

Democracy Research Institute

THE STATE SECURITY SERVICE
DUPLICATION OF
COMPETENCES
AND PARALLEL
INVESTIGATIVE
SYSTEMS IN GEORGIA



საქართველოს სახელმწიფო
უსაფრთხოების სამსახური
STATE SECURITY SERVICE OF GEORGIA



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Introduction

Undemocratic regimes employ security and intelligence services mainly to suppress free thought, political opponents and free speech. In such systems, security services enjoy a broad mandate and powers without being subjected to any oversight. After the introduction of democratic governance, one of the central challenges such states face is to create legal and institutional mechanisms that would prevent public and political officials from misusing security services for political purposes.¹ On the other hand, even in seasoned democracies, the mandate of security services gradually becomes wider to be able to avert frequent terrorist attacks.

Tightened regulations, along with the enhanced capabilities afforded by digital technologies, demonstrated unequivocally the danger of these services breaching the rights and freedoms safeguarded by the European Convention on Human Rights.²

Presently, democratic oversight and transparency, as well as depoliticising security agencies, and enhancing international cooperation in the security and military sectors remain to be the key challenges.³ Georgia is not an exception in this regard. Despite attempted reforms, institutions that fall within the security sector remain to be considered the least transparent agencies.

The present research aims at analysing the legislation and institutions emerging as a result of the changes made in the security sector in Georgia in 2015. In the opinion of the DRI, recommendations made based on the research will contribute to enhancing the effectiveness of public agencies operating in the security sphere, and transparency and impartiality of the justice system.

As a result of the amendments made in 2015,⁴ the State Security Service was entrusted with investigative powers, among them, the power to conduct operative measures, search and arrest a person. The DRI team studied whether the legislation in force complies with standards under international law and whether the existing practice gives rise to the threats of human rights violations, duplication of tasks among law-enforcement agencies and emergence of parallel investigative systems.

The present research analyses and assesses the mandate granted to the State Security Service and its compliance with the standards established under international law. The report gives recommendations that have been elaborated based on the local context which, in our view, will have a positive impact on forming an accountable, human rights oriented, balanced and modern security agency.

¹ Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, Oslo, 2005, p. 32, available at: <https://www.dcaf.ch/sites/default/files/publications/documents/making-intelligence.pdf>.

² Hans Born, Loch K. Johnson, Ian Leigh; *Who's Watching the Spies? Establishing Intelligence Service Accountability*; Washington, D.C. 2005, p.1.

³ Mindia Vashakmadze, *The Legal Framework of Security Sector Governance in Georgia*, p. 27, available at: https://www.dcaf.ch/sites/default/files/publications/documents/The-Legal-Framework-of-SSG-Georgia_2016_eng.pdf

⁴ The Law of Georgia on the State Security Service of Georgia, Article 12.

Methodological Framework

This research is based on the information obtained by the DRI through requesting public information, study of legislative regulations in force and analysis of data posted on the public agencies' websites. Furthermore, the report has cited documents and viewpoints of authoritative international organisations regarding the reform of the security system. In addition, right at the initial stage of the research, we made the list of the normative acts to be studied and processed the data obtained through requesting public information.

Considering the goals and tasks of the project, the following methodology was used in the research process:

1. Situation analysis: In terms of reforming a security service, we studied the experience of those countries that, keeping the local context in view, can be considered to be the best examples. In particular, we selected the following countries:

- **Latvia and Lithuania** were selected due to their geopolitical location, post-Soviet experience and successful reforms in the security sector;
- **Estonia** is distinguished due to the results achieved in the security, particularly in cybersecurity sector as well as exemplary cooperation with NATO and EU security agencies;
- **Ukraine** and Georgia are faced with similar challenges in terms of security. With the support of international community, numerous reforms based on international standards have been carried out for legislative and structural enhancement of the Ukrainian security sector. The Ukrainian experience is significant to Georgia.
- **Norway** was selected due to exemplary distribution of functions among law-enforcement, intelligence and security services as well as effective steps made towards the fight against extremism and radicalisation; and
- **Canada**, despite its expressly distinct legal framework, is often referred to in international organisations' researches as an example of best practice.

2. Analysis of legislation implies the assessment of reforms carried out regarding a security service's functions, mandate and supervision, and the legislation governing these issues as well as the analysis of intelligence received from a security service. The research discusses standards in the security area established by the Council of Europe (including the Venice Commission), the United Nations, and other international organisations as well as legislation and experiences of countries with the best practices in this area.

3. Descriptive statistics analysis – qualitative description of information requested from agencies, *i.e.*, maintaining descriptive statistics.

4. Desk Research implies gathering, analysing and using public data in a research process that has been published by administrative agencies proactively.

Glossary of Terms

The terms used in the research have the following meaning for the purposes of this research:

Security sector – the combination of institutions, including the police, prosecutor's office, courts and other governmental or non-governmental organisations, responsible for administering, managing, implementing and supervising security.⁵

Intelligence service – all public organisations that carry out intelligence activities in relation to state security, among them, all services having an internal, foreign and military mandate.⁶ This term covers but does not always imply a state intelligence service and state security service.

Intelligence – implies gathering and analysing information to facilitate reaching decisions concerning threats posed by foreign countries or non-governmental actors as well as internal security issues (the so-called internal and foreign threats).⁷

Security and intelligence services – there are conflicting opinions in relevant literature regarding the separation of these services. According to common terminology, the task of a security service is to eliminate internal threats within the country, whereas an intelligence service has a foreign mandate and it is focused on foreign threats.⁸ The DRI report is based on the research by the European Union Agency for Fundamental Rights which, despite internal and foreign mandates, refers to these agencies as an intelligence service.⁹ The UN Special Rapporteur on Counter-Terrorism and Human Rights follows the same approach in his report;¹⁰ therefore, the report discusses intelligence and security services as identical agencies.¹¹ Nevertheless, these agencies should not be confused with state security and state intelligence services that, despite analogous titles, are independent units with specific powers.

Policing/law-enforcement tasks – the main tasks determined under Article 16 of the Law of Georgia on Police, in particular, are to prevent threats against public safety and legal order.¹²

⁵ Geneva Centre for Security Sector Governance (DCAF), The Security Sector, Roles and Responsibilities in Security Provision, Management and Oversight, p. 2.

⁶ Martin Scheinin (UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, 2010, p. 4. (footnote 1).

⁷ Marina Caparini, Controlling and Overseeing Intelligence Services in Democratic States, 2008, p. 5.

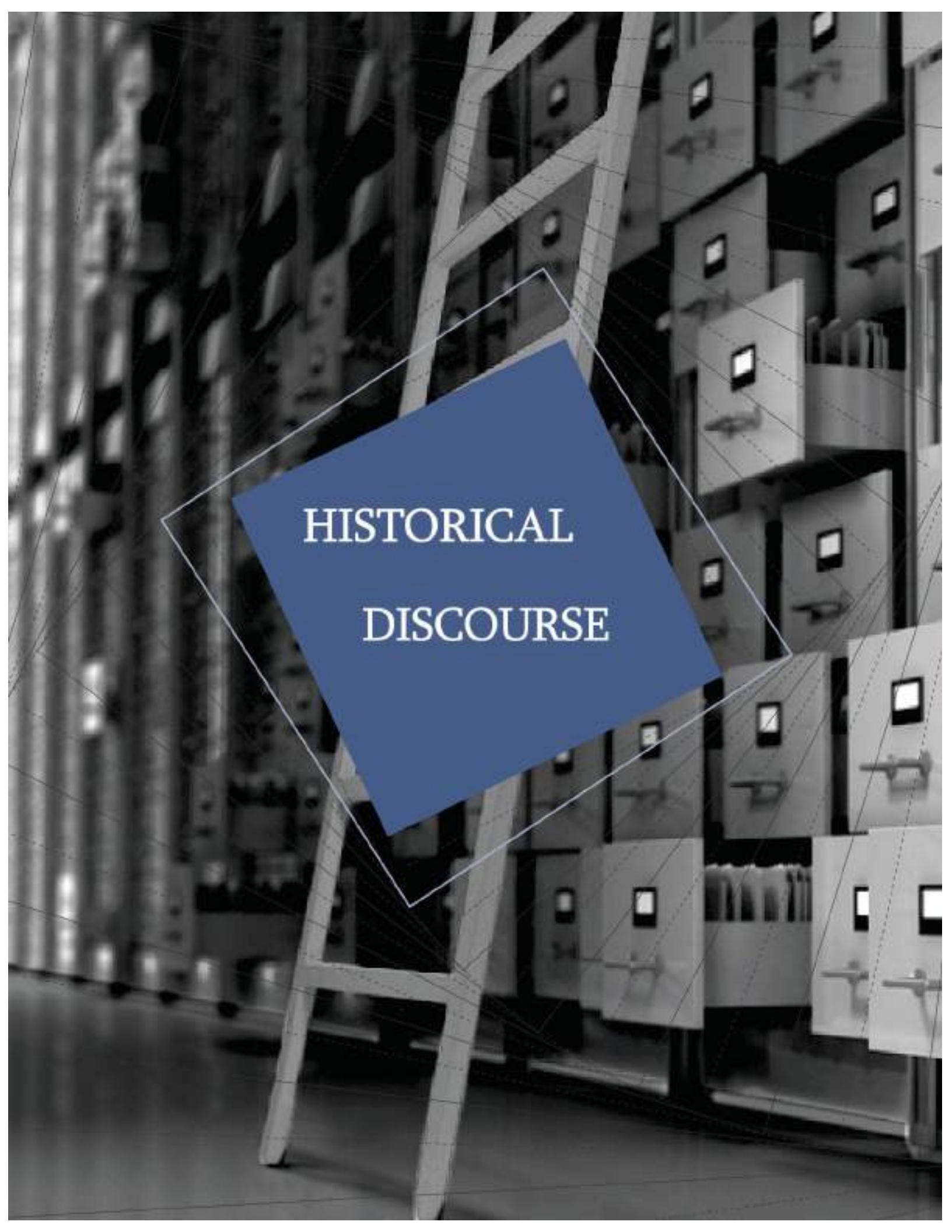
⁸ Born, H. and Leigh, I. (2005), p. 31.

⁹ The European Union Agency for Fundamental Rights, Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the European Union, Volume I: Member States' Legal Frameworks, 2015, p. 13.

¹⁰ Martin Scheinin (UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, 2010, p. 4.

¹¹ Twenty Years Without the Parliamentary Oversight, Oversight of the Ministry of Internal Affairs, the State Security Service and the Intelligence Service of Georgia by the Supreme Representative Body, Tbilisi, 2017, p. 18.

¹² The Law of Georgia on Police, Article 16.



HISTORICAL
DISCOURSE

1. Historical Discourse

The 1995 version of the Constitution of Georgia prohibited the merger of armed forces, state security forces and police agencies in any form.¹³ Later in 1998, the Parliament of Georgia adopted the Law of Georgia on the State Security Service under which the State Security Service was a system of the special military agencies.

On 12 January 2002, the President's ordinance approved the statute of the Ministry of State Security of Georgia under which the Ministry of State Security of Georgia became special governmental agency.¹⁴ An impeachment procedure was made applicable to the Minister of State Security of Georgia, as a member of the government.

After the change of the government, the 2004 constitutional amendments abolished the clause about the prohibition of merging the military forces, state security forces and police agencies in any form.¹⁵ In March 2004, the president's ordinance¹⁶ made the Ministry of State Security accountable to the Government of Georgia.

In December 2004, based on the draft law prepared by the Ministry of Justice, the Ministry of Internal Affairs and the Ministry of Security were merged. The new unit set up within the Ministry of Internal Affairs was named the Service of Public Security. Within the same period, the law's title was also rephrased to the Law of Georgia on the Public Security Service. Under the law, the security system comprised of departments of the Ministry of Internal Affairs and other structural units.

Merger of the structural units and, therefore, the excessive concentration of the power within the Ministry of Internal Affairs weakened the supervision and control mechanisms. Response to human rights breaches and misuse of security services against political opponents remained to be problematic.¹⁷

Reforming and de-politicising the Ministry of Internal Affairs by 2012 elections were among the main pre-election promises of the Georgian Dream coalition. The promised reform was carried out in 2015 when, as a result of reforming the Ministry of Internal Affairs, the powers of police and security agencies were separated both institutionally and logically and the state security service accountable before the parliament and independent from the Ministry of Internal Affairs was set up in the country.¹⁸

¹³ The Constitution of Georgia, as of 1995, Article 78.

¹⁴ Ordinance of the President of Georgia of 12 January 2002 on Approving the Statute of the Ministry of Security of Georgia.

¹⁵ The Constitutional Law of Georgia on the Amendment to the Constitution of Georgia, 6 February 2004, no. 3272-RS.

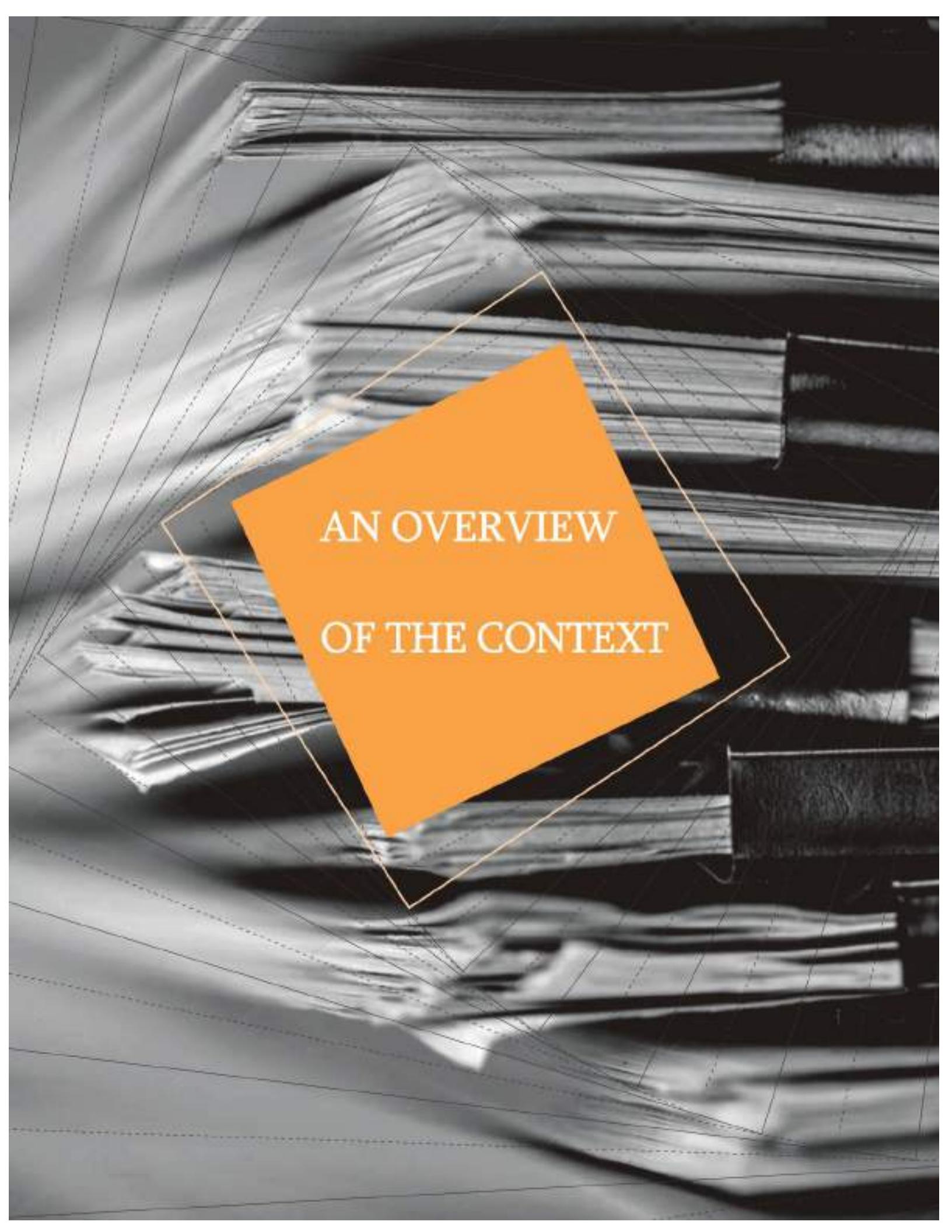
¹⁶ Ordinance of the President of Georgia of 1 March 2004 on Approving the Statute of the Ministry of Security of Georgia.

¹⁷ Phillip H. Furi and Eden Cole, From Revolution to Reform: Georgia's Struggle with Democratic Institution Building and Security Sector Reform, Vienna and Geneva, 2005, p. 55.

¹⁸ The Law of Georgia on the State Security Service of Georgia, Article 9.1. Under the same provision, the head of the service is also accountable before the Government of Georgia.

In 2017, another reform announced by the Government of Georgia was aimed at merging the State Intelligence Service with the State Security Service. However, later, the Government of Georgia withdrew the submitted draft law from the parliament.¹⁹

¹⁹ The Resolution of the Government of Georgia on Withdrawing from the Parliament of Georgia of the Draft Law Initiated by the Government of Georgia, available at: <https://info.parliament.ge/file/1/BillReviewContent/166231>.



An Overview
of the Context

2. An Overview of the Context

Any reform, not tailored to the local context, is superfluous and cannot result in profound substantive changes. The context is formed after considering the following factors:

- Political factors, which imply the political situation of the country; the participation of local, regional and international actors in the country's political events;
- Legal factors, which imply the legislative framework within which security and intelligence services operate; their accountability before the legislature and the executive; and
- Economic factors imply natural and other resources within a country, its infrastructure, conditions suitable for investments and availability of funds required for reforms.

2.1. Political Factors

Georgia is a parliamentary republic of a specific kind. In such a system, the legislature fully forms the core of the executive. However, parliamentary oversight over the executive is weak. Unlike those systems where a prime minister and, in some cases, other ministers are nominated by the directly elected president and where it is possible for the head of state and the majority to be representing different political teams, in the parliamentary and semi presidential systems, the ruling majority controls both the parliament and the cabinet.

The particular challenge that the security services face is the occupation of 20% of the Georgian territory by the Russian Federation in 2008.

2.2. Legal Factors

Georgia belongs to the continental European legal system with a legal heritage distinctive to post-Soviet countries. At the same time, Georgia strives towards introduction of legal acts and institutions compatible with the European legal framework. Stemming from the characteristics of a model of the parliamentary republic, the managers of security and intelligence services are accountable to the parliament and the government. However, in reality, parliamentary oversight is inconsistent and scant and the parliament mainly discharges legislative powers rather than acts as a monitoring body.

Furthermore, the investigative powers given to the State Security Service as a result of the 2015 reform have been widely criticised. This resulted in the duplication of the competences of the Ministry of Internal Affairs, the Security Service and other similar agencies.²⁰

²⁰ See details about the reform at: <https://gyla.ge/ge/post/print/arasamtavrobo-organizaciebi-khelisuflebas-moutsodeben-samartaldamcavi-sistemis-realuri-reforma-chaataros-96>.

2.3. Economic Factors

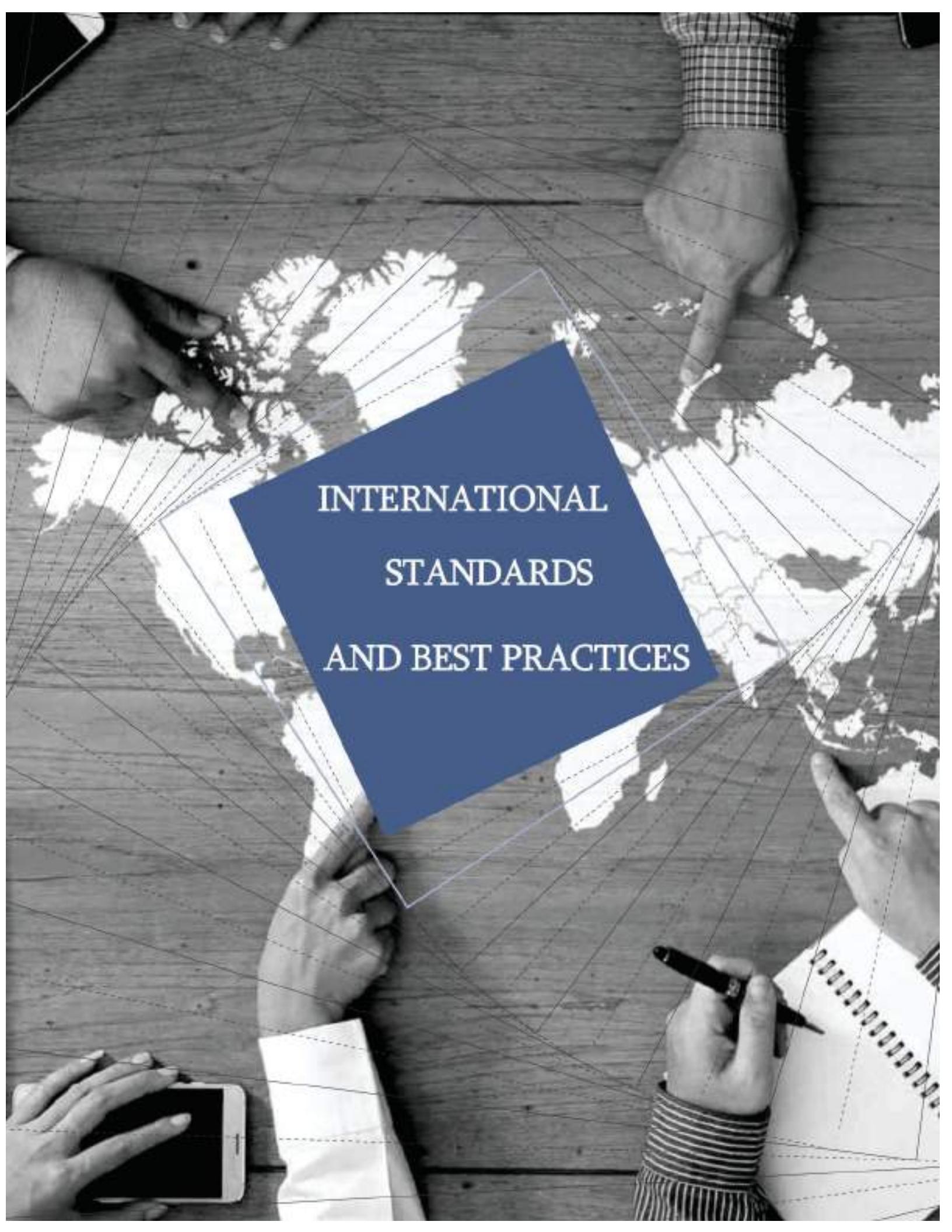
Under the Law of Georgia on the State Security of Georgia, the service is funded from the State Budget of Georgia and the Legal Person of Public Law under the service is additionally funded from other revenues as determined by legislation of Georgia.²¹ The State Audit Office audits the expenditure of the state budget and other assets of Georgia by the service. In 2015-2016, the State Security Service faced problems in terms of expending its budget. Despite this, in the same year, GEL 1,399,710 was allocated to the service from the Government Reserve Fund “to ensure its unimpeded performance”. The State Audit Office mainly exercised ex-post review over the implementation of the budget by the State Security Service and pointed out the problems related to the budget implementation in its annual reports, some of which could have been indicated in interim reports as well.²² The State Audit Office continued this trend in its 2018 report as well.²³ However, the State Security Service is not mentioned at all in the current 2019 reports. All these circumstances, taken cumulatively, indicate the low quality of the oversight exercised by the State Audit Office over the State Security Service.

Stemming from the abovementioned, in the opinion of the DRI team, the state has sufficient financial and human resources at its disposal to ensure the practical implementation of the recommendations that have been elaborated as a result of the present research if there is political will.

²¹ The Law of Georgia on the State Security Service of Georgia, Article 42.

²² The Reform of the State Security Service in Georgia, Results and Challenges, Transparency International (TI) and Human Rights Education and Monitoring Centre (EMC), p. 62.

²³ The State Audit Office, Report on the Implementation of the 2018 State Budget, the Government Report, p. 66, available at: <https://bit.ly/31Qryxw>.



INTERNATIONAL
STANDARDS
AND BEST PRACTICES

3. International Standards and Best Practices

Within the framework of the research and against the background of the Georgian context, we studied the recommendations and viewpoints of international organisations given regarding security sector reforms, best practices and models of certain states. The DRI understands that an automatic introduction of a certain state's model will not result in profound or fundamental changes and that reforms aimed at the security system of Georgia should be tailored to the local context.

Lithuania – despite different forms of Government, the challenges faced by Lithuania and Georgia are similar. The 2019 National Threat Assessment Report by the State Security Department of the Republic of Lithuania points out the threats emanating from Russia, such as, interferences in the internal affairs of the country, destabilisation, attempts to use the so-called “frozen conflict” tactic and conducting pro-Russian propaganda in the country.²⁴ The security services of Lithuania are accountable to the Minister of Internal Affairs, the President and the Parliament;²⁵ and the State Security Department is granted wide investigative powers.²⁶

Latvia is a parliamentary republic where the president's powers are relatively broader in crisis situations.²⁷ The 2018 Report of the State Security Service of Latvia gives ample information about the challenges caused by Russia's territorial and geopolitical ambitions such as recruiting Latvian nationals for future intelligence purposes, obtaining NATO-related information and problems of cyber security.²⁸ There are three agencies entrusted with state security protection in Latvia: 1) The Constitution Protection Bureau; 2) The Defence Intelligence and Security Service; and 3) The Security Police. The Constitution Protection Bureau is in charge of intelligence and counterintelligence activities, protects state secret and overseas exchange of this information with international organisations.²⁹ The Defence Intelligence and Security Service is subordinate to the Ministry of Defence and is tasked with military counterintelligence and investigative activities.³⁰ The Security Police is subordinate to the Ministry of Internal Affairs and tasked with counterintelligence and investigative activities to fight crimes against humanity, war crimes, genocide, organised and white-collar crimes, terrorism, sabotage and organized crime endangering the security of the state such as, corruption, money laundering, money forgery and other crimes endangering national security and authority committed by organized crime groups, corruption, money forgery, as well as non-sanctioned distribution of nuclear materials, narcotic and other (chemical, radioactive) substances of strong effect or double usage goods, firearms and weapons of another kind, explosives.³¹

²⁴ The State Security Department of the Republic of Lithuania, National Threat Assessment, 2019, available at: <https://www.vsd.lt/en/threats/threats-national-security-lithuania/>, pp. 4-6.

²⁵ Tanel Kerikmäe, Kristi Joamets Jānis Pleps, Anita Rodiņa Tomas Berkmanas, Edita Gruodytė Editors; The Law of the Baltic States, 2017, pp. 277-278.

²⁶ The Republic of Lithuania, the Law on the State Security Department, Article 8.

²⁷ Tanel Kerikmäe, Kristi Joamets Jānis Pleps, Anita Rodiņa Tomas Berkmanas, Edita Gruodytė Editors; The Law of the Baltic States, 2017, p. 197.

²⁸ The 2018 Report of the Latvian State Security Service, pp. 8-10; available at: <https://vdd.gov.lv/en/useful/annual-reports/>.

²⁹ The 2018 Report of the Constitution Protection Bureau, p. 3.

³⁰ The Law of Latvia on State Security Institutions, Article 14.

³¹ *Ibid.*, Article 15.

Estonia is a parliamentary republic and is selected by the project team due to the steps Estonia took towards security, especially in the cybersecurity sector. The fundamental principles that lie at the heart of the Estonian security system are cooperation with the NATO and the so-called comprehensive approach that implies each party's obligation in coordination and agreement with each other, to contribute to the protection of the member states' security based on their competence, functions and legal mandate.³² The Estonian Foreign Intelligence Service is subordinate to the Ministry of Defence. Its task is to protect Estonia from foreign security threats. It gathers and analyses intelligence and forwards information to relevant agencies to assist them in their tasks.³³ There are two other security agencies operating in Estonia, namely, the Estonian Internal Security Service and the Information Board. The Estonian Internal Security Service is vested with crime prevention and investigative powers in the country, in relation to crimes that fall in its jurisdiction. The Information Board is charged with collecting and processing information related to foreign factors, economy, national security and counterintelligence.³⁴ The Estonian Information System Authority is also noteworthy in this regard. This agency protects cyber space; it prevents and eradicates threats to cybersecurity.³⁵

Ukraine – due to the current armed conflict and territorial problems with Russia, Ukraine's state security sector faces similar challenges as Georgia. The financial support given to Ukraine for reforming its security sector by international community and donors is also noteworthy. The Ukrainian State Security Service is a law-enforcement agency that maintains state security of Ukraine and is subordinate to the country's president.³⁶ Ukraine's state security system is composed of a central administration and the following subordinate agencies – regional, military, military counterintelligence as well as educational, research and other institutions.³⁷ The Head of the Security Service is appointed by the president of the country.³⁸

Norway differs most from the listed countries in terms of the form of government. However, the Norwegian model was selected because of the exemplary distribution of powers among law-enforcement, intelligence and security services as well as the effective steps taken towards the fight against extremism and radicalism. There are four services operating in the country's security sector: 1) the Norwegian Police Security Service,³⁹ an agency working under the Ministry of Justice, is in charge of gathering intelligence, analysis, prevention of threats to the national security and their investigation; 2) the Norwegian National Security Authority⁴⁰ – a cross-sectoral supervisory agency administering the

³² Tanel Kerikmäe, Kristi Joamets Jānis Pleps, Anita Rodiņa Tomas Berkmanas, Edita Gruodytė Editors; *The Law of the Baltic States*, 2017, p. 33.

³³ The 2019 Report of the Estonian Foreign Intelligence Service, p. 2, available at: <https://www.valishuureamet.ee/pdf/raport-2019-ENG-web.pdf>.

³⁴ The Security Authorities Act of Estonia, Article 5, available at:

<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/507062016003/consolide>.

³⁵ The Cybersecurity Act of Estonia, Article 12, available at: <https://www.riigiteataja.ee/en/eli/523052018003/consolide>.

³⁶ The Law of Ukraine About the Security Service of Ukraine, Article 1.

³⁷ *Ibid.*, Article 9.

³⁸ *Ibid.*, Article 13.

³⁹ Norwegian Police Security Service, see <https://pst.no/>.

⁴⁰ Norwegian National Security Authority, see <https://www.nsm.stat.no/english/>.

security sector and protection of secret documents and monitoring cybersecurity;⁴¹ 3) the Norwegian Intelligence Service⁴² – intelligence gathering analytical agency, subordinate to the Ministry of Defence and in charge of analysing information regarding Norwegian interests in relation to foreign states;⁴³ and 4) the Defence Security Department – an agency under the Ministry of Defence mainly responsible for supplying intelligence to armed forces and monitoring their activities.⁴⁴

Canada is one of the non-European countries selected by the DRI. It differs most from Georgia in terms of its historical experience, geopolitical location and the form of government. It is often referred to as the best example of security sector. There are three services in charge of security in Canada. The Canadian Security Intelligence Service (CSIS) performs its duties and functions within and outside Canada.⁴⁵ This service does not have any law-enforcement powers. It only takes necessary measures to protect state security.⁴⁶ The respective legislation contains important clauses of imperative nature about the scope of activities of the security service.⁴⁷ The service's director is accountable to the Minister of Public Safety and Emergency Preparedness to whom the report on the service's operational activities is submitted.⁴⁸ Royal Canadian Mounted Police and Criminal Intelligence Service Canada (CISC) have law-enforcement powers in Canada.⁴⁹

⁴¹ Norwegian Ministry of Justice and Public Security; Norwegian Ministry of Defence, Support and Cooperation, A Description of the Total Defence Concept Today, 2015 p. 47.

⁴² Norwegian Intelligence Service, see <https://forsvaret.no/>.

⁴³ The Norwegian Law on the Intelligence Service, Article 3.

⁴⁴ The Defence Security Department, see <https://nsd.no/polsys/data/en/forvaltning/enhet/57001/endringshistorie>.

⁴⁵ The Canadian Security Intelligence Service Act, Article 12(2), available at: <https://laws-lois.justice.gc.ca/eng/acts/C-23/page-6.html#docCont>.

⁴⁶ *Ibid.*, Article 12.1 (1), available at: <https://laws-lois.justice.gc.ca/eng/acts/C-23/page-6.html#docCont>.

⁴⁷ *Ibid.*, Article 12.2 (1), available at: <https://laws-lois.justice.gc.ca/eng/acts/C-23/page-6.html#docCont>.

⁴⁸ *Ibid.*, Article 6, available at: <https://laws-lois.justice.gc.ca/eng/acts/C-23/page-6.html#docCont>.

⁴⁹ Hans Born, Loch K. Johnson, Ian Leigh, Who's watching the Spies? p. 111.



MANDATE AND TASKS



საქართველოს სახელმწიფო
უსაფრთხოების სამსახური

STATE SECURITY SERVICE OF GEORGIA

4. Mandate and Tasks of the State Security Service of Georgia

According to the website of the State Security Service of Georgia, “In response to the current threats and challenges facing Georgia and with the aim to ensure the efficient and democratic functioning of the security system, on 1 August 2015, independent, depoliticised, professional and highly accountable State Security Service of Georgia was established.”⁵⁰ The achievement of this goal by the Security Service depends not only on effective oversight but also on the legal framework governing its work.⁵¹

4.1. Mandate of the Security Service

Under the Law of Georgia on the State Security Service of Georgia, the areas of activities of the Service for ensuring state security include the following:

- a) Protecting constitutional order, sovereignty, territorial integrity and military capabilities of Georgia from the unlawful acts of foreign special services and individuals;
- b) Identifying unconstitutional and forceful changes of the constitutional order and state government of Georgia and ensuring the protection of the constitutional order;
- c) Ensuring the economic security of the country;
- d) Combating terrorism;
- e) Combating transnational organised crime and international crime threatening state security;
- f) Carrying out measures for preventing, identifying and eliminating corruption;
- g) Protecting state secrets and carrying out measures to ensure the protection of state secrets under procedures provided for by the legislation of Georgia and ensuring the monitoring of the implementation of such measures; and
- h) Protecting the country from foreign threats.⁵²

A state naturally has a public interest in identifying and investigating any crime. However, given the specific nature of state security services, it is believed that they ought to limit their operation strictly to the protection of national security interests and should not engage in unrelated activities.⁵³ Some

⁵⁰ See <https://ssg.gov.ge/page/aboutus/info>.

⁵¹ The Council of Europe, Democratic and Effective Oversight of National Security Services, 2015, p. 18.

⁵² The Law of Georgia on the State Security Service of Georgia, Article 5.

⁵³ Martin Scheinin (UN Special Rapporteur), Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, 2010, p. 5.

tasks of the State Security Service such as ensuring the country's economic security and preventing corruption are unrelated to the protection of national security.

The United Nations Special Rapporteur points out in his report⁵⁴ that it is good practice for national security and its constituent values to be clearly defined in a legislation adopted by the parliament. This is important for ensuring that intelligence services confine their activities to safeguarding the values enshrined in a public definition of national security. These powers must be used exclusively for the established purposes. For instance, any powers given to intelligence services for counter-terrorism must be used exclusively for these purposes.⁵⁵ In any case, it is better to have a detailed legislative interpretation of various aspects of national security rather than to entrust the State Security Services with a broad mandate determined with general phrases such as "ensuring the country's economic security"⁵⁶ or "protection of the country from foreign threats".⁵⁷

4.2. Investigative Tasks of Security Services

Security/intelligence services have broad intelligence, analytical and investigative powers. This factor combined with the high degree of confidentiality makes the oversight more difficult and opens room for arbitrariness and abuse of power, especially in those cases where judicial review over security services is either weakened or denied.⁵⁸ Therefore, express and strict legislative regulation of the powers of security services is considered to be good practice against the arbitrariness of state security services.

The Law of Georgia on the State Security Service of Georgia does not determine the list of concrete crimes that must be investigated, prevented, identified and/or eliminated by the State Security Service. The State Security Service is tasked to eliminate, identify, prevent and investigate crimes falling within the investigative jurisdiction of the service in accordance with the areas determined by law.⁵⁹ Order no. 3 of the Prosecutor General of 23 August 2019 determines the crimes falling within the investigative jurisdiction of the State Security Service. If these articles are cross-referenced with the legal interests they protect, it will give a general idea about the specific nature of the investigative activities of the State Security Service.

Chapter of the Criminal Code	Article
Crime Against Human Rights and Freedoms	Articles 142, 142 ¹ and 164

⁵⁴ *Ibid.*, p. 5.

⁵⁵ *Ibid.*, p. 6.

⁵⁶ The Law of Georgia on the State Security Service of Georgia, Article 5.c).

⁵⁷ *Ibid.*, Article 5.h).

⁵⁸ Twenty Years Without the Parliamentary Oversight, Oversight of the Ministry of Internal Affairs, the State Security Service and the Intelligence Service of Georgia by the Supreme Representative Body, Tbilisi, 2017, p. 120.

⁵⁹ The Law of Georgia on the State Security Service of Georgia, Article 5, Article 11.a).

Crime Against Public Security and Order	Articles 222, 223, 230-235, 236 and 252
Crime Against the Constitutional Order and Security Foundation of Georgia	Articles 308-321 ¹
Violation of the Legal Regime of the Occupied Territories	Article 322 ¹
Terrorism	Articles 323–330 ⁵ , 331 ¹ and 331 ²
Official Misconduct	Articles 332–335 and 337–342
Crime Against Administrative Order	Articles 343, 345, 346, 351 and 362-364
Crime Against the Procedural Rule for Obtaining Evidence	Articles 370 and 373
Actions Aimed against Timely Preventing and Closing a Crime	Article 374, 375 and 376
Crime against Humanity, Peace and Security and International Humanitarian Law	Articles 404–410

It is noteworthy that some articles of the Criminal Code do not automatically fall within the investigative jurisdiction of the State Security Service. In some cases, a crime must be detected, with some exceptions determined by the order, by an officer of the State Security Service.⁶⁰

This list runs counter to the views of the UN Special Rapporteur concerning best practice; there is also a stark difference from the models of the countries studied within this research.

Firstly, those crimes should be pointed out that by their content do not fall within the area of the activities of the State Security Service. By investigating these crimes, the State Security Service goes beyond the standards established in international practice. Article 142 of the Criminal Code of Georgia is one example. This provision lays down criminal responsibility for the violation of human equality that resulted in a substantial breach of a human right. NGOs have expressed legitimate concerns that prevention/investigation of crimes to protect equality should not be within the jurisdiction of the State Security Service.⁶¹ In accordance with the Law of Georgia on the State Security Service of Georgia, the service investigates crimes that, by their rationale, pose a threat to the country's security. A violation of human equality might not always pose a threat to national security. Therefore, we believe that giving

⁶⁰ For instance, in accordance with Order no. 3 of the Prosecutor General of Georgia of 23 August 2019, crimes under Articles 222, 236, 322¹, 331, 344, 344¹, 353, 353¹, 362-364, 370, 373, 374, 375 and 376 of the Criminal Code of Georgia fall within the investigative competence of the Security Service if identified by the State Security Service of Georgia.

⁶¹ See The Reform of the State Security Service in Georgia, Results and Challenges, Transparency International (TI) and Human Rights Education and Monitoring Centre (EMC), p. 22.

this task to the State Security Service significantly and unjustifiably broadens the area of its activities, which eventually can be counterproductive.

On certain occasions, investigation of particular crimes could fall within the area of the activities of the State Security Service, although this is not always the case. For instance, investigation of crimes under Article 236 of the Criminal Code of Georgia (Illegal purchase, storage, carrying, manufacturing, transporting, forwarding or sale of firearms, ammunition, explosives or explosive devices) falls within the competence of the State Security Service whenever any such crime is detected by the State Security Service.⁶² Similarly, vote buying (Article 164¹ of the Criminal Code), certain official misconducts (Articles 332-335 and 337-342), disclosure of investigative information (Article 374 of the Criminal Code), and concealment of a crime (Article 375) also fall within the jurisdiction of the State Security Service based on the above clause.

We believe that deciding about the investigative jurisdiction of the State Security Service using this criterion is problematic due to the following reasons:

1. Despite the importance of the State Security Service, granting it a broad mandate entails high risks of human rights violations.⁶³ In order to minimise the existing risks, it is advisable to have a security service's mandate accurately and exhaustively governed by legislation so that the service used its powers only for the purposes determined by legislation.⁶⁴

Detection of actions containing elements of crimes determined by the order of the Prosecutor General does not mean that investigation of these crimes would automatically serve the purposes of the activities of the State Security Service and the areas of activities within its mandate. As a consequence, the State Security Service uses its powers granted for investigating crimes posing high risk to the public for investigating crimes that fall within the competence of police. The official website of the State Security Service gives numerous examples of investigating such crimes.⁶⁵ We maintain that detection by officers of the State Security Service of an act containing elements of a crime cannot render it automatically, without any additional preconditions, the basis for triggering the jurisdiction of the State Security Service.

Therefore, deciding about investigative jurisdiction using this criterion allows the State Security Service to go beyond its mandate, which does not correspond to the international standards deemed to be "good practice".

⁶² Order no. 3 of the Prosecutor General of Georgia of 23 August 2019, Article 4.b).

⁶³ Martin Scheinin (UN Special Rapporteur), Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, 2010, p. 5.

⁶⁴ *Ibid.*, p. 6.

⁶⁵ For instance: <https://ssg.gov.ge/news/540/saxelmtsifo-usafrtxoebis-samsaxuris-antikorufciulma-saagentom-yalbi-valutis-gasaghebis-faqtze-2-piri-daakava>; <https://ssg.gov.ge/news/246/sus-is-antikorufciulma-saagentom-taghlitobis-mcdelobis-faqtze---erti-piri-daakava>; also: <https://ssg.gov.ge/news/485/saxelmtsifo-usafrtxoebis-samsaxuris-antikorufciulma-saagentom-taghlitobis-mcdelobis-faqtze-erti-piri-daakava>; <https://ssg.gov.ge/news/350/sus-is-generalurma-inspeqciam-narkodanashaulis-faqtze-ori-piri-daakava>.

- Using the said criterion for investigative jurisdiction also causes duplication of tasks among security agencies. The Council of Europe's Parliamentary Assembly recommendation points out the importance of avoiding the abuse of powers and duplication of tasks among security services.⁶⁶

The Minister of Internal Affairs of Georgia does not agree with the above criticism: "the tasks of a security service cannot be duplicated with those of the police due to the simple reason that the security service is tasked with prevention in the field of state security and the police are in charge of protecting public safety and legal order. Unlike the latter, the activities of the State Security Service are not concerned with averting specific threats arising in citizens' daily lives; instead, they are related to global interests emanating outside the country and attempts against the existence of the state and its security."⁶⁷ As a counter argument, it should be noted that detection of a crime by officers of the State Security Service under Article 236 of the Criminal Code of Georgia or other less serious (or serious) crime does not automatically mean that this act necessarily poses a threat to national security. Consequently, not only the State Security Service is allowed to go beyond the purpose of its activities and assume police powers, it is also obliged to do so in accordance with the regulations in force.

In conclusion, it should be pointed out that, despite the categorisation of an act under the Criminal Code of Georgia, a particular act could be related to the areas of activities of the State Security Service. However, the legislative wording under which detecting a particular act by officers of the State Security Service implies automatically that it falls within the investigative jurisdiction of the service is clearly against international standards and practice. The said regulation grants an unjustifiably broad mandate to the State Security Service instead of governing its activities in strict terms.

4.3. Investigative Powers of Various Departments of the State Security Service

While working on the project, the DRI obtained information on those structural units of the State Security Service that conduct investigation into criminal cases and the statistics related to these cases. The data could not be integrated in the research, as access to this data was limited under the Law of Georgia on State Secrets.

We were unable to incorporate the data in the research, as according to the response from the State Security Service, it is not publicly available under the Law of Georgia on State Secrets.

Based on the obtained statistics, crimes that are most often investigated by the State Security Service and the departments that investigate these crimes are identified. Namely, from 1 August 2015 to 1 November 2019, the State Security Service instituted investigation into 425 criminal cases, among them: 1) in the Counter-Terrorism Centre – 49 criminal cases; 2) in the Anticorruption Agency – 291

⁶⁶ Committee on Legal Affairs and Human Rights, Control of Internal Security Services in Council of Europe Member States, Doc. 1402, Guideline B (3), see: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16689&lang=en>.

⁶⁷ See the position of the Ministry of Internal Affairs of Georgia: <https://police.ge/ge/shinagan-saqmeta-saministros-gantskhadeba/8481>.

criminal cases; 3) in the Counter-Intelligence Department – 63 criminal cases; 4) in the State Security Department – 15 criminal cases; and 5) in the General Inspection of the Service – 7 criminal cases.⁶⁸

It should be pointed out that, during this period, the State Security Service referred only 38 cases to other investigative agencies in accordance with the requirements of investigative jurisdiction.⁶⁹

4.4. Terrorism (the Counter-Terrorism Centre)

One of the priorities of the State Security Service is combating terrorism. In accordance with Order no. 3 of the Prosecutor General of Georgia of 23 August 2019, Articles 323–330⁵, 331¹ and 331² fall within the competence of the State Security Service. Since the very beginning, the State Security Service has been in charge of active monitoring and investigation of terrorism-related acts. Therefore, a report of the United States Department of State referred to the State Security Service of Georgia as the leading agency in the field of combating terrorism. According to the document, the State Security Service has the lead in handling terrorism-related incidents and investigations and is generally well equipped and well trained. According to the United States Department of State, Georgia is generally capable of detecting, deterring, and responding to terrorism-related incidents.⁷⁰

4.4.1. Monitoring Dissemination of Radical Ideology

According to the 2015-2018 reports of the State Security Service, apart from combating terrorism, the service also monitors spreading radical ideology on the Internet and social networks to prevent the radicalisation of the population. For instance, according to a report, in November 2015, the State Security Service restricted access to websites and social media groups that disseminated radical ideology.⁷¹ Similarly, in the reporting period of 2017, the service identified a group of foreign students residing in Georgia that disseminated radical calls through social networks. The State Security Service carried out statutory measures against these persons.⁷² Monitoring of calls of radical nature made on the Internet and in social media continued in 2018 as well. Considering that definitions of radicalisation and extremism first emerged in Georgian normative framework in 2019 in the form of the National Strategy of Combating Terrorism, the criteria that the service used to define “radical ideology” are unclear.

According to the reports of the State Security Service, a group of persons were arrested for terrorist activities while some other persons were arrested for spreading radical ideology on social networks. Members of the both groups mainly belonged to the same religion and come from the same particular geographic region. This could imply that the State Security Service carries out active surveillance

⁶⁸ Letter no. SSG 7 19 00219288 of the State Security Service of Georgia, dated 18/11/2019.

⁶⁹ *Idem*.

⁷⁰ The State Department of the United States, Country Reports on Terrorism 2018, p. 88-89, available at: <https://www.state.gov/wp-content/uploads/2019/11/Country-Reports-on-Terrorism-2018-FINAL.pdf>.

⁷¹ The Report of the State Security Service of 01.08.2015-31.12.2015, p. 12-13, available at: <https://ssg.gov.ge/uploads/%E1%83%90%E1%83%9C%E1%83%92%E1%83%90%E1%83%A0%E1%83%98%E1%83%A8%E1%83%94%E1%83%91%E1%83%98/SSSG%20REPORT.pdf>.

⁷² The Report of the State Security Service of 01.01.2017-31.12.2017 p. 14.

against certain groups or representatives of a particular geographic area. It amounts to a serious breach of human rights if it turns out that, when assessing terrorism risks, monitoring of persons is based on ethnic and religious profiling.

It should be pointed out that recently certain far-right groups adhering to radical ideology have become particularly active in Georgia. Using social media, they attempt to radicalise the population with homophobic and anti-migrant narratives. However, the State Security Service has not removed their radical calls from social networks. Final judgments so far have not been adopted as a result of the investigations conducted against the leaders of such groups.⁷³ In violation of the requirements of investigative jurisdiction, the Ministry of Internal Affairs of Georgia currently investigates one of the leader's statement. The investigation has been instituted under Article 223 of the Criminal Code of Georgia.⁷⁴

4.4.2. The Action Plan of the National Strategy of Georgia to Combat Terrorism

The National Strategy of Georgia to Combat Terrorism and its Action Plan are noteworthy in terms of the fight against terrorism and radicalisation. The Government of Georgia approved, by Resolution no. 53 of 23 January 2019, the National Strategy of Georgia to Combat Terrorism and its Action Plan for 2019-2021.

The strategy aims to combat terrorism, extremism and radicalisation. It defines extremism as “a set of ideas, an ideology that does not recognise the principle of human equality; supports hate, intolerance, violence; poses a threat to the democratic order and the rule of law.”⁷⁵ Radicalisation is defined as “a process, where a person disseminating his/her views and supporting certain ideology may go beyond the scope of law and get involved in terrorist and/or extremist activities. The person concerned expresses his/her readiness in this process to agree and/or if needs be to resort to violent means.”⁷⁶

At the executive level, the strategy acknowledges that there are groups operating in Georgia that support extremist and radical ideology. The document pays particular importance to the involvement of the civil society, NGOs and the third sector in the process of combating terrorism and extremism. However, the formalistic nature of this statement should be pointed out. According to the information at the disposal of the DRI, as a rule, there are no representatives of academia or NGOs involved in the projects against radicalism and extremism.

One of the priorities identified in the strategy is the involvement of the civil society in the process of preventing extremism and radicalism. It is, however, unclear how this cooperation should be carried

⁷³ On 15 June 2019, Levan Vasadze stated in a TV interview that he was going to form a group whose members “would use belts and tie the hands” of LGBTQ community members participating in demonstrations and this way force them to vacate the territory and if they faced resistance from police, the group members would use wooden sticks against them. In order to form the group and register volunteers, Vasadze’s movement started gathering their personal data on the territory of the Vera Park. The Ministry of Internal Affairs instituted an investigation into this incident. Despite the elements of crime present in the public call made by Levan Vasadze, proved by numerous video recordings and other direct evidence, there is no final decision adopted in this case.

⁷⁴ Letter no. MIA 6 19 03327358 of the Ministry of Internal Affairs of Georgia, dated 11 December 2019.

⁷⁵ The National Strategy of Georgia on Fight against Terrorism, p. 2.

⁷⁶ *Ibid.*, p. 5.

out. This issue could be covered by the Action Plan for 2019-2021 that has been elaborated along with the strategy; the document, however, is confidential. It is impossible to justify the restriction of public access to this information by the invocation of the need to protect state interests. Confidentiality of the Action Plan also contradicts the Law of Georgia on State Secrets, under which restriction of public access to information is allowed only if it is necessary for the protection of state or public safety or the interests of the proceedings. Despite the above-mentioned, presently, there seems to be no readiness on the part of the competent governmental authorities to declassify the document or a part thereof.⁷⁷

Based on international practice, action plans (or similar normative acts) adopted by the European Union countries to combat extremism and radicalisation are public to improve the quality of public involvement.⁷⁸ The failure to use this resource in Georgia leads to strengthening the far-right and other radical ideology groups.

4.5. Official Misconduct (the Anti-Corruption Agency)

According to the information requested by the DRI, from 1 August 2015 to 1 November 2019, the State Security Service instituted an investigation in 425 criminal cases, among them:

- a) The General Inspection of the State Security Service – 7 cases;
- b) The State Security Department – 15 cases;
- c) The Counterintelligence Department – 63 cases;
- d) The Counter Terrorism Centre (department) – 49 cases; and
- e) The Anti-Corruption Agency – 291 cases.⁷⁹

The statistics demonstrate that the number of cases investigated by the Anti-Corruption Agency (department) is relatively higher than the respective data of other departments. According to the statute, the agency is tasked with combating official misconduct and corruption and investigating criminal cases. In accordance with Order no. 3 of the Prosecutor General of Georgia on Investigative Jurisdiction, the Anti-Corruption Agency investigates (official) misconduct under Articles 332–335, and Articles 337–342 if these crimes have been detected by the State Security Service. Apart from the

⁷⁷ As of 8 April 2020, an application on this issue lodged by the DRI against the Government of Georgia is considered by Tbilisi City Court.

⁷⁸ E.g., see Norway's Action Plan Against Radicalisation and Violent Extremism, available at: <https://www.counterextremism.org/resources/details/id/679/action-plan-against-radicalisation-and-violent-extremism>; Denmark's Action Plan on Preventing and Counteracting Extremism and Radicalisation, available at: <http://uim.dk/publikationer/preventing-and-countering-extremism-and-radicalisation>; Switzerland's National Action Plan to Prevent and Counter Radicalisation and Violent Extremism, available at: <https://www.newsd.admin.ch/newsd/message/attachments/50703.pdf>; France National Action Plan to Prevent Radicalisation, available at: https://cache.media.eduscol.education.fr/file/Prevention_radicalisation/06/0/PNPR_2018-02-23-cipdr-radicalisation_905060.pdf, etc.

⁷⁹ Letter no. SSG 7 19 00219288 of the State Security Service of Georgia, dated 18 November 2019.

State Security Service, official misconduct can also be investigated by the prosecutor's office and investigations of the General Inspection of the Ministry of Justice. The fact that these services can investigate corruption and official misconduct in some cases gives rise to the risk of parallel investigations and operative and preventive measures to be conducted by these agencies into the same crime. This makes it particularly difficult to separate the powers of the State Security Service and prosecutor's office in the context of official (corruption) misconduct as the State Security Service is entitled to investigate any case which, given the powers of these agencies, is supposed to be within the jurisdiction of the prosecutor's office.

The issue of vesting the State Security Service with the power to investigate corruption is debatable. The majority of the states discussed in the report do not assign to their security services the mandate to fight organised crimes and other crimes related to economic gain similar to corruption. In this context, Canada is the best example, as its security/intelligence agencies do not have the power to investigate either corruption or economic crimes.⁸⁰ Also, in a number of countries, fight against organised crime and corruption is a task of the police or special law-enforcement agencies/units. In Ukraine, similar to Georgia, until 2014, several agencies (prosecutor's office, public safety service, police, security service, audit service, etc.)⁸¹ were in charge of fighting corruption. The level of Ukrainian citizens' trust in these agencies was very low⁸² Presently, the National Anti-Corruption Bureau in Ukraine is tasked with the mission to investigate crimes allegedly committed by high-ranking officials, among them, ministers, judges and members of parliament. There is also the State Investigation Bureau, which is an independent investigative structure in Ukraine. It is formally not an anti-corruption entity, but it is supposed to provide significant indirect influence by extracting investigative powers from the prosecutor's office, the security service and police.⁸³ In Estonia, the State Security Service's mandate only extends to those corruption-related crimes that pose a threat to national security.⁸⁴ In Latvia, corruption-related crimes related to state security are investigated by an independent agency.⁸⁵

The Georgian practice is conducive to duplication of competences. In some cases, it is possible, theoretically, for three or four investigative bodies to investigate the same crimes. As the practice demonstrates, the Anti-Corruption Department often investigates cases that do not essentially pose a high threat to the state security or economy. This, on the one hand, causes wasting resources of the State Security Service and, on the other hand, gives rise to the risk of violations of human rights. The existing regulations indicate unreasonable allocation of resources, duplication of tasks and, in general, ineffectiveness of the system.

In light of the above circumstances, the Organisation for Economic Co-operation and Development (OECD-ACN) gave a recommendation, in its 2016 report, to Georgia to remove anti-corruption

⁸⁰ The Canadian Security Intelligence Service Act (R.S.C., 1985, c. C-23), available at: <https://laws-lois.justice.gc.ca/eng/acts/C-23/page-6.html#docCont>.

⁸¹ Philipp Fluri, Valentyn Badrak (Eds.), Anti-Corruption Measures in Ukraine after the Revolution of Dignity: Key Legislative Aspects, Geneva–Kyiv, 2016, p.10.

⁸² *Ibid.*, p. 11.

⁸³ *Idem*.

⁸⁴ The Estonian Security Authorities Act, Article 6.2².

⁸⁵ The Latvian Law on State Security Institution, section 15 (1).

investigative powers from the State Security Service and the Prosecutor's Office. To this day, no considerable progress has been made in this regard.⁸⁶

It should be pointed out that there is a high public interest regarding corruption and yet the State Security Service operates based on a high degree of confidentiality. For the sake of transparency, it would be advisable that the State Security Service investigated official misconduct only in those cases when the action posed a threat to national security and other cases were assigned to the Ministry of Internal Affairs and the Prosecutor's Office.

4.6. Other Departments

Under Article 6 of the Statute of the State Security Service, the following are the structural units in the service: the Administration (department), the Inspection General (department), the Economic Department, the Main Division of Human Resources, the Information and Analytical Department, the Counter-Intelligence Department, the State Security Department, the Anti-Corruption Agency (department), the Counter-Terrorism Centre, the Operative Measures Department, the Special Measures Department, the Main Division of Protection of Facilities, and the Division of Temporary Placement. Out of these units, the statutes of the Administration, the Anti-Corruption Agency, the General Inspection, the Economic Department, the Main Division of Human Resources and the Division of Protection of Facilities are public. The activities and statutes of the Counter-Intelligence Department, the Counter-Terrorism Centre, the State Security Department, the Information and Analytical Department, the Operative and Technical Department, the Department of Operative Measures and the Special Operations Department are confidential.⁸⁷

Since there is no access to the information at stake, it is difficult to assess the legitimacy of the classification of statutes of the above units of the State Security Service. However, as a general remark, it can be observed that, considering the broad mandate of the State Security Service, the confidentiality of the statutes of the units gives rise to the risk of duplication of tasks of the service's units. Furthermore, stemming from the low transparency of the agency and minimal parliamentary oversight, the blanket confidentiality of information related to the State Security Service makes public oversight of this agency impossible.

4.7. Analytical Activity

Adequate assessment of facts and circumstances and correct analysis and prediction of events have central importance for reinforcing state security. Accordingly, it is necessary for the State Security Service to have strong analytical capacities that would ensure prompt processing of information and its

⁸⁶ OECD-ACN, Anti-corruption reforms in Georgia 4th round of monitoring of the Istanbul Anti-Corruption Action Plan, progress update, 2019, p.131, available at: <https://www.oecd.org/corruption/acn/OECD-ACN-Georgia-Progress-Update-2019-ENG.pdf>.

⁸⁷ Letter no. SSG 02000020612 of the State Security Service, dated 4 February 2020.

analysis.⁸⁸ An analytical team of the State Security Service of Georgia, for the purpose of informing the leadership in charge of state security matters, carries out systematisation of information and relevant analysis of the situation, predicts threats and elaborates recommendations.⁸⁹

Under the statute of the State Security Service, the major tasks of the Information and Analytical Department of the service is, among others, to collect information from open and covert sources, register and analyse received information and generalise it.⁹⁰

In the legal doctrine, the distinction is made between targeted and untargeted collection of data. During targeted surveillance, a surveillance measure starts with the prior knowledge about a specific person, organisation or the technical characteristics of an object.⁹¹ It is impossible to identify a subject/object in advance during untargeted collection of data.⁹²

The Information and Analytical Department does not have a determined particular area of activity (such as combating corruption, counter-terrorism, etc.). However, given its main tasks, it can be assumed that conducting untargeted collection of data is its main activity. In other words, instead of collecting data from a target, the target is identified as a result of the identification of data.⁹³

In many areas within the Council of Europe, when discussing this method of data collection, it is pointed out that a significant number of Member States do not have any legislation or invoke any excessively obscure and broad legislative regulations as a ground for conducting untargeted, bulk collection of data by security services.⁹⁴ On the other hand, according to the 2016 report of intelligence and security services of Great Britain, bulk collection of data is essential for functionality of these services.⁹⁵

When examining the merits of the case against the United Kingdom, the European Court of Human Rights observed⁹⁶ that bulk acquisition of data in itself does not cause the violation of the Convention but the lack of oversight of the entire selection process, including the selection of bearers for interception, the selectors and search criteria for filtering intercepted communications, and the selection of material for examination by an analyst; and, secondly, the absence of any real safeguards applicable to the selection of related communications data for examination.

⁸⁸ The Report of the State Security Service of 01.08.2015-31.12.2015, p. 21; available at: <https://ssg.gov.ge/uploads/%E1%83%90%E1%83%9C%E1%83%92%E1%83%90%E1%83%A0%E1%83%98%E1%83%A8%E1%83%94%E1%83%91%E1%83%98/SSSG%20REPORT.pdf>.

⁸⁹ Report of the State Security Service of 1.01.2016-31.12.2016, p. 19, see <https://ssg.gov.ge/uploads/%E1%83%90%E1%83%9C%E1%83%92%E1%83%90%E1%83%A0%E1%83%98%E1%83%A8%E1%83%94%E1%83%91%E1%83%98/angarishi2016.pdf>

⁹⁰ See the Statute of the State Security Service (Resolution no. 385 of the Government of Georgia of 30 July 2015), Article 7.e).

⁹¹ The European Union Agency for Fundamental Rights, Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the European Union, 2015, Volume I: Member States' legal frameworks, p. 17.

⁹² *Ibid.*, p. 17.

⁹³ *Ibid.*, p. 18.

⁹⁴ The Council of Europe, Democratic and Effective Oversight of National Security Services, 2015, p.23.

⁹⁵ Government of the United Kingdom, Operational Case for Bulk Powers, 2016, para 1.7.

⁹⁶ *Big Brother Watch and Others v. the United Kingdom*, applications nos. 58170/13, 62322/14 and 24960/15.

It should also be pointed out in the context that, unlike the respective legislation of Great Britain, the legislation of Georgia is not quite clear about this issue. The activities of the Analytical Department and its statute are not accessible for the public and the disproportionate and blanket confidentiality of its activities facilitate the danger of insufficient oversight over the activities of the Analytical Department.

Stemming from the confidentiality of the statute of the Analytical Department and its activities, it is difficult to analyse the functions of this unit. However, the duplication of powers among the agencies is obvious as the State Security Service is also tasked with similar activities, i.e., collection of data and its analysis.

In order to ensure that the department's activities are brought in line with international practice and the case-law of the European Court of Human Rights, it is desirable that the State Security Service carried out untargeted collection of data only in cases strictly determined by law so as to achieve the goals necessary for the existence of a democratic society.⁹⁷

4.8. Cybersecurity

According to the National Security of Georgia on Cybersecurity for 2017-2018, cybersecurity is considered to be an essential part of national security.⁹⁸ A cyber-attack that might cause leaking a state secret poses danger to the country's security and the main task of the State Security Service is to protect the country's security.

Under the legislation in force, the State Security Service, which ensures state security, does not have any powers in the sphere of information and cyber security.⁹⁹ However, according to the 2015 report of the State Security Service, depending on the scale of the threat and the seriousness of potential damage, the service carries out a number of activities to neutralise threats arising in the cyberspace of the country as well as minimising any damage in this regard.¹⁰⁰

The 2018 report of the State Security Service also mentions the cyber threats posed by foreign special services. In particular, according to the report, foreign countries resort to cyber-attacks more actively. Cyber-attacks and cyber intelligence operations carried out by foreign countries' special services and hacker groups controlled by them against governmental agencies and facilities of critical infrastructure constitute another significant threat against the country's security.¹⁰¹

Against the background of the local context, challenges and hybrid war, and considering the keen interest of foreign special services in the Georgian cyberspace, it is clear that the State Security Service

⁹⁷ Daragh Murray and Pete Fussey, Israeli Law Review, Bulk Surveillance in the Digital Age: Rethinking the Human Rights Law Approach to Bulk Monitoring of Communications Data, Cambridge, 2019, p. 59.

⁹⁸ Resolution no. 14 of the Government of Georgia of 13 January 2017, the National Strategy of Georgia on Cybersecurity for 2017-2018.

⁹⁹ An explanatory memorandum on the Draft Law of Georgia on Amending the Law of Georgia on Information Security, p. 1, see <https://info.parliament.ge/file/1/BillReviewContent/232432>.

¹⁰⁰ The 2015 Report of the State Security Service of Georgia, p. 15, available at: <https://bit.ly/2u6qDwo>.

¹⁰¹ The 2015 Report of the State Security Service of Georgia, p. 13, available at: <https://bit.ly/37yDoxc>.

should have a broader mandate in terms of protecting the state's cybersecurity. The annual reports of the State Security Service give an impression that the service undertakes certain measures in this regard. However, this area of activities is not incorporated in its mandate in express terms.

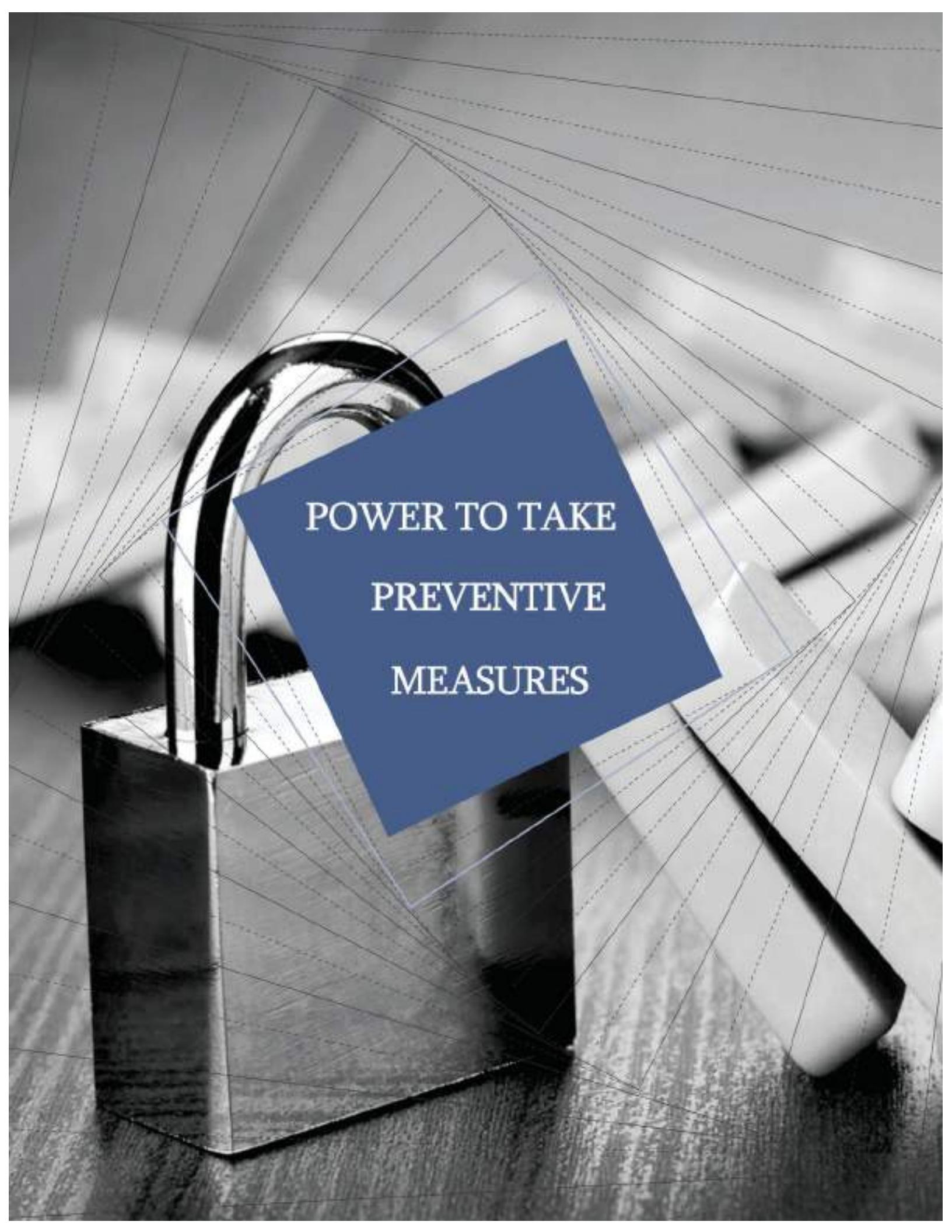
Based on the existing legislative framework, the system has emerged as ineffective with overlapping and duplicated competences where the task of the State Security Service to ensure cybersecurity is ignored. This is further demonstrated by the cyber-attack against Georgian cyberspace that took place on 28 October 2019 when thousands of Georgian websites (including the websites of governmental organisations, private companies, NGOs and media outlets) were hacked. This attack clearly posed a threat to the state's security and proper functioning of public agencies. Under the existing legislative framework, the case falls under the purview of the State Security Service. However, the investigation was instituted by the Ministry of Internal Affairs of Georgia under Article 284.1 and Article 286.1 of the Criminal Code of Georgia.¹⁰²

It is obvious that, in light of its mission, the State Security Service must investigate the largest attack on the Georgian cyberspace that has taken place since 2008. At the same time, any step made in this regard would amount to duplication of actions carried out by the Ministry of Internal Affairs of Georgia as the ministry is in charge of investigating this very attack.

Therefore, the position taken by the Ministry of Internal Affairs of Georgia that the tasks of the State Security Service will never overlap with those of the police due to the different nature of their activities is clearly wrong.¹⁰³ The existing regulations allow the State Security Service to assume police tasks and the police have been tasked to investigate those actions that clearly pose a threat to national security. It is impossible resolve these challenges without legislative amendments.

¹⁰² See <https://police.ge/ge/shinagan-saqmeta-saministros-informatsia-skhvadaskhva-qartul-vebgverdze-gankhortsielebul-kibershetevastan-dakavshirebit-mimdinare-gamodziebis-shesakheb/13097>.

¹⁰³ See the position of the Ministry of Internal Affairs of Georgia at: <https://police.ge/ge/shinagan-saqmeta-saministros-gantskhadeba/8481>



POWER TO TAKE
PREVENTIVE
MEASURES

5. Power to Take Preventive Measures

Preventive measures imply all those activities that contribute to stopping or reducing crime as a social phenomenon.¹⁰⁴ During the implementation of preventive measures, the state expends far less human and material resources than in those cases where legal interests have been already damaged and the state responds to it *post factum*.¹⁰⁵ According to the Crime Prevention Strategy of Latvia for 2014-2017, maximum amount of activities must be carried out for crime prevention for which it is necessary to have sufficient human and financial resources and a long-term strategy.¹⁰⁶ The rationale behind preventive measures is to protect human rights and fundamental freedoms.

One of the tasks of the State Security Service is to implement preventive measures aimed at averting threats to the state.¹⁰⁷ The states studied for the purpose of this research are familiar with vesting security institutions with preventive powers. For instance, the State Security Department of Lithuania has the power to take preventive measures.¹⁰⁸ Taking preventive measures is indeed one of the tasks of the State Security Institutions in Latvia (Constitutional Security Bureau, Defence Intelligence and Security Service and Security Police).^{109&110} In this regard, the Security Police of Latvia has particularly broad competences.¹¹¹ The Internal Security Service has the power to carry out investigative measures.¹¹²

However, large-scale or discriminatory nature of the use of preventive measures should not result in the arbitrariness of law-enforcement agencies. In this regard, it is necessary to determine in express terms the powers of each structure to ensure that the use of preventive measures is proportionate and appropriate for achieving a legitimate aim.

5.1. Problems Related to Taking Preventive Measures by the State Security Service

The State Security Service carries out the following preventive measures: interviewing a person, identifying a person, summoning a person, frisking and examining a person, ordering to leave a place and prohibiting to enter a certain area.¹¹³

When discussing the preventive powers of the State Security Service, our arguments about the service assuming police powers are again relevant. The preventive measures under Article 18 of the Law of

¹⁰⁴ See https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/crime-prevention_en.

¹⁰⁵ LEPL Academy of the Ministry of Internal Affairs of Georgia, Journal no. 1, Police and Security, p. 65.

¹⁰⁶ The State Police of Latvia, Crime Prevention Strategy, p. 2.

¹⁰⁷ The Law of Georgia on the State Security Service of Georgia, Article 13.

¹⁰⁸ The Law on the State Security Department of Lithuania, Article 8.

¹⁰⁹ The National Security Law of Latvia, Article 15.

¹¹⁰ The Law on State Security Institutions of Latvia, Article 2.

¹¹¹ *Ibid.*, Article 15.

¹¹² The Security Authorities Act of Estonia, Article 6.

¹¹³ The Law of Georgia on the State Security Service of Georgia, Article 13.

Georgia on Police and Article 13 of the Law of Georgia on State Security Service of Georgia are almost identical. Consequently, the two units set up for two different purposes are vested with the power to carry out identical actions.

Any procedural action carried out within a criminal case must be entered in the register of criminal cases. This system allows an officer of an investigative body to verify whether a parallel investigation is being conducted by another investigative body and thus avoid waste of state resources. The activities carried out for the prevention of a crime are not registered in this system. Therefore, if the State Security Service duplicates the activities of other investigative authorities by conducting an investigation into a crime, parallel actions taken for the prevention of a crime will go unnoticed not only to the public but also to the bodies conducting these actions.

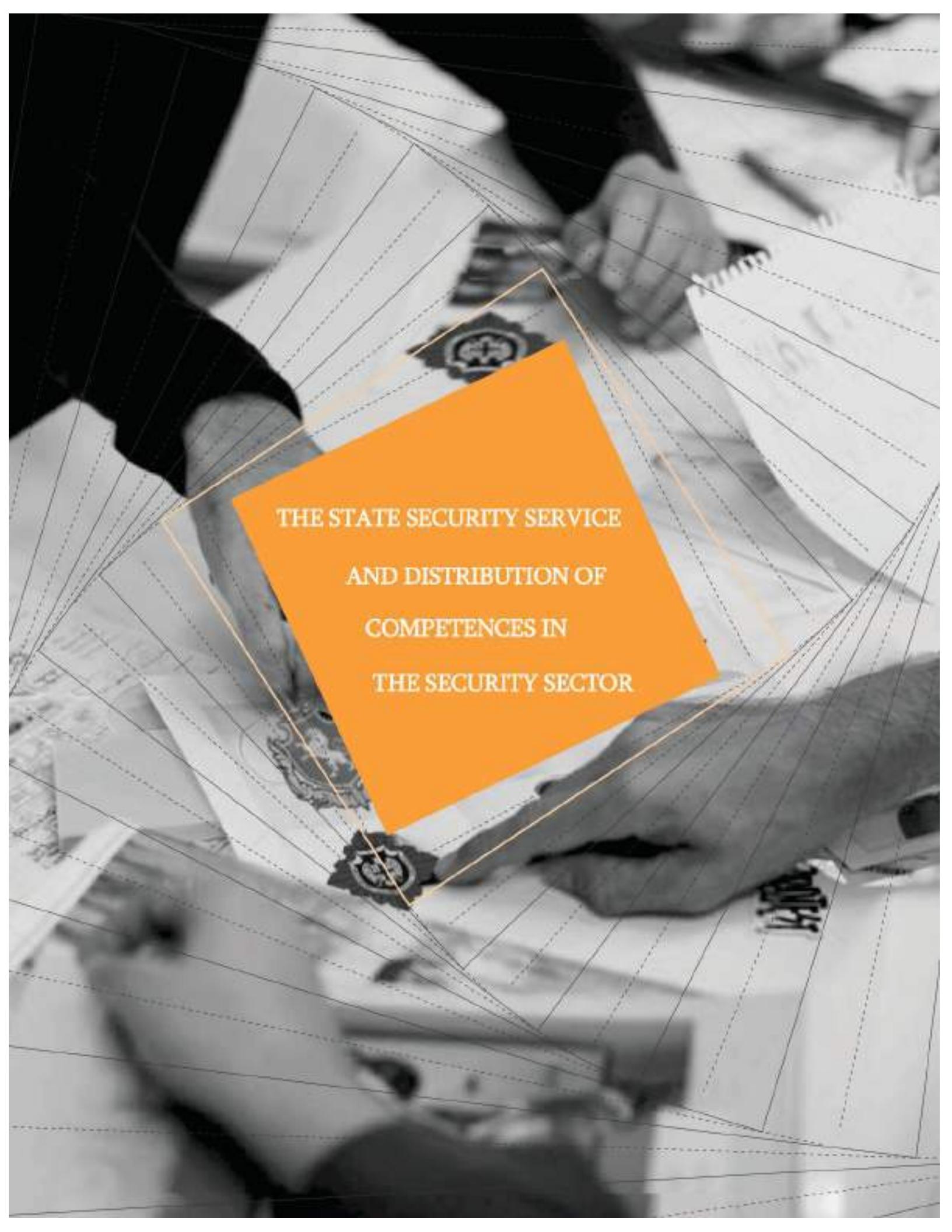
Furthermore, it is worth mentioning that the majority of crimes within the investigative mandate of the State Security Service (such as anti-corruption crimes and crimes against the constitutional order and security of Georgia) are deliberate, serious and, sometimes, particularly serious crimes. Accordingly, the Criminal Code of Georgia penalises the preparation and attempt stages of these crimes. Due to the special danger posed by these crimes to the public, their majority have formal nature, i.e., they are deemed as completed crimes at the inchoate stage – preparation or attempt, irrespective of the result.¹¹⁴

Therefore, it is unclear as to how the State Security Service can carry out preventive measures if the criminal legislation is supposed to apply to these cases. Furthermore, preparations for this crime and attempted crime constitute completed crime *per se*.

For instance, under the Law of Georgia on the State Security Service of Georgia, an officer is entitled to interview a person for the identification of a person if there is a reasonable ground to believe that the person concerned has committed or will commit a crime falling within the competence of the service.¹¹⁵ The analysis of the grounds demonstrates that it is impossible to draw a clear line between preventive and investigative measures. The purpose of a preventive measure is to avert a potential threat or a crime which is proactive by nature, whereas response to an already committed crime is reactive by nature.

¹¹⁴ For instance, Article 223 of the Criminal Code of Georgia (setting up illegal groups and their leadership) or Article 404 (planning or preparing for an act of aggression).

¹¹⁵ The Law of Georgia on the State Security Service of Georgia, Article 14.



The background consists of a large, scattered pile of numerous documents, likely bills or receipts, with faint, illegible printed text and several official seals or stamps visible on the surface.

THE STATE SECURITY SERVICE
AND DISTRIBUTION OF
COMPETENCES IN
THE SECURITY SECTOR

6. The State Security Service and Distribution of Competences in the Security Sector

6.1. The Georgian Intelligence Service

Here, another comment should be made about the terminology. According to scholarly works, intelligence services can be a) domestic, b) foreign, c) military, and d) criminal/police.¹¹⁶ Since the powers of military, internal and foreign intelligence services are not strictly separated in Georgia, for the purpose of this research, we separated intelligence services with internal and foreign mandates (the State Security Service has internal intelligence mandate, whereas the Georgian Intelligence Service has foreign mandate), based on their powers. However, it should also be mentioned that these distinctions are becoming blurred as domestic and foreign intelligence activities increasingly overlap in the 21st Century – particularly when it comes to counter-terrorism.¹¹⁷

Despite the fact that one of the main tasks of state security services is to protect the country from foreign threats,¹¹⁸ The European Union Agency for Fundamental Rights expressly differentiates the working area of intelligence and security services. According to a conceptual clarification, ‘intelligence services’ are agencies focusing on external threats (they have a foreign mandate), while ‘security services’ are agencies focusing, with a domestic mandate, on domestic threats.¹¹⁹

The Georgian Intelligence Service is directly subordinated to the Prime Minister. The service is a special designation agency of the executive, which carries out intelligence activities for protecting national interests.¹²⁰

An intelligence agency and a law-enforcement agency should also be differentiated. The former is tasked to collect information about activities against state interests and the latter seeks to ensure criminal responsibility of respective persons.¹²¹

In 2017, the Government of Georgia submitted a draft law in the parliament, proposing the merger of intelligence and security services. Due to the backlash from civil society, this reform was not accomplished.

¹¹⁶ See Twenty Years Without Parliamentary Oversight – Oversight of the Ministry of Internal Affairs, the State Security Service and the Intelligence Service of Georgia by the Supreme Representative Body, Tbilisi, 2017, p. 17.

¹¹⁷ Greg Hannah, Kevin A. O’Brien, Andrew Rathmell; Intelligence and Security Legislation for Security Sector Reform; Prepared for the United Kingdom’s Security Sector Development Advisory Team, p. 3, see:

https://www.rand.org/content/dam/rand/pubs/technical_reports/2005/RAND_TR288.pdf.

¹¹⁸ The Law of Georgia on the State Security Service of Georgia, Article 5.h).

¹¹⁹ The European Union Agency for Fundamental Rights, Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the European Union, 2015, Volume I: Member States’ legal frameworks, p. 13.

¹²⁰ The Law of Georgia on the Georgian Intelligence Service, Article 2.

¹²¹ See Twenty Years Without Parliamentary Oversight – Oversight of the Ministry of Internal Affairs, the State Security Service and the Intelligence Service of Georgia by the Supreme Representative Body, Tbilisi, 2017, p. 15; see Hannah G., O’Brien K.A., Rathmell A., Intelligence and Security Legislation for Security Sector Reform, RAND, 2005, 9.

Under Article 4 of the Georgian Intelligence Service, the main objectives of the Intelligence Service are to identify domestic threats and risks, providing the public and political officials of the country with necessary intelligence to enable them to take decisions in the political, economic, defence, information, ecological, etc., fields of national security.

Under Article 12.1 of the Law of Georgia on Operative and Investigative Activities, the operative units of the Georgian Intelligence Service have the right to conduct operative and investigative activities within their competences. In this regard, the Georgian Intelligence Service is an exception to some extent. In particular, it has operative and investigative tasks but it cannot conduct investigations.

Operative and investigative activities are mainly aimed at detecting crimes or other illegal acts, preventing and eliminating them, obtaining crucial factual data about a criminal case, identifying a person responsible for the commission of a crime or other illegal acts, etc.¹²² Since the Intelligence Service has no investigative powers, it should be assumed that the service employs these measures for achieving its aims, namely, in political, economic, scientific and technological, military and political, information and ecological spheres as well as for fighting international terrorism within its competences.

Operative and investigative measures are essentially aimed at detecting, preventing and eliminating illegal actions.¹²³ However, the categories of the statutory measures show that operative and investigative activities are also aimed at responding to inchoate or completed crimes and establishing relevant factual circumstances.¹²⁴ Such activities are not related to untargeted collection or analysis of information, which should be the major area of activities of intelligence services.

Furthermore, the duplication of competences with the State Security Service should be pointed out. In general, the line between intelligence services and security service is not very clear since domestic and foreign threats are mostly closely interrelated. It is particularly difficult to separate the tasks after the Intelligence Service was vested with operative and investigative powers. Consequently, there is a risk of the said agencies conducting operative measures regarding the same cases that will result in waste of resources, competition between agencies and confusion of competences.

Since the Intelligence Service has no investigative powers, when it detects through operative and investigative measures an action containing elements of crime, the case-files are forwarded to an agency with investigative powers (in most cases, the State Security Service). The State Security Service has the power to conduct operative and investigative actions and its activities are closely linked to the State Intelligence Service. Therefore, it is not logical for the intelligence Service to conduct any operative and investigative activities in parallel.

To avoid the duplication of powers of the State Security Service and the Georgian Intelligence Service, it is advisable that the power to conduct operative and investigative measures remained only with the

¹²² The Law of Georgia on Operative and Investigative Activities, Article 3.

¹²³ EMC, Analysis of Investigative System, p. 28.

¹²⁴ *Ibid.*, p. 33.

State Security Service. This would contribute to harmonious and complementary operation of the said agencies.

6.2. The Ministry of Internal Affairs

In the Council of Europe's Parliamentary Assembly recommendation, the Assembly proposes that internal security services should not be allowed to run criminal investigations, arrest or detain people.¹²⁵ In light of this recommendation, the mandate of security services in the majority of democratic states is limited to collecting data, processing and disseminating information. They do not have law-enforcement tasks.

Despite the reform conducted in Georgia in 2015, the tasks of the Ministry of Internal Affairs and the State Security Service have not been separated in express terms. One of the tasks of the State Security service indeed is investigation.

In accordance with the Law of Georgia on Police, the police are a system of law-enforcement agencies under the Ministry that exercises executive power. Within the scope of its authority, under the legislation of Georgia, the police carry out preventive measures and respond to offences to ensure public security and legal order.¹²⁶

It should be mentioned that one of the tasks of the State Security Service is carrying out preventive measures.¹²⁷ The types of these measures are almost identical to those determined under Article 18 of the Law of Georgia on Police.¹²⁸

The risk of overlap of powers between these two institutions is further illustrated by the fact that the State Security Service is entitled to use other preventive measures without violating human rights that are not established by law.¹²⁹ This clause significantly increases the likelihood of interference with persons' rights. This is further aggravated by the fact that the grounds for implementing preventive measures are worded in general terms.

6.3. The Prosecutor's Office of Georgia

Under the legislation in force, the prosecutor's office of Georgia is a unified, centralised system that is independent in its activities and shall comply with law. It is inadmissible to interfere in the activities of the prosecutor's office in any manner that may encroach on its independence.¹³⁰

¹²⁵ Committee on Legal Affairs and Human Rights, Control of Internal Security Services in Council of Europe Member States, Doc. 1402, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16689&lang=en>.

¹²⁶ The Law of Georgia on Police, Article 3.

¹²⁷ The Law of Georgia on the State Security Service of Georgia, Article 13.

¹²⁸ The Law of Georgia on Police, Article 18.

¹²⁹ The Law of Georgia on the State Security Service of Georgia.

¹³⁰ The Law of Georgia on the Prosecutor's Office, Article 6.

The prosecutor's office is competent to carry out investigative actions such as investigation of crimes committed by the President of Georgia, a Member of Parliament, a Member of Government, a judge, the Public Defender, the Auditor General and other high-ranking officials.¹³¹ Only a prosecutor of Georgia is competent to institute/discontinue criminal prosecution.¹³² The prosecutor's office provides procedural guidance over investigations; it undertakes full-scale investigation of a crime in the cases prescribed by the Criminal Procedure Code and supports the state prosecution before court.¹³³ The prosecutor's office is also competent to forward cases to respective bodies in accordance with investigative jurisdiction.¹³⁴

Conferring investigative powers to the State Security Service gave rise to a high risk of duplication of powers between these two institutions.

6.4. Other Agencies with Investigative Powers

Under the relevant legislation of Georgia, the following institutions are also vested with investigative powers:

- ✓ The Ministry of Justice of Georgia – Investigators of the General Inspection have the power to conduct investigative actions when an official of the ministry commits a crime under Articles 332-335 and Articles 337-342 of the Criminal Code of Georgia;¹³⁵
- ✓ The investigative unit of the Defence Ministry – the Military Police Department carries out operative and investigative activities and investigation of criminal cases within its competence;¹³⁶ and
- ✓ A designated investigative unit of the Ministry of Finance is a special law-enforcement agency having the status of a public under-agency body. In accordance with legislation, it is tasked to combat crime in the financial and economic spheres, investigate cases falling within its jurisdiction in accordance with the criminal procedure legislation and carry out other activities as determined by the legislation of Georgia.¹³⁷

In some cases, there is confusion over the competences between these institutions and the State Security Service (for instance economic/official crimes) which increases the risks of duplication of competences, unreasonable distribution of resources and abuse of authority on the part of the State Security Service. This situation makes the work of these agencies ineffective and complicates external oversight.

¹³¹ Order no. 3 of the Prosecutor General of Georgia of 23 August 2019, points 2-3.

¹³² The Criminal Procedure Code of Georgia, Article 12.

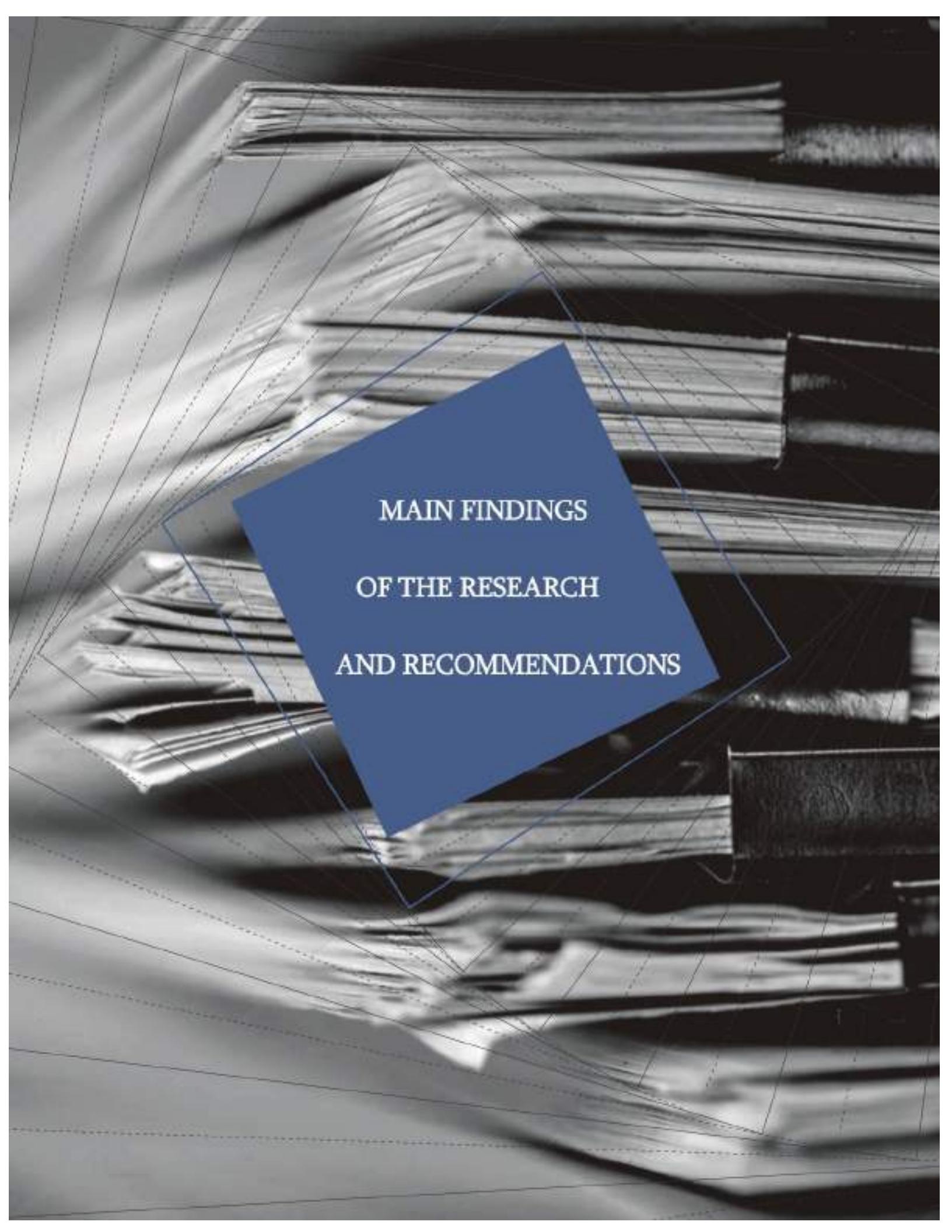
¹³³ *Ibid.*, Article 32.

¹³⁴ *Ibid.*, Article 33.

¹³⁵ See <http://www.justice.gov.ge/Ministry/Index/266>.

¹³⁶ See <https://mod.gov.ge/ge/page/28/samxedro-policiis-departamenti>.

¹³⁷ The Law of Georgia on the Investigative Service of the Ministry of Finances of Georgia, Article 1.



MAIN FINDINGS
OF THE RESEARCH
AND RECOMMENDATIONS

7. Main Findings of the Research and Recommendations

Investigative Mandate of the State Security Service of Georgia

- The rule of distribution of investigative and territorial jurisdiction over criminal cases is deficient. Officers of the State Security Service detecting an act containing elements of a crime cannot render it automatically, without any additional preconditions, the basis for triggering the jurisdiction of the State Security Service;
- Deciding about investigative jurisdiction using this criterion allows the State Security Service to go beyond its mandate and abuse its powers, which contradicts international standards;
- Using the said criterion for investigative jurisdiction causes duplication of tasks of security agencies, which can encourage undesirable competition and cause irrational distribution of resources;
- As opposed to the position expressed by the Ministry of Internal Affairs of Georgia, not only the State Security Service is allowed to go beyond the purpose of its activities and assume police powers, it is also obliged to do so in accordance with the regulations in force;
- The State Security Service investigates crimes, which are not related to the areas of its activities and pose relatively lower threat to the public; and
- For addressing the duplication of powers of the State Security Service and other investigative authorities, it is advisable to task the State Security Service with investigating only those cases that pose/may pose a threat to state security or are related to the areas of its activities.

The Counter-Terrorism Department of the State Security Service

- Despite the clause in the National Strategy of Georgia to Combat Terrorism, there are no representatives of academia or NGOs involved in the fight against terrorism and radicalisation. Similar to the European Union countries, respective normative acts of Georgia also pay particular importance to cooperation with civil society for preventing radicalisation and extremism. For this, setting up a normative framework alone cannot be deemed sufficient. In order to ensure the involvement of the public in the process of preventing and analysing extremism and radical ideology, the service should ensure at least making the basic document public, which is supposed to determine the framework of this cooperation; and
- It can be inferred from the reports of the State Security Service that the State Security Service carries out active surveillance against certain groups based on their religion and origin, which gives rise to a threat of breach of human rights by the service. In order to avoid discrimination on the part of the State Security Service, it is necessary to pay equal attention to all terrorist and/or extremist groups and persons disseminating radical ideologies, irrespective of their religion, origin and place of residence.

- There is a risk that the Anti-Corruption Department might investigate crimes that do not pose essentially any threat to the state security, economy or public interest. For the sake of transparency, it would be advisable that the State Security Service investigated official misconduct only in those cases when the action posed a threat to the national security.

Analytical Department

- The law should govern untargeted collection of data by the State Security Service. There should be a legal basis for the collection of data and this method should only be used to achieve legitimate aims that are necessary for the existence of a democratic society.

Cybersecurity

- The State Security Service should have the appropriate tools in the cybersecurity area, *inter alia*, it should investigate cybersecurity related incidents that pose threats to the country's security. ect

Prevention

- The law should separate in express terms the grounds for instituting preventive measures and investigative actions. To avoid any violation of human rights and unjustifiable interference in their privacy, it should determine under which circumstances a competent agency should use a particular preventive measure.

Georgian Intelligence Service

- To avoid the duplication of powers of the State Security Service and the Georgian Intelligence Service, it is advisable that the power to conduct operative and investigative measures remained only with the State Security Service.