Dealing with illegal surveillance material

Preliminary advice

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Introduction

The Commission set up in Georgia to oversee the handling of material which had resulted from illegal surveillance activities in the past years had a meeting on 13 July 2013 in Tbilisi to which I was invited. Information was provided by the Chief Prosecutor and the Minister of Internal Affairs on the number and nature of videos and audiotapes which had been stored in the Ministry (MIA). The main focus of the discussion was on the illegal recordings of private life situations (primarily of a sexual nature), though problems relating to other types of illegal recordings were mentioned as well.

Two aspects were stressed in the meeting: one, that the privacy rights of those targeted by these recordings must be protected and that it was in their interest that the materials were destroyed and not leaked or disseminated in other ways; and two, that the recordings were the result of serious criminal activities and that the existence of them – or at least part of them – might serve as evidence in judicial procedures against those responsible for these illegal activities.

At the end of the meeting I was asked to provide advice on how to handle these materials in the most proper manner. It was understood that I would do some consultation with experts as a basis for my forthcoming suggestions.

I was fortunate to be able to draw from exchanges with two extraordinarily competent experts. One of them (Johan Hirschfelt) is member of the Venice Commission and a respected legal expert in Sweden who has served as a high level judge and chaired commissions on constitutional and legal matters. My other interlocutor (Douwe Korff) is Professor at London Metropolitan University and has assisted the Council of Europe on a number of issues, including on data protection issues. The discussions with both of them were detailed, informal and conducted over the telephone. Their views helped me to clarify my own positions but they have of course no responsibility for my interpretation of their thoughts and my own conclusions.

Background

At the meetings it was stated that more than 17 000 thousand recordings, video and audio, had been discovered in the MIA or brought there when found in other parts of the government administration, including in one prison (Ksani). Videos containing torture scenes had also been found in hidden secret caches together with weapons, files and some other material.

The illegal recordings could be divided into three categories based on content:

- **Recording of sexual situations**. They were reported to be 94 in number and containing gay sex, out-of-marriage sex as well as sex between married couples. The purpose of these recordings appears to be to have them available for the possibility of blackmailing.
- **Recordings of meetings, exchanges and conversations with a political element**. These were the majority of the recordings. Targeted were politicians, journalists and civil society activists. Among the targets were also persons whom had not been identified. The purpose in these cases appears to be less obvious but may have been to document political or other relationships which might have been perceived as embarrassing and therefore possible to use for blackmailing.
- **Videos showing torture scenes**, including male rape with instruments. One purpose of these videos appears to have been to use them in order to frighten other prisoners on what treatment they might expect if not cooperating with interrogators. The number of such videos was not made precise at the meeting on 13 July. Some of the caches found had not been opened.

The material now stored in the MIA may not be all recordings made or even still existing. It is possible that some such materials were destroyed by those who had responsibility for their existence. Materials were found in only one of the prisons while complaints about torture in the penitentiary system have come from inmates kept in all of the prisons. There is a possibility that some recordings have been destroyed. But it is also possible that some of them have been taken away and kept by persons who had access to the relevant files. There is a clear risk that recordings have been leaked, including those showing sexual contacts.

The above is my understanding of the facts as presented by the Chief Prosecutor and the MIA. I have not been able to verify these pieces of information myself. My recommendations below are given under the assumption that the picture described above is correct.

Principles to take into account

Serious crimes were committed and must be addressed. Steps must be taken to prevent such illegal activities in the future. Those responsible for the committed crimes should be brought to justice. Very important is also that the victims of these criminal deeds be protected from any further damage to their integrity and privacy rights.

There must be clear regulations of all technical and physical surveillance activities. The basic principle is that such measures can only be undertaken by authorized authorities and only after a considered decision by a judge. The judge must only approve such activities if this is regarded as necessary for the clarification of a case in the judicial process. The person who has been subject to such measures has a right to be informed about this after the event (though exceptions might be determined by an independent judge in extreme circumstances).

In other words, no surveillance activities directed against individuals can be decided or conducted by the prosecutor, ministry of interior or other parts of the executive without proper involvement of the judiciary and based on law.

It is known that systems have been developed in other countries to enable the security authorities or ministries of interior to exercise "data mining" of basically all electronic communications. I have been informed that also Georgia has a system through which the MIA has automatic access to all phone calls, emails, SMS:s via the private telecom providers in the country. **It is important that activities in this area be regulated by law and put under democratic and judicial control. Here the Government, not least the Ministry of Justice, and the Parliament have a crucial challenge.**

The case-law of the European Court of Human Rights is clear on the *importance of privacy rights* – everyone has the right to have one's private life respected (article 8 of the European Convention). Data protection is a growing human rights priority in the international human rights discourse.

Just because privacy rights are deemed as absolutely important, it is essential that such violations are punished. The dilemma now facing the Commission is the potential conflict between the need to promptly destroy recordings abusing private life aspects, on the one side, and, on the other, to ensure that evidence is available to bring charges against persons responsible for these illegal recordings.

A Commission

A decision has been taken by the Minister of Internal Affairs to set up a Commission to deal with these complicated and sensitive issues. The composition so far has included the Minister, the Chief Prosecutor, the Public Defender and respected representatives of civil society. It has also been agreed that the newly appointed Inspector on data protection should be included.

The time has come to formalize the mandate, composition and working methods of the Commission. The response to the recommendations below will require a structural approach. It would seem appropriate that a formal government decision is taken on the authority and membership of the Commission.

Meetings of the commission should be prepared and structured. The Minister and the Chief Prosecutor might be co-chairs and minutes taken of the agreements. The MIA might be responsible for the execution of the decisions – though under the oversight of Commission members. The work of the Commission has to be transparent (without, of course, violating privacy aspects).

One key decision to be taken without delay is whether the Commission would cover the handling of all three categories of illegal recordings or only those relating to intimate private life. My suggestion would be the broader option.

Managing the archive in the interim

An archive is established in the MIA containing the illegal recordings. This archive should be managed in a manner which excludes the risk of any of its materials coming into the wrong hands. Confidentiality must be strictly protected.

This requires total control of who has access to the archive. Such access should be strictly limited and any entry should be noted in a special logbook. One of my advisers suggested that there should be a double locking system with two separate keys in the hands of two different persons. Handling of materials therein should never be entrusted to one single person alone.

There may be other practical solutions to protect the confidentiality and I would propose that the Inspector for data protection be entrusted to develop a water tight approach in this regard.

Another key problem is to ensure that any existing material of this kind which exists outside the archive is brought there. I understand that a suggestion is put to the Parliament that all such recordings must be overturned to the MIA within one-two month and that individual possession of such material after that time would be liable to criminal charges. This is a good approach.

Clarification of the content in the archive

The Commission should:

- Ensure privacy rights of persons targeted in the illegal recordings.
- Assemble, if possible, evidential material which could be used in judicial proceedings against persons responsible for the crimes in question.

- Prepare a comprehensive description of all these criminal activities with the intention to establish a correct, impartial historic record on this issue, including the measures taken by the Commission itself to undo as much as possible of the damage caused.

This will require a closer review of the material in the archive. The broad categorization mentioned above may have to be nuanced and at least broken down in sub-categories in order for a more clear picture to be established.

Priority should be given to an analysis of two special categories: recordings of intimate private life and recordings of torture. In both cases measures should be taken to protect the identity of the targeted persons during the reviews.

Destroying recordings of private life situations

Because of their special nature the recordings of private life situations must be treated with utmost care. The only purpose of the review in these cases is to ensure that information which could be used in a trial not be lost.

Material which give no information on culprits or circumstances which can facilitate investigation on responsibility should be destroyed without delay (after notes have been taken about their existence and factual content).

The Commission members - and not least the Public Defender, the Inspector on data protection and the civil society representatives - have a particularly essential role in verifying that the destroyed material in fact did exist. Special documentation should be established for this purpose and be signed by Commission members.

I have been informed that the decisions on amnesties taken by the Parliament can be interpreted to cover illegal recordings - though not so if such activities could be regarded as *abuse of power*. If this is a correct interpretation it points at the desirability to focus on who were responsible for *initiating and ordering* these illegal surveillance activities, rather than those who acted on the

orders. This in turn, might open for quick decisions on the individual tapes so that the process of destroying the materials could be fast.

Would a proper document verifying that the destroyed recordings in fact did exist be accepted by the court in the judicial proceedings? This appears to depend on several factors; among them the nature and quality of the certifying document and the national judicial practice. If the defense questions the evidentiary value of such a document the prosecutor would of course have the possibility of inviting Commission members as witnesses.

As the privacy right is such an essential aspect it seems correct to destroy these recordings immediately after the review and not await possible judicial proceedings. One possible option might be that one example recording is saved – if the anonymity of the targeted person can be guaranteed – as evidence in court.

Should the targeted persons be informed about the fact that they had been recorded? The principle is that such an individual has the right to know about this abuse in the past. On the other hand, there may be individuals who would prefer not to know – and this should also be respected. The conclusion might be to announce that people who would like to check whether they were indeed recorded in this manner would on request be given full information on this.

Videos on torture scenes

The videos depicting torture (including male rape with instruments) should be analyzed in the proper manner for possible extraction of evidential material. Again, it is important that the identity of the victims is protected.

I suggest that public showing of these types of videos is discontinued. The existence of such material is known to the public and there is no additional value in broadcasting them. Instead, the focus should now be on preparing proper procedures against those responsible for these recordings

and for the brutal violations shown in them. The identities of the torturers acting in the recordings should also not be disseminated, at least not before guilt is proven in fair procedures.

Information on who initiated these recordings and other relevant circumstances would be an important part of the report from the Commission.

Other recordings

I have no clear picture of the nature of the recordings made on political meetings and conversations targeting journalists, politicians, civil society representatives and others. I can only recommend that they be reviewed in a spirit similar to the one described above.

CONCLUSIONS AND RECOMMENDATIONS

The existence of the illegal recordings is a reflection of extremely serious crimes requiring both a judicial and a political response. The recording was criminal in all its aspects: including the planning thereof, the instruction to take such action and the actual activities to film or tape. The possession of these recordings must be criminalized (with the exception, of course, of the authorized archiving mentioned above). The dissemination of the recordings violating privacy rights must also be regarded as criminal. That any blackmail activity on the basis of these recordings must be seen as a serious crime is obvious.

The aim should be to protect the privacy of all persons who have been targeted. At the same time it is important to collect evidence which could strengthen legal actions against the culprits.

My suggestion is that a combination of these two intentions would guide a proper, fast and efficient review of the recorded material. The procedures for this review should be determined by the Commission in order that its members would be able to verify the way the

review was undertaken and its results. It would be sensible that at least one of the civil society representatives or the data protection inspector take a direct part in the review itself.

A major purpose of this review is to prepare for the destruction of recordings. That the destroyed recordings did exist would be verified by the Commission in a special, signed document.

The review might make it possible to identify elements which can be used in criminal investigation and prosecution. However, such activities must be pursued without undermining or risking the privacy rights of individual victims. In individual cases in which there would be a direct conflict between those two interests, the concern for the privacy right should be the determining consideration.

While this approach would take somewhat longer time than an immediate destruction of all privacy sensitive recordings, it is particularly important that the management of the archive with the recordings is protecting the confidentiality and that any access to the archive be strictly limited and regulated.

This approach puts great responsibility on the shoulders of the Commission members. This makes it even more important that there is a clearly defined task for the Commission, approved by the government. In this process it is recommended that the possibility of adding some further expertize in the membership is considered. It is suggested that also a representative of the Ministry of Justice is included.

In sum:

1. **The *mandate* and the *composition* of the Oversight Commission should be clarified through a governmental decision.**
2. **The Commission should define the role of its members, establish its working methods and set priorities for its work. It is suggested that it gives *immediate priority* to the handling of video recordings of intimate private life situations as well as the recordings showing torture scenes.**

3. **One of its first steps should be to establish and implement rules for the *management of the archive* in the MIA with the illegal recordings. Confidentiality of these materials must be protected. Access to the archive must be extremely restricted and regulated in order to avoid any risk of leaks.**
4. **The Commission should agree that protection of the *right to personal privacy* is a key consideration in its work and that recordings violating this right should be destroyed.**
5. **In order to prepare the destruction of such videos (through registering basic facts) and to establish whether any material in the recordings could be extracted for use in criminal charges, it is suggested that *a prompt and efficient review* would be undertaken of these video recordings.**
6. **The procedures for this review should be established by the Commission with due respect for the protection of confidentiality and for giving the Commission members a basis for endorsing the final record on this procedure. This record could serve as a basis for a document *certifying* that materials which have been reported as destroyed did in fact exist.**
7. **Only if it is deemed absolutely important as evidentiary material and only on condition that full proof guarantees are established for the protection of privacy rights, may an example of such recordings be kept for the judicial proceedings (and thereafter destroyed). However, if there is a conflict between privacy rights and prosecutorial interests, the former should be given preference.**
8. **The videos showing *torture* scenes should also be reviewed. The protection of victims' identity should be ensured and those of culprits not made known before their guilt has been established by proper court procedures.**
9. **Similar reviews of the *other recordings* should be made in connection with further categorization of these materials.**
10. **The Commission should be *authorized to inform* those who have been targeted in illegal recording about this fact.**

11. **The operational mode of the Commission should be transparent with the exception of anything that would undermine principles of respecting privacy rights or undermine work for the preparation of judicial procedures. On a regular basis it should make public all its steps of broader interest.**
12. **The final report of the Commission should detail its activities but also provide recommendations about how surveillance activities should be regulated and overseen in future.**

PS. Some of the recommendations above are fairly detailed and I am aware that there may be other possible methods of achieving the aim of protecting the interest of the victims and at the same time ensure a possibility of bringing those responsible for the criminal activities to justice. This is why I convey this advisory document as a preliminary one and declare that I am open to further exchanges on these important issues.

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