development of which is necessary for guaranteeing state security. The contribution presents a number of practical proposals regarding the changes to be implemented, pertinent to both institutional and other fields of legal regulation.

Mamuka Jgenti, the Deputy Director of the Department of International Law of the Ministry of Foreign Affairs of Georgia, discusses the importance of extradition in the fight against terrorism, from the perspective of international criminal law. After a short historical overview of the extradition, the author outlines the crucial modern aspects of extradition practice. He analyses the problem within the framework of human rights protection as well.

In the next contribution, ***Levan Nanobashvili*** discusses the legal status of computer programmes according to Georgian legislation. On the basis of the examples presented in the study, the author

tries to determine which rules are to regulate the issues related to the creation and distribution of computer programmes – those of patent or copyright law. The author also provides a general overview of the legal status of computer programmes in foreign countries and makes a comparative analysis with the Georgian legislation.

A rather complicated and lengthy process of establishing the system of international legal control over narcotic drugs is analysed in the contribution of the ***Dr. Jemal Janashia.*** The author considers, that the drug problem is international in nature, and thus efforts of a single country are not sufficient for the settlement of this issue - only mutually coordinated co-operation could be successful.

And finally, we provide an overview of normative acts of particular importance to the legal system of Georgia that have been adopted during the third and fourth quarters of 2001.

Alexander Tushuri
Deputy Director for Legal Issues

February, 2002, Tbilisi

NUNU **O**VSIANIKOVA[*]

PROPOSALS FOR THE VERIFICATION OF THE AUTHENTICITY OF PROPERTY AND FINANCIAL DECLARATIONS OF HIGH-RANKING OFFICIALS[**]

The introduction of the institute of declarations is related to one of the most important problems facing the country, corruption, and is regarded as one of the most crucial elements in the complex system of fighting against corruption. The institute of declaration makes it possible to assess whether the lifestyle of a high-ranking official is consistent with his/her official income. Evidence of corruption can be traced when one's actual property and lifestyle are incompatible with declared income and interests.

Taking into consideration the fact that the legitimate income of corrupt high-ranking officials and their actual economic standing are totally inconsistent, it's obvious that the position held by an official is the source of both unlawful self-enrichment and corruption. Just from this point of view the declaration of an official's property and financial standing, which reveals the economic standing of an official, as well as his/her economic interests, acquires its major importance in the fight against corruption. It should also be mentioned that an official has to disclose not only his own economic interests, but those of his/her family members as well, thus considerably excluding the possibility of total non-recording of personal incomes of his/her family members and relevantly making public awareness of the economic standing of an official and his/her family members more intense.

The establishment of the institute of declarations makes it possible to set up a system for preventing conflicts of public and private interests. On the one hand this will promote the elimination of such conflicts and thereby the source of corruption, and on the other hand will enable us to identify a conflict of interests and as a result react appropriately. This will finally lead to the possibility of suppression of the collision of property and other private interests of an official and the public service interests, the receipt of property or other wealth, prohibited by the law, as well as transfer of this property or the promotion of the receipt and legalisation of this wealth.

The obligation to declare property and financial interests of the officials has arisen in accordance with the law, "On the Conflict of Interests and Corruption in Civil Service", which was enacted on October 17, 1997. It allows for public scrutiny of information relating to the property status and incomes of high-ranking public officials and their family members on a periodical basis.

Property and financial declarations must include details about an official's and his family's real and movable property, the amount and value of securities, deposits at credit institutions, involvement in any enterprise and any resultant remuneration, any valid agreement entered into, received gifts, reimbursement of the expenses, and other incomes or expenses. Thus the declaration is rather comprehensive and consequently, it is of priority importance for the society, whether an official has accurately described his/her property and financial standing and those of his family members in the declaration.

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[*] *Nunu Ovsianikova* is the Head of the Bureau for Information on the Assets and Finances of Public Officials of Georgia.
[**] Translated from the Georgian language by *Ketevan Vakhtangadze*.

In accordance with the effective legislation, the guarantor of the authenticity of the data entered into the declaration is the official himself/herself, being responsible for the validity of the mentioned data; while entering of inaccurate or incomplete data into the declaration is punishable under the criminal law. However, it should be mentioned that the law does not provide for the availability of a complex mechanism of verification of the authenticity of the data entered into the declarations. One of the important, but unfortunately ineffective for the time being mechanism of public control does not actually operate at all. The provision of the law, under which any physical or natural person is entitled to demand and receive the copy of the declaration of an official and subsequently, verify the data entered into it or/and disclose the entry of inaccurate or incomplete information into it at a possible level, is actually inefficient without the availability of relevant legal and administrative levers. Actually, the non-availability of the obligatory provisions for the verification of the declarations by public authorities and of the systemic mechanism of examination makes the institution of declaration merely formal. The fact that the controlling bodies are entitled but not obliged to verify the authenticity of the data entered into a declaration within the limits of their competence appears to be a “substantiated” argument for evading the responsibility in the present situation. But of course, society can not accept such a situation. Some time ago the issue of transparency of the data concerning the property and incomes of the officials and their family members and consequently the initiation of the process of submission of such declarations by the officials and making these declarations public was rather pressing. Taking into account the current realities, the present system of declarations and its institutional development, it is important to set up an operable legislative mechanism and to practically secure the verification of data entered into the declarations. This will become one of the most important constituents of the anticorruption measures implemented in the country lately.

Efficient and valid operation of the mechanism of the institution of declarations is important just for the full accomplishment of anticorruption measures, meaning the optimisation of the content of property and financial declarations of the officials and of the information to be entered into them; setting up and implementation of the flexible mechanisms of verification of the declaration data, as well as the intensification of the relevant legal responsibility.

With the view of verification of the authenticity of the data entered into the declaration it is first of all important to improve the informational level of the data to be entered into the declarations. On the one hand, the data to be entered into the declarations should, at a maximum level, contain the information, necessary for verification. On the other hand, more or less important information concerning the property and incomes of an official and his/her family members should not be abandoned when listing the data to be entered into the declaration.

From the point of view of the optimisation of the content and informative nature of the declaration data, it is important to implement such changes at a legislative level that will enable us to remove those legislative “gaps”, which make it possible for the officials to show inaccurate information, or even not to show or hide the information about their property or financial standing. For example, when filling in a declaration, an official estimates the market value of an immovable property, owned by him/her and his/her family members, but without indication the apartment area and the location of an immovable property it deems impossible to establish, whether its value is indicated correctly or not. Furthermore, no movable or immovable things valued less than GEL 5000 are entered into the declaration, thus leaving the considerable part of the property undeclared. According to the present format of the declarations any gift valued less than GEL 500 isn't mentioned either, thus allowing for the possibility of non-recording of a substantial part of the gifts. Moreover, as far as there is no mechanism for the registration of gifts, this issue is totally beyond the control. Given the fact that no particular field of entrepreneurial activity needs to be specified, it seems impossible to control the observation of the

prohibitions, established by the incompatibility requirements. An official is not required to indicate the source of property and finances mentioned in the declaration, or information regarding the property and incomes of his/her adult daughter/son, etc.

Regarding the verification of the authenticity of the declaration data, we consider it important to take account of the legislative and practical experience of certain foreign countries (USA, Italy, Baltic States, Hong-Kong) in this field, which have served as the basis of the submitted proposals.

With a view to securing the complete and systemic verification of the authenticity of the data entered into the property and financial declarations, as well as preventing parallelism and distribution of responsibilities, and securing observance of the principle of impartiality, it is possible a duly authorised state authority to verify the authenticity of the data entered into the declarations, who will have the status of an independent state body and be accountable and responsible directly to the President of Georgia. To facilitate transparency and monitoring its activities, we consider it necessary that a Public Council to be set up with such authority.

Upon the verification of the data entered into the declaration, it is important to determine the grounds for why it was chosen for scrutiny, in order to exclude the possibility of turning the institute of verification of the declarations into an instrument for settling political scores and conflicts.

With due consideration of the above said, the grounds for the verification of the declaration data could become the assignment of the President of Georgia, the Parliament of Georgia, and other authorised person or collegial body, as provided by law, substantiated information disseminated via the mass media or a written substantiated submission of an individual or a legal person, etc.

It is also necessary to establish definite time limits for the verification of the data entered into the declarations; the verification to be carried out within the established time limits; to maintain the confidentiality of such information during the search for and processing of the material, necessary for the verification. The results of the verification should be made public and in the case of detection of some violation during the verification of a declaration, the relevant materials should be referred to the Prosecutor's Office and the Judicial bodies in accordance with the law.

For complex verification of the data entered into the declaration, with due consideration of the specific nature and diversity of the declared data, it is necessary to somewhat "accumulate" the functions of the controlling and law enforcement bodies. The body, verifying the authenticity of the data entered into the declarations should be duly authorised to invite an official (or any relevant person), to require and receive any information and explanations from the latter regarding the issues that are crucial for the verification of a declaration; to require from any official, agency, enterprise, establishment, organisation (including the Prosecutors' Office, Ministries of Internal Affairs and State Security and taxation, customs and judicial bodies, commercial banks and commercial establishment) the provision of full and timely information, necessary for specifying and verifying data contained in the declaration; to require and receive any information, documents regarding the property and incomes of an official and his/her close relatives (of ascending and descending line) (including information concerning their origin) and check the said information; to seek the services of the independent auditors, experts and other relevant specialists for studying and settling specific issues and to secure the appropriate conditions for their activities; to check the data regarding the assets deposited by an official and his/her family members at banking or/and credit institutions and financial and banking transactions conducted on them; to study the data concerning the participation of an official and his/her family members in entrepreneurial activities, to what end it is to be authorised to require and get acquainted

with the acts of incorporation of an enterprise, the internal correspondence of an enterprise, information regarding the economic activities of an enterprise, taxes paid, incomes, grants, credits and other sources of financing, as well as materials concerning the fulfilment of tax and customs obligations, etc.; to receive information from foreign representations, operating in Georgia, Border Control State Department, customs' agencies and other private organisations regarding the secondment, travel, study (and etc.) of an official and his/her family members abroad and check this information; to require and receive any information regarding gifts received by an official and his/her family members and a gift donator (including the information about the incomes of a gift donator, necessary for the establishment of the financial origin of a gift); to require and receive information about the income (wages, bonus, business mission, etc.), received for any payable activity, executed by an official and his/her family members and to get acquainted with relevant accounting data; to require and receive information about the decisions made for the implementation of an economic activity by an official and the activity carried out in accordance with these decisions. When required, and after having researched and verified the data to be entered into the declaration and the related materials, it is possible to empower the above-mentioned body with additional authorisations (namely, the possibility of obtaining the operational information).

For the verification of some information entered in the declaration, it is necessary that the property of an official and his/her family members, located abroad, be subjected to verification. To this end, according to the international treaties and agreements made with the respective foreign countries, it is important to elaborate the mechanisms for securing the receipt and the verification of the information regarding the property of an official and his/her family members, located abroad (including the offshore zones), as well as about their deposits in the banking or/and credit institutions of foreign countries, and about their participation in entrepreneurial activities.

In order to conduct the process of verification of the declaration data, it is necessary to establish responsibility (namely, criminal responsibility) of a natural person, official, head of an establishment, organisation or/and of their structural units, who do not present the information required for the verification of the declaration or hamper, hinder the receipt of such information or provide inaccurate or incomplete information.

With due consideration of the above said, a new body is to be established for the verification of the authenticity of the data entered into the declarations. The body is to be empowered to carry out all the above-mentioned functions, have the operational service and secure the verification and the establishment of the authenticity of the data entered into the declaration independently from any other organisations. This itself requires fundamental changes in the existing legislation so as to elaborate the legal framework for the operation of this body and to adapt it to the existing infrastructure. As well as this, an additional source of financing is to be found.

More importantly, when setting up a new controlling body, we should be careful not to allow the body to become the source of corruption against a background of widespread corruption. Besides, increasing the number of controllers is the basis for a one-off and not systemic solution of the problem. The fight against corruption and the process of verifying the declaration data involve long-term, well-elaborated, targeted actions that are co-ordinated with various state agencies. Thus, it is more realistic and less problematic from a practical point of view to verify the authenticity of the declarations within the existing institutional framework, through the relevant, co-ordinated and targeted completion of the functions granted upon them.

Proceeding on from this, it is impossible to ignore the role of the Bureau for Information on Assets and Finances of Public Officials as that of "the body of initial control". It is a specific state body, which is not

a part of either legislative or executive power or the judiciary. It holds a totally neutral position both among the power branches and political forces and is accountable only to the President of Georgia. From the functional point of view, the Information Bureau secures the receipt of the filled in declarations, their registration and examination - whether they are accurately filled in from the technical point of view or not; exercises control over the timely submission of the declarations; analyses, generalises and makes public the submitted declarations. To further develop the verification process it is necessary to expand the scope of activities of the Bureau to a certain extent, as has been done in many foreign countries (USA and UK among others). Namely, the Bureau is to secure the analysis of the data entered into the declaration and of the attached material submitted by the officials. At the same time it should be entitled to require any information and document concerning the declaration data from a state body, high-ranking official, natural or legal person, to establish the positional incompatibility of an official and his/her family member; in the case of establishing this, to refer the issue to a relevant body or official for the implementation of the measures, provided by the law. In the case of detecting inaccuracy or incompleteness of the data entered into the declaration, or non-entering of the data, the Bureau should be entitled to apply to the Prosecutor's Office or to a court, who will secure the establishment of the authenticity of the data entered into the declaration within the limits of their competences.

Within the framework of the given model, the Information Bureau analyses the declaration data, makes an initial conclusion and detects whether the information entered into the declaration is complete or not, whether there is a case of positional incompatibility of an official, provided by the law and whether there is an inconsistency between the annual income and expenses of an official and his/her family members. In parallel, the Bureau, within the limits of its competence, verifies the declaration data. On this basis, a public summary is prepared and where there has been a violation of the law, materials are referred to the relevant bodies (in the case of detecting a disciplinary infringement – to a superior official or body, and in the case of the grounds for a criminal offence – to the Prosecutor's Office or to a court).

In tandem to the verification process, it is important to reinforce the mechanisms of bearing responsibility.

According to the existing legislation, non-presentation of a property or financial declaration or the entry of incomplete or inaccurate data into a declaration is punishable under the Criminal Law (Article 335 of the Criminal Code of Georgia). As these are two separate offences, it is possible to provide for different penalties.

It is also important to separate the non-entry of data concerning property and incomes or/and the concealment of this information by entering inaccurate or incomplete data into a declaration, and to introduce the latter as a specific offence. Non-entry or concealment of data could be effected via various means (e.g. registering property on behalf of other persons, conducting business with the help of substitute persons, failing to mention every family member or other persons permanently living with him/her with a view to concealing information concerning property and income, etc.)

In addition it is necessary to make the sanctions, provided by Article 335 of the Criminal Code of Georgia, more stringent, in order to make the mentioned action "of high risk" – "persistent evasion from the presentation of a property or financial declaration and/or entering incomplete or inaccurate data into a declaration shall be punishable by a fine or up to 120-200 hours of forced labour, with the deprivation of the right to hold high positions or to carry out business activity for a period of up to three years". But the introduction of severe punishment will not remove the problem itself. To this end, a

whole system of legislative provisions is necessary, which will secure the proper functioning of the institute of declaration and the mechanisms for the verification of the declarations.

When speaking about the perspectives of the development of the institute of declaration and related mechanisms of the responsibility of the officials, we consider it necessary to introduce the legal definition of the term “ungrounded property” into the legislation. This measure will considerably enhance the exposure of the property, the source of which is not officially registered and will create the conditions for the disclosure of the cases of legalisation of illegal property. The existence of “ungrounded property” and particularly of “unjust enrichment” itself is stipulated by an illegal income or an income received by an official through the violation of a law, sub-legal or a normative act, what could have been revealed as a criminal offence, administrative infringement or the violation of the provisions regulating civil relations.

Hence, an income is earned through an offence and the object of an offence are money means and other property, which according to Article 147 of the Civil Code of Georgia means any thing and incorporeal property wealth, which could be possessed, made use of and disposed by natural and legal persons.

Specifically property obtained by means of illegal income could be construed in the context of ungrounded property, and it should be qualified as a substantial offence and be subjected to criminal or administrative liability with due consideration of the nature of the act.

Any property, possessed by an official or his/her family member and exceeding their current or past (it is better to calculate for a certain period) income, could be construed as an ungrounded property; as well as the property used by an official and/or his/her family member, which exceeds the current or past income of the owner of the mentioned property; also the property, transferred to an official and/or his/her family member and exceeding the current or past income of the donator of the property. In the case of failure to prove the existence of the legal source of such property, it should be subjected to the transfer to the state; at the same time, during the verification of the information regarding the ungrounded property the alienation of the property or exercising any economic or financial transactions on it should be prohibited.

Upon the consideration of the possibility of transfer of the property to the state, the issue of compatibility of an action with the Constitution acquires a priority importance.

According to Article 21 of the Constitution, property is inviolable. Of course, we should mean only the legal property right. It is difficult to imagine that somebody will oppose this statement and assert that the State with the help of Article 21 of the Constitution declare the inviolability of the right on “possession” of illegal property.

If the transfer of ungrounded property to the state is effected through seizure, it should cover only the property that is obtained illegally and not the whole property, which is in the possession of an individual. Though, we do not exclude the voluntary transfer of this property to the state and consequently the possibilities of discharging from the responsibility in the case the property is not obtained as a result of a criminal offence.

Thus, the seizure of property is considered unconstitutional when the property is acquired legally and not the case when it is obtained illegally.

Thus, legislation allowing for the seizure of illegally obtained property is not against the Constitution, and is also in full compliance with international provisions for the protection of human rights and the fight against criminality. In this respect we can mention the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and 1999 Council of Europe Criminal Law Convention on Corruption which deal with the possibility of seizure of illegally obtained property.

Upon the reglamentation of "ungrounded property", "unjust enrichment" and consequently of the issues of imposing the respective responsibilities, particular importance needs to be attached to legal guarantees, so as not to relate the legal prosecution with the "politisation" and settling personal scores and to effect it in an independent and impartial manner. Such guarantees aim to the establishment of a general perception in the society, that legal prosecution is not a means for fighting against political opponents, but is merely the proper implementation of the law, in accordance with the legal principle that "all are equal before the law", and that every decision is applied with due observance of the rule of law. Taking the above into consideration, particular importance has to be given to the creation of a legal environment, in which issues of laundering of illegal proceeds, identification of persons and property, search of incomes, transparency of the fiscal system, etc. are addressed.

These are the main observations that are related with the reglamentation process of the mechanism of verification of the data entered into the declarations. During the practical realisation of the presented proposals the following should be taken into consideration: the negative and positive aspects of the above-mentioned models, their compatibility with the institutions of a rule-of-law state and to what extent they actually facilitate the full-scale and actual functioning of the institute of declarations.

ZURAB EZUGBAIA*

A GENERAL OVERVIEW OF THE NORTHERN EUROPEAN (SCANDINAVIAN) SYSTEM OF LOCAL SELF-GOVERNMENT**

When reviewing the institute of local self-government, usually several principal systems of self-government are outlined. The signs of such system are reflected in any national model of self-government. In addition, a number of scientists exclusively treat the Northern European (Scandinavian) system of self-government, the nature and broad scope of which is not radically different from others, but has a whole series of peculiarities, caused by different historical-cultural development and the socio-economic situation of the Northern European countries. We believe that for a comprehensive review of the institute of local self-government, an examination of the specific experience of the Northern European states in this field would be reasonable.

Democratic legislative regulation of local self-government in the Scandinavian countries has been ongoing for about 150 years. In establishing self-government units, ecclesiastical divisions were applied in the Northern Europe (it is noteworthy that in some states of the region ecclesiastical units - parishes are still mentioned along with secular units). In this region, the introduction of local self-government was caused by various influences: on the one hand, self-government was considered as a way of releasing people from the control of central authority, providing citizens' rights and freedoms, and establishing local political responsibility; on the other, self-government was deemed to be a flexible administration formed on the local level, which would promote the exercise of central power.

For further examination of the Northern European system of self-government, first of all a general review of the principal peculiarities of the national model of local administration existing in each state of this region is needed.

Finland is divided into 12 provinces called Laani. Each laani is divided into communes. In the Laani, state local administration is exercised by a Governor appointed by the President. One of the Laanis – Ahvenanma (Aland Islands), where a major part of the local population is of Swedish origin, partial autonomy has been granted to. On a lower level (communes, cities and other municipalities) local self-government is exercised.

Denmark is divided into 14 administrative units called Amts. The capital of Denmark, Copenhagen, has the status of Amt. Greenland and the Faeroes Islands have a certain degree of autonomy. Amts are headed by elective councils and Amtmans are appointed by the King. Amts are divided into communes and municipalities where representative bodies of self-government - municipal councils - operate. The Elders of communes and Burgomasters of municipalities are appointed by the respective Amtman on the basis of the nomination from the local representative bodies.

Sweden consists of 24 Län, where elective representative bodies of self-government, Landstings, and representatives of central authority, governors, operate. Governors head the special county administrative boards, whereas the executive body responsible before and elected by the Landsting, is

* *Zurab Ezugbaia* is the Deputy Minister of Justice of Georgia.
** Translated from the Georgian language by *Maka Machkhaneli*.

the county administrative office. Län are divided into kommuns, where the first level representative bodies of self-government - councils - are elected. Executive bodies of self-government of kommuns are also called municipal administrative offices.

Norway is divided into 19 provinces called Fylker. In Fylke (except for Oslo and Bergen Fylker) representative bodies, Fylkestings are elected. Each Fylke is headed by a Governor, Fylkesman (Head of Fylke), who is appointed by the King. Administrative office in a Fylke is established on the basis of the principle of appointment, with no participation from the public. Fylker are divided into communes (municipalities) where the first level self-government is exercised.

Iceland is divided into 37 Syslar. State administration is exercised in Sysla and only administration formed by the central authority is met on this level. The capital, Reykjavik, and some other cities have a system of independent government. In the cities and other populated areas of Iceland, local self-government is exercised by elective representative bodies – municipalities. Municipal territory in Iceland usually is very small and its scope of competency and responsibility is limited.

After a general review of the local government systems of the Northern European states, the main trends and factors characterising the municipal development of these countries can be discussed. Their examination, in our opinion, reflects the main directions of municipal development in Scandinavia. This is indeed interesting because at present, in transforming the national system of self-government in Georgia, reasonability of sharing the Scandinavian experience (especially Sweden's) is being increasingly urged. Moreover, in order to apply foreign examples, a complete study of both their positive and negative characteristics, and a prediction of the results of their adaptation are necessary. The compatibility of this very analytical prognosis with the goals and realities of the present situation in Georgia could become an objective criterion for the assessment of foreign experiences. It should also be taken into account that an assessment of the results of municipal reforms is not at all homogeneous, even in Sweden: “Focusing on the results of the process of updating in the debates in the society, Riksdag (Swedish Parliament – Z.E.) in the spring of 1994, started the process of general analysis and scientific assessment. The task of conducting such analysis and scientific assessment was assigned to the Parliamentary Commission on Municipal Development Matters, which at the end of spring 1996 submitted the results of its work. The Commission established the fact that the process of decentralisation and transferring responsibility or any activity from the state level to the communes and *Landstings* was carried out without appropriate management, for ensuring the guaranteed achievement of various goals, and with a lack of delicate instruments for analysing and assessing the achieved results. Citizens were not sufficiently informed on how to act, whom to submit the claims or who to address for making the desirable changes”.[1]

The following four trends of the municipal development of the Northern European states is discussed in this paper:

a) The enlargement of self-governing units;
b) The choice between politicians and professionals;
c) The politicisation of local self-government;
d) The substitution of territorial collectives with consumer collectives.

Enlargement of self-governing units. The process of enlarging self-governing units – municipalities, was carried out in the Northern European countries. The objective was the optimisation and increase

[1] *K.Haggroth, K.Kronvall, C.Riberdahl, K.Rudebeck*, Swedish Local Government:Traditions and Reforms, The Swedish Institute, Stockholm, 1999, p. 71.

in efficiency of local government, which should have been based on a reduction in the number of municipalities and an expansion of their territorial borders. The process of enlarging municipalities in the Northern European states was carried our with different intensity and range:

Number of municipalities according to years[2]

Years	Iceland	Finland	Norway	Denmark	Sweden
1950	229	547	744	1388	2498
1990	195	455	448	275	284

The motives for, as well as the dynamics of the unification of municipalities in the Northern European states was caused by various factors. The principal motive for unification was: in Sweden - a need for the full realisation of social policy; in Norway - to subordinate secondary schools to municipalities; in Denmark - the danger of territorial-administrative splits occurring in expanding cities and other urban centres. The contrast, in terms of the dynamics of unification, is explained by the use of voluntary and compulsory forms of unification: in particular, the voluntary principle was the basis for the unification of municipalities in Finland and Iceland; whereas in Sweden, Denmark and Norway due to the inefficiency of this principle, this issue was determined by the pressure of central authority. In addition, the general reason for the unification and enlargement of municipalities was a fuller realisation of central authority policy, as well as for the transfer of a large number of powers from central authority to the local level. As such, it was necessary to ensure the organisational-administrative and financial-economic readiness of municipalities.

Today, as a result of the enlargement, the Northern European communes belong basically to the category of large municipalities[3]:

	Denmark	Norway	Finland	Sweden
Average territory of Municipalities	156,4	723,2	72,6	1584,5
Average population of municipalities	19.000	9.000	11.000	30.000

Enlargement had some negative sides too. Enormous territories of Scandinavian municipalities, certainly, are not homogeneous – often there are several settlements in one municipality, which differ not only by geographical location (located along a fjord, on an island, slope or lowlands) but by specific interests as well. Conflict of interests within settlements is quite important. This is confirmed by the following fact: internal conflicts in some municipalities enlarged after the unification carried out under the pressure of central governments of Scandinavian states were so severe that it led to the split of unified municipalities. This negative side of the forced unification of municipalities is becoming even more a part of the Georgian reality due to the historical tradition of independence of certain areas, the multi-ethnic background of the country and the problem of not having enough land. It should also be taken into account that in Scandinavian countries the process of enlarging municipalities was carried out at a certain stage in the development of the local self-government system, on the basis of the state's strength on the one hand, and on the other, of the governmental and economic strength of the municipalities. This guaranteed that the new functions delegated to the municipalities after the enlargement would not be left unfulfilled and local administration would become more effective.

[2] *A. Offerdal*, On Nordic Local Government: Developments and Prospects, "Policy", №2 (50), 1999, p.162.
[3] *A. Offerdal*, On Nordic Local Government: Developments and Prospects, "Policy", №2 (50), 1999, p.159.

Moreover, the repeal of the interim body of local administration (the second level of self-government) and the transfer of relevant functions partly to the central authority and partly to the first level of local government is being advocated in Norway and Sweden. The interim body of administration was characterised with some imperfection, which necessitated more "specialised" supporting bodies: "As soon as the unification process was drawn to a close, participatory development started and sub-municipal bodies appeared."[4]

In this regard, the experience of Finland is interesting, where there is no interim body of self-government. Though, an institute of co-operation between municipalities is widely applied and developed. Co-operation between municipalities is carried out in specialised spheres, such as, health care, higher education, etc. To organise the co-operation between municipalities in Finland, multi-functionality is promoted – i.e. it is considered reasonable to carry out the organisation's work in more than one particular direction. In such cases, co-operation between municipalities is quite closely related with the interim second body of local self-government. Some scientists believe that the further development of Finnish self-government system might lead to the introduction of interim levels, as in Sweden, Norway and Denmark.

The choice between governments with politicians or professionals. In Scandinavian countries, attention is paid to the choice between the involvement of politicians or professionals in the exercise of self-government. First of all I would like to define the term "politician", which in this context means a person elected to the municipal representative bodies or appointed to the municipal executive bodies, according to his/her Party-membership, as well as the representative of a political party who participates in the promotion of local administration on a voluntary basis. Whereas the term "professional" means a municipal public servant, and an expert who is involved in local administration with a professional background in a specific area.

Until 1965-1966 the political element prevailed in local administration of the Northern European countries, after which it became more and more depended on the professionals. The increase in the share of professionals in local administration was influenced by the enlargement of municipalities, which led to a significant decrease in the amount of both representative and executive bodies exercising self-government.

Below, reasons for political or professional involvement in self-government, are given:

a) Recognition of the principle of appointment by election and of representation as the fundamental basis in the theoretical foundation of the institute of local self-government, leads to the involvement of non-professionals in the municipal government. On the other hand, the significant enlargement of the self-government entities in Scandinavian countries necessitated their political management and their involvement in common state policy, which also required the participation of politicians in municipal administration. Strengthening of the political element is also proved by the task of bringing self-government and the population together to a maximum possible extent, because the involvement of non-professionals in the determination of issues of local importance speaks for the expansion of the possibilities for active work of the representatives of the territorial collective in the self-government bodies. Thus several Northern European specialists consider self-government as a political system of administration.

[4] *A. Offerdal*, On Nordic Local Government: Developments and Prospects, "Policy", №2 (50), 1999, p.165.

Politicians are treated importantly in determining the issues concerning the self-government that cannot be discussed or settled on the experts' level (e.g. convergence of conflicting interests, making choice between opinions expressed by professionals or experts etc.) In this regard, the politicians are able to combine different interests and experts' calculations, gather them and to make a common decision on the basis of the generalisation, which becomes compulsory in the work of municipality. Thus, municipal policy is usually established by the politicians themselves. In this regard, the words of the famous Norwegian political scientist, *O. Offerdal* are interesting: "If politicians are removed from the bodies of local government, only the local administrative offices of the bodies of central authority will be left."[5]

b) On the other hand, besides political, economic management is also a characteristic feature of the self-government. The most important part of the municipal government is the professional administration of local property, the municipal economy and finances. This characteristic feature is becoming more obvious in the Northern European countries where the so-called "states of common welfare" either already exit or are being established. The municipal system in Scandinavia is characterised with a particular financial-economic strength and the professionals employed in the local administration played the main role in ensuring this. The need for professionals is crucial in terms of making the municipalities meet the interests of consumers.

As for the politicians, in the opinion of some scientists, they are only a force for raising potential conflicts, which is absolutely unacceptable on a local level for the purpose of municipal development. Therefore it should be noted that in the Northern European countries, conflicts between politicians on a municipal level often do not coincide with those of their respective party forces on a central level. This indicates the sophistication of political and municipal administration in Scandinavia.

Proceeding from the above, the choice between politicians and professionals in the municipal administration does not exclude the need for either of these components. The problem is agreeing on the optimum balance in terms of the involvement and influence of these components, so as to ensure municipal development, protect local interests, provide for organic involvement in common state mechanism and, more importantly, distinguish between self-government and state administration.

Politicisation of local self-government. In Scandinavia, the importance of municipalities within the state is bigger than in other European countries. This is due to the fact that the municipal economy in the Northern Europe is one of the integral parts of the state's economic system. Municipalities also have leading positions in the social and employment fields, and territorially enlarged municipalities have significant human and financial-economic resources. For comparison, we would like to show a table showing the share of local bodies in common indicators of the employment in the state sector of some Scandinavian and western European countries:

Year of calculation of data	Share of municipalities in the common field of employment in the state sector[6]					
1980	Denmark	Norway	Sweden	UK	Germany	France
	70%	64%	54%	38%	15%	115

[5] *A. Offerdal*, On Nordic Local Government: Developments and Prospects, "Policy", №2 (50), 1999, p.164..
[6] *A. Offerdal*, On Nordic Local Government: Developments and Prospects, "Policy", №2 (50), 1999, p.158.

Such statistics show that the municipal system in the Northern European countries is not an organism, which is autonomous from the state, but is rather an integral part of the state sector. Consequently, the politicisation of local self-government is quite high. In municipal elections, as a rule, the parties successful in the common state elections win. In the majority of municipalities, the electorate is stabile – namely, a particular party usually obtains the majority of votes in particular municipalities. In addition, serious conflicts of a political nature do not take place on the local administration level what is partially explained by the existence of real possibilities for the participation of various political forces in the formation of municipal bodies, on the basis of the principle of proportionality. For instance, in Sweden "municipal councils elect all committees on a party-political basis with due consideration of the distribution of seats in the council. On the other hand, the law allows for the election of committees on a professional basis where agreement between the parties is achieved".[7]

Substitution of territorial collective with consumer collective. Recently the successful municipal development in the Northern European countries has created a favourable basis for conducting countless experiments in the area of self-government. Attempts at forming so-called "free communes" are quite popular. The essence of such experiments is to allow some municipalities, under the principle of selection, to present their own opinions on the sophistication of organising the municipal administration and introducing new forms. Provided the proposals of the municipalities are approved, the implementation of the experimental project is financed with state subsidies. As a result of such experiments, new legislation has been elaborated and adopted, the degree of self-governing units expanded and municipalities and local population have been brought closer.

As regards the trends in municipal experimental development, the changes and opinions that in the end lead to the substitution of territorial collectives with consumers collectives are especially interesting. Such practice is widely applied in Denmark and Sweden. The point is that, as an experiment, population as a determining factor, was replaced by consumers of municipal services (population is the consumers' collective, whose interest, influence and relationship with municipal administration bodies is limited to the fields of supply of services and quality, as well as the use of services). In exercising local self-government, representatives of the local population appear not as citizens or a source of power, but as consumers of municipal services. As a result, self-government bodies loose their political and governmental function and in their relations with the population, appear as organisers, co-ordinators or suppliers of services. Consequently, the representatives of the local population are allowed to be broadly involved on the municipal level in the discussion and determination of the issues concerning services and consumption. A positive effect of the experiment was the following: members of the local collective who had no interest in working on the political, legal or organisational problems of the municipality, were active as consumers and unintentionally involved in the management of the activities of the supplier of services – the municipality. In the view of some scientists such involvement (under the status of consumer) prepares people for later political participation in the self-government process.

Within this framework, municipal services were privatised and market competition principles established in the given fields. "Earlier, the entire work of communes had been financed and carried out only with their own resources, and therefore private enterprises had not been involved. But nowadays, the monopolies of the social sector are being gradually liquidated and the work of the communes is more and more being carried out under the conditions of competition."8 Specifically, the

[7] *K.Haggroth, K.Kronvall, C.Riberdahl, K.Rudebeck*, Swedish Local Government: Traditions and Reforms, The Swedish Institute, Stockholm, 1999, p.45.
[8] *K.Haggroth, K.Kronvall, C.Riberdahl, K.Rudebeck*, Swedish Local Government: Traditions and Reforms, The Swedish Institute, Stockholm, 1999, p.64.

local population was given the option of receiving certain services from private companies (including those established by the municipality itself) under the auspices of the municipality. Competition in this case means that the municipality selects the companies whose proposed terms meet the consumers' interests to a better extent (and thus the municipal order will be placed). In addition, a voucher scheme for municipal services, was implemented. Essentially, the municipality does not limit the local population in its choice of service provider (e.g. a particular hospital). It issues vouchers that allow for the remuneration of services received from an organisation, which is more favourable to the consumer.

Accordingly, the political element in local self-government should be minimised and the emphasis placed on the effective provision of services in order to meet the populations' requirements. Municipal activity is thus not concentrated on the social or public interests of citizens, but on the private interests of local residents. In our opinion, this has resulted from the dynamics of the development of statehood in the Northern European countries.

KONSTANTIN KORKELIA*

THE DANGER OF CRISIS IN THE EUROPEAN COURT OF HUMAN RIGHTS: MEASURES TO BE TAKEN AT THE INTERNATIONAL AND NATIONAL LEVELS TO OVERCOME THE PRESENT SITUATION**

1. INTRODUCTION

The system of protection of human rights established under the Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention on Human Rights' or the 'European Convention') is considered to be the most effective international machinery. Despite this appraisal, the maintenance of the current situation in the European Court of Human Rights will definitely cast a doubt its image. The potential consequences of the increasing number of individual applications were described in the Report dealing with the current situation in the European Court of Human Rights:

"… immediate and urgent action is indispensable if the Court is to remain effective. If no steps are taken, the situation will simply deteriorate, with the Court having no prospect of "catching-up" with its ever-increasing arrears of work. It will no longer be able to determine all cases within a reasonable time, its public image will suffer and it will gradually lose credibility."[1]

The purpose of this paper is to evaluate the current situation in the European Court of Human Rights and give an analysis of the measures to be taken at the international and national levels for its improvement. It aims at making the readers aware of the recent proposals on the reform of the European Court of Human Rights, as well as at presenting the opinions of the author regarding the reasonability of specific measures.

Initially the article reviews the current situation in the European Court of Human Rights. Then comes a review of the proposals and initiatives on the measures to be taken at the international level, which aim at the improvement of the current situation in the European Court of Human Rights. Measures to be taken at the national level, which are to facilitate the overcoming of the current situation in the European Court of Human Rights shall be analysed as well. Finally, some concluding remarks and recommendations are made with regard to the measures that, in the author's opinion, promote the process of overcoming the current situation in the most efficient manner.

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* *Konstantin Korkelia*, the Candidate of Legal Sciences, is the Deputy Director of the Institute of the State and Law, the Lecturer of the Faculty of International Law and International Relations of the Tbilisi State University.

** Translated from the Georgian language by *Ketevan Vakhtangadze*.

[1] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 39, p. 34. An electronic version of the Report is available at the Council of Europe web site: www.coe.int.

2. THE CURRENT SITUATION

2.1. Background

The European Convention on Human Rights, drafted within the Council of Europe, was signed in Rome, on November 4, 1950.[2] It entered into force on 3 September 1953 after its ratification by the 10 member states of the Council of Europe.[3]

For the first time in the history of mankind, the European Convention laid down the fundamental human rights and freedoms in a legally binding manner and established the machinery of control over the observance of the rights and freedoms under the Convention.

Along with the European Convention on Human Rights, 12 Protocols have also been adopted.[4] Some of these Protocols provide for additional rights and freedoms for individuals, while the others aim at the reinforcement of the control machinery of the European Convention. Protocols No1, 4, 6, 7 and 12 provide for the protection of substantive rights. Only Protocol 12 (on the prohibition of discrimination) has not yet entered into force. The European Convention and additional Protocols thereto set forth fundamental civil and political rights.[5]

The Convention established two international bodies – the European Commission and the European Court of Human Rights, the purpose of which was the supervision over the observance of the rights and freedoms under the European Convention and Protocols thereto by the High Contracting Parties. The European Commission on Human Rights examined and decided on the admissibility of the applications. The European Court of Human Rights examined the applications on merits and decided whether a High Contracting Party had violated the rights and freedoms under the Convention and Protocols thereto. The applications were also examined on merits by the Committee of Ministers of the Council of Europe, which is the statutory political body of the Council of Europe. The Committee of Ministers exercised control over the execution of the judgments of the European Court of Human Rights by the states parties to the European Convention.

As mentioned above, the European Convention on Human Rights is considered to be the most effective and advanced international system for the protection of human rights.[6] The efficiency of the Convention is conditioned not so by the rights and freedoms laid down by the Convention and Protocols thereto, but by the control machinery securing their protection.[7]

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[2] *J. Frowein*, The European Convention on Human Rights as the Public Order of Europe, in: Collected Courses of the Academy of European Law, 1990, Vol. I(2) 1992, p. 275. About the history of the adoption of the Convention, see *A.Robertson, J. Merrills*, Human Rights in Europe: A Study of the European Convention on Human Rights, 1993, pp. 5-12.

[3] For details, see *F. Jacobs, R. White*, The European Convention on Human Rights, 1996, pp. 3-6.

[4] Protocol 13 has already been drafted. Unlike Protocol 6 of the Convention (on the abolition of the death penalty in peace-time) Protocol 13 provides for the total abolition of the death penalty, including in time of war. The Draft Protocol has been submitted to the Committee of Ministers of the Council of Europe for adoption.

[5] Exceptions are Article 1 (protection of property) and Article 2 (the right to education) of Protocol 1. For details, see *D.Harris, M. O'Boyle, C. Warbrick*, Law of the European Convention on Human Rights, 1995, pp. 3-4.

[6] *A. Robertson, J. Merrills*, Human Rights in Europe: A Study of the European Convention on Human Rights, 1993, 1; *J. Meyer-Ladewig*, Reform of the Control Machinery, in: The European System for the Protection of Human Rights, *R.St.J. Macdonald, F. Matscher and H. Petzold (Eds)*, 1993, p. 909; *D. Harris, M. O'Boyle, C. Warbrick*, Law of the European Convention on Human Rights, 1995, p. 29; Human Rights: A Continuing Challenge for the Council of Europe, Council of Europe Press, 1995, p. 5.

[7] *K. Vasak*, The Council of Europe, in: The International Dimension of Human Rights, *K. Vasak*, (Ed.) Vol. 2, 1982, p. 673.

The European Commission and the European Court of Human Rights, recognising the European Convention as the "*constitutional instrument of European public order*", stressed the particular importance of the European Convention on Human Rights for European states.[8]

It is noteworthy, that the importance of the judgments of the European Court of Human Rights exceeds the protection of the rights of individuals. The legislation and practice of a state is evaluated on the grounds of these judgments, and as a result the states amend their legislation and improve their judicial and administrative practice. These judgments affect nearly every field of national law.

For the time being, 41 states are parties to the Convention, Georgia among them. On 25 January 2001 the Convention was signed by Azerbaijan and Armenia, though they have not ratified it as yet.[9]

2.2. The situation before the reform of 1998

For the first two decades of its operation, the workload of the European Commission and the European Court of Human Rights was rather low given the small amount of applications. Until 1976 the number of such cases never exceeded 3 judgments per year. There were years, when the European Court of Human Rights did not even consider a single case (1959, 1963, 1964, 1966 and 1977). It was not until 1982 that the European Court of Human Rights examined more than 10 cases a year.[10]

Starting from the 1980s the number of cases submitted to the control machinery of the European Convention was progressively increasing, as a result of the popularisation of the system of protection of human rights[11] and because of the recognition of the right of an individual application to the European Commission by the states parties to the Convention.[12] Increasing number of applications directly affected the duration of the examination of the applications lodged before the control bodies of the European Convention, and especially before the European Commission. It took on average over 5 years for a case to be finally decided by the Court, which is too long a period for the consideration of an application.[13]

The amount of applications registered with the European Commission per year increased from 404 (1981) to 2037 (1993).[14] The amount of cases submitted to the European Court of Human Rights

[8] See *Chrysostomos v. Turkey*, Decision of 4 March 1991, Appl. 15299-15311/89, Para. 22; *Loizidou v. Turkey*, Judgement of 23 March 1995, Series A, No. 310, Para. 75. See also: Declaration on the European Convention on Human Rights at 50: What Future for the Protection of Human Rights in Europe, The European Ministerial Conference on Human Rights, H/Conf (2000)1, 10.

[9] The Council of Europe has 43 member states, the last two ones – Azerbaijan and Armenia – joined the Council on 25 January 2001.

[10] *R.Bernhardt*, The European Court of Human Rights in Strasbourg: New Phase, New Problems, in The State and the Law (in Russian), 1999, No. 7, p. 57.

[11] Explanatory Report, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Para. 20. See on the Council of Europe Web-site www.coe.int.

[12] See Article 25 of the initial text of the European Convention, Human Rights and International Law, Council of Press, 1992 Europe, p. 170. Starting from the 1980s the right of individual applications to the European Commission on Human Rights was acknowledged by, *inter alia*, the following states: France and Greece – 1990; Bulgaria, the Czech Republic, Hungary and Slovakia – 1992; Poland 0 1993; Rumania – 1994.

[13] Explanatory Report, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby Para. 21.

[14] *D. Harris, M. O'Boyle, C. Warbrick*, Law of the European Convention on Human Rights, 1995, p. 706.

increased in a corresponding manner. In 1981 only 7 cases were referred to the European Court of Human Rights, but there were 52 in 1993.[15]

The increase in the number of the applications submitted to the Convention control bodies was greatly promoted by the process of ratification of the Convention by Central and East European states by the end of the 1980s and at the beginning of the 1990s, which resulted in an increase of the number of applications, sent from these countries. Consequently the workload of the control bodies of the European Convention increased as well.[16]

The European Commission and the European Court of Human Rights found it more and more difficult to deal with the increasing workload. It was evident, that the amount of applications submitted to the European Commission and the European Court of Human Rights would not decrease, but on the contrary, would increase together with the increase in the number of the High Contracting Parties to the Convention. It became apparent, that without the reform of the control bodies of the European Convention it would be impossible to maintain the efficiency of the system of the protection of human rights.[17] Given this the issue of the reform of the control machinery of the European Convention has arisen.[18] The states started to vigorously debate the reform of the control machinery of the European Convention. Among the proposals for the reform of the control machinery of the European Convention,[19] the parties to the Convention finally decided to support the idea of a permanent Court, which was embodied in the 1993 Vienna Declaration of the State and Government Heads of the Council of Europe Member States. As a result, the states have adopted Protocol No11 to the European Convention on Human Rights, which provided for the restructuring of the control machinery of the Convention and acceleration and simplification of the procedure of application and examination.[20]

Protocol No11 to the European Convention entered into force on 1 November 1998. It changed the two-tier control system of the European Convention (the European Commission and the European Court of Human Rights, which was not a permanent one). After the entry into force of Protocol No11, the European Commission on Human Rights[21] and the 'old' European Court ceased to exist. Restructured permanent European Court of Human Rights started to operate. Another, the most important change introduced by Protocol No11 into the control machinery of the European Convention, is that the Committee of Ministers of the Council of Europe in no longer authorised to consider cases on merits, though it has maintained the function of supervising over the execution of the judgments of the European Court of Human Rights. [22]

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[15] Survey of Activities, European Court of Human Rights, 2000, Para. 6. See the Web-site of the European Court of Human Rights: www.echr.coe.int. See also *J. Meyer-Ladewig*, Reform of the Control Machinery, in: The European System for the Protection of Human Rights, *R.St.J. Macdonald, F. Matscher, H. Petzold (Eds),* 1993, p. 911.

[16] In 1990 a No.rdic country - Finland – ratified the European Convention as well.

[17] *D. Gomien, D. Harris, L. Zwaak*, Law and Practice of the European Convention on Human Rights and the European Social Charter, 1996, p. 91.

[18] Report on the Reform of the Control Machinery of the European Convention on Human Rights, Parliamentary Assembly of the Council of Europe, Doc. 6659, 15 September 1992, See on the Council of Europe Web-site www.coe.int.

[19] Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Paras. 14-17; See also J. *Meyer-Ladewig*, Reform of the Control Machinery, in: The European System for the Protection of Human Rights, *R.St.J. Macdonald, F. Matscher, H. Petzold (Eds),* 1993, pp. 919-920.

[20] *K. Korkelia*, The Legal and Political Consequences of Georgia's Accession to the European Convention on Human Rights and Fundamental Freedoms, in: Politika (in Georgian), No. 7/9, 1997, p. 12.

[21] Protocol No. 11 provided for a transitional provision providing that the European Commission continued dealing with the cases which had been declared admissible at the date of entry into force of the Protocol No. 11 for a period of one year (until 31 October 1999).

[22] Para. 2 of Article 46 of the European Convention.

Despite the substantial changes, made to the control machinery of the European Convention, Protocol No11 has not changed the rights and freedoms provided by the Convention.

2.3. The situation after the reform of 1998

Despite the fact that a restructured control system was put into operation in the recent past (1998), the current situation in the European Court of Human Rights is not less difficult (if not more difficult), than the situation necessitating the reform of the control machinery of the Convention. The reason for the current difficult situation is the same: an increasing number of applications.[23]

The number of judgments delivered by the European Court of Human Rights has been progressively increasing for the past years: 1994 – 50 judgments; 1996 – 72 judgments; 1998 – 105 judgments; 1999 – 177 judgments. In 2000 the European Court of Human Rights delivered 675 judgments, which is a record figure.[24]

A particularly large number of applications is coming in from the large states, given the population of these countries. During 2000 the European Court of Human Rights received 1470 applications from the United Kingdom (626 were registered); 1618 applications from Germany (593 were registered); 909 applications from Turkey (735 were registered); 5142 applications from Italy (867 were registered); 3117 applications from Poland (777 were registered); 1987 applications from Russia (1325 were registered); 2813 applications from France (1325 were registered); 1493 applications from Ukraine (728 were registered).

In 2000 alone, the European Court of Human Rights received 26398 applications-10486 of them were registered. For the first seven months of 2001 (January–July) the European Court of Human Rights received 20739 applications, and 7909 of them were registered.[25]

The workload of the European Court of Human Rights has been increased given the flow of applications from the states, which ratified the European Convention after 1994.[26]

Together with the general trend of increase in the number of applications, the objective conditions for the growth of the number of the application could be easily predicted, namely, the possible growth in the number of the High Contracting Parties to the Convention and the enactment of Protocol No12 to the Convention (on the prohibition of discrimination).[27] It is likely that they will cause a new increase in the number of applications.

The situation is particularly difficult at the pre-admissibility stage. The number of applications is so large, that the Court Registry is technically unable to carry out the preparatory work with regard to

[23] Steep Rise in Workload for European Court of Human Rights, Press-Release Issued by the Registrar of the Court, N349, 21 June 1999. See on the Web site of the European Court of Human Rights www.echr.coe.int. Also: Recommendation 1535(2001), Structures, Procedures and Means of the European Court of Human Rights, the Parliamentary Assembly, 26 September 2001, Paras. 4-5. See on the Web site of the Parliamentary Assembly of the Council of Europe www.stars.coe.int.

[24] Survey of Activities, European Court of Human Rights, 2000. For details see: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, pp. 23-26.

[25] These are the latest statistic data available. Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, p. 69, p. 71.

[26] Albania, Andorra, Croatia, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Latvia, Lithuania, Moldova, Russia, Ukraine.

[27] As mentioned already, Azerbaijan and Armenia signed the European Convention in January 2001 and it is probable that they will ratify it in the near future.

every application in due course and to submit them to the Committee.[28] The problems also arise because of the "repetitive" (so called "clone") cases (e.g. applications lodged against Italy regarding the unreasonable duration of the court proceedings). These cases, which derive from the same structural problems in a state (which have not been eliminated by earlier delivered judgments), constitute a great burden for the European Court of Human Rights.

In order to increase its productivity, the European Court of Human Rights has taken a number of significant measures. As a result of the improvement of the administrative and organizational system, in 2000 the Court's efficiency has increased two-fold in comparison with 1999.[29] Despite such a significant increase in productivity, it is clear that the Court is not able to deal with the increasing workload of the received applications, as the number of submitted applications is much higher than the increase in the Court's productivity.

Given the drastic increase in the number of applications, the Court workload has increasingly become the centre-point of concern. The issue of a new reform of the European Court of Human Rights has gained more urgency. In his speech, made in Rome at the Conference held to mark the 50th Anniversary of the European Convention, the President of the European Court of Human Rights *L.Wildhaber* pointed out:

"We have had an increase of 500% in the number of applications over the past seven years. Put simply, for as long as the number of incoming cases obviously exceeds the number of outgoing cases, the backlog will continue to grow and there will come a point at which the system becomes asphyxiated. Put equally simply, the solutions are either to speed up the process by which cases are dealt with, or to reduce the volume of incoming business, or indeed both."[30]

Given the increasing number of the applications submitted to the European Court of Human Rights, the issue of the second reform of the European Court of Human Rights restructured in 1998, has become pressing again.[31] The Court's statistics have made it clear, that without an immediate reform, the European Court of Human Rights would be facing imminent threat in the near future and would not be able to deal with its functions.

The situation at the European Court of Human Rights was discussed at the Ministerial Conference dedicated to the 50th Anniversary of the European Convention (November 3-4, 2001), when a decision was made regarding the urgent measures to be taken. In the Declaration, adopted by the Conference it is highlighted, that "… it is indispensable, having regard to the ever-increasing number of applications, that urgent measures be taken to assist the Court in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation."[32]

[28] Appendix IV, European Committee on Legal Cooperation, Submissions of the CDCJ for the attention of the Evaluation Group, Strasbourg, 3 July 2001, CDCJ (2001)20, Para. 15, in: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, p. 88.

[29] European Governments urged to Increase Support for Human Rights Court, Press-Release Issued by the Registrar of the Court, No. 651, 28 September 2000. See on the Web site of the European Court of Human Rights www.echr.coe.int.

[30] Spotlight on Second Restructuring of European Court of Human Rights, Press-Release Issued by the Registrar of the Court, No. 418, 8 July 2000. See on the Web site of the European Court of Human Rights www.echr.coe.int.

[31] Court Making Steady Progress in the Face of Continuing Rise in Case-Load, Press-Release Issued by the Registrar of the Court, N 50, 24 January 2000; Spotlight on Second Restructuring of European Court of Human Rights, Press-Release Issued by the Registrar of the Court, No. 418, 8 July 2000.

[32] Declaration on the European Convention on Human Rights at 50: What Future for the Protection of Human Rights in Europe, Ministerial Conference and Commemorative Ceremony of the 50th Anniversary of the Convention, H/Conf(2000)1, Para. 13, Rome, 3-4 November 2000, p. 9.

The situation at the European Court of Human Rights was discussed by the Parliamentary Assembly of the Council of Europe as well, which adopted a special resolution.[33] It points out: "Unless immediate short- and long-term measures are taken, and unless the Court is provided with the resources immediately required, it, together with the Convention system, will face a situation of crisis."[34] The Parliamentary Assembly recommended the Committee of Minister of the Council of Europe, to "launch preparations with all the interested parties for the drafting of an amending protocol to the European Convention on Human Rights with a view to ensuring the long-term effectiveness of the European Court of Human Rights".[35]

Based on the decision of the Ministerial Conference, some specific measures have been taken with a view to maintaining the productivity of the European Court of Human Rights. Two groups were created to study the existing situation and to submit the proposals for the second reform of the control machinery of the European Convention. The Committee of Ministers established the Evaluation Group on the European Court of Human Rights[36] on February 7, 2001 on the one hand and on the other, the Steering Committee for Human Rights set up the Reflection Group on the Reinforcement of the Human Rights Protection Machinery.[37] Both groups have completed their work and prepared the recommendations for the maintenance of the effectiveness of the European Court of Human Rights.

What measures should be taken for the maintenance of the effectiveness of the European Court of Human Rights?

For the past few years many proposals have been made for the improvement of the control machinery of the European Convention on Human Rights. It is impossible to cover all the initiatives in the present article; accordingly attention will be paid only to those ones, which in the author's view are of particular importance.

The measures to be taken for the maintenance of the effectiveness of the European Court of Human Rights, can be divided into two groups: *international measures* and *national measures*.

3. MEASURES TO BE TAKEN AT THE INTERNATIONAL LEVEL

For the long-term solution of the problems of the European Court of Human Rights and the maintenance of its efficiency, complex measures should be taken, which aim at the further increase of the Court productivity on the one hand and the reduction of the number of applications submitted to the Court on the other hand. Due to the complexity of the problem, the measures to be taken at the international level will be divided into two parts:

[33] Recommendation 1535(2001) Structures, Procedures and Means of the European Court of Human Rights. See also the Explanatory memorandum to the Recommendation: the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Doc. 9200, 17 September 2001. See on the Web site of the Parliamentary Assembly of the Council of Europe www.stars.coe.int.

[34] Recommendation 1535(2001), Structures, Procedures and Means of the European Court of Human Rights, the Parliamentary Assembly, 26 September 2001, Para. 7.

[35] Recommendation 1535(2001), Structures, Procedures and Means of the European Court of Human Rights, the Parliamentary Assembly, 26 September 2001, Para. 14(v).

[36] The members of the Evaluation Group are: *Mr. Justin Harman*, Irish Ambassador to the Council of Europe (the Chairman), *Mr. Luzius Wildhaber*, President of the European Court of Human Rights, and *Mr. Hans-Christian Kruger*, Deputy Secretary General, acting on behalf of the Secretary General.

[37] Report on Structures, Procedures and Means of the European Court of Human Rights, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Doc. 9200, 17 September 2001. See on the Web site of the Parliamentary Assembly of the Council of Europe www.stars.coe.int.

- Measures *not* involving the amendment of the European Convention;
- Measures involving the amendment of the European Convention.

3.1. Measures not involving the amendment of the European Convention

3.1.1. Refusal of the Registry of the Court to register applications

A change of the rules of registration of applications might considerably reduce their number. In accordance with the established practice of the European Court of Human Rights, after the communication between an applicant and the Court Registry, an application is registered and submitted to a committee of three judges, which decides on the admissibility of an application. According to the current practice of the Court, an applicant's request regarding the registration of an application and its referral to the committee should be met in any case regardless of the fact that it might be clear to the Registry that an individual application is not compatible with the formal requirements for applying the European Court of Human Rights (E.g. the non-exhaustion of all domestic remedies).

To follow the full procedure with regard to these "hopeless" applications (the number of which is rather impressive), overloads both the Court Registry and the committees. Given this, it is necessary to establish a practice, under which the Registry would refuse the registration of an application, provided it is clear to the Court Registry that an application is "hopeless" and its examination would be terminated irrespective of an applicant's request regarding the registration of an application and its referral to the committee.

3.1.2. Group decisions on a certain category of cases

There is a proposal to apply simplified procedures with regard to "hopeless" and "repetitive" ("clone") applications. According to this proposal, the admissibility of the cases of this category should be determined through delivering group and not individual decisions.

As regards the examination of "repetitive" cases on the merits, it is also possible to deliver group judgements. However, the state party concerned should be informed about the Court's decision to consider the case under the simplified procedure. The state should be notified, as it might, *inter alia,* have a desire to find a friendly settlement of a case or contest the correctness of the facts, indicated by an applicant.

3.1.3. Examination of the admissibility by the committees

A decision regarding the admissibility of an application should be taken mainly by a committee of three judges instead of a Chamber of seven judges. Though there is a tendency to move in this direction, such a practice should be further reinforced.

3.1.4. Minimising the reasoning of the judgements regarding the admissibility of the applications

A proposal was expressed to minimise the reasoning given by the Court for declaring of an application inadmissible. Such reasons could be limited to the grounds provided by Article 35 of the Convention and if necessary, to the case-law of the European Court.

3.1.5. Encouragement of friendly settlement

The workload of the European Court of Human Rights could be decreased by the encouragement of friendly settlements between states parties and applicants. Though under Paragraph 1 of Article 38 of the European Convention, the Court places itself at the disposal of the parties concerned with a view to the friendly settlement of the matter, the friendly settlement should not be excluded before the consideration of the admissibility of an application even especially with regard to "clone" cases. It is also important for the European Court of Human Rights to play a more active role in the friendly settlement.[38] The opinion of the Evaluation group, that such settlements would be enhanced by the adoption of a resolution or a recommendation of the Ministerial Committee of the Council of Europe, regarding the settlement procedure, is to be supported.[39]

3.1.6. Compulsory representation of an applicant by a lawyer

With a view to a reduction of the number of applications, it was proposed to introduce such a rule as to make it compulsory for an applicant to be presented by a lawyer at every stage of the case examination. It should be mentioned that according to the current rule, the representation of an applicant by a lawyer is not compulsory until the admissibility stage, except for the cases, when a court hearing is held with regard to the admissibility of an application.[40]

The essence of this proposal is that a lawyer can better prepare an application and in general present the case in a better way, which will promote the speeding up of the case examination. The Evaluation Group considered it inexpedient to support this proposal as this requirement might hinder the submission of many important applications to the European Court of Human Rights given the possible financial problems an applicant might face with regard to hiring a lawyer.[41]

3.1.7. Financial and human resources

The effectiveness of the European Court of Human Rights is largely dependent on the available financial resources, which, *inter alia*, is necessary for the maintenance of sufficient personnel, including lawyers.

According to the current rule, the budget of the European Court of Human Rights is part of the budget of the Council of Europe.[42] Although the annual budget of the Council of Europe has not increased for the past years (zero growth), the budgetary resources allocated for the Court maintenance have been increased on an annual basis with due consideration of the situation in the European Court of Human Rights.[43]

[38] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, 44, Para. 62.

[39] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 62, p. 11. The Reflection Group delivered a similar opinion as well. Appendix III (Activity Report, Reflection Group on the Reinforcement of the Human Rights Protection Machinery) to the Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 9, p. 83.

[40] See Rule 36 of the Rules of the European Court of Human Rights.

[41] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 55, p. 41.

[42] See Article 50 of the European Convention.

[43] In 1997 the resources allocated for the Court (and the Commission) amounted 145 million French Francs, in 1998 – 152 million FF, in 1999 – 164 million FF, in 2000 – 171 million FF, in 2001 – 190 million FF. See: Report on Structures, Procedures and Means of the European Court of Human Rights, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Doc. 9200, 17 September 2001, Para. 36.

Though the resources allocated for the European Court of Human Rights every year are to cover the various expenditures of the Court, one of the most important is the expenditure incurred with regard to the maintenance of the Court personnel. It is clear that the growth in the number of applications submitted to the Court requires an increase in the number of the personnel working on the applications (lawyers, administrative-technical personnel), and here the Court encounters major financial problems.[44]

According to the data for February 2001, the Registry of the European Court of Human Rights is assisted by 295 officials (185 permanent, 95 temporary and 15 trainees). The majority are the case processing staff - the lawyers responsible for dealing with the applications.[45] The number of the officials working at the Registries of the Court and the Commission was increasing together with the growth in the number of applications received by the control bodies of the European Convention of Human Rights. In 1989, the permanent personnel in the Court (and the Commission) made 74, but in 1997 the number increased to 161, while in 2001 there were 185 permanent officials in the Court. In December 2000, the Committee of Ministers approved a special appropriation to cover the recruitment of 45 additional temporary lawyers and an additional 15 secretaries, and the maintenance of a scheme for trainee lawyers.[46]

Despite the growth in the number of officials of the Court, the preliminary processing of an application and its transfer to the Committees is greatly hindered due to insufficient human resources. Given the current situation it is necessary to increase the Court's financial resources, which will enable it to determine the necessary number of officials for dealing with the applications by itself, with due consideration of the number of applications received annually.

The process of dealing with the applications submitted to the European Court of Human Rights could also be promoted through the secondment of lawyers (and possibly the administrative-technical personnel) to work with the Registry of the European Court of Human Rights, whose expenses, including salary would be jointly covered by the Court and the state party concerned. Of course, it is evident, that the requirements for the Court officials should be applicable mentioned persons as well, particularly the requirement for the impartial exercise of their duties. The secondment of additional personnel to the European Court of Human Rights by the states parties shall be beneficial both for the Court and the states parties. On the one hand, the Court's expenses incurred with regard to hiring the lawyers will be reduced as it will cover only a half of the maintenance costs. On the other hand, the states parties would be interested in the secondment of the lawyers to the European Court of Human Right, as after return to their home countries with experience on the European Convention, they would promote the observance of their provisions at the national level.

3.1.8. Execution of the Court Judgements

Effective machinery for the execution of the Court judgements may play a pivotal role in reducing of the number of applications submitted to the Court. The Committee of Ministers of the Council of Europe, which supervises the execution of the Court judgements, should play a crucial part with respect to the "repetitive" ("clone") applications, raising an issue identical or very similar to one already

[44] European Governments urged to Increase Support for Human Rights Court, Press-Release Issued by the Registrar of the Court, No. 651, 28 September 2000.

[45] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 18, p. 20.

[46] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 18, p. 20.

decided upon.[47] An example of such applications is the numerous applications against Italy concerning the violation of the Convention provision on having a trial within a reasonable time.

The Committee of Ministers should efficiently monitor if a state party concerned (violating the rights and freedoms under the Convention) has removed the reasons of the violation of the Convention. If a state party removes these reasons, there would no longer exist the grounds for addressing the European Court, which would considerably reduce the total number of applications submitted to the Court.[48]

With due consideration of the above, there should be introduced a procedure for the Committee of Ministers to exercise control over the removal of the reasons causing the violation of the Convention.

3.1.9. Enhancement of the role of the information centres of the Council of Europe

The reduction in the number of applications submitted to the European Court of Human Rights could be promoted by the information centres of the Council of Europe. The information centres of the Council of Europe, which exist in many member states of the Council of Europe may disseminate information concerning the procedures and the requirement for applying to the European Court of Human Rights and furnish advice to persons intending to lodge an application to the European Court. The latter could be done through the increase of the resources of such centres.[49]

It is also possible to increase the role of information centres in training lawyers on European Court of Human Rights and in general, in the popularisation of the European human rights protection system.

3.1.10. Posting of the lawyers to state parties to the European Convention

With a view to the reduction in the number of applications submitted to the European Court, it was proposed to post lawyers of the Court Registry to the states parties to the Convention for consultative activities. The essence of this idea is that after consultations with a lawyer of the Court, it will become clear for a potential applicant whether his/her application has any prospects of success or not and he/she will not lose any time for applying to the Court if an application is 'hopeless'. The Reflection Group set up by the Steering Committee for Human Rights considered this idea unacceptable as it might reduce the number of lawyers at the European Court.

3.2. Measures involving the amendment of the Convention

3.2.1. Introduction of an additional admissibility criterion for applications

One of the proposals deals with the introduction of an additional admissibility criterion. According to this proposal, Article 35 of the Convention, which sets forth the admissibility criteria, should be revised.

The European Court of Human Rights should be empowered to decline the detailed examination of applications raising no substantial issue under the Convention. Although the idea requires further

[47] Appendix IV, European Committee on Legal Cooperation, Submissions of the CDCJ for the attention of the Evaluation Group, Strasbourg, 3 July 2001, CDCJ (2001) 20, in: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, 87.

[48] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 43, p. 36.

[49] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 46, pp. 37-38.

specification (which applications should be considered as 'substantial' and what will become with the applications which raise no substantial issue), this might be one of the ways out of the situation the Court has found itself in.[50] In any case there is not much choice: either the Court continues its efforts to deal with all the arriving applications in the same way, or it reserves detailed treatment for those cases which raise only substantial issues. It should also be mentioned that whether or not an application raising a 'non-substantial' issue is dealt with in detail, the Court would still have to examine it so as to establish whether the issue raised is 'substantial'.

3.2.2. Reduction of the composition of the Committee and/or Chambers

Opinions differ concerning the initiative for the reduction of the composition of the Committee and/or Chambers. As known, a Committee consists of 3 judges, while a Chamber – of 7 judges. Opponents to this proposal consider that the reduction of the composition of a Committee to 2, or even to 1 judge and of a Chamber to 5 judges, would not accelerate the case examination and consequently, would not directly affect the Court 'productivity', since at the pre-admissibility stage (which is the most problematic) the Court lacks the time of Registry lawyers (responsible for the case preparation and transfer to the Committee) and not of the judges.[51] According to the proponents of the proposal, the reduction in the composition of the Committees and the Chambers will make it possible to set up additional Committees and Chambers, which would enhance the general effectiveness of the Court. They consider that the reduction in the number of a Committee from 3 to 1 would increase three-fold the Court's 'productivity'.

3.2.3. Possibility of adoption of decisions on the admissibility of applications by the Court Registry lawyers

A proposal was made to allow the leading lawyers of the Court Registry to adopt the decisions on the admissibility of applications. According to this proposal the adoption of such decisions by the leading lawyers of the Court Registry would considerably save the time of the judges.

There was also a suggestion to make it possible for the committees, considering the admissibility of applications, to consist of a judge and two specially appointed lawyers ("assessors").[52] With regard to the last initiative, it was suggested that one of the lawyers might assume the role of a rapporteur on a specific case. Here it should be mentioned that a three-judge Committee, deciding on the admissibility of applications, should make a decision on the grounds of a consensus. Otherwise a judge may be in minority while making a decision.

Though the last initiative requires some further specification, there are sufficient grounds to assert that it might have an essential influence on the increase of the Court efficiency.

3.2.4. Increase in the number of judges

One of the initiatives deals with the increase in the composition of the European Court, which according to its proponents would reinforce the productivity of the Court.

[50] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. pp. 92-93, pp. 54-55.
[51] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 69, p. 44-45.
[52] Appendix III (Activity Report, Reflection Group on the Reinforcement of the Human Rights Protection Machinery) to the Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 2, p. 84.

This idea was not supported, as it does not provide a solution to the major problem of the Court – the timely preparation of the applications lodged before to the Court and their transfer to the Committee. As mentioned above, the lawyers and administrative-technical staff of the Registry do this work. Besides, the increase in the composition of the Court would necessitate considerable expenses.

3.2.5. Creation of regional courts

The idea of creating regional human rights courts in various parts of Europe was widely discussed. According to this proposal these courts would act as the 'courts of first instance'. The European Court of Human Rights would become the supreme instance at the international level.[53]

This idea was not supported for two reasons: first of all, the creation of the 'first instance court' would necessitate considerable resources, and secondly, the risk of inconsistent interpretation of the Convention provisions is very large and it may cause conflicting case-law of the Court.

As regards the measures to be taken at the international level, due consideration should be given to one important issue. Since some of the measures require the amendments to the Convention and this may take some time (possibly 2-3 years), it is of great importance to commence immediately the taking of measures not involving the amendment of the Convention. Otherwise the situation with regard to the increasing number of applications might become more difficult[54] and even after the amendment of the Convention the Court would not be able to deal with the resultant backlog.

4. MEASURES TO BE TAKEN AT THE NATIONAL LEVEL

The principle of subsidiarity is the cornerstone of the system established under the European Convention on Human Rights.[55] According to this principle, the protection of human rights should be secured, first of all, at the national level, while the European Court may be addressed only when human rights and freedoms are not duly protected at the national level.[56] The principle of subsidiarity has been embodied in the provisions of the Convention, in accordance to which all domestic remedies should be exhausted before applying the Court (Article 35 (1)). Thus, the Court should be referred to only in exceptional cases.

With due consideration of the principle of subsidiarity, the effective operation of the national mechanisms for the protection of human rights are of particular importance, as it has a direct effect on the number of applications submitted to the Court.

What measures should be taken at the national level in order to secure the effective operation of the European Court of Human Rights?

There are several such measures:

[53] Spotlight on Second Restructuring of European Court of Human Rights, Press-Release Issued by the Registrar of the Court, No. 418, 8 July 2000.
[54] Presumably, the number of applications submitted to the Court would make 33000 in 2005.
[55] Resolution I, Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level, Ministerial Conference and Commemorative Ceremony of the 50th Anniversary of the Convention, H/Conf(2000)1, Rome, 3-4 November 2000, p. 1.
[56] *J. Meyer-Ladewig*, Reform of the Control Machinery, in: The European System for the Protection of Human Rights, *R.St.J. Macdonald, F. Matscher & H. Petzold (Eds),* 1993, p. 916.

4.1. Reinforcement of effective legal remedies

Granting a key role to the national human rights protection mechanisms demonstrates that both the quality of the protection of human rights at the national level and the number of applications submitted to the European Court depends on the existence of effective legal remedies for the protection of human rights in the states parties to the Convention. Creation of effective legal remedies is of utmost importance not only for the reduction in the number of applications submitted to the European Court of Human Rights, but primarily for the improvement of the national mechanisms of human rights protection.

The more effective the mechanisms for legal protection at the national level are, the less is the number of applications submitted to the European Court and consequently, easier for the Court to deal with the workload resulting from the individual applications. Where there is strong machinery for the protection of human rights at the national level, an application to the European Court becomes needless. Because of this, it is important to create effective remedies at the national level, where natural and legal persons would apply to in case of a violation of their rights.

Legal remedies for the protection of human rights differ from one European state to another. Based on their legal systems and traditions, states are free to decide on the types and forms of these remedies. The practice of the European states has demonstrated that some remedies for the protection of human rights are more effective than others. The number of applications sent to the European Court of Human Rights (and until 1998 to the European Commission as well) from various states proves the efficiency of the legal remedies for the protection of human rights available at the national level. One such state is Germany, which has very effective mechanism for the legal protection of human rights, including the right to apply to the Federal Constitutional Court if an individual believes that the state has violated his/her rights and freedoms.[57] The model of the Constitutional Court of Germany is a clear example of the crucial importance of the availability of effective national legal remedies for the protection of human rights. It is evident that the availability of effective legal remedies for the protection of human rights at the national level has a direct impact on the number of applications submitted to the European Court. In Germany, this figure is very small in comparison with its population.[58] Presumably, the acceptance of such a model will enhance the reinforcement of the national machinery of legal protection of human rights which itself will have a positive impact upon the number of applications submitted to the European Court.

It may be asserted, in general, that the greater the number of remedies within a state, the more effective is the protection of human rights and consequently, the number of applications lodged before the European Court is less.

From the point view of creating effective remedies for the protection of human rights, attention should be paid to the Italian example of action that might have a considerable impact upon the reinforcement of the system of human rights protection in the state and the reduction in the number of applications submitted to the European Court from Italy.

[57] See Article 93, Para. 1.4(a) of the Constitution of Germany. Конституции государств Европейского Союза, Москва, 1997 г., стр. 214; *J.Meyer-Ladewig,* Reform of the Control Machinery, in: The European System for the Protection of Human Rights, *R. Macdonald, F. Matscher, H. Petzold (Eds),* 1993, p. 916.

[58] *Г. Штайнбергер*, Модели конституционной юрисдикции, Совет Европы, 1994 г., стр. 29-31.

Of the 1085 applications declared admissible in 2000, 486 concerned Italy and, in 428 cases, related to the issue of the violation of the "reasonable time" requirement by the Italian courts. It demonstrates how the number of applications submitted to the European Court could be reduced if a state establishes effective legal remedies for the protection of human rights. It should be mentioned that on 21 March 2001 Italy adopted a special Law (so called "Pinto Act"), which provides for that any individual who has suffered damage from Italian courts by reason of a violation of the "reasonable time" requirement is entitled to lodge a complaint for just satisfaction with the Court of Appeal of Italy.[59] Through the adoption of this Law, Italy created effective remedies for the protection of human rights at the national level with a view to securing the "reasonable time" requirement, and reinforced the machinery of protection of human rights at the national level. Every application, which presumably should have been sent to the European Court alleging a violation of the Convention standard, has been examined by the Italian Court of Appeal since the enactment of this Law. In the case of a direct application to the European Court (without lodging a complaint before the Italian Court of Appeal and its examination) for a violation of the mentioned provision of the Convention, the European Court will declare such an application inadmissible, as there exists an effective legal remedy on the national level which the individual who has applied to the European Court, has not exhausted. There was such a case in the practice of the European Court of Human Rights. The Chamber of the Court declared an application (length of criminal proceedings case) inadmissible because of the non-exhaustion of the domestic procedures as stipulated in the Pinto Act.[60]

No doubt, the Italian Law will considerably reduce the total number of applications sent to the European Court from Italy and will considerably relieve the Court.

4.2. Systematic screening of the compatibility of state legislation and administrative practice with the European Convention standards

Systematic screening of the compatibility of state legislation and administrative practice with the European Convention standards is one of the most important measures in securing the effective protection of human rights.[61]

With regard to securing the compatibility of normative legal acts with the European Convention standards, it should be mentioned that such screening should be carried out with respect to both legislations in force and draft legislation. It will, on the one hand, remove the possible contradictions between the legislative in force and the Convention standards and on the other hand–eliminate the possibility of adopting normative acts that contradict the European Convention standards.

A number of member states of the Council of Europe accomplished a comparative analysis of national legislation and the European Convention standards. This analysis helped the states to identify the discrepancies between legislation in force and the European Convention standards and take relevant measures to prevent them.

The practice of the states parties to the European Convention has demonstrated that in most of the states there is no special procedure for screening the compatibility of draft legislation with the

[59] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 27, p. 25.

[60] Report on Structures, Procedures and Means of the European Court of Human Rights, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Doc. 9200, 17 September 2001, Para. 21.

[61] Resolution I, Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level, Ministerial Conference and Commemorative Ceremony of the 50th Anniversary of the Convention, H/Conf(2000)1, Rome, 3-4 November 2000, Para. 14(ii), p. 2.

European Convention and particularly, with the case-law of the European Court.[62] In the majority of these states, there exists a general procedure for securing the compatibility of draft legislation with the international treaties concluded by the states. Only in some of the states parties to the European Convention (in Hungary and Ireland among them), there exists a special rule for screening the compatibility of the draft legislation with the European Convention standards, together with the general compatibility procedure. For example, in Hungary the draft legislation are subjected to legal expertise in terms of their compatibility with the European human rights standards, including the case-law of the European Court.

It is particularly important to bring the national legislation in line with the case-law of the European Court, which interprets of the content of the Convention provisions and specifies the limits on individual rights and freedoms. If the European Court in a specific case examined has arrived at the conclusion that a rule applied in a specific situation was the reason for the violation of human rights and has established the violation of the European convention by the state, it is likely that in a similar case it will arrive at the same conclusion. Through the screening of the compatibility of draft legislation with the case-law of the European Court, a state party will bring the draft legislation with the case-law of the Court and exclude the possibility of applying such a rule against a natural or legal persons which might cause the violation of the European Convention standards.[63]

The states parties to the Convention should also follow the development of case-law of the European Court and accordingly harmonise their national legislation and practice with it. It is possible that the case-law of the European Court undergoes some changes and some provisions of the European Convention might be interpreted in such a way as to result in the contradiction of a domestic rule with the case-law of the European Court.

It is equally significant for a state to not only prevent contradictions between the national legislation and the European Convention standards, but also to identify the areas requiring proper regulation, and to fill the legal gaps that might exist in the national legislation as manifested by the case-law of the European Court.

Analysis of the Court judgments makes it possible to draw an essential conclusion.[64] The majority of Court judgements deals with Article 6 of the Convention (the right to a fair trial). For instance, of the 695 judgements of the European Court delivered in 2000, 591 (i.e. 85%) refer to Article 6 of the Convention.[65] A considerably large number of judgements deal to Article 5 (the right to liberty and security).[66] The above demonstrates that these rights are violated most often and consequently states must pay particular attention to the national legislation and practice related with these rights. The improvement of the legal framework and particularly of the practice related to Articles 5 and 6 of the European Convention will greatly decrease the number of applications submitted to the European Court of Human Rights.

Though Articles 5 and 6 are the most problematic ones for the majority of the states parties to the Convention, it is possible to reveal the “weak points” in the national legislation and practice through an

[62] Croatia, Czech Rep., Denmark, Estonia, France, Georgia, Germany, Iceland, Italy, Moldova, the Netherlands, Norway, Poland, Slovakia, Slovenia.
[63] Of course, this does not refer to an “actual” violation of human rights.
[64] *D. Harris, M. O’Boyle, C. Warbrick*, Law of the European Convention on Human Rights, 1995, p. 32.
[65] *J. Meyer-Ladewig*, Right to a Fair Trial under Article 6 of ECHR, speech delivered at the Conference: The European Convention on Human Rights and Its Case Law: Application by Domestic Courts and Public Administration, Conference on Application of European Convention on Human Rights, 6 March 2001, Riga, Latvia.
[66] *R. Beddard*, Human Rights and Europe, 1993, p. 10.

analysis of the applications lodged before the European Court against certain states. It is evident that they might differ in various states parties to the European Convention.

A violation of the rights and freedoms under the Convention may be caused by the shortcomings of the legislation or improper application of the national legislation compatible with the European Convention standards. The European Court of Human Rights will establish a violation of the Convention not only when it stems from the contradiction of the national legislation with the European Convention standards, but also in the case of an improper application of the national legislation that is compatible with the European Convention standards. Thus, it is important to secure not only the compatibility of the national legislation with the European Convention standards, but its the proper application in practice.

The role of a government agent before the European Court of Human Rights is of particular significance in securing the compatibility of the national legislation and practice of a state with the European Convention standards.[67] The government agent may greatly contribute to the preparation of the proposals on the compatibility of the national legislation and practice with the European Convention standards.

Taking this into consideration, securing the compatibility of the domestic normative acts and practices with the European Convention standards is of utmost importance, which will, on the one hand, reinforce the protection of human rights at the national level and on the other hand, reduce the number of applications submitted to the European Court of Human Rights.

4.3. Reinforcement of human rights training system

An effective human rights training system is also very important for the protection of human rights at the national level. The resolution of the Ministerial Conference on the 50th Anniversary of the European Convention on Human Rights paid particular attention to the existence of an effective human rights training system. States parties to the Convention were requested to introduce and reinforce the human rights training courses, including the courses on the European Convention on Human Rights and the case-law of the Court. The need to train the police and prison staff in human rights protection was particularly emphasised.[68]

The inclusion of the Convention and the case-law of the Court as an item in the curricula of university law faculties and professional institutions is of equal importance.[69] No doubt, judges and lawyers should have a deeper knowledge of the European standards of human rights protection. Moreover, nearly all states parties to the Convention have recognised the European Convention as being part of national legislation and as a source of national law, which can be referred to for the settlement of disputes, including in a national court.

[67] Introductory Report of the Secretary-General, Rome Ministerial Conference on the 50th Anniversary of the European Convention of Human Rights, 3 November, 2000. See the Web page of the Council of Europe www.press.coe.int.

[68] Resolution I, Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level, Ministerial Conference and Commemorative Ceremony of the 50th Anniversary of the Convention, H/Conf(2000)1, Rome, 3-4 November 2000, Para. 14(iv), p. 2.

[69] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 45, p. 29.

4.4. Dissemination of information regarding the European Convention standards

An effective information policy with regard to the dissemination of the Convention and the case-law of the Court will also greatly reinforce the protection of human rights at the national level.[70] It is necessary to make available not only the texts of the European Convention and Protocols thereto, but also the significant case of the European Court.

The states parties are to ensure that not only those cases are available at the national level to which they are parties to the dispute, but also the cases involving the other states parties having precedent value. This will enable a state, including the courts to secure the protection of human rights according to the standards that are established by the European Court.

It is also important that the relevant national authorities, in particular the courts, take notice of not only current case-law of the Court, but also its developments.

It is possible to publish either full text of judgements having precedent value or their summaries. The state practice varies in this regard. Irrespective of the form of dissemination chosen by a state, it is essential that these judgements become available to the courts and administrative authorities.

Dissemination of the European Convention on Human Rights and the case-law of the Court at the national level would have a contradictory affect on the number of applications submitted to the Court. On the one hand, it would enhance the popularisation of the European Convention standards at the national level and consequently, promote the *growth* in the number of applications submitted to the Court. On the other hand, the dissemination of the European Convention standards would promote the *reduction* of the number of applications submitted to the Court, as only applications meeting the requirements of the Convention would be lodged. Naturally, the applicants (and their lawyers) would not lodge applications before the European Court if, based on the Convention and the Court's case-law it is clear to them that an application does not meet the Convention requirements (Article 35, admissibility criteria).[71] If an applicant (and his/her lawyer) is aware of the criteria and the requirements for the submission of an application, only applications meeting (at least, in the applicant's opinion) the Convention criteria will be submitted. It is obvious that the submission of well-prepared applications to the European Court would save the time of the Court Registry lawyers involved in correspondence with a view to sorting out the issues related with the applications.

Dissemination of the European Convention standards and the information regarding the European Court of Human Rights procedures would be greatly promoted by the distribution of information bulletins, where the rights and freedoms provided by the Convention and the procedure of applying to the Court would be explained in non-legal language.

4.5. Promotion of the application of the European Convention standards at the national level

The compliance with the European Convention standards at the national level could be promoted by the establishment of the practice of their application by the national courts and administrative bodies.

[70] Resolution I, Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level, Ministerial Conference and Commemorative Ceremony of the 50th Anniversary of the Convention, H/Conf(2000)1, Rome, 3-4 November 2000, Para. 14(iii), p. 2.

[71] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights (27 September 2001), Strasbourg, 2001, Para. 46, p. 29.

It is noteworthy, that the European Convention became a part of the domestic legislation of nearly all the states parties to the Convention, and a source of domestic legislation, which can be applied by natural and legal persons for the protection of their rights in the courts as well.[72]

The national courts and administrative bodies can apply it for dispute settlement. The only state, which has not (yet) recognised the European Convention as a part of national legislation is Ireland. The Parliament of Ireland is now considering a draft Law on the European Convention on Human Rights, which aims at incorporating the Convention into Irish law.[73]

Though the European Convention is a part of the legislation of nearly all states parties to the Convention, the application of the Convention by national courts and administrative bodies differs. The Courts and the administrative bodies of a majority of the 'old' states often apply the European Convention and the Court's case-law while settling disputes. Though the application of the European Convention by the Central and East European states in not homogeneous, it is increasingly being applied.[74]

Through the application of the European Convention standards, the national court and administrative bodies may contribute to the reduction in the number of applications submitted to the European Court.[75] If the national courts apply the European Convention standards, and protect the rights and freedoms of legal and natural persons with due consideration of these standards, there would be no reason to apply to the European Court in principle. Moreover, the application of the European Convention standards at the national level will 'assure' legal and natural persons that their rights and freedoms are guaranteed under the European Convention standards, and given this, in the case of application to the European Court, the judgement of the latter would not differ from that of the national court. It should also be mentioned, that provided the national court applies the European Convention standards and renders a judgement of their grounds, a person would lodge an application before the European Court only if he/she considers, that the national court has wrongfully applied the European Convention standards.

Given the above, the number of persons applying to the European Court for the protection of their rights and freedoms would considerably decrease, provided the national courts and administrative bodies apply the European Convention standards and protect the rights and freedoms of legal and natural persons according to these standards.

5. CONCLUSION

The analysis of the situation in the European Court of Human Rights has made it clear that without immediate and radical reform, the Court will be facing a crisis in the near future. In order to avoid such a crisis, it is necessary to take effective measures without any delay, which will secure the long-term efficiency of the Court. These measures should be taken both at the national and international levels.

[72] The United Kingdom was one of the last to accept the European Convention as a part of national legislation. In 1998 the Parliament of the United Kingdom adopted the Human Rights Act, which entered into force in 2000.

[73] The draft Law was submitted to the Irish Parliament on 10 April 2001. The text of the draft Law is available at the Web site of the Irish Parliament: www.irlgov.ie/oireachtas/frame.htm.

[74] *K. Korkelia*, New Trends Regarding the Relationship between International and National Law, Review of Central and East European Law, N2/3, 1997, N2/3, pp. 233-234.

[75] Recommendation 1535(2001), Structures, Procedures and Means of the European Court of Human Rights, the Parliamentary Assembly, 26 September 2001, Para. 9.

Among the measures to be taken at the international level, the following call for particular attention:

- the introduction of a rule for the rejection of an application with no 'prospects of success';
- rendering of group judgements in certain categories of cases;
- the encouragement of friendly settlements;
- an increase in the financial and human resources of the European Court;
- the establishment of the machinery of control over the execution of the court judgement with a view of eliminating 'repetitive' cases;
- the establishment of additional admissibility criteria ("applications raising substantial issue under the Convention").

The measures to be taken at the national level play an important role in securing the effectiveness of European Court. The national measures will secure the reinforcement of the national system for the protection of human rights on the one hand and promote the reduction in the number of applications submitted to the European Court, on the other hand. No effective machinery for the protection of human rights at the international level would exist, unless the states parties secure the operation of efficient machinery at the national level.

With regard to the measures to be taken at the national level, it is important

- to reinforce effective legal remedies for the protection of human rights – to this end the establishment of strong mechanisms is worth considering, including the sharing of experience of those European states who have been particularly successful in this regard;
- to establish a system of screening of the compatibility of national legislation (as well as draft legislation) and administrative practice with the European Convention and the case-law of the European Court. Particular attention should be given to the compatibility of national legislation on Articles 5 and 6 of the European Convention, with the European Convention standards;
- to reinforce the system of training in human rights, notably in the European Convention standards. Particular attention should be paid to the introduction/reinforcement of the training in human rights for the police, the prison service, judges, lawyers and law school students;
- to improve the information policy of the states with regard to the dissemination of the European Convention and the case-law of the European Court. The European Convention, its Protocols and the key judgements of the Court should be easily available;
- to take effective measures for the application of the European Convention standards, notably by the national courts and administrative bodies, which will enable the states to protect human rights at the national level according to the European standards.

In general it should be mentioned that as long as the national standards for the protection of human rights are inferior to the European Convention standards, there will be a temptation to apply to the European Court of Human Rights. The more inferior the national standards in comparison with the European ones, the stronger the temptation.

LALI PAPIASHVILI*

THE MINIMUM PROCEDURAL GUARANTEES STIPULATED BY ARTICLE 6.3. OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

The special procedural norms establishing the mechanism for the exercise of material rights and freedoms and providing their protection are of a great importance in the legal system of human rights and freedoms. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") is particularly interesting in this respect. It has a "central place" in the Convention and establishes the "fundamental principle of the rule of law"[1]. A major part of the practice of the European Court of Human Rights (hereinafter "the Court") is connected with this article, because of its importance in securing rights and because of the quantity of the civil, criminal and other cases involved.

One of the major achievements of the human rights' protection supervising system, established by the Convention, is the explicit, broad and in many cases diverse interpretation of the principles and rights stipulated by the Convention. Thus, an examination of the Court cases is essential for the comprehensive study of the rights and freedoms guaranteed by the Convention.

The aim of the present study is to define, on the basis of an analysis of Court practice, the scope and terms of application of the procedural guarantees and to review the requirements imposed on the Member States by the Article.

Article 6.3 represents a list of the minimum procedural guarantees that have to be granted to a person charged with a criminal offence, in terms of a "fair trial" as provided for in Article 6 of the Convention.[2] The guarantees stipulated in Article 6.3 have to be interpreted in terms of the function they have in the entire context of the legal proceedings[3].

The aim of the Article is to establish, for a person charged with a criminal offence, the necessary preconditions for the due preparation and execution of his/her defense. Due to the fact that the list of the rights guaranteed in Article 6.3 is not fully comprehensive, even when complied with, a fair trial is not necessarily a foregone conclusion.

The provisions of the Article are in compliance with the requirements of Article 9 of the International Pact on Civil and Political Rights. However, unlike Article 9, the seizure or arrest of a person is not a necessary precondition for the application of Article 6. The only precondition for its application is when a person is charged with a criminal offence[4], in which case, Article 6.3 does not cover suspects[5] and

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* *Lali Papiashvili*, the Candidate of Legal Sciences, is the First Assistant to the Chairman of the Parliament of Georgia.
** Translated from the Georgian language by *Tamar Cherkezishvili*.
1 *A. Grotrian,* Article 6 of the European Convention on Human Rights, The Right to a Fair Trial, Human Rights Files No. 13 - Council of Europe Press, 1994, p. 6.
2 *Adolf v. FDR*, Commission Report 8/10/1980 B 43 (1985) p. 29; *Colozza and Rubinat v. Italy*, A89 (1985), p. 14.
3 Commission Report of 12.07.1984, A96.
4 *Adolf v. Austria*, A 49 (1982).
5 *X v. FDR*, No. 1216/61, 11CD 1 (1963); *X v. FRG*, No. 4483/70, 38 CD 77 (1971).

persons extradited to another state for the purpose of investigation[6]. At the same time, an accusation made against a person does not necessarily entail the direct application of all the rights provided for in Article 6.3 of the Convention.

The rights stipulated in sub-points "b", "c" and "e" of Article 6.3, as a rule, are assigned to an accused person at the stage of preliminary investigation as well. While sub-point "d" of Article 6.3 is applicable only during the trial. On the other hand, Article 6.3 covers the appeal stage as well, although the requirements drawn at this stage have to be defined in terms of the functions of the court of appeal and its place in the entire legal proceedings[7].

The concept of "a person charged with a criminal offence"[8] has an autonomous, independent meaning for the purposes of the Convention[9]. In particular, the person is considered to be accused from the moment "when the measures taken against him" have an essential impact on him[10] (for example, in the case of preliminary detention as a preventive measure and in other cases).

According to Article 6.3(a), a person charged with a criminal offence shall be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him. It should include the following three important issues:

- the volume of the materials provided to the accused person to become familiar with;
- the moment when the materials for familiarization are provided;
- the right of the accused person to become familiar with the accusation against him/her in a language he/she understands.

Article 6.3(a) partly corresponds to Article 5.2 of the Convention, as far as both of them deal with the right of the persons involved in the criminal procedure, to know the reason of the measures applied against them by the law enforcement agencies. However Article 5.2 applies to the arrested person, who disputes the legitimacy of his/her detention, while Article 6.3 aims at providing the arrested person with the information necessary for the preparation of a defense[11]. At the same time, unlike Article 5.3, the information stipulated by Article 6.3 "has to be more specific and detailed". Article 5.2 does not require familiarization of the detained or arrested person with all materials concerning the case, while Article 6.3(a) aims at the provision of detailed and specific[12] information to the detained or arrested person. In particular, the accused person has to be informed of the nature and cause of the accusation against him/her.

Article 6.3(a) requires the provision of detailed information to the accused person, clarifying the nature and cause of the accusation against him/her. In this context, not only the nature of the accusation against him/her, i.e. the offence he/she is charged with, has to be clearly defined but the factual and legal grounds, i.e. the particular circumstances and facts on which the accusation is based[13], as well. The investigation bodies are obliged to provide promptly the charged person with the materials they obtained since the institution of the criminal prosecution. This information has to include the circumstances of the case, which shall give the opportunity to the charged person to prepare for

[6] *X v. Austria*, No. 1918/63, 6YB 484 (1963); *X v. FRG*, No. 4247/69, 36 CD 73 (1970).
[7] *Artico v. Italy* A 37 (1980); *Kremzow v. Austria* A 268-B, Para. 58 (1993).
[8] The term "accused" (charged with offence) is used in the meaning defined by the Convention and not the procedural legislation of Georgia.
[9] *Adolf v. Austria*, A 49 (1982) Cf; *C v. Italy*, No. 10889/84, 56 DR 40 (1988).
[10] *Dewer v. Belgium* A 35, Para. 46 (1980).
[11] *Bricmont v. Belgium*, No. 10857/84, 48 DR106 (1986).
[12] *Neilse v. Denmark*, No. 343/57, 2YB412 at 462 (1959)
[13] *Ofner v. Austria*, No. 524/59, 3 YB 233 at 344 (1960); *X v. Netherlands*, No. 3894/68, p. 47 (50) Coll. 32 (1970); *X v. Austria*, No. 8490/79, DR22, p.140 (142), (1981).

his/her defense. However, the provision of the evidence the accusation is based on[14] is not required at this stage. The information that has to be provided to the accused person depends on what he/she can learn from the examination and about other circumstances of the case.[15] It is considered that the court notification that includes the list of the offences the person is charged with, the time and place of their commitment, the relevant article of the criminal code and the victim's identity, contains sufficiently detailed information[16]. The information provided to the accused person can be completed, as a rule, as more evidence is obtained during the investigation process.

The timely provision of information, stipulated by Article 6.3(a), has a particular importance for the preparation of the defense by the accused person as well as for ensuring the goals of the legal proceedings.

The issue - whether the information has been provided to the accused person timely or not - shall be solved on the basis of the particular circumstances of each case.

Unlike Article 5.2, under which the prompt provision of information must be provided within "several hours" from the moment of arrest, Article 6.3 presupposes several days. Court practice does not explicitly define the moment of the application of the right stipulated in Article 6.3(a). Taking into account the importance of the preliminary investigation in the criminal proceedings and the goal of Article 6.3(a), the Article becomes applicable from the moment when a person becomes the subject of the accusation stipulated in Article 6.

The right of the accused person to be informed of the accusation against him in a language that he understands assumes that the accused person shall understand the language of the legal proceedings. The state authorities should have a sufficient objective basis to believe that the accused person is able to understand the content of the notification send to him and has a knowledge of the language in which he has been accused. Otherwise the authorized bodies are obliged to provide the accused person with an appropriate translation[17].

In the case of *Kamasinski v. Austria* the Court did not satisfy the applicant's claim that he had not been provided with the court decision as well as certain information regarding the accusation and investigation in a language that he understood, at the stage of investigation. The Court stated that the applicant was provided with a lawyer, who was able to communicate with the applicant in the language of legal proceedings as well as in his native language. Thus, the state authorities had fulfilled the obligation imposed on them by Article 6.3[18]. This right of the accused person, stipulated in Article 6.3(a) is connected with the opportunity provided in the sub-point "e" - to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court. This also includes an inability to speak or understand caused by a physical defect (for example, being deaf-and-dump).

The right of the person charged with a criminal offence, stipulated by Article 6.3(b), to have adequate time and facilities for the preparation of his defense is strongly connected with the rights guaranteed in Article 6.3(a) and Article 6.3(c) and includes the right:

- to get familiar with the case materials;

[14] *X v. Belgium*, No. 7628/76, DR 9 (1978), p.169 (173); *X v. Belgium*, No. 7628/76,9DR, p. 169(173) (1977); *GS and M v. Austria*, No. 9641/81, 34 DR119 (1983).
[15] *Kamasinski v.Austia*, A 168, Paras. 79-81 (1989).
[16] *Brozicek v. Italy*, A 167, Para. 42 (1989); *C v. Italy No.* 10889/84, 56 DR, p. 40 (1988).
[17] *Brozicek v. Italy*, A 167 (1989).
[18] *Kamasnski v. Austria*, A 168 (1989).

- to have adequate time for the preparation of one's own defense;
- to have confidential relations with a lawyer;
- to have other facilities.

In *Can v. Austria*[19], the Court interpreted an accused person's right to have adequate facilities as an opportunity to perform his/her own defense in a relevant way and to provide the court with all the arguments of defense important for the case without any limitations.

Familiarization with the case materials is an important element of the "facilities" stipulated in Article 6.3(b).[20] Despite the fact that the article does not explicitly provide for the right of a charged person to become familiar with the case materials, it assumes that in certain circumstances the charged person or his/her lawyer should have an adequate opportunity to become familiar with the case materials.[21] With regard to *Jespers v. Belgium,* the European Commission for the Protection of Human Rights mentioned that the notion of "facilities" assumes the familiarisation of a charged person with the results of the investigation, regardless the fact of who has ordered or directed the investigation, as well as the right of the charged person to possess the information connected with the case, that was or might be obtained by the competent authorities, for self-discharge or mitigation of the sentence.[22] Later on, the Commission commented that the mentioned right does not mean the right of unlimited access of defense to the case materials obtained by the investigation bodies. Pursuant to the Court's opinion, the limited interpretation - according to which only the lawyer, or if such is not provided, the charged person him/herself has the right of access to case materials - does not contradict Article 6.3(b);[23] as well as the limitation of the mentioned right to the lawyer of the charged person does not contradict the requirements of Article 6.[24] At the same time the Court and Commission stated that access of the lawyer of the charged person to the relevant file corresponds to the requirements of Article 6.3 (a), while the accused person does not have the automatic and independent right to study his/her file himself.

The right guaranteed by Article 6.3(a) gains particular importance from the first stage of legal proceedings since it can essentially influence the decision-making with regard to institution of the criminal proceedings against the accused person. According to *P. van Dijk* and *G.J.H van Hoof,* certain paragraphs of Article 6.3(a) and 6.3(b) assumes the charged person to be fully informed with regard to any suspicion against him/her, before making the above formal decision.[25] The mentioned provision is doubtful, due to the fact that both a suspect and a charged person get involved in the criminal procedure only after the institution of the criminal proceedings. Furthermore, the familiarization of the person with the information obtained against him/her, before drawing a decision concerning his/her detention or accusation, is quite disputable.

The results of an on-going preliminary investigation may include evidence obtained through search, examination or other investigation measures. The defense side might not be aware of these results. The goal of Article 6.3(b) is to give an opportunity to the charged person to get personally familiar with the results of the entire process of investigation for the due preparation for his/her own defense[26] in order to ensure equal facilities to both the prosecution and the defense. As demonstrated by the case

[19] A 96 Commission Report, Para. 53 (1985).
[20] *X v. Austria*, No. 4622/70, Coll 40 p. 15(18), (1972).
[21] *X v. Austria*, No. 7138/75, DR 9, p. 50(52), (1979).
[22] *Jespers v. Belgium*, No. 8403/78, DR 27, p. 61, pp. 87-88 (1981).
[23] European Court HR Kamasinski Judgment A 168, p.39, Para. 88-87 (1989); *X v. Austria*, No. 7138/75 DR 9 p. 50, (1977).
[24] *Kamasinski v. Austria*, A 168, pp. 38-40 (1989).
[25] *P. van Dijk, G.J.H. van Hoof,* Theory and Practice of the European Convention on Human Rights, 1998, p. 464.
[26] *Jespers v. Belgium*, No. 8403/78 (1981).

of *Edwards v. UK*[27] prosecutor's offices are obliged to become familiar with all the evidence in favor or against the charged person, presented for his/her defense. The non-fulfillment of this obligation may cause an unfair trial. At the same time, Article 6.3(b) does not require the prosecutor to provide the defense party with all the evidence planned to be presented to the court before the commencement of a trial. State authorities are obliged to provide to the charged person adequately detailed information, so as he/she can have an opportunity to prepare well to defend him/herself.

CONFIDENTIAL RELATION WITH A LAWYER

The most important aspect of the right guaranteed by article 6.3 (b) is the right of the charged person to have face-to-face confidential consultations with a lawyer. Although the Convention does not explicitly provide for this right, it has been acknowledged in case law. With respect to *Campbell and Fell v. UK*[28], it has been mentioned that the consultations (oral as well as written[29]) of the accused person and the lawyer, in principle, should be of a confidential nature in order to maintain trust and to protect client confidentiality.

On the basis of Article 93 of the Minimum Standard Rules on the Treatment of the Arrested Persons, Article 3.2 of the European Agreements on the Persons Participating in the European Commission of Human Rights and the Court proceedings and the Court Decision in *Artico v. Italy*, the Court has mentioned that the right of an accused person to consult with a lawyer without the attendance of a third person represents one of the most important requirement for a fair trial and proceeds from Article 6.3(c). If the lawyer can not consult with his/her client and receive confidential instructions from him/her without supervision (so that staff at the place of detention or other official persons can not hear them), his/her assistance losses an essential part of its purpose, while the Convention calls for the protection of the right, which is of a practical and active nature[30].

The recording of the telephone conversations of a lawyer and a client may be considered as a violation of Article 6.3(b) as well.[31]

Confidentiality has particular importance for a charged person. An arrested person should have the opportunity to meet a lawyer without the attendance of staff of the place of detention or other official persons, for the purpose of preparing his/her defense, transferring and receiving[32] confidential information and giving instructions. The search of the lawyer by the representatives of the place of detention and the examination of his/her correspondence with the arrested person, as a rule, is not permitted. The relevant persons have to be notified about the supervision exerted over them even in exceptional cases, which is conditioned by the necessity of the protection of public interests.[33]

The right to confidential meetings with a lawyer includes the right of the charged person to meet with the lawyer for the period of time that is required for the preparation of his/her defense.[34] The only acceptable limitation is for the protection of public interests. The public authorities are obliged to prove the necessity of such a limitation (for example, to prevent an escape or avoid a disturbance of the

[27] *Edwards v. UK*, A 247 B (1992).
[28] A 80 (1984).
[29] *S v. Switzerland*, A 220 (1991).
[30] *Artico v. Italy*, A37 (1980).
[31] *D v. Austria*, No. 16410/90 (1990) unreported.
[32] *Can v. Austria*, Commission Report A 96, Para. 51-52 (1985); *Campbell and Fell v. UK* A80 Para. 113 (1984).
[33] *P. van Dijk, G. van Hoof,* Theory and Practice of the European Convention on Human Rights, 1998, p. 470.
[34] *Campbell and Fell v. UK*, A80 (1984); *Goddi v. Italy*, A 76 (1984).

trial[35], or if the authorities have the strong basis for assuming that the lawyer abuses or enables another person to abuse his/her position; for example: hiding or removing evidence or disturbing the exercise of justice in a different way. With respect to terrorism cases, the following limitations on client/attorney meetings were considered to be in compliance with the requirements of the Convention: permission for only two meetings per week and with prior notification, and with a dividing glass, etc.[36]).

The requirements of Article 6.3(b) are not violated when an arrested person is forbidden to bring his/her records and documents to a meeting with his/her lawyer[37] or if, due to the non-presence of the lawyer, an arrested person lacks the opportunity to personally discuss the subject matter of the appeal of the procedural documents with a lawyer appointed free of charge, as far as there is the possibility of written communication with a lawyer.[38] The limitation of the right of the lawyer to review specific evidence with the client might be considered acceptable, if it is conditioned by the motivation to protect the identity of an informant[39].

The application of the mentioned right has to be assigned to the accused person timely - from the moment of detention or arrest. A 48-hour delay contradicts the requirements of Article 6.3(c) of the Convention.[40]

TIME AND ADEQUATE FACILITIES FOR THE DEFENSE

Article 6.3 protects an accused person from an accelerated court examination.[41] The length of time, sufficient for the case preparation, might vary. For the resolution of this problem, consideration should be given to the rights granted not only to the charged person but to the entire defense as well[42] (the essence of the case and the specific circumstances[43]). To determine what falls under the "requirement of an adequate time for the defense" the following issues have to be taken into consideration: all circumstances of the case concerned, including the nature and complexity of the case,[44] the stage of legal proceedings,[45] the work load of the lawyer,[46] the decision of a charged person to defend him/herself personally,[47] the time sufficient for the appointment of the lawyer before the court examination[48] or for the requesting for a lawyer by the accused person[49], if a replacement of a lawyer is required - providing additional time for the study of the case, etc[50]. For example, with respect to "truly complex" cases concerning embezzlement[51] 17 days prior notification on the date of case examination is considered to be sufficient, in case of disciplinary court examination in places of imprisonment - 5 days prior notification,[52] and in professional disciplinary proceedings - 15 days[53]. The

[35] *Can v. Austria,* A 96 (1985) Commission Report; *Campbell and Fell v. UK*, A80 (1984).
[36] *Kröcher and Möller v. Switzerland*, No. 8463/78, 34 DR 25, 57(1982), Commission Report; *Bonzi v. Switzerland*, No. 7854/77, 12 DR 185(1987); *Schertenleib v. Switzerland*, No. 8339/78, 17 DR 180 (1979).
[37] *Koplinger v. Austria No.* 1850/63 12YB438 (1968).
[38] *X v. Austria*, No. 1135/61, 6 YB 194 (1963).
[39] *Kurup v. Denmark*, No. 11219/84, 42 DR 287 (1985).
[40] *Murray v. UK* A 300, (1996).
[41] *Kröcher and Muller v. Switzerland*, No. 8463/78, 26 DR 24 AT 53 (1981).
[42] See for example *X v. Austria*, No. 2370/64, Collection 22, p. 96 (1967).
[43] *X v. UK*, 4042/69,YB XIII (1970) p. 690(696); *X and Y v. Austria*, No. 7909/77, DR 15 (1979), p. 160 (162-163).
[44] *Albert and Le Compte v. Belgium*, A 58 (1983).
[45] *Huber v. Austria*, No. 5523/72, 46 CD 99 (1974); See for example *X v. Belgium*, No. 7628/76, DR 9, p. 169 (1977); *X and Y v. Austria*, No. 7909/77, DR 15, p.160 (1978).
[46] *X and Y v. Austria*, No. 7909/77, 15 DR, p.160 (1978).
[47] *X v. Austria*, No. 2370/64, 22 CD, p.96 (1967).
[48] *X and Y v. Austria*, No. 7909/77, 15 DR, p.160 (1978).
[49] *Perez Mahia v. Spain*, No. 11022/84, 9 EHRR, p.145 (1985).
[50] *Goddi v. Italy*, A 76 (1984).
[51] *X and Y v. Austria*, No. 7909/77, 15 DR, p.160 (1978); *X v. Austria*, No. 2370/64, 22 CD, p.96 (1967); *X v. Austria*, No. 8251/78, 17 DR, p.166 (1979).
[52] *Campbell and Fell v. UK*, A 80 (1984).
[53] *Albert and Le Compte v. Belgium*, A 58 (1983).

Court did not consider as a violation of Article 6.3(b) the appointment of a first meeting with a lawyer provided free of charge to an accused person 10 minutes prior to court examination, which ultimately led to a 7 year prison sentence.[54]

An accused person should try to postpone a hearing if he considers that the time assigned to him/her is not sufficient for the preparation of a defense.[55] The limitation placed on the lawyer's time[56] and the rejection of an application concerning the postponement of a case examination[57] may become the basis of a violation of Article 6.3(b). When, because of the accused person's own fault, a lawyer is appointed shortly before the court examination[58], such a violation is deemed not to have taken place.

For the resolution of a problem with respect to adequate time for the preparation of a defense, consideration should be given not only to the rights assigned to the charged person but also to the defense[59] (the nature of the case and specific circumstances[60]).

Article 6.3(b) covers other facilities necessary for a defense during the court proceedings. The matter of what kinds of "facilities" are necessary for the preparation of a defense greatly depends on the specific circumstances of a case. However, certain facilities, for example the right of a charged person to have confidential relations with a lawyer, may be considered as necessary on a case-by-case basis.[61] The "facility" assigned to the defense party, as a rule, shall include the familiarization with the evidence, including the study of documents and objects.

The preparation of an appeal requires less time than the preparation for the court proceedings of first instance.[62] However this time has to be sufficient for the detailed study of the court ruling in order to decide the reasonability of appeal,[63] while the duration of time from the submission of the claim till the assignment of court examination established by the law has to be sufficient for due preparation for court examination[64]. Thus, if there exists the right of appeal, charged person has to be timely informed of the reasons of the sentence passed against him/her[65] and be provided with a copy of a pleading [66]; in the case of preliminary imprisonment the administration of the place of detention has to provide him/her with the legal documents for the preparation of an appeal[67].

The right guaranteed by sub-paragraph "c" is one of the most important among the procedural facilities stipulated by Article 6.3. The right of defense granted to a charged person and *inter alia*, the right of free legal assistance is connected with requirements of a "fair trial". The concept of the "interests of justice" has a wider sense for the objectives of the Convention and comprises the entire process of legal proceedings, that ensures the application of the mentioned right at all stages of the legal proceedings. So far, Article 6.3(c) covers everyone charged with a criminal offence at the stage of the preliminary detention as well as at the stage of court examination[68] and stipulates the right of the charged person:

[54] *X v. UK*, No. 4042/69, 13 YB 690 (1970).
[55] *Campbell and Fell v. UK*, A80 (1984).
[56] *X v. FDR*, No. 7085/75, 2 Digest 809 (1976).
[57] *X v. UK* 6404/73, 2 Digest 895 (1975).
[58] *X v. Austria No.* 8251/78, DR (1980), p. 166 (169-170).
[59] *X v. Austria*, No. 2370/64, Collection 22, p.96 (1967).
[60] *X v. UK*, 4042/69,YB XIII (1970), p. 690 (696); *X and Y v. Austria*, No. 7909/77, DR 15 (1979), p.160(162-163).
[61] *Krocher and Moller v. Switzerland*, No. 2463/78, DR 26, p. 24 (1981).
[62] *Huber v. Austria*, No. 5523/72, 17YB, p. 314 (1974).
[63] *Huber v. Austria*, No. 5523/72, YB XVII (1974), p. 314 (312).
[64] *Kremzow v. Austria*, A 268-B, pp. 41-42 (1993).
[65] *Hadjianastassiou v. Greece*, A 252 (1992).
[66] *Kremzov v. Austria*, A 268-B (1993).
[67] *Ross v. UK*, No. 11396/85, 50 DR p. 179 (1986).
[68] *S v. Switzerland*, A 205 (1991).

- to defend him/herself in person;
- through the lawyer of his/her own choice; or
- through the lawyer appointed within the framework of free legal assistance.

The freedom to choose granted to a charged person under Article 6.3(c) is a result of liberalism and individualism on which is based the adversary system of Anglo-American legal proceedings. However it does not stipulate an unlimited and absolute right of a charged person to defend him/herself independently.[69]

With respect to the case of *Merilin v. France*[70], the Court mentioned that the charged person who, according to the requirements of the legislation, chooses to defend him/herself independently and refuses the assistance of a lawyer is burdened with "proving diligence". However this does not mean the application of the standards established for a professional lawyer. Account should be taken of experience, special knowledge and the ability of a charged person.

The Convention imposes on Member States the obligation to ensure the "effective" application of the right to defense. It, as well as the national legislation of the majority of Member States, stipulates the right of a Member state to provide a charged person with a lawyer even against his/her will if it is in the interests of justice. Moreover, taking into account the duration of the legal proceedings and its complexity, the state, in order to ensure justice, has the right to appoint a second lawyer to the charged person even against his/her will, if the lawyer initially retained by him/her is ineffective and his/her refusal is unreasonable.[71]

The Convention entitles the charged person to choose and retain a lawyer at his/her own discretion, and stipulates the right of a charged person to retain a lawyer as well as a person not having a legal qualification[72] to provide legal assistance (a professional qualification is not necessary, if the legal assistance is actually "effective"[73]).

Article 6.3(c) does not entitle a charged person to retain an unlimited number of lawyers. The Court, according to the requirements of Article 6.3(c), decided to limit the number of lawyers to three[74], providing that the defense has equal opportunities for the presentation of its case as the prosecution has.[75]

The right to retain a lawyer, as stipulated in Article 6.3(c), is not absolute. The state, without doubt, has the power of regulation, which it can use as it is obliged to ensure "the efficiency of defense" and it can challenge the appointed or retained lawyer. The state has the full right to dismiss the lawyer from the court examination[76] - mentioned the Court with respect to *X v. FDR.* However, later on, it changed its approach towards the issue and stated that, as a rule, state authorities have to respect the choice of a charged person[77]. This though does not exclude the possibility of the State to challenge a lawyer in cases where the lawyer at the same time is a defense witness,[78] violates the rules of professional

[69] *J.Herrmann,* Models for the Reform of Criminal Procedure in Eastern Europe: Comparative Remarks on Changes in Trial Structure and European Alternatives to Plea Bargaining in Criminal Science in a Global Society, Essays in Honour of Gerhard O.W. Muller, 1994, pp. 70-71.
[70] 261 A, Para. 25 (1993).
[71] *Croissant v. Germany*, A 237-B, Para. 27 (1992).
[72] *Engel v. Netherlands*, A 22 (1976).
[73] *X v. FDR*, No. 509/53, 3 YB 174 (1960), UN Doc E/CN 4SR 107, p. 6.
[74] *Ensslin, Baader and Raspe v. FDR*, Application No. 7572/76,14 DR 64 (1978) p. 64
[75] *Ibid*.
[76] *X v. FDR*, No. 722/60 5YB 104 at 106 (1962).
[77] *Goddi v. Italy*, B 61, p. 25 (1982).
[78] *K v. Denmark*, No. 19524/92 (1993).

ethic,[79] disregards the court,[80] misuses his/her position, or does not want to represent the interests of a charged person, who is "unpopular" or in opposition to the government, etc.

The opportunity to defend him/herself granted to a charged person by the Convention is a right and not an obligation. That is why the state cannot force a charged person to exercise this right[81] and refuse him/her to retain or appoint a lawyer. Furthermore, if issue of interpretation of a legal norm arises almost in all the cases, which requires professional competence, the state cannot require the charged person to determine this kind of issue independently.[82]

FREE LEGAL ASSISTANCE

According to the Court, if a charged person does not want to defend him/herself independently he/she should have an opportunity to be assisted by a lawyer chosen by him/her. If a charged person has insufficient means, the Convention grants to the charged person the right to be provided with free legal assistance of a lawyer appointed by the court[83] if it is in the interests of justice.

Practice shows that the majority of charged persons belong to the category of needy people. Thus the right of free legal assistance, stipulated by Article 6.3 (c), is of particular importance. According to the Court interpretation, this right is an independent right and does not represent the alternative to the right of a charged person to defend himself independently. The right of free legal assistance is related to two conditions:

- The charged person should not have "sufficient means" to meet the costs of the rendered legal assistance.

The Convention and the Court practice do not determine the concept of "sufficient means" and there exists no court precedent defining the type, amount and level of personal income that could be taken into consideration while deciding - whether to grant a charged person with the right of free legal assistance or not.

The right of free legal assistance is conditional and depends on the economic status of a charged person. That is why a charged person is obliged to prove his/her insolvency. However, he/she is not obliged to prove his/her insolvency without leaving space for any doubt and it is enough to point out certain circumstances evidencing insolvency.[84]

The Court supports the opinion that Article 6.3(c) does not forbid Member States to require the charged person to remunerate the costs of provided free legal assistance, if after the conviction he/she were in a position to do so.[85] We think that such an approach towards the issue may force a charged person to abstain from free legal assistance and defend him/herself independently, even when the provision of legal assistance complies with the requirements of a fair trial and the goals and tasks of the Convention.

[79] *Ensslin, Baader and Raspe v. FDR*, No.s 7572/76, 75686/76, 7586/76 14 DR64 (1978).
[80] *X v. UK*, No. 6298/73, 2 Digest 831 (1975).
[81] *Pakelli v. FDR* A 64 (1983).
[82] *Kremzov v. Austria*, A 268-B p.43, Para. 58-59 (1993), also *Quantra v. Switzerland* (1991) A 205, *Boner v. UK* A300-B (1994), *Maxwell v. UK*, A 300-C (1994).
[83] *Pakelli v. FDR*, A No. 64, p.15, Para. 31 (1983).
[84] *Pakelli v. FDR*, A 64, Para. 34 (1983).
[85] *Croissant v. Germany*, A 237-B (1992) Commission Report.

- The Member States are obliged to provide a charged person with free legal assistance only if it is required in the "interests of justice".

The issue of free legal assistance in the interests of justice mostly depends on the circumstances of the case and it has to be decided by the competent national authorities at the stage of court examination of first instance. However if during the appeal proceedings, the case is considered to be more complex than it seemed to be at the beginning, the denial of free legal assistance has to be reexamined.[86] The Court is authorized to reexamine the case and disagree with the decision of the national bodies.

The Court elaborated the following criteria upon which the decision regarding the provision of free legal assistance to a charged person shall be based:

- the complexity of the case (factual and legal circumstances);[87]
- the ability of a charged person to defend him/herself independently;[88]
- the nature of the offence for which the person is charged; and
- the type and measure of the supposed punishment.[89]

In *Quaranta v. Switzerland,* the Court ruled that the possibility of conviction to a 3 year prison term necessitates the provision of free legal assistance[90]. So far, free legal assistance has to be provided in all cases involving serious offences or severe punishment, regardless of the charged person's chances of winning. In the interests of justice free legal assistance may be necessary also when a case concerns an issue of public importance, even if a lawyer can or cannot assist the defense.[91] The interests of justice require the rendering of free legal assistance to a charged person for the effective application of the right of appeal as well, granted to him/her under national legislation, despite having very little chance of winning[92].

The right to choose a lawyer is valid only in case of retaining the one, when a charged person has sufficient means to pay for lawyer's services. Thus, Article 6.3(c) does not provide for the right of a charged person to choose a lawyer to be appointed for him/her or express any considerations in this respect[93]. However, in *Croissant v. FDR,* the Court ruled that when appointing a lawyer the national courts should take into account the wishes of a charged person where possible, if they do not contradict the interests of justice[94].

The difference between a *de jure* and *de facto* defense is the main problematic issue of Article 6.3(c) in the Court practice. The fundamental principle of Article 6.3(c) is the right to an effective defense in criminal proceedings. The Court repeatedly underlined that "the right of everyone charged with a criminal offence - to be effectively defended by a lawyer and in case of necessity by an appointed lawyer, is one of the fundamental principles of a fair trial"[95].

[86] *Granger v. UK*, A 174 (1990).
[87] *Granger v. UK*, A174 (1990), *Quantra v. Switzerland*, A 205 (1991), *Pham Hoang v. France*, A 243 (1992).
[88] *Granger v. UK*, A174 (1990), *Quantra v. Switzerland*, A 205 (1991).
[89] *Boner v. UK*, A300-B Para. 41; *Maxwell v. UK*, A 300-C, Para. 38.
[90] A 205, Para. 34 (1991).
[91] *Fawcett,* Application of the European Convention on Human Rights 2nd edition; 1987, p.170.
[92] *Boner v. UK*, A300-B, Paras. 41-44 (1994); *Maxwell v. UK*, A 300-C Paras. 38-41 (1994).
[93] For example: *X v. FDR*, No. 6946/75, DR. 6 (1976), p.114; *M v. UK*, No. 9728/82, DR 36 (1983), pp. 155-158; *X v. Netherlands*, No. 846/60, 3 YB 273 (1961); *X v. UK*, No. 9728/82, 6 EHRR 345 (1983); *F v. Switzerland*, No. 12152/86, 61 DR 171(1989); *X v. FDR*, No. 6946/75, 6 DR 114 (1976); *Ostergren v. Sweden*, No. 13572/88, 69 DR 198 (1991), No. 9127/80, 2 Digest 851(1981); *Kamasinski v. Austria*, A 168 (1989) Commission Report Para. 160
[94] A237-B (1992).
[95] *Poitrimol v. France* A 277- A, Para. 34 (1993).

In *Franquesa Freixas v. Spain*[96], the Court appointed a lawyer to the charged person, who was a lawyer himself, according to the procedure of free legal assistance. The Court did not satisfy the solicitation on challenging of an appointed lawyer taking into consideration his professional experience. The Court ruled that the charged person, though being a lawyer himself, did not express the desire to defend himself independently, did not present any evidence proving the non-competence of the appointed lawyer, did not retain another lawyer, did not nominate the candidacy of a lawyer chosen himself and relevantly did not require the appointment of another lawyer of his choice. The Court ruled that Article 6.3 does not provide the charged person either with a right to choose an appointed lawyer, according to the procedures of free legal assistance, or with a right of consultation before the appointment of a lawyer.

Article 6.3(c) refers to "assistance" and not to an "appointment". The appointment of the lawyer does not guarantee the effectiveness of the rendered assistance. Often the rendered legal assistance may be practically useless if the lawyer appointed passes away or gets seriously ill, is unable to or avoids performing his/her duties, or if he/she lacks the relevant qualifications or experience. Regardless the fact that the effectiveness of the legal service rendered by a lawyer first of all is a problem of relations between a lawyer and a charged person, Article 6.3(c) stipulates the right of a person to have "effective" legal assistance, which obliges the relevant authorities to change the appointed lawyer or ensure the duties imposed on him/her are performed. A limited interpretation of Article 6.3(c) by the state could adversely affect the application of sub-paragraph (c) and Article 6.3 in its entirety. However the state cannot be considered responsible for any deficiency of a lawyer appointed within the framework of free legal assistance[97]. According to Article 6.3(c) the relevant national authorities are required to interfere only if the failure of the appointed lawyer in rendering of an effective assistance is evident or if they possess sufficient information in this regard[98]. In *Kamasinski v. Austria,* the Court mentioned that although a state cannot be responsible for any deficiency of a lawyer appointed within the framework of free legal assistance, the court preferred to stay passive, whereas for the protection of the Convention's provisions, positive actions were required from it[99].

The problem of "effectiveness" may occur when there are frequent changes of appointed lawyers[100], or if there is an insufficient allocation of time to the retained or appointed lawyer for the preparation of case materials[101].

Where there is an unsatisfactory relationship between a charged person and a lawyer, or a lack of legal qualification or experience of a lawyer with regard to the complexity and particular character of a case, which makes it impossible to properly execute a defense, according to Article 6.3(c), a charged person has to be provided with a new lawyer upon his/her request. But the refusal of the court to appoint a new lawyer when the withdrawal of a lawyer from legal proceedings is conditioned by the behavior of a charged person, complies with the "interests of justice", if from that moment the charged person is provided with sufficient facilities to defend him/herself independently[102].

It has to be mentioned that a charged person cannot complain on not being provided with free legal assistance, if he/she him/herself did not apply for it[103].

[96] European Court of HR Information Note No. 24 November 2000.
[97] *Artico v. Italy*, A 37 Para. 36 (1980).
[98] *Kamasinski v. Austria*, A 168 Para. 65 (1989); *Stanford v. UK*, A 280-A (1994); *Tripodi v. Italy*, A 281-B Para. 30 (1994); *Imbrioscia v. Switzerland*, A275 (1993).
[99] *Artico v. Italy*, A37, p. 18, Para. 36.
[100] *Koplinger v. Austria*, No. 1850/63, 9YB 240 (1966).
[101] *X v. UK*, No. 4042/69, 32 CD 76 (1970); *Murphy v. UK*, No. 4681/70, 43 CD-1 (1972).
[102] *X v. UK*, No. 8386/78, DR21, p. 126(130-132), (1981).
[103] *Biondo v. Italy*, No. 8821/79, 64 DR 5 (1983) Commission Report.

The issue of the effectiveness of a defense and the equality of facilities is closely connected with the presence of a charged person on trial, and in the case of his/her non-presence, the participation of a lawyer in court examination. The Court has underlined that a proper defense for a charged person at the first instance as well as at further instances of the legal proceedings has a great importance for ensuring a fair trial.

The right of legal representation does not depend on the presence of a charged person at court. Despite the importance of attendance, his/her non appearance at the trial upon being summoned, even in the case of inexcusable reasons, can not be used as grounds to deprive a charged person of the right to be assisted by a lawyer, as provided for in Article 6.3(c). Regardless of the fact that the legislator has to establish the preconditions ensuring the attendance of a charged person at a court examination, he/she cannot complicate the situation of a charged person by making exceptions to or limitations to the right of legal assistance[104]. When a charged person is assisted by a lawyer, Article 6.3 (c) provides for the right of a charged person to attend the court examination with a lawyer[105].

The Court considered as a violation of the Convention cases where courts refused lawyers the right to defend their clients not attending the court examination[106], or where the courts did not satisfy the solicitation of a charged person on postponing the case examination due to the absence of the lawyer, etc. In *Tripodi v. Ital*[107], despite such a solicitation, court refused to postpone the case examination although the charged person was represented neither by a retained nor by an appointed lawyer. The Court has noted that no circumstances may justify the incorrigible damage caused to an applicant by depriving him/her of a right to defend him/herself even if the applicant blamed in “imprudence” and “lack of diligence” by the state cannot refute the latter[108].

The main objective of Article 6.3(d) is to grant the charged person with the same rights as those of the prosecution, in respect of the examination of witnesses[109] and to provide a charged person with the opportunity to dispute the testimony of any prosecution witness. This reinforces the equality of both parties and supports the actual implementation of the adversarial principle.

Article 6.3 (d) assigns to a charged person the following facilities:

- to cross-examine prosecution witnesses;[110]
- to examine direct defense witnesses;
- to require the examination of defense witnesses;
- to require the examination of defense witnesses under the same conditions as the prosecution witnesses.[111]

Article 6.3(d), cover the examination of the case at court of first instance as well as at the courts of the further instances, but as a rule, does not cover the stages prior to a court examination[112]. Thus the refusal to the charged person or his/her lawyer to confront witnesses examined by the police[113] or a

[104] *FCB v. Italy*, A 208-B (1991).
[105] *FCB v. Italy*, A 208-B (1991).
[106] *Poitrimol v. France*, A 277-A (1993); *Lala v. Netherlands*, A 297-A (1994); *Pellandoah v. Netherlands* A 297-B (1994).
[107] Commission Report A 281-B (1992).
[108] *Tripodi v. Italy*, Commission Report, A 281-B, Para. 41 (1992).
[109] *X v. Switzerland*, No. 9000/80 Dr 28 p. 127 (1980).
[110] *S.N. v. Sweden*, No. 34209/96 Information Note No. 26 on the case law of the Court, January 2001.
[111] The requirement of examination of witnesses under equal conditions was underlined in *Bonisch v. Austria* (A 92(1985)), where it was mentioned that court is obliged to be led by the same requirements when examining the witnesses summoned upon the initiative of court and defence (and Not only a charged person or defence).
[112] *Can v. Austria*, A 96 (1985), Commission Report, Para. 47; *Adolf v. Austria*, B 43 Commission Report, Para. 64 (1980).
[113] *X v. FDR*, No. 8414/78, 17 DR 231 (1979).

judge investigator[114], if they can be confronted at the court hearing, as well as, a refusal of a judge investigator to hear the witnesses of the defense, if they can be subsequently examined at the court hearing[115], is not considered as a violation of Article 6.3(d).

At the same time, the Court has mentioned that the right to examine witnesses under the equal conditions stipulated by Article 6.3 (d) does not assign to a charged person the absolute and unlimited right to subpoena witnesses and does not provide for an obligation of a state to subpoena all witnesses required by the defense. The national court is authorized to reduce, at its own discretion, the number of summoned witnesses to a reasonable amount, noting the reasons of refusal. For example, to refuse to examine a witness whose testimony is of no importance for the case[116]. That is why a charged person has to prove not only the fact that he/she was deprived of the possibility to summon a particular witness, but also that the examination of this witness would have had great importance for uncovering the truth and that the refusal to summon the witness limits his/her defense[117]. The right of a charged person to subpoena witnesses for his/her defense may be subject to reasonable limitations established for the acceptance of the evidence, if these rules equally apply to both - defense and prosecution[118].

Article 6.3 does not stipulate the responsibility of a state if the defense cannot manage to subpoena a particular witness[119]. The court is obliged to provide the attendance at the trial of only those witnesses, who have been summoned according to the established rule by the defense. The requirements of Article 6.3(d) are not violated if the non-attendance of the witness was not conditioned by a court's reasons or if the court, not causing damage to the defense side, has summoned the witness at a different time from the time required by the defense party.

The concept of a witness stipulated by Article 6.3(d) gains specific importance in terms of the goals of the Convention and includes "expert witnesses" summoned by the defense or prosecution. A person whose statements are presented at the court as evidence but who does not make oral testimony[120] is not considered as a witness. The assignment of the witnesses summoned by the court to the defense or prosecution is carried out on the basis of the content of the statements made by them. According to Article 6.3(d), the examination of witnesses should be of an adversarial nature and the evidence presented by the prosecution shall be presented at a public hearing attended by the charged person[121].

The participation of an anonymous and protected witness in a trial may take place in some cases or the removal of the charged person from the court may occur, in order to study certain evidence. In the opinion of Strasbourg bodies, the use of anonymous sources might be justified at the investigation stage, but the conviction of a charged person on the basis of such testimony contradicts the guarantees stipulated by Article 6122. As is evident from the Court practice, it is difficult to talk about the violation of the rights provided for by Article 6.3(d) if, in the course of legal proceedings, at least one confrontation has taken place between a charged person and the witness, a charged person is familiar with the identity of a witness and the court decision is based also on other evidence123

[114] *Ferraro-Bravo v. Italy*, No. 9627/81, 37 DR 15 (1984).
[115] *Schertenleib v. Switzerland*, No. 8339/78, 17 DR 180 (1979).
[116] See for example: *Bonisch v. Austria*, Opinion of the Commission A92, p. 22; *X v. UK*, No. 8231/78, DR28, p. 5 (1982); *Engel and others v. Netherlands*, A 22, p. 38, Para. 91, Eur. Court HR (1976); *Bricmont v. Belgium*, A 158, p. 31, Para. 89 (1989).
[117] *X v. Switzerland*, No. 9000/80 DR28, p. 127 (1982).
[118] Blastland v. UK, No. 12045/86, Eur. Court HR Reports 10, p. 528 (1987).
[119] *F v. UK*, No. 18123/91, 15 EHRR CD32(1992).
[120] *Kostovski v. Netherlands*, A 166 (1989); *Cardot v. France*, A 200 (1991) Commission Report, Para. 51.
[121] *Barbera, Messegue and Jabardo v. Spain*, A 146, (1988) p.33 Para. 78.
[122] *Windisch v. Austria*, A 186 (1990); *Saidi v. France*, A 261- C (1993).
[123] *Isgro v. Italy*, A 194-A (1991).

besides the testimony of this witness. On the other hand, in certain cases, the removal of a charged person from the court hearing is admitted, if the court examination is attended by his/her lawyer who is able to conduct the cross-examination of the witness124. For example, if a charged person threatens a witness125, in a case involving serious crime connected with drugs126, etc. The use of the testimony, obtained from such a witness at the preliminary stage of investigation, as evidence, is not considered as a contradiction to the requirements of Article 6.3(d), if the right of defense of a charged person is protected127. These rights, as a rule, entitle a charged person to challenge the witness testifying against him/her and examine this witness after his/her testimony or at a later stage of court examination128. However, with the use of an anonymous witness' testimony, there is always the threat that the defense will not be able to re-examine or cast doubt on the correctness of the testimony, which might be erroneous or intentionally incorrect, if the identity of the witness is unknown to the defense.

According to sub-paragraph “e”, a charged person is entitled to the right to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court. The free assistance of an interpreter is a part of the facilities stipulated by Article 6.3 that has to be provided by a state.

The right to have the free assistance of an interpreter does not depend on the financial standing of a charged person and provides for the complete and unconditional exemption of a charged person from the remuneration of the interpreter’s service, so that a charged person should not abstain from the assistance of an interpreter because of a financial motivation[129]. Forcing a charged person to pay is unacceptable even if a person is convicted[131] or the court does not make the decision in his favor[131].

Any alternative interpretation of Article 6.3(e) would not be incompatible with the objectives and tasks of Article 6. This guarantee, like the other rights provided for by Article 6, covers “persons charged with a criminal offence” and applies to the preliminary investigation, the hearing at the court of first instance[132], appellate, cassation and any other kind of law proceedings to the extend that the latter is connected to the substance of the criminal charge, translation of the indictment and the procedural ruling issued by the court[133].

If a charged person understands the language of the legal proceedings quite well or speaks this language, he/she does not have the right to apply for the free assistance of an interpreter in order to defend him/herself in another language[134], and he/she can not insist on defending him/herself in another language, even in the language of the ethnic minority to which he/she belongs[135].

“A charged person .... has a right to use the free assistance of an interpreter so that any act of court examination drawn against him/her shall be translated and interpreted for him/her if the execution of the fair trial requires the familiarization of these acts by him/her”.[136]

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[124] *Kurup v. Denmark*, No. 11219/84, 42 DR287 (1985).
[125] *X v. Denmark*, No. 8395/78, DR 27, p. 50 (1981).
[126] *Kurup v. Denmark*, No. 11219/84 DR42, P 287 (1985).
[127] See for example: *Ludi v. Switzerland*, A238 (1992).
[128] *Delta v. France*, A 191-A p. 16, Para. 36 (1990).
[129] *Luedicke, Belkacem and Koç v. FDR*, A29 Para. 42 (1978).
[131] *Luedicke, Belkacem and Koç v. FDR*, A29 (1978); as well as *Öztürk v. FDR*, A73(1984).
[131] *Kamasinski v. Austria*, A 168 p. 35, Para. 74; *Artico v. Italy*, A37 pp. 16-18, Paras. 33-36 (1980); *Luedicke, Belkacem and Koç v. FDR*, A29, Para. 40 (1978)
[132] *Luedicke, Belkacem and Koç v. FDR*, A29 p. 20, Para. 49 (1978) ; *Kamasinski v. Austria*, A 168, pp. 36-37, Paras. 76-81 (1989).
[133] *Kamasinski v. Austria*, A 168, p. 38, Paras. 84-85 (1989).
[134] *K v. France*, No. 10210/82, DR35, p. 203 (1983).
[135] *K v. France*, No. 10210/82, DR 35, p. 203 (1983); *Bideault v. France*, No. 11261/84, 48DR232(1986).
[136] *Luedicke, Belkacem and Koç v. FDR*, A29, p. 20, Para. 48 (1978).

The scope of the assistance stipulated by sub-paragraph "e" of Article 6 substantially depends on the factual circumstances of the case, including the level of understanding of the law proceedings' language by a charged person and on whether he/she uses the assistance of a lawyer. A charged person should be able to understand the course of legal proceedings (court examination) and participate in it to the extent that is necessary for ensuring a fair trial.

Although the Convention does not establish the form of translation, the Court, as a rule, requires a written translation. An oral translation, even made by an interpreter, shall be considered as an insufficient basis for the preparation of the charged person's defense[137]. However this does not foresee the written translation[138] of all the written evidence[139] or documents[140] related to the case, but only of the documents, which are necessary for ensuring a fair trial for a charged person. The written translation of the court decision[141] and indictment[142] is not necessary, if a charged person has received adequate oral information regarding their content. The written translation is not obligatory when a charged person has received sufficient information orally or he/she has foregone the right to written communication[143]. The assistance of an interpreter should allow a charged person to understand what he/she is accused of and allow him/her to defend him/herself in court by presenting his/her own version of events[144]. That is why the assistance foreseen under Article 6.3(e) includes not only the translation of the documents but the participation of an interpreter in court sessions as well[145]. The simultaneous and complete translation of the court session is not necessary. The Court considered as sufficient the general and consecutive translation, not including the questions to witnesses[146].

In our opinion, the requirements of Article 6.3(e) shall be violated if the relevant state authorities do not provide for the participation of an interpreter in legal proceedings for the following reasons: the lawyer assisting a charged person (and not a charged person him/herself) can understand or speak the language of the legal proceedings; or if the information (in the language of the legal proceedings and not the translation) is submitted to the lawyer, who speaks fluently the language of the legal proceedings and is able to explain the content of the information to his/her client. In this case, the state authorities are assigning their obligation to a lawyer. While for a charged person it is important to adequately understand his/her defense. This requirement of Article 6.3(a) shall not be fulfilled if a charged person receives the information in a language, which is understood by him/her or his/her lawyer[147]. On the basis of *Kamasinski v. Austria*, we can categorically say that a fair trial requires the submission of the translation directly to a charged person, so that he/she shall be able to understand the court examination carried out against him/her, take an active part in it and inform his/her lawyer about any issue or circumstance, that may be or must be drawn to the attention of the court for his/her defense. Regarding the issue of providing the assistance of an interpreter for the communication of a charged person with a lawyer, it has to be mentioned that when retaining a lawyer a charged person is obliged to retain a lawyer who speaks the language which is understandable to him/her[148]. In any other case, he/she and not a state has to provide for the participation of an interpreter[149] and the remuneration of the expenses related to his/her assistance. If a charged person applies to free legal

[137] *Kamasinski v. Austria*, A 168, pp. 36-37 (1989).
[138] *X v. Austria*, No. 6185/73, DR2 (1975).
[139] *Kamasinski v. FDR*, A168 (1989); as well as *Luedicke, Belkacem and Koç v. FDR*, A29 (1978).
[140] *Kamasinski v. Austria*, A168, p. 35, Para. 74 (1989).
[141] *Kamasinski v. Austria*, A 168, pp. 37-38, Paras. 82-83 (1989).
[142] *Ibid*.
[143] *Ibid*. Paras. 79-81 (1989).
[144] *Ibid*. p. 35, Para. 74 (1989).
[145] *Ibid*, also *Luedicke, Belkacem and Koç v. FDR*, A29 (1978).
[146] *Kamasinski v. Austria*, A 168, pp. 36-37, Para. 78-81 (1989).
[147] *X v. Austria*, No. 6185/73, 2 DR 68 (1975).
[148] *X v. FDR*, No. 10221/82, 6 EHRR 353 (1983).
[149] *X v. Austria*, No. 6185/73, 2 DR 68 (1975).

assistance the relevant state authorities are obliged to provide an interpreter or appoint a lawyer who will be able to speak (communicate) with his/her client.

The issue of ensuring of the actual and efficient implementation of facilities granted to a charged person is raised in this case as well as in other Article of the Convention. That's why the state authorities are obliged not only to retain an interpreter but also to ensure his/her competency. The obligation assigned to the state authorities under Article 6.3(e) is not limited to the appointment of an interpreter but includes controlling the translation's quality if such control is necessary[150].

[150] *Kamasinski v. Austria*, A 168, p. 38, Paras. 82-83 (1989).

JEMAL GAKHOKIDZE / ZURAB GARAKANIDZE*

THE PLACE AND THE ROLE OF ECONOMIC SECURITY IN THE FORMATION OF THE GEORGIAN STATE**

We try in this article to address the question of the role and the place of economic security in the formation of the Georgian State. This requires at least a brief overview of the place and role of economic security in the world's leading states. In general, the concept of security has greatly changed in recent times. Non-military aspects of security have been brought to the forefront in light of the transformation of a once bipolar world. Among them is economic security – the ability of a national economy to provide socio-economic stability and personal economic strength in the context of internal and external threats.

The term "economic security" first appeared in the nineteen seventies. The maintenance and strengthening of a country's position within the world's economic system is the first priority from a security perspective.

Insuring the country's economic interests and protecting its industrial secrets, is defined as the main goal of America's economic security policy. In 1993, *Warren Christopher*, the then U.S. Secretary of State , noted that his country's objectives should be based on "three strands": the strengthening of economic security, support of democracy and protection of human rights.

In December 1995 the then U.S. President, *George Bush* (Senior), adopted a memorandum, which outlines the basis of national economic security. The economic security system, with an emphasis on maintaining U.S. technological leadership and insuring continuing economic strength, was established as a result of the realisation of the mentioned program. The following people form part of the interagency group: the Deputy Minister of Defence, the Deputy Director of the Central Intelligence Agency, the Minister of Energy, representatives of the Federal Bureau of Investigation and the National Security Agency, the chiefs of the such leading corporations as General Electronics, Boeing and TRV. The group has not only identified threats to US economic security but has also taken the decision to publish a single catalogue of the "Threats to Economic Security and their Assessment".

The *Clinton* administration reaffirmed the importance of economic security. As long as economic, scientific and technological threats continue to grow in importance special services will continue to gain a leading role in countering them. In nineties financial resources provided for economic intelligence accounted for more than 40% of the total Intelligence budget. . Currently, US special services jointly collect information relating to the world's export-import processes, support provided by foreign governments for their firms' exports and protection of internal markets from competitors. This process is implemented on two levels: macroeconomic intelligence and economic counter-intelligence. In 1994 the Central Intelligence Agency and other special services were "integrated " with more than 150 leading corporations of the USA. This clearly illustrates the American approach to economic security.

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* *Jemal Gakhokidze,* the Candidate of Legal Sciences, is the Deputy Secretary of the National Security Council of Georgia. *Zurab Garakanidze,* the Candidate of Economic Sciences, is the Deputy Minister of the State Property Management of Georgia.
** Translated from the Georgian language by *Tamar Cherkezishvili.*

On April 29, 1996, under the Decree No.608, the then President of the Russian Federation, *Boris Yeltsin*, approved the State Strategy of the Economic Security of the Russian Federation (basic provisions) and ordered the Government to elaborate and implement an appropriate policy.

The document consists of the following four parts:

I. Goals and objectives;
II. Threats to the economic security of the Russian Federation;
III. The criteria and parameters for the maintenance of the economic security of the Russian Federation;
IV. The tools and mechanisms of the economic policy to provide economic security.

The main goal of the state strategy for economic security is to reach a level of economic development that will allow for the creation of conditions: for life and development of a person; for the socio-economic, military and political stability of society; for the maintenance of territorial integrity; for protection against internal and external threats; for the maintenance of the political and military status of Russia as a super state.

In the document names the following main threats to the economic development of the Russian Federation:

1. The differentiation, and its continuing increase, of the population in terms of property status;
2. The weak points of the economy of the Russian Federation (in particular, raw materials; the higher level of soil exploitation; the capture of the internal consumer market by foreign firms; the purchase of Russian enterprises by foreign firms for the purpose of removing local entrepreneurs from the internal and external market, the increase of foreign debts, etc.);
3. Inequality in the development of the regions of the Russian Federation
4. The rising level of crime (promoted by the growth of unemployment; weakening of state control; the increase of the level of organised crime, etc.).

The mentioned document outlines the basic parameters (indicators) of economic security. Their violation poses a threat to the economy of the country.

The document mentions the following factors for the achievement of the economic security of the Russian Federation: taking into account the requirements of economic security in processing the forecasting indicators of the socio-economic development of the state; co-ordinating the role of the government; relevant financial expertise being used which will take into account the requirements of economic security. The document, while not naming any ministry or agency separately, specifically mentions the role of the Security Council of the Russian Federation. In particular, the Security Council is obliged to review the conception of the federal budget in terms of maintaining the economic security of the country.

This document represents the material prepared as “public information” and differs very little from the corresponding documents of other countries.

It is well known that the discussions relating to the problems of the economic security of the Russian Federation were conducted for 5 years in scientific and governmental circles. The mentioned document again illustrates the so called “ big brother syndrome”, whereby the Russian Federation’s

economic security state strategy "takes care of" the CIS countries, so that economically developed countries don't oppress them.

The conception of economic security elaborated in the former Soviet Union and inherited by Russia and the work for the practical implementation of theoretical issues is proceeding.

We consider reasonable:

a) To promote, through the Georgian mass media, discussion on the concept (doctrine) of the economic security of Georgia among scientific and governmental circles and to elaborate a tailored version of the doctrine;
b) To subject the most important issues of the economic security of the country (the establishment of a budget, foreign-economic agreements, the privatisation of strategically important enterprises, etc.) to the experts at State Security Council's hearings.

The basic goal of the economic security of Georgia is to overcome difficulties involved in the transition to a market economy, to increase the prosperity of the population and to ensure the stable development of the economy of our country for the long-term period. On this basis, the state of the country's economy has to satisfy a whole number of qualitative and quantitative requirements. The definition of particular types of economic security indicators and the establishment of marginal parameters in figures has to be implemented in the target programs elaborated on the basis of the economic security strategy.

The major methods (mechanisms) insuring economic security are:

1. Political (diplomacy, intergovernmental agreements, Diaspora, cultural unions, lobbying, public diplomacy, etc.);
2. Economic (structural improvement of the economy, export-import diversification, protection of the national currency, convergence of the privatisation process with state interests and the improvement of fiscal policy, the establishment of a reserve of strategic resources, investment in the exploration and processing industries of the countries which are rich in resources, economic intelligence, etc.);
3. Forceful (introduction of reciprocal economic sanctions, utilisation of the military, etc.).

The efforts of a single agency in applying such measures for the economic security of Georgia shall not produce the desired impact. Complex inter-institutional co-ordination of the activities of all the agencies and ministries, which shall work on the analysis of the economic threats is required. The table of the "marginal" indicators of economic security has to become the basis for such analysis (see: table).

Currently, due to the major importance of the economic security of Georgia, a subdivision of the Ministry of Security shall work on the following important problems:

- The prevention of corruption through the implementation of the normative acts;
- Protection of the economic area (fight against smuggling);
- Security of the transport corridor (the provision of "the silk road" and oil pipelines with counterintelligence);
- Protection of special purpose units;

- Investment in security (the monitoring of the energy and other strategic sectors and investment in the implementation of programmes);
- Maintenance of the monetary-credit system's stability;
- Struggle against budgetary separatism;
- Food safety.

Table

Indicators	Marginal figures	Current state
Reduction of GDP	25%	30%
The share of investments in GDP	25%	10%
The share of consumption of imports in the population	30%	60%
Ratio of foreign currency to the amount of GEL	25%	100%
The proportion of persons who have an income less than the minimum living standard, from total population	7%	40%
The difference between the 10% strata of the most high- income and low-income population	8 times	20 times

Solving these problems will make it possible to achieve economic security and ensure stable economic development. At this stage the threats to the economic development can be characterised as follows:

- Protection of the economic area from the smuggling. This kind of economic crime contains a triple threat to the economic development of the country: first of all it destroys fair business by establishing uneven competition and forces it to hide tax revenues and move into the "shadow". Secondly, the unhealthy lobbying of this or that private structure will become so common due to the patronage of the high-ranking officials at the customs border of the country that the payment of taxes will become the exception and the concessions achieved by so-called "roofs" - laws; and thirdly, according to current practices, the new normative acts regulating the economic field are enforced from the moment of their publication. This damages a lot of entrepreneurs, because usually, many of them conclude agreements and make their business-plans for defined long running periods. It can be said, that the enforcement of new taxes or redefined existing ones upon publication totally destroys entrepreneurs' plans and makes them less reliable for foreign partners. As a rule, such changes are the results of lobbying of certain groups and are in the interests of the particular businesses.

Crimes covered under Article 214 (violation of customs rules, smuggling) of the Criminal Code of Georgia falls within the competencies of the investigative bodies of the Ministry of State Security and of the Special Legion. Besides, the Ministry of the Interior and the Georgian State Department for the Protection of Borders are also authorised to investigate these crimes.

Under existing, legislation the disclosure of tax evasion falls within the remit of the Special Legion. The fight against corruption and economic crime is dealt with by the Ministry of Internal Affairs. The

Economic Security Service of the Ministry of State Security is also authorised to deal with such crimes. As can be seen, functions are not allocated by any specific feature and the current legislation gives room for numerous examples of parallelism and duplication. If we look at the statistics for recent years, the figures give little room for peace of mind. The unified attack did not reduce the scale of smuggling but on the contrary made the situation more complicated. Today it is practically impossible to carry out large scale smuggling. In particular, the transportation of goods inside the country without the support of some of the law enforcement bodies. As it has been already mentioned, a smuggler is not acting independently and is not able to do so. No hidden smuggling ever exists in practice. That is why the level of corruption is the highest in those mentioned agencies, which are actually called upon to fight against smuggling. Inappropriate distribution of the responsibilities, to our mind, is the main reason for this. In this context we consider it expedient to:

Withdraw the function of fighting against industrial smuggling from the Ministry of State Security and thereby dissolve the Economic Security Service existing within that Ministry and the Board for Fighting against Smuggling existing within the Counterintelligence Service. The latter should retain the function of fighting the smuggling of drugs, arms and radioactive substances and this should become its main task. With regard to the analysis of economic security and forecasting possible threats, this is to be assigned to the National Security Council. Shortly, the Ministry of State Security has to be totally discharged from its "economic burden". It is beyond doubt, that such steps will only have a positive impact on the image of the Ministry of State Security.

The function of revealing tax evasion cases has to be taken away from the Ministry of Internal Affairs as well and the relevant departments of the Main Board for Fighting against Corruption and Economic Crime are to be dissolved. The major function of the Main Board should be to uncover and investigate crimes against property, crime in the monetary system, bribery, etc.

2. In the given circumstances we consider it possible to establish a service on the basis of the Special Legion that will be subordinated to the President in the form of a State Department. It can be named as a State Department of Financial or Tax Police (similarly formed services are functioning in the Russian Federation, Ukraine, Europe and many other countries; recently the Federal Bureau of Financial Investigation directly subordinated to the President was established in Kazakhstan). The main function of such a Department will be the fight against industrial smuggling and the fight against tax evasion.

There should be a single state body that would assume full responsibility to fight against industrial smuggling and tax evasion.

3. If the outlined steps are taken:

- A body, directly responsible for the actual fight against industrial smuggling and tax evasion in the country, shall be established in the state as an independent state department;
- Parallelism, duplication and the never-ending process of looking for the wrong and right party shall finally end ;
- Such measures will have positive feedback from international organisations and foreign states. At the same time it will be interpreted as the beginning of a process with implications for the police and other security bodies. Moreover, they are expected to support financially and technically the newly established services. Society shall have a positive attitude towards this decision. In particular this refers to the people involved in business and in the economic field in general. They will know clearly who is fighting smuggling and tax evasion;

- There will be a proper legal basis for the recruitment of staff (it is difficult to find other agencies more advanced in employing relatives and friends).

Besides it is essential that these proposals directly correspond to the implementation of the anticorruption program which was initiated at the President's initiative.

Corruption in the controlling and law-enforcement agencies has become the frequent subject of discussion. Some people have learned to "make money " from nothing in Georgia. For example, Georgia concluded Agreements on Free Trade with Azerbaijan, Ukraine, Armenia and Kazakhstan in 1996-1998. Despite ratification by the Parliament in the period from1996 to August of 1998, the Customs Department has not submitted to the relevant boards the instructions concerning the non-custom trade with these countries. Consequently, the internal debt of the state to entrepreneurs reached the amount of U.S.$10 million by the end of 1998. For example the budget had to pay back U.S.$15 million to entrepreneurs for oil products imported from Azerbaijan in 1996. There were certain examples of improper deals In the process of paying back debts. This has raised concerns with the governments of Ukraine and Azerbaijan, which was reflected in a letter from the Ambassador of Georgia in Ukraine to the President of Georgia.

Here one should also mention a series of notorious bankruptcy cases. It is not discounted that the special services of certain countries are strongly interested in the ineffectiveness of strategically important units of the country and in destroying Georgia's investment image.

There is little information on the origin of capital invested. Does invested money result from laundering - so-called "dirty" money? Or did anyone collect information on foreign companies , which operate in economically strategic? For example:

"Metallurgoilgasinvest" Ltd won the tender conducted by the Ministry of State Property Management for the right to control the joint stock company "Metallurgical Centre" on January 9, 1998. By 2000, the mentioned company had not fulfilled even a single provision of the contract concluded with the Ministry of Property Management. This resulted in the suspension of business, the failure of the investment program and employee anger being directed against the investors.

Before the arrival of the Czech company "SagaPrint" (which is not implementing the investment program either), the Russian joint stock company, "Industry", won the tender conducted for the privatisation of the (76%) controlling interest of the joint stock company "Chiaturmanganum". The winner was obliged to pay U.S.$1 million for the restoration of the company and invest U.S.$30 million over 10 years. The sum was not transferred and the Ministry of Property Management had to cancel the results of the tender and announce a new one. Can it be that the forces operating in the name of "Industry" are those, who halt the privatisation process and hence, hinder the restoration of enterprises for a certain period of time?

The main goal of the security services in the economic field is not the permanent inspection of the trade units for the purpose of fulfilment of the budget, but the study of the above-mentioned problems and collection of necessary information in advance around these processes. There is no threat more vital for the cornerstones of the state than social, because nothing can confront the hungry rebellion or social revolution.

The improvement of the current legal basis for foreign exchange operations is very important. For the time being, non-entrepreneurs are authorised to draw foreign currency in cash from their bank

accounts (regardless of the money being deposited in cash or transferred) without any restriction. This is followed by the transfer of money of legal persons into those accounts, thus "recovering" it. According to the information on hand, only sums related to unregistered export transactions are mainly transferred via money orders. This necessitates the raising of the issue of paying out the money orders in GEL which were effected in foreign currency. Because of the same reason and for making the GEL the only means of payment it is advisable to stop the issuance of credits in foreign currency.

Total control over the allocation of currency sources on private accounts is very important for the maintenance of the stability of the monetary-credit system. In many foreign countries the law gives an opportunity to the owner of the account to fully maintain his financial confidentiality (by the way the same is guaranteed under the Georgian Law on "Activities of Private Banks" - Article 17). However it is true only until the banking operation is beyond doubt and the money as well as the client are "clean".

Under the Law of the Russian Federation on "Fighting Against Corruption", the banks are obliged to inform the Tax Inspection if the amount of money on the account of a legal or natural person over 30 days exceeds the minimal salary by 200 times. In case of non-compliance with this requirement the bank shall be fined or have its license withdrawn. The law also forbids the performance of check bearer operations without checking the clients personal information. Similar rules are applicable in the United States too. Banks must notify the tax authorities if more than US$10,000 is deposited and the Federal Bureau of Investigations - if the amount exceeds US$100,000.

In such cases there is no violation of legal provisions relating to "banking confidentiality" by the law enforcement bodies. A bank is obliged to inform the special services itself (otherwise it will be fined). For example, in Latvia an operation may be considered doubtful if a large amount of money is transferred to the account of a recently formed firm, or if a large amount of money is drawn by the client with a doubtful reputation.

Such a legislative vacuum can result in some very unsavoury activity. For example: the local branch of a foreign bank upon receiving U.S.$10 million from the unidentified person, transferred it to Germany within three days to the account of a firm which had operated in Georgia neither an import nor even a transit operation. Is this a case of currency outflow, or worse, has the money been acquired through drug dealing or illegal arms dealing?

Till now the enforcement agencies have experienced difficulties in collecting information on operations performed by our citizens abroad. After the ratification of the European Convention on Legal Assistance by the Parliament of Georgia in the Spring of 1999, it has been possible to receive the relevant information from other countries.

During the financial crisis in 1998 (September-November of 1998) the National Bank through interventions sold U.S.$51.2 million for the purpose of maintaining the GEL exchange rate. Its currency reserves have as a result been considerably reduced. Before ending such interventions two important circumstances took place:

1. The National Bank was selling dollars at lower rates at the currency stock exchange, compared to the rate on the open currency market. The difference in rates created favourable conditions for making large, undeclared profits;
2. Because of the imperfection of the rules of the inter-bank currency stock exchange, the National Bank experienced a loss in favour of the commercial banks on the basis of the daily rate differences.

The avoidance and prevention of such situations is essential for the maintenance of the stability of fiscal system.

Security of the transport corridor has to be maintained not only by forceful but also through economic means. According to the second part of Article 94 of the Constitution, "the structure of taxes and fees and their introduction shall be determined by law". The laws on Agricultural Quarantine and on Veterinary defined that quarantine service is chargeable. However, they have not defined the tariffs for phyto and veterinary quarantine services. These tariffs were outline in a decree issued by the Ministry of Agriculture and Food. Consequently, for example, the tariff for the visual phyto-quarantine inspection (during the import as well as during the transit custom control) of one container is equivalent of U.S.$10 and for the inspection of ships' holds (with wheat), the equivalent of U.S.$50 (it would be interesting to know how much it costs not to reveal a violation found during such visual inspections, or had anything been revealed at all?). This will remain true while the price of port processing of one container at Poti port costs less than the equivalent of U.S.$10. Under the Georgian Law on Grounds for System of Fees, the enforcement of these tariffs had to be ceased. However they are still levied. This damages the image of the Euro-Asian Corridor and if it were not for the political conflict between Iran and America, this corridor could have started from the ports of Iran.

The problem of food security, together with the protection of the environment, utilisation of new sources of energy and other important issues, constitute global problems which will determine the future of mankind. *Jacques Diouf,* the Director-General of the Food and Agriculture Organisation of the United Nations (FAO), predicts, that if there is no technological breakthrough in the fertilising of soil and the production of food, there will be a food crisis by 2010. This was confirmed by the crisis that was caused in Georgia by drought in the Spring of 2000.

The majority of the developed countries have their own legal basis for food security. For example, the United States' Law on Food Security is more than half a century old. Germany adopted the Law on Agriculture of Germany in 1955, which obliges the state to consider food supply as a strategic objective; to establish if necessary strategic food stocks; to use all possible methods of economic stimulation and support and not to allow a situation where the country becomes dependent on foreign food.

The assessment of food security necessitates the characterisation of the levels of food sufficiency and availability, its ecological pureness and the country's ability to be self-sufficient. A simple calculation of these indicators in assessing food security is not sufficient. There is a necessity for a certain base for comparison to exist. When comparing with this base, it will be possible to draw up concrete conclusions concerning the level of food security. Here we deal with so-called marginal indicators of the human vitality.

- Energy value of food;
- the amount of consumed basic food substances (proteins, fats, mineral substances and vitamins);
- the level of product pollution;
- the level of import dependency ;
- the protection of the local agricultural producers.

In the present conditions the state faces the following task: to refer to budgetary federalism to eradicate budget, tax and other financial impediments and prevent the strengthening of the decentralisation-destabilisation of the budgetary system. The major reason for the complication of

budgetary relations is the weakening of the central budget. There is a possibility to distinguish contradictory tendencies from the interrelation of the different kinds of budgets: 1) the establishment of a budgetary system with a strong central budget and 2) rapid decentralisation that means the financing of only the minimal costs for the maintenance of the centre from the central budget. These tendencies are revealed both in politics and in practice: in particular, the share of the central budget in total revenues, from January-May, 1998 has fallen from 76, 5% to 72,6% by the January-May, 1999, i.e. it has been reduced by 13,9 million GEL. All this creates the actual threat of budgetary separatism.

As a conclusion, we would like to underline that the problem of economic security has to acquire a central place in the system for the maintenance of the security of the country. Moreover, in reality, as it is widely recognised, non-military spheres gain more and more importance not only for the state, but in other dimensions of security – regional and world security. Besides, in our opinion, maintenance of economic security has to become a priority, to safeguard the formation of the Georgian state, because not only are stability and the hope for the future dependent on it, but also the self-defence of the country and its military strength. Economic development and stability allow for military capability. In other circumstances, where there is a lack of economic development, it is useless to speak about military capability or the moral level of law enforcement agencies and military forces.

We would like to draw attention on one more guiding conclusion, which, in our opinion, has to be taken into consideration while the adoption of the final concept of the state security. Here we deal with the traditional fields of our national economy on the basis of which our country was supplied with food during the centuries, especially taking into account the current situation in the world, when the majority of the populations of the developing countries are facing the threat of hunger. Thus, the maintenance of food safety is one of the priorities of our economic security; this is supplemented with the increase of the ecological problems, pollution of the atmosphere and biosphere, water and air and etc. *Ilia Chavchavadze* symbolically called Georgia “the country of bread and wine”, that conditioned the upbringing of the physically and mentally healthy generations and *Ivane Javakishvili* in his fundamental work the “Economic History of Georgia” proudly wrote that as a result of the proper economic policy and effective economic organisational forms of our ancestors Georgia and Georgian Nation has never experienced “threat of the big and mass hunger”. It is underlined as well that in terms of natural-historical development of the country the production of grains was always the leading strategic trend.

So far the maintenance of the economic security is one of the essential factors of the Georgian state building.

MAMUKA JGENTI*

A SHORT REVIEW OF THE LEGAL AND PRACTICAL ASPECTS OF EXTRADITION**

Since September 11, 2001, after the terrorist acts on the United States, the interest of the international commonwealth in international crime and specifically extradition, has considerably increased. Particular attention has been paid to the issues of improving and implementing extradition law. This paper briefly reviews the legal and practical aspects of extradition, based on the European experience.

On April 27, 1999 Georgia became the 41st Member State of the Council of Europe. This resulted in the recognition of progressive steps made by Georgia but imposed on the country numerous obligations, the timely and due fulfilment of which should provide for the introduction and development of democracy and other principles and goals of the Council of Europe.

A major part of the list of obligations elaborated and recommended by the Council of Europe's Parliamentary Assembly and approved by the Committee of Ministers is dedicated to Georgia's obligation to accede to the international-legal instruments adopted under the auspices of the Council of Europe within a certain time framework. It should be emphasised that these instruments (conventions, treaties, agreements, charters) encompass quite a broad spectrum of matters within which human rights and international criminal law have a primary place. The conventions dealt with in this paper and those which form part of the obligations assumed upon accession to the Council of Europe are already in force in Georgia. Therefore, Georgia has already duly fulfilled this part of the assumed obligations.

The European Convention on Fundamental Human Rights and Freedoms and its additional Protocols[1] have been in force in Georgia respectively since 1999 and 2000; The European Convention on Extradition and its additional protocols have been in force in Georgia since 13 September 2001; the European Convention on Mutual Assistance in Criminal Matters of 20 April, 1959 has been in force for us since 11 January, 2000; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its additional protocols have been in force since 1 October, 2000.

Besides the international-legal instruments envisaged by the mentioned obligations, Georgia is acceding to other European documents to achieve full integration in the European legal space. Among the European agreements applied in the field of international criminal law, I would stress the following agreements: a) on Suppression of Terrorism (in force for Georgia since 15 March 2001) and b) on Transfer of Sentenced Persons (in force since 1 February 1998).

In 1280 B.C. the Egyptian Pharaoh *Rameses II* and the Hittites Prince *Hattusili* III concluded the first agreement related to extradition. This agreement was applied only to noblemen suspected of political crimes and not to ordinary criminals. Whereas, modern bilateral or multilateral treaties related to extradition purposefully exclude political criminals from the scope of extradition. The well-known

* *Mamuka Jgenti* is the Deputy Director of the Department of International Law of the Ministry of Foreign Affairs of Georgia.
** Translated from the Georgian language by *Maka Machkhaneli.*
[1] Except for the additional protocol (so-called the first additional protocol) of the European Convention on Human Rights, which basically deal with the property right, rights to free elections and education. The Protocol was ratified by the Parliament of Georgia in December 2001.

scientist, *Blakesley*,[2] notes that extradition was applied even before Christ although the term itself was unknown and only some of present-day existing procedures were applied. "Diplomatic request", usually was accompanied by the threat of war, unless the requested person was transferred to the requesting state. In a short while after the conclusion of the Egyptian-Hittites treaty other aspects of extradition had been recorded.[3] Moreover, the procedures of those times indicate that the extradition system aimed at returning both ordinary and noble criminals. Examples of extradition are seen in Roman times as well. Thus, extradition has been known since ancient times[4]. However, it would be very difficult to compare the old practice[5] and procedures with the rules applied today.

In the opinion of certain scientists[6], the first European agreement regarding extradition is dated in 1174, with the signing of a convention between England and Scotland. In Continental Europe, the domestic legislation of France dealt with extradition as far back as 1376. In 1303 France signed a treaty with England allowing for the transfer of political opponents of the requesting state.

The extradition system, as applied nowadays, can trace its development to continental European states in the 18th century. As the United Kingdom is an island, it is somewhat far from neighbouring states, but France is distinguished with a different location and thus it was the one who had to make the first efforts in concluding extradition treaties. For this reason, France is recognised as the founder of contemporary extradition law and practice.

In his work, Martens[7] tells us that almost 100 international treaties dealing with extradition were signed in the 18th century and at the beginning of the 19th century. Usually such treaties were signed between neighbouring states because of the poor transport system.

Today the world has "diminished", due to the speed of modern transport. Consequently the opportunities for criminals to flee from justice has grown. Extradition is one of the mechanisms applied for the transfer of criminals across state borders to face justice. Thus extradition should fulfil its most important role in the enforcement of international criminal law and assist states in punishing people violating domestic legislation.

Besides its legal meaning, extradition has another no less weighty meaning. Although until recently, extradition was a mechanism of mutual assistance between states in criminal matters, now it has acquired significance in terms of protecting human rights as well. This characteristic distinguishes it from alternative methods such as exile, deportation or abduction. In my opinion, extradition itself is an integral part of the international protection of human rights. On the other hand, when a criminal returns to the "state of commission" for punishment before the law, extradition is an element of human obligations.

Proceeding from all the above, the significance and efficiency of the method of extradition is clear. As a matter of fact, nowadays the issue of extradition cannot be regulated only with bilateral treaties signed between neighbouring states. Thus it needs a more complex, diversified approach and harmonisation of the existing practices and experiences. It is also true that in terms of its geo-political location and other factors our country cannot remain an ordinary spectator or even a commentator.

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[2] *Blakesely*, The practice of Extradition from Antiquity to Modern France and the United States: A brief history, 4B.C.INT'L&Comp.LJ 39 91981). It could be said that in his work *Blakesely* reviews the whole history of extradition – starting from the pre-Christian period to medieval.
[3] Including antique history, Indus Code etc.
[4] Another example of extradition is the treaty concluded between Kiev and Byzantium in 10th century.
[5] *Schmid*, Extradition and International and Administrative Assistance in Penal Matters in East European States, 34 Law in E. EUROPE 167 (1988).
[6] *Geoff Gillbert,* Transitional Fugitive Offenders in International Law, *Martinus Nijhoff* Publishers, 1998.
[7] *Martens,* Recueil De Traites 7 Vols, 1791-1826, Supplements au Recueil des Principaux Traites, 20 Vols, 1802-42.

Today there is no doubt that extradition is an integral part of international public law, related to and encompassing both the relationships of nations (states) and the status of entities (individuals). In the relationships between the states this problem is regulated by means of treaties and other international agreements.

Despite the arguments advanced by the famous scientist, *Hugo Grocius*[8], where such "contracts" do not exist, international legal obligations on transferring or prosecuting a person shall not be raised. If there is no treaty there is no obligation and everything depends on the good will and policy of states. However, there are quite persuasive arguments on the need to transfer even if there is no official treaty.

"It is as much to our advantage that such criminals should be punished, and that we should get rid of them, as it is to that foreign state that they should be brought within the reach of its law[9]".

Some (basically civil law) states[10] recognise extradition even if there is no treaty. Some countries like Georgia considers such transfers as possible; the so-called common law states, as a rule, require more formal agreement or negotiation between the requesting and requested states.

Despite all the above the combination of international treaties and domestic legislation is not still able to create an imperative obligation on extradition proposed by *Grocius*, since such legislative bases allow state to act but do not assign it with the obligation to act[11].

Without a decrease in the role and importance of international treaties, I believe that in terms of criminals of a certain category, appropriate authorities of the requested state just perform their role in the execution of international justice, which in its turn requires punishment of criminals. Even though in the international customary law there is still no common rule on the necessity of transferring or punishing a criminal who has fled beyond the border, many newly elaborated anti-terrorist conventions stipulate the obligation to prohibit non-punishment of criminals[12] – which means that a new norm of international criminal law is born.[13]

[8] DE JURE BELLI AC PACIS, BKII, c. 21, Paras. 3 and 4.
[9] See also Royal Commission on Extradition 1878, C2039 and PARRY, BRITISH DIGEST OF INTERNATIONAL LAW, Vol. 6 at pp. 805-6 (1965). See also Application of the Canadian Government to the International court of Justice on *Kindler v. Canada*, Communication No. 470\1991, 14 HRLJ 307.
[10] E.g. France, Switzerland. See Article 1 of the Law of France of 10 March 1927.
[11] *G. Gillbert*, Extradition and other mechanisms, Vol. 55, 1998, Kluwer Law International.
[12] For standard provisions see Article 7 of the Hague Convention on the Suppression of Unlawful Seizure of Aircraft: "the Contracting State in the territory of which the alleged offender is found shall, if it does Not extradite him, be obliged, without exception whatsoever and whether or Not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State".
[13] Major part of the scientists studying this issue agrees with such obligation. As for the respective legislation of Georgia on the issue of jurisdiction see Articles 4 and 5 of the Georgian Criminal Code and Article 252 of the Georgian Criminal Procedure Code. In this regard very interesting is paragraph 3 of Article 6 of the Georgian Criminal Code saying that: "it is prohibited to extradite a refugee who has committed a crime and is being persecuted for political creed or who has committee the action Not regarded as crime under the legislation of Georgia or if for this crime capital punishment is prescribed in the state requesting the extradition. The Criminal liability of such persons shall be stipulated under the international law". The last sentence of this paragraph is related with the evasion of Non-punishment of criminals. If we take into account that the principle "transfer or punish" is more and more often applied in the international law, we can assume that in case transfer is Not possible the criminal liability of such person shall be stipulated according to the above mentioned "new Norm". However, let's wait for the development of court practices with regard to this article.

"The extradition state also has the right, in the cases where extradition for whatever reasons is not possible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting state."[14]

Consequently, many states[15] have adopted quite liberal legislation, which allows for so-called *ad hoc* extradition if there is no valid bilateral or multilateral agreement with the second party. As a rule, under such conditions, the requested party in advance requires from the requesting party guarantees for the protection of the criminal's rights. Returning to human rights, it should be noted that the requested party agrees on extradition only if the system of legal proceedings in the requesting state is compatible with the standards set up by the requested state.

As emphasised above, to carrying out an extradition, either formally or informally, common or *ad hoc* agreements between the states, negotiation to some extent that a person will be transferred and at the same time the second party will ensure the fulfilment of certain terms, is necessary. When a valid treaty is available, one of the questions raised is related to the relationship of various types of treaties.

Assuming that Georgia has signed an extradition treaty with X state, but at the same time is a contracting party to the European Convention on Human Rights. The point is to what extent should it (in this case Georgia) envisage the human rights-related obligations assumed by the European Convention regarding extradition cases with X state. According to Article 30 of the Vienna Convention "on Law of Treaties", when states have agreed on a further treaty with regard to the same subject, this issue is more or less regulated. However, when human rights and extradition "oppose" each other, it is quite difficult to say that they represent one and the same subject. Consequently, the application of Article 30.3 of the Vienna Convention under such conditions is not so effective.

From my point of view, in this case the following argument should be used: the UN Charter stipulates that every member shall respect human rights. Therefore in the "Barcelona case"[16] the International Court of Justice ruled that the obligations *erga omnes* partially derive from "the principles and rules of fundamental human rights". Thus, the requested state shall *prima facie* respect and give priority to a criminal's human rights. However, this does not mean that the interests of international criminal procedures should outweigh those of human rights. In cases like this, an absolutely different approach is suitable for the right to life and freedom not to be tortured or treated in a degrading manner than for example the right to marry etc.

None of the human rights protection instruments (European Convention on Human Rights[17], Charter on Civil and Political Rights, American Convention on Human Rights, African Charter on Human and Peoples Rights) adopted world wide after World War II prohibit extradition. Indeed, it would be incomprehensible if the human rights protection documents hindered or directly interfered with the process by which states assist each other in the execution of justice. On the other hand, it is interesting whether the decision on extradition is subject to appeal or not on the basis of a violation of the rights granted by the convention. This question was answered by the case law of the Charter on Civil and Political Rights and the European Convention on Human Rights, according to which the requested state might violate the obligation assumed by the Convention if it returns the criminal to the place where his rights enjoyed in the requested party are not protected.

[14] "In cases when extradition is impossible due to certain reasons the extradition (requested) state has also the right to carry out legal proceedings and deliver a sentence instead of carrying out such actions by the requesting state". *Gillbert*, Extradition and other Mechanisms, 1998.
[15] E.g. Canada, Australia, UK.
[16] Barcelona Traction, Light and Power Co. Case, (Belgium v. Spain) ICJ. Rep. 3 (1970).
[17] *Vogler*, The Scope of Extradition in the Light of the ECHR, *Matscher & Petzold*, Protecting Human Rights, The European Dimension, 1988.

Case law of the European Court of Human Rights basically focuses on Articles 2, 3, 6, 8, 13 of the Convention on Human Rights and Article 3 of Protocol No. 4. If cases dealing with Article 6 (right to fair trial) still give rise to questions, it could be said that the particular standards in this respect[18] are not yet outlined. Cases with regard to Articles 2 and 3 allow for the establishment in a more or less precise manner the of the standpoint of the Strasbourg Court;

- if the requesting state is also a party to the European Convention on Human Rights, the request for extradition should not *prima facie* be rejected (Alton case[19]);
- if the requesting state is not a member of the Council of Europe but is a "follower of western democracy", rejection of extradition is rather rare though such an approach is quite changeable. (*App/0292/83 v. Spain* and *Kirkwet* and *Saring* cases [20]);
- as for other states, much depends on whether there is an international legal obligation on extradition (i.e. an extradition treaty is signed between the states or not).

If such a treaty is available, the person to be extradited shall be protected by the relevant guarantees. If there is no such treaty, the requesting state, before receipt of approval on extradition shall issue due guarantees on the protection and respect of the Convention-provided rights of the person. (*Chahal* case and case *App.9012/80, X v. Switzerland*).

As emphasised in the beginning of this article, recent developments in the practice of extradition law excludes the transfer of a person for political crime. Nevertheless, one of the preconditions of extradition is to determine the crime for which this person will be tried after being transferred. "Extradition crimes can be determined by both the enumerative and eliminative methods. If the first method is applicable, the extradition treaty and any domestic legislative regulation provide for the precise list of crimes to which extradition is extended. If the crime is not in the list, it is not deemed as extradition crime and thus transfer will not take place.

Recently, the number of states, which follow this method, has reduced due to its inefficiency. Many times new types of crimes, not included in the previously concluded treaties, have become known. Thus it necessitates the amendment and modification of already valid international legal instruments. This is subject of quite time-consuming and laborious negotiations and procedures. Difficulties are also met with the interpretation of the list etc.

The alternative, eliminative method is for example stipulated by the 1927 Extradition Statute of France and determines extradition crimes by a minimal sanction. The same solution is preferred by the 1957 European Convention. Article 2 of which introduces the principle of a one year sentence.

Of course the eliminative method has some shortcomings as well and its "inaccuracy" might cause misinterpretation but any way it seems more efficient than the above-mentioned first method. Indeed, there are additional mechanisms and principles for avoiding misunderstanding.

[18] It is noteworthy that the Court of Strasbourg considers not the issue of guilt of a person but only the rightfulness of the decision on extradition.
[19] *Aksoy v. Turkey*, 100/1995/606/694 (1996).
[20] In the light of human rights protection, the reservations of Georgia made at the ratification of the European Convention on Extradition (the Convention is open for accession by both the Member States of the Council of Europe and Non-Member States, subject to certain procedures) is quite interesting, saying: "3. Extradition shall be permitted unless any person suspected in the commitment of a crime, citizen of Georgia, stateless person or foreigner, is Not tried by the special court of the requesting state or unless his extradition aims at execution of a sentence or arrest adopted by the similar court; 4. Georgia leaves the right to object the extradition of any person on humanitarian basis if his transfer might worsen the person's conditions; 5. …shall Not admit extradition of a person suspected in the commitment of the crime for which death penalty is applicable in the requesting state".

One of the most important guarantees, in my opinion, is the principle of so-called "double crime", which significantly reinforces the rule of reciprocity, and has a dynamic role in extradition practice.

"Double crime" is a widely accepted standard of extradition, which, if it is applied properly, is an important element protecting a person being extradited. The point is that a person shall not be transferred for an action not determined as a crime in the requesting as well as the requested state.

Another standard of extradition characterising the common law states and which is also becoming less and less applicable, is the so-called "*prima facie* case requirement"[21]. According to this standard, the requesting state is obliged to *prima facie* substantiate the case against the accused before the authorities of the requested state. Such an approach is not known to continental Europe, which consists basically of civil law states. One of the consequences of "*prima facie*" is that sometimes[22] it is impossible to transfer a prisoner. This occurred with failure of the Anglo-Spanish Treaty on 13 October 1978, when the Spanish Government "failed" to *prima facie* substantiate the case before the competent British authorities. After due consideration of the existing arguments, Britain has accessed the European Convention on Extradition and thus its relations regarding extradition are regulated by the provisions of Article 12 of this instrument.

In accordance with the procedural legislation of Georgia, "the request for transfer shall be in compliance with the requirements provided for by the international treaty (could be the European Convention) and initiated by the competent authority. This request can be notified through available technical means and then confirmed in a written form. Further, the Prosecutor General of Georgia shall determine the grounds and legitimacy of the request and make a final decision on the transfer. Moreover, if the request is made by us, under the existing Georgian legislation, the request shall include: a) name and surname of an accused or sentenced person; b) details of a committed crime by referring to the stipulation of the law punishing such action; c) reference to the necessity of the detention, arrest, examination or search; d) reference to the place of transfer, time, regulation and the authority to which the person will be transferred. The request shall be accompanied by a copy of the ruling on the accusation, the ruling on the detention, arrest and search of this person, and in the case of a sentenced person – a copy of the judgement of conviction.

Another aspect essential for studying extradition and which is rather interesting, concerns the extradition of not a suspected or accused person, or even a defendant, but of an already sentenced person, different from the provisions of the treaties on the transfer of sentenced persons – or when a person was *in absentia* tried and sentenced in the requesting state[23].

In such cases, a person's life is less threatened, for he has already been convicted by the relevant court. Consequently, an extradition procedure is also quite simplified, though there is one problem[24].

Legislation of the continental law states is familiar with two types of in default trial: in the first case a sentenced person is left with the right to appeal the sentence delivered by the previous instance

[21] The request of preliminary argumentation of a case.
[22] In particular in cases requiring long study and investigation.
[23] Paragraph 1 of Article 254 of the Criminal Procedure Code of Georgia says: " In cases and under the rule stipulated by the Georgian legislation and International Treaties or Agreements, the Prosecutor General's Office of Georgia addresses the relevant authorities of foreign state with the request on transfer of the Georgian citizen who has committed a crime on the territory of Georgia providing the ruling on accusation or judgement of conviction is made and put in legal force towards this person". Moreover, in order to have the court deliver judgement of conviction towards the defendant the provisions given in Articles 420 and 443 of the same procedural legislation shall be followed. Paragraph 2 of the latter article says: "trial of the case in absence shall be permitted if: a) defendant is outside the territory of Georgia and avoids to appear before the court".
[24] *Cassese*, Terrorism, Politics and Law (1988).

court[25], whereas in the second case, he has no such right. The first variant is more or less clear, whereas the second alternative leaves many questions without answer. Namely, it is dubious whether a person's rights (in particular the right to a fair trial) are violated when he does not have the right to appeal the mentioned decision of the court and thus might be deemed as grounds for denial of transfer.[26] Any way, today there is no single standard established by international jurisprudence in this regard and judicial bodies are free to solve this problem in each particular case with due consideration of the requesting state's practice and using their own discretion.

With regard to this problem, I'd like to give an example from international courts and namely from the procedural rules established in the International Tribunals of Rwanda and Yugoslavia. According to Rule 61, if the Prosecutor has taken all reasonable, but fruitless, measures to have the accused present at the trial, the Trial Chamber may accept any evidence against him and adopt an indictment. If the Trial Chamber adopts such an indictment, then it is entitled to issue an International Arrest Warrant to be transmitted to all States. Since the Tribunals are established in accordance with Chapter 7 of the UN Charter, all states (except some restricted exceptions)[27] are obliged to transfer the sentenced person to the international court.

It would be very interesting to see what decision the Georgian competent authority would make in such a case. If we approach the essence of the problem only with legal arguments, we can conclude that a person shall not be transferred to a state where he will not be allowed to appeal the sentence made against him. However, it should be noted that extradition has always combined elements of legal and political reasonability. If we look at the history of extradition in European or American countries, we can observe that judicial bodies either take into account the political nature of a particular case of give the right to ultimately decide to the central executive authority.

Matters concerning extradition are closely related to the foreign policy of any state. The implementation of a state's foreign policy is the direct competence not of judicial but of executive authority. With their decisions, representatives of judicial authority can damage the foreign relations and policy of a country. In many states, the final determination of an extradition issue is the prerogative of the executive authority, which certainly raises some questions. Namely, if the court decides to transfer a person from X state to Y state and the executive authority of X state does not consider such a decision reasonable in terms of foreign policy, would the principle of separation of powers be violated and disordered?! However in a country with strong and influential judicial authority such as the U.K., the court in one of its decisions ruled that the court should have dealt with the legal side of extradition and not its political aspects. Neither do the US courts consider the conditions existing in the requesting state if such functions are not directly prescribed to it by the relevant agreement.

Interference of executive authority has a legitimate basis. It is easy to imagine what problems Georgian authorities would face if for example: the Armenian side was to request the extradition of a Turkish citizen or if Iran were to request the transfer of a US citizen. With regard to such hypothetical examples, it could be said that the first situation is less problematic since Armenia, Turkey and Georgia are members of the Council of Europe and thus we can depend on the jurisprudence of the Strasbourg Court, even though diplomatic relations have not been established between Armenia and Turkey. As for the second example, it is more complicated. Let's a priori assume that the material provided by Iran in accordance with a bilateral treaty is correct and all the conditions and guarantees

[25] E.g. Georgian legislation.
[26] E.g. French courts rejected to transfer US citizen since there were no guarantees that Pennsylvanian court would reconsider the case (International Herald Tribune, Dec. 1997).
[27] Exceptions concern e.g. state of citizenship.

have been duly submitted. At the same time, the US claims that the transfer of an arrested US citizen to Iran will on the one hand threaten his personal safety and on the other damage friendly relations between Georgia and the USA. There is no doubt that the resolution of such a matter requires a political decision, unlike in the first case, where one based on legal arguments is more appropriate[28].

Even in Georgian legislation, there is a provision in the Criminal Procedure Code, which says that if several countries request the extradition of a particular person, the Prosecutor General of Georgia, after consultations with the Ministers of Foreign Affairs and Justice, shall determine the case[29]. Moreover, there are several ways in which the case law could develop:

- if X and Y states request the transfer of X country's citizen and an extradition treaty exists between both states, it would be more rightful to satisfy X state's request[30];
- if the same scenario is given, but there is no treaty signed between X state and Georgia (i.e. there is no international legal obligation on transfer), a person shall be transferred to Y.
- if X state, a member of the European Convention on Extradition, with whom we also have signed a bilateral treaty, requests the transfer of a Georgian citizen. (It is assumed that procedurally all conditions are met, documentation is provided properly and the request for extradition is made under the European Convention).

The Georgian Constitution and relevant Criminal legislation prohibits the transfer of a Georgian citizen or a stateless person[31] permanently residing in Georgia to a foreign country, "unless otherwise provided for by the International Treaty of Georgia". The European Convention is valid in this respect for Georgia, which allows for the transfer of a country's own citizen though allows for the making a reservations. Georgia has made a reservation, according to which Georgia, as a rule, shall not transfer its citizens, though it is possible with due consideration of each particular case. Thus, Georgia in such cases shall equally take account of both legal and political elements of a case.

In conclusion, it should be noted that the decision of the EU Council of Ministers introduces an absolutely new component in extradition law, with the introduction of a European Arrest Warrant). Its introduction will completely change extradition practice within the EU and will impact on the application of the provisions of the "European Convention on Extradition" between EU Member States, on the one hand and other contracting parties of the Convention, on the other.

[28] The above-mentioned examples and agreements are brought for illustration and not based upon real facts.
[29] See: Article 256 (5) of the Criminal Procedure Code of Georgia.
[30] This is the case when other criteria (e.g. type of crime, etc.) are identical and it is hard to adopt final decision on these grounds.
[31] See: Article 6 of the Criminal Procedure Code of Georgia.

LEVAN NANOBASHVILI

THE LEGAL STATUS OF COMPUTER PROGRAMS UNDER GEORGIAN LEGISLATION*

The invention of the computer has led to significant progress in the development of mankind. Today it is very difficult to fully assess the importance and potential of the computer, but it is hard to imagine a world without it. Its importance is so vital that any hindrances in its operation cause chaos, which becomes particularly apparent upon the appearance of new computer viruses. Moreover, a computer is just a machine, which is unable to work without a relevant program. Perhaps this is why the work of producers of computer programs is more profitable and more known to the public than of the computer producers.

The great importance of computer programs requires the legal regulation of their production and distribution. It is noteworthy that the legal norms regulating computer program-related relations have many characteristics. The present Article reviews the legal status of computer programs, under Georgian legislation, namely the issues regarding their production, use and distribution, stipulated in the law of Georgia "on copyright and related rights". The Article also deals with the issues of the creation, use and spread of computer viruses under the Georgian Criminal Code.

In the majority of countries, including Georgia, the issues relating to the production and distribution of a computer program (hereinafter, program) are regulated by the norms of intellectual property law, namely copyright law.

It should be mentioned that for centuries a book has been the most common and important work protected under the norms of copyright law. However, after a while many new objects that are subject to protection under the copyright law have been created, among them, the program. Interestingly, the granting of copyright to the author of a computer program only took place forty years after the invention of the computer and the creation of the first programs.

The first electronic calculating machine was created in 1946 at the University of Pennsylvania, USA. In the beginning, computers were so expensive that only state institutions or large companies could afford them. A customer used to buy a computer and its program from one producer and the producer of a computer itself created the program suitable for one particular machine. At those times such relations were regulated by the norms of law of obligations and not the copyright law.[1] However, after a while the situation changed. The invention of personal computers made it as a necessary attribute of all institutions. Demand for them increased among ordinary families too. The same computer program could be used for the computers of different producers. As a result of these changes the authors of programs required protection of their rights. The first laws protecting the rights of the authors of programs were adopted in the US and France respectively in 1980 and 1985.

* Translated from the Georgian language by *Maka Machkhaneli.*
[1] *P. Meggs, A. Sergeev,* Intellectual Property, 2000, p. 57.

Some authors consider that protection of programs under copyright law is quite unreliable and it would be reasonable to protect them under patent law norms.[2] In the latter case protection of copyrights on programs would require registering the program in the relevant institution (in the case of Georgia such an institution is the National Centre for Intellectual Property "Sakpatenti") and obtaining a patent – a document certifying the rights. However, a computer program cannot be counted as an invention. Under Georgian legislation, a patent is granted for an invention, which is patentable and satisfies the criteria of novelty, an inventive step and industrial applicability. Moreover, an invention is new if it is not known to technical progress. Computer programs cannot be counted as an invention as the novelty criterion is not satisfied. Computer programs have existed for a long time and are well known to technical progress. Besides, each new computer program to a certain extent repeats the elements of the previous one. Such a characteristic gave rise to the opinion that computer programs have developed step by step and their overprotection might have negative impact on further progress.[3] This opinion could be countered by the argument that insufficient protection of computer programs might cause even more negative impact on further development because everyone will lose the desire of and interest in (material, first of all) creating a new computer program.

Very often a computer program replaces some technical device, for instance, the typewriter or the thermostat for the automobile. Initially, the norms of patent law were applied to the typewriter and the thermostat, but after the creation of programs performing the same functions, they have been protected under copyright law (though this does not exclude protection of computer-operated devices under patent law norms). This comparison speaks about the possibility of protecting computer programs only under the copyright law norms. A computer program is not know-how (commercial secret): protection in the form of a commercial secret of what is intended for wide distribution and exists in numerous institutions or families is impossible. We can conclude from this that despite difficulties, protection of computer programs under copyright law is the most effective and only possible way.

Copyright on a computer program arises upon its creation. In general there is no need to register or conduct other formalities for the establishment and exercise of copyright. Rights-holders are entitled to register their works in the registry of the National Centre for Intellectual Property "Sakpatenti". After the registration the author is granted a certificate, which does not *per se* raise the presumption of authorship. With the certificate the rights-holder has more evidence for establishing his authorship.

Under Georgian legislation, a computer program is defined as a combination of instructions in words, codes, schemes, machine readable or other forms, which is able to operate a computer for the achievement of a certain result. In addition, a computer program is considered as a literary work like a book, brochure or article. *Prima facie* it does not sound possible to consider the present article and a program as one and the same creation, but the notion of literary work comprises as written so the oral work. The relation between the article and program is conditioned due to their written form. It does not matter on what material carrier is the work made: in the case of a book it is a paper whereas the program is made on a magnetic carrier.

For a better understanding of the essence of a program, a short description of the creation process and variations of it would be interesting. A program is the compilation of instructions expressed in words, codes, schemes, numbers or any other form. A program is created by a specialist (programmer) in a computer language. It should be emphasised that copyright is not extended to computer language and a person wishing to create a program can use any computer language without

[2] *R. Folsom, M. Gordon, D.Spanogl,* International Transactions, M., 1996, p. 194.
[3] R. *German, J. Ginsburg,* Copyright for the nineties, 1993, p. 710.

its author's prior consent. The process of creating a program is quite time-consuming and must be followed carefully and precisely. A program created this way could be read and understood by a human being. It is called the in source code of the program. Unlike a human being, a computer is unable to understand the in source code unless translated in the object (binary) code. The object code is a combination of numbers – zeroes and ones, grouped into eight numbers and causes some processes in the processor of the computer – connection and disconnection of electric circuits. Any program or information existing in the memory of the computer is the combination of these two numbers: zeroes and ones. The process of creating a program is quite attractive, not only from a material or scientific viewpoint but also from a purely aesthetic perspective, as the creative process closely resembles that of a literary work.[4]

According to their purposes, programs are divided into three types: 1) operation program – intended for the internal functioning of the program and the management of other programs. An operation program is the most complicated type of computer program, on which countless number of people works for many years. It is so complicated that it is practically impossible to check how perfect it is. 2) Applied program, intended for solving a certain task: for drawing up a document or chart, anti virus or accounting programs, games programs etc. 3) Instrumental programs, by means of which new programs are created. Its integral part is the so-called "translator" program, which translates the in source code into the object code.[5]

A program is the combination of instructions by which certain processes are conducted in the computer. However, one of the fundamental principles of copyright law is that, like an idea, it does not protect processes. Copyright law undoubtedly assumes that an idea is not *per se* the subject of copyright law. The main formula of Einstein's theory of relativity $e=mc^2$ is not protected under copyright law norms. A description of this theory published in a scientific journal is the subject of copyright law. Thus, identical creation may comprise an idea, not protected by copyright law norms, as well as the objective form for expressing the idea, to which relevant protection is applied. "Romeo and Juliet" serves as a good example. It is interesting that while writing his tragedy, Shakespeare used other authors' works; in other words he used others' ideas, but not the form of expressing those ideas. There are many works that repeat the plot (idea) of "Romeo and Juliet" but not the Shakespearean form of its expression. It is necessary to show such examples, because as we have already mentioned, as with an idea, copyright law does not protect processes. The reason is the same as in the case of ideas: a process does not have an objective form of expression. More than once the question has been raised whether protection of computer programs under copyright law contradicts the basic principles of this field of law, since the program causes some processes in the computer?

Copyright law protects a program existing in any objective form and not the electronic processes, which it causes in the computer processor. A recipe book is also the combination of certain instructions to be performed by a human being. However in this case, copyright law protects the form of expression of recipes and not the ideas contained in the book or the processes to be carried out according to it. In other words, legal protection is applied to the book and not the preparation process for a certain dish as outlined in the book. If copyright law were to cover the process, the owner of the book would have to obtain the consent of the book's author for preparing some dish. A program is not the method (copyright law is not applied to the method). For example, the Investment Bank, Merrill Lynch, had patented a computerised system for the management of cash flow. The bank sued the user of this system, who used it without permission. The respondent objected to the claim and declared that this system was a method of conducting business, which is not protected under

[4] *D. Knuth*, The Art of Computer Programming, (2nd ed.), 1973.
[5] *V.Vekhov*, Computer Crimes, M., 1996, pp. 26-27.

copyright law. The court ruled that the dispute concerned the patented computer system and rejected the respondent's views.[6] Accordingly, we can conclude that a program is neither a process nor a method. And its protection under copyright law does not contradict the basic principles of this field of law.

A program can be recorded on a special circuit or magnetic carrier but it cannot become an ordinary part of a computer, which would exclude the possibility of its protection under copyright law norms. A program cannot be counted as an integral part of a computer, just as a phonogram is not a part of sound recording machine. A program recorded in a computer or created by it, exists in an objective form and the copyright is awarded to its author. A program is considered created upon its recording by a computer as well as the written work – upon writing it down on paper. Moreover, a written work can also be created by a computer. The present article (written work) was written on a computer and its copyright was granted to its author upon typing it up. Although the written work is saved in the memory of the computer it still exists in the objective form: the computer allows one to read and reproduce the work saved in its memory. These criteria determine whether the work is created or not.

There is an opinion that just a program in itself is of no value unless used together with the computer.[7] However, even then, protection of program is afforded under copyright law, since, as we have already mentioned, it is not an integral part of the computer and is valuable even independently.

The legal consequence of the contract concluded with regard to the sale of a copy of a program is quite specific. The conclusion of a sales contract by a buyer simultaneously causes the conclusion of a licensing contract, whose terms are primarily and explicitly defined by the program right-holder and is placed on the package (so-called "packaging contract")[8]. In fact, we are dealing with the standard terms of a contract. In addition, the terms of a licensing contract on the majority of programs distributed throughout Georgia are in a non-Georgian language (primarily in English) and according to the Georgian Civil Code, such a contract does not burden the buyer with any legal obligation. A buyer, unless the language of the packaging contract is understandable to him, is unable to learn its terms. According to the Civil Code, standard terms of contract shall become the integral part of the contract concluded between the maker of the offer and the other party to the contract if this other party is able to read the contents of these terms and agree to accept them.[9] It should be also noted that a packaging contract is an ordinary license, entitling an owner of the copy of the program the same rights as any other owner of such a copy. A packaging contract entitles the owner to just use it. It is noteworthy that the legal force of a "packaging contract" more than once has become a subject of dispute and nowadays producers of the programs around the world are struggling to have it recognised on the legislative level. Sometimes analogous terms of a "packaging contract " become integral part of a program and they appear during the installation process. If the user does not agree with these terms, he cannot install the program in the computer.

In the law of Georgia on "copyright and the related rights", several articles deal with programs only. First of all, it should be mentioned that the article stipulates that "the protection of computer programs extends to any kind of computer program (including operational systems), expressed in any language or form including the in source code and object (binary) code". Putting the in source code and object code on the same level is very important, since the protection of number sequence under copyright law norms has often become disputable.[10] As already mentioned, a program can be expressed in the

[6] *J. Marshall, V. Bansal,* Financing Engineering, M., 1998, p. 746.
[7] *A. Miller, M. Davis,* Intellectual Property (Patents, Trademarks and Copyright), (2nd Ed.), 1990, p. 306.
[8] P. *Meggs, A. Sergeev,* Intellectual Property, 2000, p. 188.
[9] See also Comments on the Georgian Civil Code, Book 3, Tb., 2001, p. 188.
[10] *R. German, J. Ginsburg,* Copyright for the nineties, 1993, p. 705.

form of a combination of zeroes and ones (binary code). Regarding the multiplication of binary code, the possibility of protecting the sequence of zeroes and ones under the copyright law norms has often been raised. In order to avoid such misunderstanding, lawmakers have formulated the above-mentioned article, which explicitly placed the in source and object (binary) codes of the program on an equal level.

A program is often a work co-created and, accordingly, all the norms regulating the legal status of co-authors is applied to it. If the program is created in the course of fulfilling an employer's order (work done for hire), the employer himself enjoys the exclusive right to use the created program unless otherwise provided for in the contract.

The author of a program enjoys the same economic rights as the author of any other type of creation. Namely, the author of the program shall exercise, permit or prohibit: reproduction of the program; public dissemination of the original or copy of the program in any form including selling and renting; translation and processing of the program; importation of copies of the program for the purpose of distribution etc.

In addition, besides the basic economic rights, the author of the program enjoys other exclusive rights, which are granted under the law on copyright, and the related rights". He shall exercise, permit or prohibit the reproduction of the program. This differs from the general right of reproduction as it means the reproduction of the program by any means and in any form, completely or partially. In other words, reproduction of the in source code or object code, whether written down on paper or saved in the memory of the computer. An author shall prohibit or permit the reproduction of the program completely or in part. The author's consent is necessary even when reproduction is needed for loading, display, operation, transmission or saving of the program. Additionally, the author of the program shall exercise, permit or prohibit the translation, adaptation, systemisation or modification or reproduction of the received consequences.

Besides the above given rights, the author shall disseminate the original or copy of the program in any form, including rental. In Georgia the right to control the distribution (but not reproduction) of such copies is limited to the first realisation of the copies of the program by the author or with his consent, except the right to control the further rental of the original or copies of the program. It should be noted that legislation in some countries does not allow rental of the copy of the program, since it leads to its reproduction without permission.[11]

Individuals are not entitled to reproduce computer programs for personal use, except in the cases provided for by the law. A person lawfully owning a copy of a program has the right to make changes to the program that are technically necessary for its functioning, for the recording and saving in the memory of the computer and for the correction of obvious mistakes, without the author's or other copyright-holder's consent and without having to pay royalties. He is also entitled to make a reserve copy of the program provided that it remains in an archive and is used only for replacing a useless copy, which has been either lost or destroyed by the rightful owner. Moreover, a reserve copy of the program shall not be used in contradiction to the rules given in this paragraph and shall be destroyed upon the termination of the rights of the program owner.

The law "on copyright and related rights" regulates the free use (decompilation) of a program. Decompilation means the transformation of the object code into the in source code performed by a special device or program. Such a transformation aims at achieving interaction between programs. For

[11] P. *Meggs, A. Sergeev,* Intellectual Property, 2000, pp. 242-243.

instance, between the operation and applied programs. It is believed that decompiling of object code for the purpose of comprehending the operation of the program shall not fall within the scope of copyright law since it does not involve an idea or a process of thinking.[12] However, with due consideration of peculiarities of the programs, the lawmaker deliberately regulated the relations with respect to this issue.

Decompilation shall take place only if a person is a lawful owner of the program and he himself independently created other program for achieving the ability of interaction between them, and by observing the following: 1. A person lawfully owns the program and has the right to use its copy; 2. Information necessary for achieving interaction was not before available to him from other sources; 3. Action concerns the parts of the program that are necessary for achieving interaction; 4. Information obtained this way will be used only for the purpose of achieving the interaction between the programs and for no other purposes.

The definition of a program given in the law of Georgia "on copyright and the related rights" says "the term comprises preparatory material for program design". The external look (design) of the program is quite an important attribute given the fact that the user of the computer only sees the design (visual and sound processes). He does not care how the program performs its orders, though the colour, size of the program and its arrangement on a display is important. Consequently, repetition of design might cause damage to the author of the program. However, design should not be confused with the external structure (arrangement of separate orders) of the program, which is an integral part but not the equivalent of the entire design. Very often, the same arrangement of orders is used in different programs intended for performing of one task. This has more than once led to serious court disputes.[13] For example, in the majority of programs intended for use in the Internet, orders are arranged under the same principle even though the programs are created by different authors. Peculiarities in the number or arrangement of orders are not *per se* the protected elements of the program. It is believed that this is the idea and not the form of expressing the idea. The arrangement of orders in the external look of a program can be compared with the arrangement of the keyboard of the computer or the fuel indicator of a car; both of which are not the result of intellectual-creative activity and to which copyright is not extended. It should be noted that in the US, a program code, as a written work and design as an audio-visual work used t. Later, single registration was introduced and in 1989 after the accession of the US to the 1886 Berne Convention for the Protection of Literary and Artistic Works, the requirement to register every work was done away with.[14]

Copyright on a program is granted upon its creation. As already mentioned, it is extended to both in source code and object code, to a program written down on paper or saved in the memory of a computer. A separate algorithm – sequence of instructions for determining a certain task - is also considered as the work.[15]

Copyright is not applied to a program if it is the only means for achieving a particular result. In other words, it is an idea and not just an expression of this idea.[16] Sometimes it is quite difficult to distinguish the two. Copyright law protects only the latter. The form of expression is considered the general structure of the program, the basic peculiarities of its functioning, the forms of operation and control of the computer etc. Copyright on a program shall last for the author's lifetime and for seventy

[12] *R. German, J. Ginsburg,* Copyright for the nineties, 1993, p. 767.
[13] *R. German, J. Ginsburg*, Copyright for the Nineties, 1993, pp. 731-747.
[14] *A. Miller, M. Davis*, Intellectual Property (Patents, Trademarks and Copyright), (2nd Ed.), 1990, p. 309.
[15] P. *Meggs, A. Sergeev,* Intellectual Property, 2000, p. 205.
[16] *A. Miller, M. Davis,* Intellectual Property (Patents, Trademarks and Copyright), (2nd Ed.), 1990, p. 308.

years after his death. Such a time frame is quite sufficient as programs created in the 1960s and seventies are no longer used today.

Programs are also peculiar in that they can create new works. This is only the case when the protected work creates a new work (e.g. translation, painting, musical work etc). With this in mind, the World Intellectual Property Organisation has not yet elaborated any regulatory norm, as it's difficult to decide whether the resultant object should be considered as a work and who is entitled to copyright.[17] According to the prevailing opinion, if a photo is taken by a special mechanical machine, copyright shall not be applied to it, not because of a lack of artistic value, but because of the non-existence of the author. Similarly, a program cannot be considered as an author, though it would be reasonable to grant certain rights on the use of the work created by the program to the author.

Scientific-technical progress has both positive and negative consequences. The computer virus is an obvious example. Even an occasional virus attack can disrupt the whole world. The inventor of the first computer virus is an American, *Fred Coen*, who issued a report on the possibility of creating viruses at a scientific conference in 1984. Since then, the number of viruses has increased daily. A virus is a program too, but its principal goal is to destroy a useful program or hinder its operation. Viruses are studied as an independent science, computer virology, which recognises residential and non-residential, vulgar and split viruses. In addition there are system, file, combined and other viruses[18]. A virus performs an algorithm like: “delete all the information in this program, then go to another computer and do the same”. A virus is created in the same language as an ordinary computer program. Very often a virus does not appear in the computer but instead verbally assault the computer operator (so-called vulgar virus). A virus is spread while information is being distributed through computer network. Recently, another type of virus has appeared: a virus seen in the integral circuit, against which even an anti-virus program is unable to fight.

The term “computer virus” is t unknown in Georgian legislation. However, according to Article 285 of the Criminal Code, the creation of a program damaging electronic calculating machine or making of changes to this program that intentionally causes non-authorised destruction, blockage, modification or the copying of information hindering the operation of an electronic calculating machine, the machine's system or the network, and the use or spread of such a program or machine-carrier containing such a program shall be subject to criminal liability. The creation and spread of a virus is a type of computer crime. Other types of computer crimes stipulated by the Criminal Code are not directly related to programs and thus are not dealt with here.

Issues relating to viruses are quite specific from a legal perspective. A program is a work protected under copyright law. A virus is also a program but its creation can result in criminal liability. Would copyright extend to it too? The answer to this question must be negative. It is hard to imagine that one who creates a virus would ask for recognition of authorship or protection of property right. Instead of being granted with copyright he would be subject to criminal as well as property liability.

According to the official data, in the majority of countries, 40-50% of computer programs are pirated copies.[19] Such a situation is explained by the fact that copies of programs are easily created – sometimes only seconds are enough. Thus it is necessary to take decisive measures. Georgia is a member of the 1886 Berne Convention for the Protection of Literary and Artistic Works, along with 200

[17] *S. Jorbenadze,* Explanatory Dictionary of Intellectual Property, Tb., 1998, p. 137.
[18] *V. Vekhov,* Computer Crimes, M., 1996, p. 81.
[19] *N. Keiserov, T. Shamba,* Intellectual Property and Cultural Values, M., 1994, p. 60.

other countries. Accordingly, the citizens of all these countries can demand legal protection of their rights on their program in Georgia too. Such protection of computer program is pressing for Georgian authors as well. However a proper study of the essence and nature of these rights is necessary for its realisation, to which, hopefully, the present article will have also contributed.

JEMAL JANASHIA*

THE ESTABLISHMENT OF A SYSTEM OF INTERNATIONAL LEGAL CONTROL OVER NARCOTIC DRUGS**

1. THE LONG AND HARD WAY TO THE AGREEMENT

This paper seeks to provide an overview and analyses of the "century old route" the countries of the world community have passed since the first Shanghai conference in 1909 up to the Vienna Convention of 1998. The fight against the illegal trade in narcotic drugs has taken up much time and energy, but despite extensive efforts, no single international agreement, addressing the problem, has been yet reached.

The fight against well-experienced criminal organisations, in fact the monopolies of the world-wide illegal traffic in narcotic drugs, leaves us with little hope that any government will be able to prevent the distribution of drugs independently without close intergovernmental co-operation.

According to the assessments of the 1990 UN General Assembly 17th Special Session, the annual income from the illegal drug trade amounted to 500 billion USD. In world trade this is surpassed only by the amount spend on armament.[1]

For the time being, drug-related issues are of foremost importance for every state and international organisation, along with peace development, environmental protection and other issues of state importance. The importance of the drug issue is so great, that illegal traffic in drugs might jeopardise the initial institutional arrangement of a state, quite frequently state stability, intergovernmental relations, and even the welfare of the community.

Illegal traffic in drugs is a complicated chain of operations starting with drug producers and ending with their users. The chain is rarely bound to the borders of a single sovereign state - production of one country is often processed in another country, being transformed into narcotic or psychotropic substances, aiming at reaching the end user through market or distribution channels. Profits are invested in almost every receptive country.

This multi-billion dollar illegal business was established under the control of criminal syndicates. The more the scope and influence of the illegal trade in narcotic drugs grew at a dangerous speed, the more dynamically was the world focusing its attention on it.

Large profits enticed political elites and economic godfathers, corrupt governments and state apparatuses.[2]

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* *Jemal Janashia*, Doctor of Legal Sciences, is the Major-General of the Security Service.
** Translated from the Georgian language by *Ketevan Vakhtangadze.*
[1] UN General Secretary speech on 20 February 1990, General Assembly 17th Special Session open meeting, A/S_17/PV1.
[2] *R. Godson*, Professor of Georgetown University, President of US National Strategy Research Centre. Effects of Organized Crime on National Security and Transnational Stability, the conference sources, Germany, Garmish-Partenkirhen, September 1999.

During the last millennium narcotic drugs became a multi-faceted problem for the world order – drug abuse and illegal trafficking in drugs affected political, economic and social spheres of many countries. Given this fact, during the entire twentieth century every progressive society made efforts to establish such interstate framework and mechanisms to protect themselves against the illegal trade in narcotic drugs.

But this task turned out to be very hard to accomplish. Many governments, firstly Great Britain, deliberated that the opium trade could help in the development of their economy. This consideration gave rise to opium poppy cultivation in British dominions – North and South China. India could no longer satisfy the increased demand for opium of the local population. Cultivation of drugs and the drug industry grew to enormous scales in China.[3] This was definitely promoted by the relatively easy victory of Western countries and first of all of England in the "Opium Wars". As a result, the number of opium consumers in China surpassed 100 million and the world became witness to the collective intoxication of the great Chinese nation. The world became enveloped with opium smoke.[4]

Opium smoking became an indispensable part of the culture of the Chinese people living outside the country - in Asia. To be more precise, opium smoking has vastly spread among the Chinese diasporas and the system of opium farming has been developed that could completely satisfy the demands of opium-smokers on Java and in Singapore. These farms – the small opium monopolies, became part of the region's political economy. Soon, opium spread throughout the world.

Analysis of the events known as the "opium wars", demonstrates that drug abuse and illegal trade in drugs is a transnational phenomenon, and its effective control requires first of all close intergovernmental co-operation. To be short, many states and political figures arrived at the conclusion that the planet is to be cured from the opium disease as soon as possible.

This was the issue the bishop, *Charles Brent,* was trying to direct the attention of the President of the United States, Mr. *Theodore Roosevelt*; but life showed that for those times the only thing mankind has done in this respect was to get a grasp of the problem and not to resolve it.[5]

The world's leading countries gradually realised that China had to be saved from opium, as the country was on its way to decay and the dynasty was on the verge of disappearing.

The events of 1911 were deepened by the Chinese civil war, which partitioned the world's first greatest opium producer and consumer state. Great Britain and other great powers of the world, including the USA and Russia also became interested in East Asia.

The West started to exert its influence over Asia. The basis for an international anti-opium conference was firmly laid.

This paper gives particular importance to the first international conference, organised in 1909 in Shanghai under the initiative of the President of the United States, Mr. *Theodore Roosevelt*. This conference is commonly known as the Shanghai Opium Conference. 13 states participated in it (the US, China, Great Britain, France, Germany, Italy, the Netherlands, Portugal, Austria-Hungary, Russia, Japan, Siam and Persia).

[3] *V. Berridge*, Opium and the People: Opiate Use in XIX England, Yale University Press, 1987.
[4] *J. Spencer*, Opium Smoking in Ching China, in, ed. *F. Wakeman Jr.*, *C. Grant*, Conflict and Control in Late Imperial China (Berkeley and Los Angeles: University of California Press, 1975), pp. 144-172.
[5] *A. Zabriskie*, Bishop Brent: Crusader for Christian Unity (Philadelphia: The Westminster Press, 1948).

American and Chinese delegates fiercely attacked the Europeans, who due to their colonial interests were in opposition and rejected the proposed option - prohibition of opium commerce. The Conference still managed to set forth some fundamental principles: the drug's trade was to be controlled and limited to medical and scientific needs. One more achievement of the Conference is the acknowledgement of opium, in particular its smoking, as a political and social problem.[6] The idea that opium was a consumer good and it had an economic importance was not shared by the Conference.

The US delegation to the Conference, represented by Bishop *Charles Brent* and Far East tropical diseases researcher, *Dr. Hamilton Right*, accused Great Britain of expanding opium production in Shanghai. According to the US accusation, Great Britain was mainly responsible for Chinese problems in respect of opium.[7]

During the Hague Conference of 1911-1912 it was Great Britain's turn to accuse the US in forcing China under Washington's influence. Great Britain made a proposal to the Conference, in which she tried reduce and prevent illegal traffic in raw materials and refined opium.[8]

Despite the fact that the US representatives had a more far-reaching purpose, namely they wanted to include morphine and cocaine into the agenda of the Conference, they were still satisfied with their achievements. The implementation of the resolutions of the Hague Conference was triggered by World War I.

Very soon the war became a strong impulse for proclaiming drugs as stimulants and exciters, as what promoted their world success, drastically increased the volume of production and introduced them in military pharmacological therapy. The *Sky Heroes* (in 1914-1918), as well as the future marshal of the Third Reich, *Herman Goering*, were great promoters of narcotic drugs.

By the beginning of the 1920s the large German, Dutch and Japanese laboratories were producing hundreds of tonnes of narcotic drugs.

After the Second Geneva Opium Conference (1925), global attention was concentrated on the same problem. The countries that had something to do with anti-drug actions were still unsuccessfully demanding the employment of adequate measures against cocaine production, but this was opposed by the Netherlands and other states in principle.

The League of Nations continued the search for a system limiting harmful narcotic drugs and proposed an idea of creating a "Drug Producers' International Cartel". The idea was instantly approved by a major part of the world and it became the centre point of the intensive commercial negotiations of 1921-1931.

Despite the frontal opposition of the Soviet Union and Japan, vacillation of the Yugoslavians, the Poles, the Italians and the Spaniards, the large European states (France, Germany, Switzerland, Great Britain) still managed to adopt the International Convention on Opiates. It was based on export quotas – a kind of world system of legally controlled deliveries.

[6] *C. Trocki*, Opium and Empire: Chinese Society in Colonial Singapore, 1860-1910, Ithaca: Cornell University Press, 1990.
[7] *A. Taylor*, American Diplomacy and the Narcotics Traffic, 1900-1939: A Study in International Humanitarian Reform (Durham: Duke University Press, 1969), pp. 47-82.
[8] Great Britain, Foreign Office, The Opium Trade, 1910-1941, FO 415: Correspondence Respecting Opium, 6 Vols, (Wilmington, DE: Scholarly Resources, 1974), 2: v, January-June, 1912, No. 81.

Against the background of the global economic crisis of 1929-33 an agreement was reached which provided for some stringent restriction on trade in narcotic drugs. This pushed states to implement some measures beyond the customs borders. Smuggling began to flourish.

The promotion of stringent measures against drug abuse by the League of Nations and the establishment of agreed tariffs by the Cartel attracted the attention of businessmen and public figures to the profitable drug industry.

Opium producing Yugoslavia and Turkey, as well as Poland, gradually got involved in the competition within the alkaloid industry. The production of morphine from poppy straw began in Budapest. The Hungarian products went to Austria, Finland and Estonia.[9]

But at the same time, the Cartel started to influence the illegal trade. This resulted into a direct outcome - Cartel action caused the reduction of opium's nominal price by 600 percent from January 1930 to October 1933, which made numerous Near East producers to go bankrupt.

The international organisations and state governments implemented measures necessary for the reinforcement of the control over barbiturates, and for co-operation. For example, in 1929 politicians supported the visit of the League Commission to the Philippines and other Asian countries (except for China), which aimed at the collection of information on the harm caused by opium smoking. The League Member Countries expressed their disappointment while assessing the measures implemented by the Japanese government on the territory liberated from the Kvantun army.

The Japanese government was spreading bogus information about the drug production on this territory. As was discovered later, during the League visit, the situation on this territory was much graver than described in the report.[10] Given the inaccurate fulfilment of the Convention's decisions on restrictions on production, the League Council held a Conference in November 1931, in Bangkok. The objective of this Conference was to reduce the number of opium smokers. China did not participate in the conference, which had an impact upon the Conference itself.

After Bangkok, the politicians had to hold several other discussions for a better understanding of the situation in Asia - first in Washington and later in London.

Later events, of course, changed the drug-policy of the world's countries. It became clear that only a country that was not economically dependent on drugs could implement strict control over opium production. In the Chinese political economy, opium held the leading position, and this was promoted by the Japanese during World War II. Due to this, an increasing quantity of opium gained admittance to Manchuria through illegal channels. China gradually came under Japanese economic influence.[11]

After a thorough study, I can demonstrate what was the reason for the Japanese expansionist policy in those years. To this end I rely on the historical facts.

From 1868 Japan employed the European model of political and economic development in order to catch-up with the Western developed countries. This forced the country to choose an expansionist policy that legalised the expropriation of raw materials in other countries.

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[9] *A. Block*, European Drug traffic and its consequences, in Journal of Social History, Vol. 23, No. 2, winter 1989.
[10] *Johnson* to *S. Hornbeck*, 31 May 1934, *N. Johnson* Papers, General Correspondence, Box 23, Manuscript Division, Library of Congress, Washington, D.C.
[11] *W. Walker III*, U.S. Narcotics Foreign Policy in The Twentieth Century: An Analytical Overview, Westview Press, Boulder, San Francisco, Oxford, 1944, pp. 7-39.

Like European imperialism, drugs became one of the powerful economic instruments of Japanese imperialism. Japan, strengthened and bolstered thanks to territorial growth, which resulted from the Treaty of Versailles, became the main producer of the Chinese morphine market. The result was the following: the production of Japanese morphine grew from 45 kilograms in 1915 to 5 tons by 1921. During the same period, the importation of drugs from England into China drastically decreased. On the other hand, the Japanese industry became strongly dependent on the importation of opium.

Until the armed invasion of Manchuria in 1932 and the Chinese coast in 1941, only Taiwanese and Korean opium was available to Japan.[12] Given this fact, it had to import opium from abroad, namely from Turkey, which held the highest percentage figures and contained 14 percent of the morphine base instead of 11-12 percent.

Japan established one more channel of drug export with Calcutta, where, from the beginning of 1920 the Japanese were the first buyers of unprocessed Bengaline opium. Heroin was made from opium in the clandestine laboratories located in Kobe and Osaka, from where the drugs were sent to Kengdao – Shindong port.

Despite everything Japanese did not attempt to establish official channels for drug trafficking. Through making use of the technology brought to China from the West and through collaboration with the occupational army they intensively developed clandestine, secluded drug-commerce that was more profitable for them.

Suatoka and Hong Kong became saturated with opium, morphine and heroin brought in from Taiwan. Here the triads, after weak opposition, started to co-operate with the Japanese ruling circles.

Japanese profiteers used a sizeable portion of the legal importation of big European companies. In 1925 a large Swedish pharmaceutical company, Sandoz was exporting up to a ton and a half of morphine to Japan.

When as a result of the 1925 Geneva Convention, the danger of terminating the legal heroin and morphine flow emerged, Japanese chemists considered it necessary to join the mentioned Convention. Japanese students were sent to Europe (to Germany) to study the heroin industry, and in 1927 a heroin factory was built in Istanbul – “The Orient Products Co”, that was intended to supply the Japanese distributors scattered throughout Asia.

In the Western Hemisphere, Peru and Bolivia dealt with the efforts of the United States concerning the extension of the Hague Convention. An opinion was born in these states that the US was intervening in the domestic affairs of their countries, particularly regarding the traditional cocaine production. But still, the 1909 Shanghai, the 1912 Hague and the 1925 Geneva Conferences were steps forward in world history, made towards fighting drugs. They were the manifestation of the will of the world's governments against the opium trade and even assumed certain responsibilities. Namely the Conferences sanctioned the role of customs in exercising control over the importation and exportation of opium.

From 1920 –to 1946, the international community prepared the grounds for those three important treaties that constitute the basis for the effective international Conventions. They are:

[12] *W. Walker III*, Opium and Foreign policy: The Anglo-American Search for Order in Asia, 1912-1954 (Chapel Hill: University of North Carolina Press, 1991), pp. 13-19.

- The1925 International Opium Convention;
- The 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs;
- The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs.

These three Conventions gradually expanded the authorisations of the League of Nations and its agencies in the suppression of the international transit of illegal drugs. These documents established the first multilateral administrative mechanism for fighting the drug problem.

The1936 Convention was of far greater importance, as it was the first international attempt to distinguish between the illegal and the legal drug transit and to highlight the sanctions necessary for the suppression of the illegal traffic.

This was the first multilateral Convention providing for criminal punishment of persons engaged in illegal manufacture, conversion, extraction (separation from the compounds), preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery of the drugs mentioned in this document. The Convention was enacted in October 1939 - after the launch of World War II and de-facto "death" of the League of Nations.

In my opinion, World War II played a very important part in the fight against the illegal circulation of drugs. World War II caused the fighting parties to switch their attention away from drug problems. New groupings of the former two armed blocks followed the confrontation. Until the 1990s, during the so-called Cold War, competition among the great power dominated everything; the drug problem became part of the common policy. An obvious example of the above is the political confrontation in connection with opium and heroin production in China.

In the beginning of the 1950s the US, aiming at obtaining money through heroin exportation and narcotic drugs, accused China of undermining the enemies. In the 1960s, when the disagreement arose between the Soviet Union and China, the Soviet Union started the same anti-Maoist campaign that the US was engaged in earlier. To everybody's surprise, the US supported China and claimed that the Soviet Union was blackmailing the great Chinese people. It is obvious that the main for the international uproar was the Cold War in which the two super-powers were engaged.[13]

In those times, sovereign countries ignored the demands for drug control, as the main participants of the drug community where occupied with other concerns, much more important than drugs. Despite the aforementioned, the countries of the international community well understood the drug hazard and started to gradually establish international institutions to combat the problem.

After the War the League of Nations was delegated to the United Nations Organisation, within the framework of which the Economic and Social Council established a Commission for drug issues in February 1946.[14] In 1946-60 the Commission prepared only one additional Protocol, namely the 1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium.

[13] *A. McCoy*, The Politics of Heroin: CIA Complicity in the Global Drug Trade, New York, Brooklyn: Lawrence Hill, 1991.
[14] United Nations Documents E/CN. 7/1991/1 Rev. 1, of December 20, 1990, prepared for the thirty-fourth session in which the history and functions of the Commission on Narcotic Drugs are summarised. The Commission was created by the United Nations Economic and Social Council (ECOSOC) in resolution 9 (1) of February 16, 1946, as the successor to the Advisory Committee on Traffic in Opium and other Dangerous Drugs.

Until the end of the 1950s the attention of the United Nations Commission was shifted to the avoidance of the mutually exclusive disagreements, similarities and ambiguity between the various Agreements, Conventions and Protocols. This concerns the legal acts that were enacted later. Given this, a portfolio of new comprehensive legal acts was prepared in 1960-61, which provided for the opportunity of international co-operation in this field. This was the UN Single Convention on Narcotic Drugs (1961) amended by the 1972 Protocol, Article 44, which limited other international legal acts being in force since 1912. Later the countries of the international community adopted one more legal act – the 1971 UN Convention on Psychotropic Substances, which secured control over them.

The Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substance, adopted in 1988 provided the world with the instruments necessary for intergovernmental co-operation, primarily, in combating the illegal traffic in drugs.

This legal system was highly supported by 135 countries, parties to the UN Single Convention (108 of them ratified the Protocol of 1972), 107 enacted the 1961 UN Convention on Psychotropic Substances; in 1988 77 countries signed the Convention that was enacted in November 1990, after its approval in July, 1992 by 20 countries, and additionally it was adopted and approved by 62 countries and the UN.[15]

2. THE THREE UNIVERSAL CONVENTIONS

For the time being the UN strongly advocates these three Single Conventions. They provide for the introduction of a single legal framework to successfully combat the illegal circulation and use of narcotic drugs and psychotropic substances.

These documents, elaborated as a result of multilateral efforts, progressively amalgamated into the international system. They are legal acts of a constitutional level for every subject operating in this field and present the culmination of century-old attempts to establish a worldwide system of control over drugs.

As observed, the creation of a global system of control over drugs and the corresponding decisions are the valuable products of the Twentieth Century.

I will try to examine and analyse in detail the role and the importance of each of the Conventions; the mechanisms for the implementation and monitoring of their requirements by the countries of the world community and the UN.

In my opinion, the 1961 UN Single Convention on Narcotic Drugs as amended by the Protocol of 1972 establishes a universal system for exercising control over the cultivation, production, procession, export, import, traffic in, trade in, use and storage of the three families of narcotic substance – opium poppy, coca leaves and cannabis. The convention obliges countries not only to give effect and carry out the provisions of the legal act within their own territories, but to co-operate with other countries as well. According to the Single Convention the legal use of narcotic drugs is limited exclusively to medical and scientific purposes. The convention established an international management body for the latter to identify and distribute controlled drugs for the purpose of legal cultivation, production, manufacture, etc.

[15] UN, Report of the International Committee on the Control of Drugs of 1993, New York, 1993. p. 12.

The convention obliges the parties to license the production and manufacture of controlled narcotic substances, which will make the rules of import-export much stricter later on; at the same time the countries which receive of the shipments, are required to issue the corresponding import certificates and special governmental permission - for the export. Legal transportation of goods requires the corresponding export permission along with an import certificate. A relevant licence issued by a state authority is needed for trade in and distribution on the internal market; private consumers are required to have a medical prescription. The Single Convention explicitly states that the Parties shall not allow the possession of drugs except under legal permission. All the above establishes governmental inspection and other forms of surveillance over the persons who obtain licenses, permission and certificates. All these are necessary for the state authorities to register and strictly monitor manufacturers, traders, scientists, scientific institutions and hospitals.

It is explicitly stated that the sole purpose of the mentioned provision of the Single Convention is to avoid the illegal trade in drugs, which is itself one of the basic requirements of this Convention. Based on experience accumulated since 1912, the parties are required to reach an agreement on the national level regarding prohibition, and to designate a relevant agency responsible for such co-operation.

It is necessary to co-operate on bilateral and multilateral levels for the prevention of illegal trade in drugs, punishment of their distributors and support for the campaign against the illegal traffic in drugs.

At the centre of the international system, the Single Convention established a diversified managerial body within the framework of the United Nations - the International Narcotics Control Board (INCB) - with the view of observing the implementation of the Convention.

The INCB is a competent body composed of 13 specialists from the Convention Member States. The members of the INCB are elected by the United Nations Economic and Social Council (ECOSOC) for a period of five years. The Board is supported by the expertise body of the World Health Organisation (WHO). It is authorised to strictly monitor the scientific and medical demand for controlled substances throughout the whole world on an annual basis, to distribute them between the countries for licit cultivation, production, processing, export, import, distribution, trade in, use and possession. The INCB is authorised to establish standards and rules of procedure, and to return forms for obtaining information from the Convention Member States (hereinafter referred to as “the Parties”).[16]

Later on the INCB was delegated with the right to make a list of controlled substances. With the consent of the Parties, it is empowered to check the protocol; in case of necessity it can call the attention of the ECOSOC, of the Narcotic Drugs Commission and of the Parties to a particularly important problem. It is authorised to provide the Parties with information concerning the scope of the illegal drug-business in the countries, illegal cultivation, production, processing, use and trade in drugs.

The INCB does not have its own executive body and punitive mechanisms. The right of punishment lays within the jurisdiction of each of the parties. The constitutional restrictions of each country provide for the professional attack, punitive actions and other mechanisms for the prosecution of the lawbreakers.

[16] UN, Single Convention on Narcotic Drugs, 1961, Article 5, pp. 9-20.

The differences in national traditions and l standards of living, and limited intergovernmental and international co-operation, diminished the efficiency of the implementation of the Convention's provisions.

The Single Convention obliges the Parties to combat the cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, through punitive actions.

Moreover, the Convention provides for appropriate penal actions that are stipulated by the principle of mutual international co-operation and include the suppression and prevention of the mentioned illegal actions.

Thus, for the elaboration of a multilateral legal programme, it is necessary to establish the parameters for licit production, circulation and consumption of drugs in the whole sphere of drug use.

The INCB provides the Governments with the recommendations regarding the technical issues concerning the implementation of the Convention's requirements, runs the training programmes for public officials in accordance with the requirements, set forth by the Conventions and INCB.

The 1961 UN Single Convention on Narcotic Drugs as amended by the 1972 Protocol has been ratified by 158 states, including Georgia.

Another important legal act is the 1971 Convention on Psychotropic Substances. It is of the same family group as the 1961 UN Single Convention. It sets forth the international mechanism for the control of psychotropic substances and requires the INCB to implement its decisions with the technical support of the WHO.

This Convention provides for control over the production, trade in and distribution of those natural or synthetic substances that cause a state of dependence, central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor functioning, thinking, behaviour, perception or mood.

The Convention outlined four Schedules of the controlled substances. The substances from the first and second Schedules are subject to the strictest control. A Schedule may be expanded, decreased or amended on the recommendation of the WHO Drug Commission. Production and distribution of the substances from any of these four Schedules is subject to governmental authorisation. Governments are required to report to the INCB regarding the above on an annual basis. Moreover, the Convention obliges the Parties to furnish each other with information regarding any prohibition or restriction that may be placed on the import-export of any of the controlled substance by the UN Secretary- General. Furthermore the Parties are to demand a medical prescription for the supply and distribution of each of the substances from Schedules I, II, III.

The Convention contains relevant directions to limit the use of controlled substances for medical and scientific purposes.

Under Schedule I, it is specified that the Convention Member States are to “prohibit all use (of narcotic substances) except for scientific and very limited medical purposes by duly authorized persons, in

medical or scientific establishments, which are directly under the control of their Governments or specifically approved by them".[17]

Under the Convention, each Party shall limit the manufacture, export, import, distribution and stocks of, trade in, and use and possession of substances in Schedules II, III and IV to medical and scientific purposes.

The INCB is empowered to exercise the right of control over the Convention Annex, where its decisions are given. Each country is free to exercise its rights within the scope determined by the Convention.

The control, inspection and the implementation of the law are the functions that fall within the competence of each of the Member States.

Domestic legislation sets forth the relevant sanctions and punitive mechanisms for violations of the law. The INCB receives reports and gathers information. It may give advice to an interested party, provide a consultation, guidance and render the necessary assistance.

The Convention calls for the Parties to co-operate on a periodical basis, but authorises the Parties to choose the most adequate mechanism, based on their Constitutions and an assessment of the local situation.

The 1971 UN Convention on Psychotropic Substances has been ratified by 146 countries. The third important document dealing with illicit trafficking in drugs is the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It was enacted on December 20, 1988. It pays particular attention to the problems of illegal trafficking in drugs. The first two Conventions have determined the mechanisms that would globally limit the legal cultivation, production and processing of controlled substances. These Conventions obliged the Convention Member States to follow the INCB directions. The third Convention called for the elaboration of the necessary mechanisms for the enforcement of the obligations under the first two ones.

The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was prepared in a very short period. This is a small step forward in international law. The Convention establishes a framework of intergovernmental co-operation, which aims at the suppression of criminal activities and does not contradict the national legislation of any of the sovereign countries.

In my opinion, the speed the world came to in reaching a consensus on the elaboration of this complex document, which is made up of 34 articles, demonstrates the deep interest of every government and every nation in the world in slowing down the dynamics of the illegal traffic in drugs and drug abuse. The great damage caused by drugs to political stability, economic development and the welfare of the population, especially that of children is well recognised. According to the Convention "the illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority".[18]

A major part of the 34 Articles of the Convention is based on the notions, principles and obligations initially set forth in the 1936 Convention and in general refers to the Single Convention on Psychotropic Substances.

[17] Article 7 of the 1971 UN Convention on Psychotropic Substances.
[18] The Fourth Preambular clause of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The new convention gives full analyses of the notions, as well as the mechanisms that are necessary for the implementation of the established goals.

This is an agreement between independent States to carry out a successful campaign against illegal traffic in narcotic drugs and psychotropic substances. They should carry out their activities only on an international level. According to the Convention the Parties shall carry out their obligations under this Convention in a manner consistent with the principles of the sovereign equality and territorial integrity of the states, and those of non-intervention in the domestic affairs of other states. Joint efforts of this kind are an explicit manifestation of the strong political will of each country – the enforcement of the law on their territories.

The basic principle of the Convention is that Convention Member States acknowledge any action that is against the rules under the UN Conventions, to be illegal. Article 3 of the Convention highlights that any State that has ratified the Convention shall be liable to elaborate domestic legislation and consider the following actions as contrary to the rules of international law: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance. The same requirement shall be applicable with regard to the manufacture, transport or distribution of the equipment, materials or substances, that are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances. Furthermore the Convention sets forth the mechanisms for combating the management and financing of illegal activities, as well as the methods and ways of revealing cases of money laundering and of property seizure.

The Convention provides the governments of various countries with the guidelines regarding the means for the development of domestic legislation for the seizure of assets obtained from the illegal traffic in drugs. The Convention specifies the guiding principles and rules of procedure that will uncover the illegal traffic in precursors and chemicals needed for the manufacture of various drugs. It also provides for corresponding controlling mechanisms. The Convention offers the Member States the ways and methods of destroying illegal crops and decreasing public demand. According to the Convention, the Parties are authorised to employ stricter measures, whenever needed.

When working on this issue I have arrived at the conclusion that the Convention is a basis for intergovernmental co-operation, which:

- Recommends to the Member State ways of elaborating the legislative system in particularly complicated circumstances for the suppression of criminal activities;
- Establishes the basic rules of extradition;
- Determines the legal scope of co-operation in the legislative and control system (control on supply) and co-operation in the field of technical assistance;
- Identifies the main rules, which should be followed in cases involving particularly grave circumstances which were committed in free trade zones, free ports, bays, postal system, trade ships, and commercial carriers;
- Determines the laws according to which the marking of export should be carried out and drug cargo should be seized from commercial ships and carriers.

The UN Commission on Drugs and the INCB are authorised to monitor the implementation of the measures under the Convention. The latter has a special function and is responsible for the behaviour of a state. The Board may invite one or more Parties for consultations for obtaining information. It

provides the Commission with information on an annual basis, or in emergency cases, as it considers necessary.[19]

Hence the adoption of the 1988 UN Convention and its enactment, equipped Member States with powerful mechanisms for combating the illegal trafficking in drugs and drug abuse. The Convention is ratified by the Georgian legislative body as well.

Until the 1960s, international attempts to solve the problem were limited to non-systematic seminars, training programmes and technical assistance. Obviously, this was not enough. It was also necessary to elaborate a consistent strategy and to implement adequate projects together with national governments and society. To this end, special new UN divisions were established.

The first such UN division was the Commission on Narcotic Drugs (CND) that was to carry out the functions of a Secretariat.[20] As mentioned earlier, right after the adoption of the 1961 UN Single Convention the International Narcotics Control Board (INCB) was established to monitor the implementation of the provisions of the Convention.[21]

The new Convention has expanded the authorisation and scope of competence of the INCB.

In 1971, the UNFDAC – UN Fund for Drug Abuse Control - was established, which finances action programmes.[22]

The UNFDAC was funded on the contributions of UN Member States and the donations of other public or private organisations. During the first ten years, the donations were scarce, but after 1980 they increased considerably and the annual budget exceeded 70 million USD. This amount was not so large as compared to the profits obtained from the drug circulation, and yet, the UNFDAC played a very important part in fighting the illegal traffic in drugs and drug abuse.

In my opinion, December 21, 1990 is a particularly important date in the history of the UN's fight against the illegal traffic in drugs and drug abuse, when under Resolution N45/179, the General Assembly united the three above units in one operational mechanism and established a single body based on them – the United Nations International Drug Control Programme (UNDCP).[23] The first Head and the Executive Director of the Programme was the UN Under-Secretary-General, *Giorgio Giacomelli*. He was elected to this position in the beginning of 1991. UNDCP encompasses the DND, UNFDAC and INCB Secretariats.

From that time on, one operational unit began to operate, instead of several bodies. It directs and is responsible for all the UN activities related to drugs, elaborates UN action plans and co-ordinates the anti-drug activities of UN Member States.

With a view to a better and more efficient operation, the UNDCP was transformed into an operational unit.

[19] Article 23 (a) of the 1988 United Nations Convention and Article 22 for the specification of INCB functions under the 1988 Convention.
[20] Articles 2 and 16-19 of the 1971 Convention on Psychotropic Substances and articles 22-23 of the 1988 Convention for INCB functions specified in their administration.
[21] Article 22 (a) of the 1988 United Nations Convention, cited in footnote 5. Also see Article 22 for the specification of INCB functions.
[22] United Nations Document A/39/646 of November 12, 1984, for a detailed description of the functions of UNFDAC.
[23] General Assembly resolution 45/179 of 21 December 1990, Concerning the Enhancement of the United Nations structure for drug abuse control.

The necessity for UNDCP's creation was first stressed during the Vienna International Conference on Drug Abuse and Illicit Trafficking held in June 1987. The representatives of various regional and intergovernmental organisations and 200 NGOs from 138 states prepared and adopted the Comprehensive Multidisciplinary Outline of Future Activities in the Control of Drug Abuse (CMO).[24] It was the first global programme that was to become the basis for multilateral, regional and local co-operation aimed at fighting drug abuse, decreasing demand, controlling supply, and limit illegal trafficking and use of drugs.

After World War II a number of other international mechanisms were created for further the improvement of UN operations: the International Police Co-operation Organisation (ICPO/INTERPOL)[25] and the Custom Co-operation Council (CCC).[26] The main task of these organisations was to render assistance to various governments in fighting the drug problem.

Thus, the multilateral international legal framework initiated at the beginning of the previous century is based on, affects and often exerts pressure over the politics, social standards and rules of procedure of Member States. Their protection and implementation is necessary for fighting the illegal traffic in drugs. However, independent States are to decide within the framework of their domestic legislation what kind of laws and other normative acts are necessary for the efficient operation of the law enforcement bodies. Therefore, the efficiency of the Convention is largely dependent on the activities of Member States that should be based on their national political will and interests.

Multilateral co-operation between governments and society is a relatively new dimension in the global and regional activities against drugs. It always supports the peremptory implementation of the Convention requirements and qualitative improvement of national anti-drug programmes.

The better the governments perceive the necessity of international co-operation against this criminal action, the more adequately the importance of this multilateral mechanism will increase rendering them assistance.

3. FROM THE CONVENTIONS TO THE NATIONAL PROGRAMMES

After researching and analysing the problem, I have arrived at the conclusion that the most important issue in fighting the illegal traffic in drugs and drug abuse is the adoption of national programmes by states and their implementation. In February 1990, the World Programme adopted against drug problems called for governments to carry out co-ordinated activities on national and international levels in order to reduce illegal supply and demand, as well as the illegal traffic in drugs. These measures have stressed the necessity of complex national planning. It recommended to states that they draft national action programmes and to consider them at the level of national legislative power.

With a view to supporting these activities, the UN International Drug Control Programme provided for measures aimed at assisting and encouraging national state programmes.

[24] United Nations Publications, the Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of future Activities in Drug Abuse Control, 1988, UN document ST/NAR/14, UN Sales Publications No. E.88. XI.I, ISBN 92-1-148075-2, 00900P.

[25] The International Police Cooperation Organization (ICPO/INTERPOL) was founded in 1923 in Vienna, by national police organizations of 1938 and was reorganized after World Was II and its Headquarters moved from Vienna to Paris.

[26] The Custom Cooperation Council (CCC) was created by the Brussels Convention of December 15, 1950, by the customs services of over 40 countries. It is headquartered in Brussels.

On the basis of theoretical and practical experience and having worked on “The National Programme against Illegal Trafficking in Drugs in Georgia”, I'm convinced that a national programme/plan should be a single document adopted by the government where all the existing national problems related to drug control are reflected.

The programme should briefly outline the national policy in this area, as well as the priorities and obligations.

We should also keep in mind that the preparation of a national programme is the basis for the elaboration and co-ordination of a common policy of a state in combating this problem.

The national programme should provide for common agreed efforts for combating drug abuse in the following areas:

- Fighting illegal supply;
- Suppression of illegal trade;
- Predetermination of the demand and its reduction;
- Treatment and rehabilitation.

Apart from the above, a state programme allows for the establishment of close contacts with the institutions that plan, co-ordinate and implement anti-drug-abuse activities. Such a complex approach enables the national institutions to pay due attention to inter-relations, which should exist between the healthcare, education, economic development, information, and legislative agencies, aiming at the solution of this grave problem. This also makes it possible to pay attention to the institutions that plan, co-ordinate and implement measures against drug abuse and determine ways for their improvement.

State programmes enable governments to consider anti-drug measures as part of a framework of the national programme of social-economic development and means they are not merely isolated measures.

When preparing the national programmes the specific circumstances of each country should be taken into consideration, as far as:

Firstly – the problems related with drug abuse and their illegal trafficking are usually completely different in every country. A number of states mainly confront the problem of the cultivation and production of drugs (or the possibility of this problem arising). Other states are centres of illegal trafficking in drugs or money laundering. The rest are forced to fight drug abuse and to deal with the problems related to the treatment of drug addiction and rehabilitation. However the majority of states usually confront all of these problems simultaneously.

Secondly – various states are in completely different situations. Some states have rich experience in this field and already have relevant programmes. Other states are aware of these issues and have already determined the guidelines of a national policy and have identified priorities, even though they have not yet started the preparation of a programme. It should be taken into consideration that a large number of states are encountering such problems for the first time. Thus, they differ according to the existing levels of the comprehension of the political and social importance of the problem and that of the state organisations and private institutions that are to solve this problem.

Thirdly – it should be taken into account that these differences result not only from the existence of a drug problem, but also from the level of economic and social development of a particular state and its

financial standing. Apart from this, every government has to decide whether it regards drug abuse as a separate problem or as a part of a wider, more complex problem, involving the abuse of various other substances, including alcohol and tobacco products.

And finally, there exists the so-called national planning systems, i.e. completely different from the effective ways for the elaboration of a state's social, economic and financial programmes from short-term, mid-term and long-term perspectives.

According to the importance a state accords to its state programme, the following types of plans may exist:

- Short-term action programme (2 or 3 years);
- Part of a mid-term national development plan (5 years);
- A programme set out from a mid-term or long-term perspective (5-10 years);
- Mid-term sectoral programmes (for healthcare, education, etc. systems) as part of a single plan – programme.

The first decision concerns the preparation of a state programme as an action plan and as a resolute state undertaking – to finance and to implement it. In this case the time frames for the implementation of the measures under the plan should not exceed the time limits of state planning and corresponding activities should be included in the state budget and state investment programme or be financed from the clearly pre-determined special funds.

Such a statement is rather severe as it obliges states to clearly indicate the way they are going to implement the state programme.

The second option covers cases where the state programme may be prepared as part of a mid-term national development plan. Such an approach allows for the planning of measures for a longer period.

The third option together with the identification of specific purposes – a special mid-term programme is the most realistic approach in most cases.

And finally the fourth option, when various sectoral plans are prepared instead of a single national programme – has its advantages and disadvantages. The advantage of this option is that it secures more intense participation from the relevant ministries and various administrative services in the fight against drug abuse, while the disadvantage is the division of the planning process and difficulties in the co-ordination of various aspects of the work.[27]

A group of Georgian scientists and practitioners, headed by the author of this article, prepared “The National Programme on Illegal Trafficking in Drugs”, which was approved by Presidential Ordinance. Unfortunately no funds for financing the Programme have been obtained as yet (neither from the state budget, nor from other sources), and no assistance has been rendered by the relevant UN agencies or other international organisations either. Given this, the requirements of the National Programme have not been met even at an initial level.

The above circumstances triggered the relevant Georgian services to become intensely engaged in the international infrastructure for fighting against the problem.

[27] United Nations Programme on International Drug Control, Format and guidelines for preparation of general national plans for drug control, Vienna, 1994.

And finally, to conclude with, we would like to say that the actions against drugs are based on three UN Conventions and current programmes prepared by regional and sub-regional organisations. These measures are relatively new and have just been put into operation. The most important part in the fight against drugs is played by independent states themselves. No supra-governmental infrastructure exists that could induce any state to implement the measures set forth by the Convention and the programmes. The sole function of these diverse international organisations is to advise and to convince. Despite this modest function, they have played an important part in the fight against the illegal traffic in drugs. The drug problem is definitely an international problem and the efforts of a single country are not sufficient for the solution of the problem. Only co-ordinated actions may be successful. The desire for such co-operation is growing in more and more states, as they gradually become aware of an irrevocable damage caused by the illegal traffic in drugs to a state and society.

I hold the opinion that it is our duty to overcome the existing drug-crisis, to make the anti-drug campaign efficient and to show the world that only the concerted actions of states can be the main guarantee of a better future.

MOST IMPORTANT LEGAL ACTS
ADOPTED IN THE THIRD AND FOURTH QUARTERS OF 2001

1. LAWS OF GEORGIA

20.07.2001	Law on the Rule of State Management and Regulation of the Filed of Transport and Communications	SM* No. 24, Art. 93
20.07.2001	Law on Amending the Law of Georgia on Conflict of Interests and Corruption in Public Service	SM No. 24, Art. 94
20.07.2001	Law on Amending the Law of Georgia on Budgetary System and Budgetary Responsibilities	SM No. 24, Art. 95
20.07.2001	Law on Amending the Law of Georgia on Motor Vehicle Roads	SM No. 24, Art. 96
20.07.2001	Law on Amending the Law of Georgia on Public Service	SM No. 24, Art. 97
20.07.2001	Law on Changes to the Law of Georgia on Motor Vehicle Transport	SM No. 24, Art. 98
20.07.2001	Law on Amending the Law of Georgia on Prices and Principles of Price Formation	SM No. 24, Art. 99
20.07.2001	Law on Amendments to the Tax Code of Georgia	SM No. 24, Art. 100
20.07.2001	Law on Changes to the Law of Georgia on Guarantees of the Social Security of the Members of the Constitutional Court of Georgia	SM No. 24, Art. 101
20.07.2001	Law on Changes to the Law of Georgia on Privatisation of the State Property	SM No. 24, Art. 102
20.07.2001	Law on Changes to the Law of Georgia on the Rule of Management and Disposal of Non-agricultural State Owned Land	SM No. 24, Art. 103
20.07.2001	Law on Amending the Law of Georgia on the State Budget of Georgia for 2001	SM No. 24, Art. 104

* Sakanonmdeblo Matsne is the Georgian official law gazette.

20.07.2001	Law on Amending the Law of Georgia on the Status of the Military Servant	SM No. 24, Art. 105
02.08.2001	Law on Changes and Amendments to the Organic Law of Georgia on Local Self-governance and Governance	SM No. 25, Art. 106
02.08.2001	Election Code of Georgia	SM No. 25, Art. 107
12.09.2001	Law on Changes to the Law of Georgia on the Fees for the Inspection of Migrants	SM No. 26, Art. 109
14.12.2001	Law on Changes and Amendments to the Administrative Code of Georgia	SM No. 26, Art. 110
28.09.2001	Law on Changes and Amendments to the Organic Law of Georgia "Election Code of Georgia"	SM No. 26, Art. 108
28.09.2001	Law on Changes to the Law of Georgia on Chamber of Control of Georgia	SM No. 27, Art. 111
28.09.2001	Law on Amending the Law of Georgia on Public Service	SM No. 27, Art. 112
28.09.2001	Law on Protection of the Minors from Harmful Influence	SM No. 28, Art. 113
28.09.2001	Law on Amending to the Law of Georgia on State Levy	SM No. 29, Art. 114
28.09.2001	Law on Amending the Administrative Infringements Code of Georgia	SM No. 29, Art. 118
28.09.2001	Law on Changes to the Tax Code of Georgia	SM No. 29, Art. 117
28.09.2001	Law on Amendments and Changes to the Law of Georgia on Budgetary System and Budgetary Responsibilities	SM No. 29, Art. 116
28.09.2001	Law on Employment	SM No. 29, Art. 115
12.10.2001	Law on Changes to the Tax Code of Georgia	SM No. 30, Art. 120
12.10.2001	Law on General Census of the Population of Georgia	SM No. 31, Art. 122
12.10.2001	Law on Amendments to the Administrative Infringements Code of Georgia	SM No. 31, Art. 123
12.10.2001	Law on Changes and Amendments to the Law of Georgia on Creative Workers and Creative Unions	SM No. 30, Art. 121

26.10.2001	Law on Amending the Organic Law of Georgia on Local Self-governance and Governance	SM No. 30, Art. 119
23.10.2001	Law on Changes and Amendment to the Organic Law of Georgia on National Bank of Georgia	SM No. 32, Art. 124
23.10.2001	Law on Changes and Amendments to the Law of Georgia on the Activities of the Commercial Banks	SM No. 32, Art. 125
23.10.2001	Law on Amending the Law of Georgia on Firearms	SM No. 32, Art. 126
23.10.2001	Law on Changes to the Law of Georgia on the Normative Acts	SM No. 32, Art. 127
23.10.2001	Law on Amending the Law of Georgia on State Levy	SM No. 32, Art. 128
23.10.2001	Law on Changes and Amendments to the Law of Georgia on State Budget of Georgia for 2001	SM No. 32, Art. 129
26.10.2001	Law on Changes to the Law of Georgia on Self Defence of Georgia	SM No. 33, Art. 130
26.10.2001	Law on Amending the Law of Georgia on State Security Service	SM No. 33, Art. 131
26.10.2001	Law on Trade-Industry Chamber	SM No. 33, Art. 132
26.10.2001	Law on Changes and Amendments to the Law of Georgia on Medical Activities	SM No. 33, Art. 1 33
26.10.2001	Law on Amendments to the General Administrative Code of Georgia	SM No. 33, Art. 134
07.12.2001	Law on Changes to the Criminal Procedure Code of Georgia	SM No. 34, Art. 135
07.12.2001	Law on Changes to the Law of Georgia on Extending Term for Jury Obligations for the Supreme Court of Georgia	SM No. 34, Art. 136
07.12.2001	Law On Medical-Social Expertise	SM No. 35, Art. 137
18.12.2001	Law on Licensing Fees for International Motor Vehicle Deliveries form the Territory of Georgia	SM No. 36, Art. 138
18.12.2001	Law on Amendments to the Law of Georgia on the Basis for the System of Taxes	SM No. 36, Art. 139
18.12.2001	Law on Changes and Amendments to the Law of Georgia on Medicines and Pharmaceutical Activities	SM No. 36, Art. 140

18.12.2001	Law on Changes to the Administrative Infringements Code of Georgia	SM No. 36, Art. 141
18.12.2001	Law on Amendments to the Law of Georgia on Mandatory Insurance of Health and Life and Pension Security of a Member of Parliament	SM No. 36, Art. 142
18.12.2001	Law on Changes and Amendments to the Law of Georgia on Displaced Persons - Refugees	SM No. 36, Art. 143
21.12.2001	Law on Amendments and Changes to the Tax Code of Georgia	SM No. 36, Art. 144
21.12.2001	Law on Changes to the Tax Code of Georgia	SM No. 36, Art. 145
21.12.2001	Law on Changes to the Customs Code of Georgia	SM No. 36, Art. 146
21.12.2001	Law on Changes to the Law of Georgia on Customs Tariffs and Fees	SM No. 36, Art. 147
21.12.2001	Law on Amending the Tax Code of Georgia	SM No. 1, Art. 3
21.12.2001	Law on Amending the Tax Code of Georgia	SM No. 1, Art. 4
21.12.2001	Law on Amendments and Changes to the Law of Georgia on Advertisement	SM No. 1, Art. 5
21.12.2001	Law on Changes and Amendments to the Law of Georgia on Special State Ranks	SM No. 1, Art. 6
21.12.2001	Law on Changes to the Law of Georgia on Committees of Parliament of Georgia	SM No. 1, Art. 7
21.12.2001	Law of Georgia on Changes to the Organic Law of Georgia on Prosecutor's Office	SM No. 1, Art. 1
21.12.2001	Law on Amending the Law of Georgia on Export and Re-export of Metal Scrap and Waste of Ferrous and Non-ferrous Metals	SM No. 1, Art. 8
21.12.2001	Law on Changes to the Law of Georgia on State Budget of Georgia for 2001	SM No. 1, Art. 9

2. ORDINANCES OF THE PRESIDENT OF GEORGIA

13.07.2001	Ordinance of the President of Georgia No. 278 on the Statute of the Ministry of State Property Management of Georgia

21.07.2001 Ordinance of the President of Georgia No. 286 on Register of Public Service Posts

17.08.2001 Ordinance of the President of Georgia No. 334 on Approval of the Statute of State Chancellery Service for Analysis and Prognosis Financial-Budgetary and Fiscal Policy

16.09.2001 Ordinance of the President of Georgia No. 371 on Legal Person of Public Law - Insurance State Supervision Service of Georgia

16.09.2001 Ordinance of the President of Georgia No. 373 on Changes to the Ordinance of the President of Georgia No.317 of 24th of July 2000 on Promotion of Fulfilment of Partnership and Co-operation Agreement between European Union and Georgia

27.09.2001 Ordinance of the President of Georgia No. 387 on Establishing the Legal Person of Public Law - Regional Power Centre of International Co-operation

27.09.2001 Ordinance of the President of Georgia No. 389 on Changes to the Administrative Arrangement of Georgia

17.10.2001 Ordinance of the President of Georgia No. 411 on Approval of the Statute of the Ministry of Labour, Health and Social Protection of Georgia

06.12.2001 Ordinance of the President of Georgia No. 412 on Establishing the Governmental Co-ordination Commission for Economic Issues

21.12.2001 Ordinance of the President of Georgia No. 526 on Establishing the Temporary Interagency National Anti-terrorist Commission with National Security Council with the Aim to Fulfil No. 1373 (2001) Resolution of U.N Security Council and Carry out State Program of Joint Action of Georgia for Combating International Terrorism

31.12.2001 Ordinance of the President of Georgia No. 544 on Approval of the Statute of the Ministry of Justice of Georgia

3. DECREES OF THE PRESIDENT OF GEORGIA

11.07.2001 Decree of the President of Georgia No.708 on Some Measures for Solving the Environmental Problems

15.07.2001 Decree of the President of Georgia No. 735 on Some Immediate Measures for Organisational Ensuring of Carrying Out Justice in General Courts of Georgia

22.07.2001 Decree of the President of Georgia No. 743 on Measures to be Fulfilled for Advancing Further Deepening and Structural Changes of Economic Reform in Georgia

26.07.2001 Decree of the President of Georgia No. 752 on Singing an Agreement between Georgia and Republic of Austria on Consolidation and Restructuring of Georgia's Debt to Austria

27.07.2001 Decree of the President of Georgia No. 758 on Some Anti-corruption Measures

29.07.2001 Decree of the President of Georgia No. 765 on Signing an Agreement between the Governments of Georgia and the Republic of Uzbekistan on Conditions of Inter Travel

05.08.2001 Decree of the President of Georgia No. 805 on Singing the European Convention on the Legal Status of Children Born out of Wedlock

10.08.2001 Decree of the President of Georgia No. 873 on Establishing Budgetary Commission for the Purpose of Improving the Mobilisation of the Budgetary Incomes

17.08.2001 Decree of the President of Georgia No. 866 on Signing a Memorandum on Mutual Understanding between the Governments of Georgia and United States of America

27.08.2001 Decree of the President of Georgia No. 885 on Signing an Agreement between the Governments of Georgia and Republic Armenia on Restructuring of Georgia's Debt to the Republic of Armenia

01.10.2001 Decree of the President of Georgia No. 1039 on the Academy of Ministry of Internal Affairs of Georgia

14.10.2001 Decree of the President of Georgia No. 1067 on Signing an Agreement between the Governments of Georgia and the Federal Republic of Germany on Project "Consultation in the Ministry of Foreign Affairs with the Aim of Co-ordination of Co-operation in the Field of Development"

31.10.2001 Decree of the President of Georgia No. 1143 on Signing a Protocol on Making Changes to the Agreement between Georgia and the Republic of Kazakhstan on Mutual Assistance in Civil and Criminal Matters

25.20.2001 Decree of the President of Georgia No. 1114 on Signing an Agreement on Making Changes to the Development Credit Agreement between Georgia and International Development Association (Healthcare Project)

06.11.2001 Decree of the President of Georgia No. 1156 on Signing an Additional Protocol to European Convention on Mutual Assistance in Criminal Matters

4. DECISIONS OF THE PARLIAMENT OF GEORGIA

20.07.2001 Decision of the Parliament of Georgia No. 1038 on Ratification of Development Credit Agreement between Georgia and International Development Association (Institutional Development Project of Power-transfer Transit)

12.20.2001 Decision of the Parliament of Georgia No. 1104 on Ratification of Development Credit Agreement between Georgia and International Development Association (Credit for Reforming and Strengthening the System of Education)

07.12.2001 Decision of the Parliament of Georgia No. 1179 on Accession to the European Convention on International Recognition of Criminal Judgements

18.12.2001 Decision of the Parliament of Georgia No. 1196 on Ratification of Agreement between the Governments of Georgia and Russian Federation on the Activities of the Representatives at the Borders

18.12.2001 Decision of the Parliament of Georgia No. 1195 on Ratification of Agreement between the Ministry of Defence of Georgia and the Ministry of Defence of the Republic of Estonia on Bilateral Co-operation in Defence Issues

18.12.2001 Decision of the Parliament of Georgia No. 1194 on Ratification of Agreement between the Government of Georgia and Federal Council of Switzerland on International Passengers Convey and Cargo Auto Transportation and of Annexed Protocol

21.12.2001 Decision of the Parliament of Georgia No.1209 on Ratification of Credit Project Agreement between Reconstruction Credit Bank (KFW) (Frankfurt am Main) and Georgia (debtor), which is represented by the Ministry of Finances and SAQENERGOGENERACIA (project executor)

21.12.2001 Decision of the Parliament of Georgia No. 1210 on Ratification of Agreement between the Government of Georgia and the Government of United States of America on Programs of Peace Corpus in Georgia