Council of Europe - The Government of The Republic of Georgia - European Union

Expert Opinion

Re.

Supporting the Criminal Justice Reforms – Tackling the criminal aspects of the Judicial Reforms in Georgia

Project ID 2348
on the Legislation on International Cooperation in Criminal Matters

10 June 2020

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I. Introduction

1. This expert opinion is mainly based on the English translation of the *Law of Georgia on International Cooperation in Criminal Matters* of 21 July 2010. The document is the current consolidated version, which includes the amendments and additions introduced by Law n° 671 of 30 May 2013, Law n° 1798 of 13 December 2013, Law n° 3956 of 13 July 2015, Law n° 3138 of 5 July 2018, Law n° 3156 of 20 July 2018 and by Law n° 3803 of 30 November 2018.

The next package of primary sources for this opinion are the English translations of the relevant excerpts of the general legislation of Georgia, i.e. : selected provisions of the *Criminal Procedure Code*, the *Criminal Code*, and the *Civil Procedure Code*.

A third batch of primary sources are the English translations of specific laws or acts or the selected relevant provisions thereof. These are : *The Law on International Cooperation in Law Enforcement* that regulates international police cooperation and two pieces of legislation that regulate international protection (commonly known as asylum), namely the *Law on International Protection* of 1 December 2016 and an excerpt of the *Administrative Procedure Code* (Chapter VII, articles 21^{24} and 21^{25} on 'Administrative Legal Proceedings Concerning an Application for International Protection or for Granting Asylum') and one piece of legislation that is of an "institutional" or "organic" nature, namely the *Organic Law of Georgia on the Prosecutor's Office* (Chapter VII, article 30 on international cooperation).

2. This report does not regard language issues as such. My experience in the field of international cooperation in criminal matters learned that translations, especially translations of legal texts are never flawless. The translation of certain Georgian legal terms and concepts may have an effect on the understanding of the legislation and the meaning of some of its provisions.

I have tried, insofar as possible, to avoid any kind of misinterpretation. If certain terms or phrases seemed unclear to me, I have indicated this explicitly. Where needed, supplemental questions were raised in order to resolve these issues before the final report was submitted. Under II.D a general remark to that end is made. The remark is limited to certain wordings that have or may have important legal consequences. The basis for the report is the translated legislation as it stands, combined with my knowledge of the subject, especially of the international instruments that regulate international cooperation in criminal matters with regard to Georgia. These instruments are already available in official English language versions or official translations provided by the Georgian stakeholders.

3. As to the international instruments, the main reference point is of course the Council of Europe's framework of instruments in the field of international cooperation in criminal

matters[1]. Both the binding - the Conventions and where applicable, the Protocols thereto - and the non-binding instruments have been taken into account. Furthermore, in some cases the explanatory reports to the binding instruments and other sources have been taken into account. The latter are mostly, if not exclusively gathered from the PC-OC website.

4. "It takes Two to Tango" as they say. The expression fits international cooperation in criminal matters. In international cooperation it may even happen that more than two Parties are involved. The Alpha and Omega of this opinion is the *international perspective*. A law on international cooperation in criminal matters is at least in my view, is not a purely domestic matter. Legislation on international cooperation in criminal matters is the *hyphen* between the international instruments and domestic criminal (procedure) law and other domestic legislation that affects international cooperation, such as legislation on international protection. A dedicated law regulating international cooperation is the legal place where the Parties meet and, beyond the realm of conventional cooperation, where States meet.

A 'proper' law on international criminal matters should thus try to be modest in its demonstration or projection of domestic legal requirements on the international legal forum. Quite on the contrary : such a law or legislation should reach out to what was negotiated and accepted at the international level, even in the broadest sense when there is no 'direct' international instrument or a 'direct' Treaty provision available for a given situation. The domestic legislation is thus the *facilitator* to ensure the proper application of conventional, Treaty and – soft – comity obligations, *while* respecting the fundamental principles of the domestic legal system.

5. The method used to assess the Georgian law and legislation on international cooperation in criminal matters boils down to trying to answer one simple question : does the Georgian legislation create *limitations* to cooperation that are not covered by the instruments or no longer compatible with established practice within the conventional framework. Given the point of view set out above, the law cannot and should impose unilateral obligations to the – even hypothetical - requesting Party. In the end, such limitations do backfire : limiting cooperation to others is limiting cooperation for oneself.

Just one, unfortunately real, example. It does not concern Georgia, so it should not be seen as a preliminary critical note. Nationality is for most of the Parties to CETS n° 024 an mandatory ground for refusal of extradition. Most Parties, Belgium included, have a strict nationality exception to extradition, usually inscribed in domestic (extradition) legislation or even in the Constitution such as in Germany. However, one or perhaps more Parties to CETS n° 030 consider nationality also as a ground for refusal for some types of *mutual legal assistance*,

[1] For the Council of Europe's instruments. All relevant information can be found on the Treaty Office website: www.conventions.coe.int. The primary source for all 'secondary' information, i.e. detailed information about the functioning of both the binding and the non-binding the instruments, is retrieved from the Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters website : www.coe.int/t/DGHL/STANDARDSETTING/PC-OC .

such as the interviewing (questioning) of suspects that are nationals of the requested Party. This is a reality that is not even grounded in domestic legislation and, moreover, not reflected at the international level by a reservation or a declaration that is - de facto and de jure – a reservation. This is a hidden limitation, grown out of practice and from the onset most likely, out of political considerations. In any case, such a limitation goes far beyond what is excluded, let alone what is perfectly permissible in accordance with the Convention. In this example, domestic regulations - the word *legislation* is not applicable - serves as a 'blocking statute', or rather a 'blocking practice' that is a de facto blatant denial of cooperation, that is incompatible with the instrument. The absence of reciprocity may backfire at some point in time, since requesting Parties that were confronted with such a roadblock, may apply a similar restriction when confronted with a similar MLA-request from that Party.

Essentially, domestic legislation should allow - to the greatest extent possible - the wide variety of cooperation tools and options that are currently offered to the Council of Europe Member States and beyond this realm, the Parties. The law cannot cross the borders of the conventional framework, but at the same time, it should not limit itself to do anything *less* than the conventional framework in the widest sense of the word allows for. In that respect, domestic legislation should allow cooperation *even without a Treaty basis*.

From this point of view, I have compared the ICCM-Law and the surrounding legislation against the background of the relevant Council of Europe instruments. In some cases, references are made to binding international instruments of other fora, especially the Conventions of the United Nations Office for Drugs and Organized Crime (UNODC). These instruments may be the sole conventional basis for cooperation when there no bi-or multilateral instrument available.

As a final general remark, the importance of the *reservations and declarations* to the Council of Europe's *instrumentarium* should not be overlooked. For ease of use, I have compiled all the reservations and declarations that Georgia as made to all the relevant instruments in one single WORD-document (attached as an annex).

Reservations and declarations reflect the limits of domestic legislation onto the international level of obligations. The (partial) exclusion of the application of a certain provision or even a whole part of a Convention or an Additional Protocol, is based upon domestic requirements and limitations. The main question is whether the reservation was made cautiously, meaning not in such a way that international cooperation is limited, made more difficult, to such an extent that the conventional obligations are almost or even completely eradicated.

When comparing domestic law, especially the law or laws that regulate international cooperation in criminal matters, to a *hyphen* between international and domestic law, I also mean the wording of the reservations and declarations since these constitute the necessary second hyphen or maybe rather the bridge between the domestic and the international level. The latter is in principle common to all the Parties.

Reservations and declarations are never cast in stone, ready to withstand eternity. They are always made at a certain time and in a certain political constellation. Time and politics always change. Reservations made 20, 10 or even just a couple of years ago may be outdated and even contrary to today's legislation.

In that respect I see it as an obligation to refer – in fact *again* - to the PC-OC's initiative to request all Parties to the Conventions and the Protocols under the remit of the PC-OC, *to review their reservations and declarations*. The Committee found that, apart from some rare exceptions, none of the reservations and declarations were ever updated or, where necessary, withdrawn. I refer to PC-OC document PC-OC/Docs 2018/ PC-OC (2018)10, dated 31 October 2018[2] and the Chair's letters that were send out to the Parties' Central Authorities.

6. The report is further structured as follows : Under II, the international framework and first impressions are provided. This part is based upon the structure rather than the content of the legislation. This part is focused on the basic principles of the ICCM-Law and other relevant legislation where needed, 'as a whole' and offers a preliminary and broad evaluation. This section is further divided into comments on the international framework that applies to Georgia (II.A), the comprehensive nature of the ICCM-law (II.B), the overall structure of the ICCM-law (II.C) and the inevitable translation issues (II.D).

Under (part) III, the different Chapters of the ICCM-Law are discussed in detail, where necessary, other related legislation is incorporated in the analysis. This section is subdivided into a general comment about the structure of each Chapter. From Chapter II, the recurrent subdivision per Chapter is : A, the international framework, B, the domestic legislation, which includes a table where the articles are listed, briefly described and brief comments are added. subdivision C contains more elaborate comments to some of the provisions.

(Part) IV concludes the opinion by providing an overview of the main suggestions for eventual amendments or changes to the legislation.

The report contains limited references to sources, either in the text or in footnotes. The basic sources of the international instruments are always the websites of the Council of Europe or the UNODC.

7. Last but not least, I wish to express my gratitude to the Council of Europe, the European Union and the Georgian Government for their generous joint offer to involve me in this project.

My special thanks to the people in charge of the project, Giorgi Giorgadze, Mahir Mushteidzada**,** Ana Medarska-Lazova and Valentina Boz of the Council of Europe, Irakli Chilingarashvili, Head of Legal Support Department, General Prosecutor's Office and Georgia's representative in the

[2] PC-OC website : https://rm.coe.int/ref/PC-OC(2018)10-rev.

PC-OC. I also thank my Georgian colleagues of both the General Prosecutor's Office and the Ministry of Justice with whom I have the privilege to cooperate.

On May 15, 2020 a draft of this opinion was forwarded to the key people involved in this project. My special thanks to Irakli Chilingarashvili for his valuable comments to the draft.

II. The International Framework and First Impressions

II.A. The International Framework

8. Georgia is a Council of Europe Member State since 24 April 1999 and Party to most CoE Conventions and Protocols in the field of international cooperation in criminal matters. Apart from the Conventions under the remit of the PC-OC, The same applies to the UNODC Conventions.

As for the CoE Conventions and Additional Protocols that have not yet been signed or ratified by Georgia, the list is fairly short. Georgia is not a Party to the *European Convention on the Transfer of Proceedings in Criminal Matters* of 15 May 1972 (CETS n° 073). The *Third Additional Protocol to the European Convention on Extradition* of 10 November 2010 (CETS n° 209) was signed but is not yet ratified. The *Fourth Additional Protocol to the European Convention on Extradition* of 20 September 2012 (CETS n° 212) is not yet signed. The same applies for the recent *Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons* of 22 November 2017 (CETS n° 222).

Georgia is party to most other Conventions of the Council of Europe that have an influence on international cooperation in criminal matters or that contain provisions on ICCM, but are not within the remit of the PC-OC. The most important ones to mention here are the *European Convention on the Suppression of Terrorism* of 27 January 1977, CETS n° 090 and the *Protocol amending the European Convention on the Suppression of Terrorism* of 15 May 2003, CETS n° 190 ; the *Criminal Law Convention on Corruption* of 27 January 199, CETS n° 173 and the Additional Protocol to the Criminal Law Convention on Corruption of 15 May 2003, CETS n° 191 ; the *Convention on Cybercrime* of 23 November 2001, CETS n° 185.

More recent Conventions such as the Council of Europe *Convention on the Manipulation of Sports Competitions* of 18 September 2014, CETS n° 2015 have been signed but not yet ratified.

9. Multilateral instruments have the inherent disadvantage that they require *reservations and declarations* in order to each Party. In fashionable words: multilateral Conventions are like prêt-à-porter, bilateral instruments are made-to-measure. In order to 'fit' a multilateral instrument into the domestic legal system, Parties need to express their adaptations via their reservations and declarations. Through the reservations and declarations, the Parties are able to assess what can be requested and obtained, i.e. what can be expected from the other Parties. As stated in the introduction, it is therefore very important to make precise reservations and declarations and to review these periodically in order to keep the reservations and declarations in line with changes into the domestic legal system, even if these changes have a purely

institutional character – such as the establishment of a new central authority or the change of the competence of authorities that play a role in international cooperation in criminal matters.

10. Recently, there has been a shift, basically a different "division of labor" between the Prosecutor's Office and the Ministry of Justice in Georgia. The *Organic Law of Georgia on the Prosecutor's Office* n° 3794 of 30 November 2018 (consolidated version), in particular art. 30 defines the Public Prosecutor's Office's role in international cooperation. The PPO is explicitly competent for outgoing and incoming MLA, parts of the extradition process (as for incoming extraditions, the PPO deals with the admissibility stage of the extradition procedure), the transfer of proceedings[3], transnational confiscations and asset sharing (art. 30.4). Under art. 30.5 & 6, the PPO has the competence to conclude individual agreements with its foreign counterparts when there is no bi- or multilateral Convention or Treaty available for international cooperation in criminal matters.

11. Georgia's network of *bilateral instruments* is rather limited. According to document PC OC INF 8 rev.7 of 30 October 2018[4], Georgia has concluded 7 bilateral extradition conventions or Treaties (an extradition Treaty with the United States is being negotiated or has been negotiated recently), 8 MLA conventions, 5 Conventions regarding the transfer of proceedings and 3 Conventions on transfer of sentenced persons. Further details are provided in Part III, for each of the subjects.

12. Modern multilateral instruments can also be used to supplement and thus informally and indirectly *modernize* old(er) bilateral instruments. In an increasingly shrinking world, cooperation with third States, often States with which one has never cooperated before, becomes an inevitable necessity. In those cases the UNODC instruments prove to be increasingly valuable since they provide the only available legal link with the (to be) requested State. The ability to use the UNODC and other UN instruments as a *subsidiary basis* for international cooperation is the key to add modern types of criminality to old(er) bilateral instruments that often contain a limited list of offences for which extradition and / or mutual legal assistance can be allowed. Older Treaties containing such a list, instead of a penalty threshold, do not allow cooperation for (later) 20th or 21st century crimes such as diverse forms of transnational organized crime, money laundering or cybercrime. Via one or more UNODC instruments, the 'obsolete' bilateral Treaty can be supplemented and still serve as a basis for cooperation.

[3] Since Georgia is not Party to CETS n° 073 – see below, III, Chapter IV (ICCM-Law). It is thus more correct to use the term 'laying of information' in the meaning of art. 21 CETS n° 030.

[4] https://rm.coe.int/08inf-bil-rev-7-list-of-bilateral-and-multilateral-treaties-binding-co/16808ea888.

The UN instruments typically contain a *soft obligation* ("may") to "consider this Convention the legal basis for extradition in respect of any offence to which this article applies", if a State Party makes extradition conditional on the existence of a treaty – see for example art. 16.4 UNTOC[5]. The United Nations Convention against Corruption (UNCAC, 31 October 2003) and the United Nations United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, amongst others, contain similar provisions. Most Parties to the UNODC Conventions do consider these instruments as a sufficient basis for extradition or other types of cooperation in the absence of a dedicated (extradition) Treaty or Convention. Usually an ad hoc – diplomatic - reciprocity declaration or guarantee is required.

13. Lastly, a rather fast and effective way to dramatically increase the network of conventional ties with other States is to consider *acceding to multilateral instruments of intergovernmental organizations in other geographical regions*. As an example, the Conventions dealing with international cooperation in criminal matters of the Organization of American States (OAS), - the American 'equivalent of the Council of Europe' - are worth mentioning[6]. For instance the *Inter-American Convention on Extradition* (Caracas, 25 February 1981), the *Inter-American Convention on Mutual Assistance in Criminal Matters* (Nassau, 23 May 1992), the *Optional Protocol* thereto (Managua, 6 November 1993) and the *Inter-American Convention on serving sentences abroad* (Managua, 9 June 1993) are open to accession by third States. Acceding to these instruments saves considerable time and effort (and money) to negotiate bilateral instruments with each of the current 35 North, Middle and South American States that are members of the OAS. In one stroke, any third State can establish modern mutual legal assistance relations with potentially dozens of new States and / or modernize existing old-fashioned bilateral instruments. For example, the Czech Republic and Saudi Arabia have actually acceded to the *Inter-American Convention on serving sentences abroad*. This instrument allows both non-American States to either transfer sentenced persons or transfer the execution of sentences (involving deprivation of liberty) to and from the other 15 Parties to this Convention, without having to go through 15 different bilateral negotiations.

II.B A Comprehensive Law

14. The Georgian ICCM-Law provides a *comprehensive legal basis* for international cooperation in criminal matters. This is already clear from the title of the Law.

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[5] *United Nations Convention against Transnational Organized Crime* (and the Protocols thereto), Palermo 15 November 2000 – see www.unodc.org.

[6] See www.oas.org/DIL/treaties .

The comprehensive character is certainly one of the positive key features of the law. Too often, domestic legislation in the field of international cooperation regulates only certain aspects of cooperation, e.g. only extradition or just mutual legal assistance etc. In other states, some forms of international cooperation in criminal matters is regulated in general legislation. The French extradition legislation is ^part of the Criminal Procedure Code. Domestic legislation often offers a fragmented regulation or rather a sequence of fragmented regulations of ICCM. Even if the available legislation is limited to one single type of cooperation, it is more than advantageous to be able to "fall back" on an all-encompassing domestic law.

15. For practitioners, it is essential to be able to see 'the whole picture' and to be able to choose, at the appropriate time and in accordance with the circumstances, the appropriate form of cooperation. International cooperation in criminal matters is increasingly a matter of combining different types of cooperation during the course of a case. Mutual legal assistance in all its varieties and subtypes (e.g. temporary transfer of a detained person, notification of legal documents, …) is most often if not exclusively used in the pre-trial stage. The same is often the case for extradition. During the trial stage supplemental mutual legal assistance may be required, for instance to assure the presence of witnesses or experts at the trial. In the post-trial stage, again an extradition might be needed, the transfer of the execution of sentences, including of fines or confiscation measures may be required. During any given stage of the proceedings, a prosecution service may well be confronted with a combination of, for instance, mutual legal assistance and extradition or there may be a moment at which a choice must be made between extradition and the transfer of the proceedings or the transfer of the execution of the sentence, e.g. when nationality is a bar to extradition. In organized crime or terrorism cases – the two may well be combined – international cooperation is a matter of four, five or more States cooperating. Multiple jurisdiction conflicts may arise which means that intense coordination in an early stage, as early as in the law enforcement (police) cooperation stage of the investigation. One may expect an increasingly complex reality for the years to come.

This new complexity is already a daily reality. One recent and *additional* cause is the *Petruhhin* judgment of the Court of Justice of the European Union (CJEU), Case C-182/15, 6 September 2016. The judgment *potentially protects* EU-citizens from extradition to third States. Although the judgment regards the application of EU-law, more precisely articles 18 (non-discrimination on the grounds of nationality) and 21.1 (free movement and residence of citizens of the EU within the EU) of the Treaty on the Functioning of the European Union (TFEU), it affects the rest of the world. If Georgia requests the extradition of Dutch national from Belgium, then *Petruhhin* requires Belgium to *inform* the Netherlands about the existence of the Georgian extradition request. The Netherlands may then decide to prosecute their national for the offences allegedly committed in Georgia (for which the extradition was requested) and, to that end, transmit a European arrest warrant to Belgium. The application of *Petruhhin* may

lead to a switch from extradition proceedings between Georgia and Belgium to a *transfer of the proceedings* or *laying of information*, between Georgia and The Netherlands. Next to this switch, the extradition between Georgia and Belgium also changes into a European arrest warrant procedure between The Netherlands and Belgium. The Netherlands will be unable to even start the prosecution against their national without a minimum of evidence that is inevitably located in Georgia. It should be underlined that the obligation *Petruhhin* has created is limited to a mere obligation of the requested EU Member State to *inform* the EU Member State of the nationality of the person sought. In practise, this information is a rather simple notification, a one-page letter, containing just the essence of the extradition request - the 'who and what (for)'. According to informal EUROJUST and EJN guidelines[7], the 'Petruhhin-notification' should be done as soon as possible, meaning shortly after the provisional arrest. In that stage, the extradition request is not even available, which means that the content of the notification is identical to the INTERPOL Red Notice or the Schengen Information System *Sirene* notification from Schengen-associated States such as Switzerland.

16. The ICCM-Law is a (very) recent law, dating from 2010 and has been regularly updated, namely in 2013 and twice in 2018. This is a second positive characteristic. Domestic legislation inevitably needs constant updating in a fast changing world. As the ICCM-Law stands today, it accommodates the whole range of forms of ICCM. For the (near) future, the Law will most likely require an update to accommodate specific forms of cooperation in the field of cybercrime. Since the Cybercrime Convention (2001) contains fairly general provisions on ICCM, the outcome of the negotiations of the Second Additional Protocol to the Cybercrime Convention have to be awaited. The drafts thus far show that the future Protocol will indeed dedicate most of the text to ICCM provisions.

17. As to the basic principles, the ICCM-law is limited to *horizontal cooperation*, i.e. between Georgia and other States. Vertical cooperation between Georgia and the International Criminal Court is explicitly excluded. Article 1.2 refers to the Rome Statute of the International Criminal Court and the Law on Cooperation of Georgia with the ICC.

The wording gives rise to a couple of questions. The exclusion of vertical cooperation does not mention any other – other than the ICC - existing or future International Tribunal or Court or a 'mixed' construction that deals or may deal with genocide, war crimes or crimes against humanity. I refer to the *International Residual Mechanism for*

[7] EUROJUST, 'Briefing Note on the *Petruhhin* judgment (Case C-182/15) and the role of Eurojust', 19 April 2017, 7 pages and European Judicial Network, 'Conclusions of the 48th Plenary Meeting of the European Judicial Network', 29 and 30 June 2017 in Malta, 25 September 2017, point 2. See also the EUROJUST booklet *Case Law of the Court of Justice of the European Union on the European Arrest Warrant*, 15 March 2020, p. 81-83.

Criminal Tribunals - incorporating the remaining functions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the *Residual Special Court for Sierra Leone* and the *Special Tribunal for Lebanon*.

Secondly, it seems that horizontal cooperation regarding such crimes is indeed possible on the basis of the ICCM-Law. If Canada requests mutual legal assistance regarding an alleged Serbian war criminal, I assume that that MLA-request will be handled according to the ICCM-Act.

A third remark is the eventual cooperation between Georgia and the *European Public Prosecutor's Office* (EPPO). For the time being the legal basis for such cooperation is still very much unclear. At the EU-level and the Council of Europe level, discussions are ongoing to – for example – allow the EPPO to accede to some of the CoE instruments, such as the MLA-Convention CETS n° 030 and its Additional Protocols.

18. Article 2 'Legal basis for international cooperation in criminal matters' of the ICCM-Law starts off with the principle "no cooperation without a Treaty" (the wording 'international agreement' is used in the English translation), but in art. 2.1 an opening is made to allow international cooperation on the basis of either an *individual agreement* or the principle of *reciprocity*, i.e. whenever a conventional or Treaty basis for cooperation is lacking.

If mere reciprocity applies, all forms of cooperation are possible, except for extradition, as regulated in chapter III ICCM-Law and for international enforcement of judgments, basically the transfer of the execution of sentences, regulated in Chapter VI – see art. 2.3. Reciprocity is then conditional to the adherence of the minimum guarantees established by the ICCM-Law. Even higher standards to assure fundamental rights standards can be defined, or rather required from the requesting State (art. 2.4).

In case an individual agreement applies, the same or a similar set of additional conditions applies. The individual agreement must contain the minimum guarantees of the ICCM-Law and again, if needed, higher standards may apply (art. 2.5).

The term 'individual agreement' cannot otherwise understood as an agreement with a State with which no bi- or multilateral Convention or Treaty is concluded, having the character of a *Memorandum of Understanding* or similar diplomatic or semi-diplomatic 'ad hoc instrument'. Such an 'agreement' is clearly, or at least appears to be made for one specific case. The binding nature of such an ad hoc agreement is clearly not at the same level as a Treaty or a Convention.

The above is arguably the best feature of the general principles of the ICCM-Law. The Georgian ICCM-Law allows to a very large extent cooperation outside the realm of

conventional or Treaty-based cooperation. The layered system on the basis of an internationally binding instrument, cooperation on the basis of reciprocity or cooperation on the basis of an individual (case-by-case) agreement, the latter with only two exceptions, allows for flexibility and thus a maximum *reach* of cooperation. At each of the alternatives, a sufficient minimum level of "domestic protection", in a layered fashion, is attached. The "widest possible cooperation" has indeed its ultimate limits. These limits are by themselves less "domestic" as it seems because ultimately they boil down to the fundamental rights and liberties as proclaimed in the European Convention on Human Rights.

II.C. The Structure of the ICCM-Law

19. Looking at the overall *structure* of the law. The ICCM-Law contains 8 parts and 57 articles, however later amendments and additions (from 2013 and 2018) are numbered with superscripted numbers, for example article 12^1, in reality there are thus 72 articles.

- Chapter I contains the *general provisions*. This part is made up of 4 articles ;
- Chapter II regulates *Mutual Legal Assistance* (the title is "judicial cooperation") contains 13 articles, from article 5 to 12^1 ;
- Chapter III regulates *Extradition*. There are 23 articles, numbered 14 through 36;
- Chapter IV, is called "Transmitting criminal case files" and is about the *transfer of proceedings*. There are 6 articles, 37 through 42 ;
- Chapter V, regulates the *transfer of sentenced persons*. This part contains 4 articles, 43 – 46 ;
- Chapter VI regulates *transfer of the execution of sentences* and contains 10 articles, 47 – 56 ;
- Chapter VI^1 is one of the most recent additions (inserted by Act n° 3156, 20 July 2018) and deals with "International cooperation in the sphere of property seizure". This part contains 9 new articles, numbered 56^1 through 56^9.
- Chapter VII *Final Provisions* consists of one single article 57, simply stating that the Law enters (*entered* to be more correct) into force on 1 October 2010.

20. The structure of the ICCM-Law is clear and consistent as a proper comprehensive ICCM-Law should be. At this point, I do not see any reason to change the structure. The

system of new laws to amend the ICCM-Law by inserting articles with superscripted numbers or an even entire Chapter (VI[1]), is probably the easiest way to amend laws. I assume that the development of new instruments in the field of ICCM with regard to cybercrime will require inserts of new articles both in the ICCM-Law and in the *Law on International cooperation in Law Enforcement*.

II.D. Regarding the English Translation(s)

21. As indicated above, I have to rely on the English translation of the ICCM-Law and the English translations of the surrounding legislation or the relevant provisions thereof. As a general remark, I noticed that in many provisions English terminology is used that is inconsistent with generally accepted terminology. For instance under Chapter III on extradition, the translation mentions consistently 'remand' and 'preventive measure(s)' instead of 'provisional arrest' as regulated in art. 16 of the European Extradition Convention (CETS n° 024). 'remand' is the (English, UK) term for pre-trial detention in a purely domestic context. In extradition proceedings when the wanted person is provisionally arrested or afterwards, detained for the (sole) purpose of extradition, the deprivation of liberty has a strict sui generis meaning as indicated in art. 5.1 f) ECHR and, accordingly, a quite separate domestic legal basis. Another example of incorrect translation is the consistent use of the word 'seizure' throughout Chapter VI[1], when clearly 'confiscation' is meant. The title of this Chapter is rather confusing : "International cooperation in the sphere of property seizure". Apart from the term 'seizure', a title that would reflect the content, would rather be "International cooperation for the purpose of (or regarding) search, seizure and confiscation of proceeds of crime". Language issues are also evident in some of the other laws that are related to ICCM (or excerpts thereof). For example, the title of the "Law (of Georgia) on International Cooperation in Law Enforcement" would be better rephrased as "Law on International Law Enforcement Cooperation". There are some other examples that create or may create confusion. Where necessary, they are mentioned in Part III below.

III. Analysis and Specific Comments

Chapter I : General Provisions

22. Apart from the preliminary remarks – and appraisal – see above, Part II.B, there is not much comment to be added to Chapter I.

Except regarding art. 3 regulating the 'Communication channels and means of communication'. For the future, the – secure - electronic transmission of any kind of requests will be a standard feature of ICCM. The past years, INTERPOL is trying to set up the legal and logistical structures to enable the secure electronic transmission of extradition and MLA-requests. These projects, E-Extradition and E-MLA, were discussed within the PC-OC. The INTERPOL communication network is an established system that offers proven reliability and security. It is logical step to open up the network to judicial cooperation. IBERRED, the judicial network of the Spanish and Portuguese speaking countries in Europe, Middle and South America and Africa, is also working on a secure system for judicial cooperation. In a first step a broad convention is drafted and signed that regulates only the communication and transmission side of ICCM. Such an instrument has the tremendous advantage that is applies to any current and future type of ICCM, avoiding dedicated provisions for extradition, MLA, etc. The ICT-infrastructure is based upon the proven national database system used by the Spanish notaries. These projects merit a close following up and a reflection on future domestic use. In that respect, it should be noted that, if Georgia intends to sign and ratify the *Fourth Additional protocol to the European Extradition Convention* (CETS n° 222), article 3 should be adapted accordingly. Again, at the time of the ratification, eventual reservations and declarations should be carefully considered before they are submitted to Parliament.

Chapter II : Mutual Legal Assistance

23. Chapter II consists of 13 articles, 5-13, including the more recently (2013 & 2018) inserted articles 6^1, 7^1, 9^1 and 12^1.

II.A. *The International Framework*

24. Council of Europe : CETS n° 030, CETS n° 099 & CETS n° 182.

25. Reservations and Declarations[8]

Georgia made the following reservations and declarations to CETS n° 024 :

[8] See CoE, PC-OC website & (referring to) CoE, Treaty Office website.

Regarding art. 2 : optional grounds for refusal if, (a) "criminal proceedings have been instituted in Georgia for the offence in respect of which assistance is requested" and (b) "if the offence in respect of which assistance is requested has already been tried by a court of law and the judgment has entered into force."

COMMENT : *The reservation under littera (b) is essentially an application of the ne bis in idem principle to MLA. Ne is in idem in this particular context refers to the identity of offences and not to the identity of (f)acts, unless the translation is incorrect. CETS n° 030, nor the Protocols thereto mention ne bis in idem as a mandatory or an optional ground for refusal. Nothing prohibits a Party to start an investigation and even prosecution of offences an to that end request MLA from another Party, even if the latter Party did render a final verdict re. the same offences (or acts of facts for that matter).*

With respect to art. 5, Georgia declared that MLA-requests for the purpose of search and seizure are dependent on the conditions of art. 5 §1, 'a', 'b' and 'c'.

Comment : *This reservation is quite 'traditional' since many Parties to CETS n° 030 have made a similar or even an identical reservation. Art. 5 CETS n° is a relic from the past, insofar it connects MLA to extradition (CETS n° 024). Before CETS n° 024 came to being, MLA was a mere annex of extradition as old, mostly 19th century extradition Treaties testify. MLA (the old wording 'letters rogatory' was still in use) was nothing more than the extradition of objects, (potential) evidence that went alongside the extradition of the fugitive suspect or sentenced person. Since 1959, MLA is an independent form of ICCM, regulated by different conditions and grounds for refusal than those that apply to extradition.*[9] *In that respect one may ask the question whether the possibility, by making a reservation, to "reconnect" MLA to extradition – for the purpose of house searches and seizures – is still valid in the 21st century. It would be more appropriate to declare that MLA aiming at the execution of coercive measures is limited to the offences with a certain minimum level of seriousness, i.e. in terms of maximum penalty. The limitation to house search and seizure is as such outdated since many other 'technological' coercive measures exist, for example wire taps, including the real time tapping of electronic communication.*

On the transmission of MLA-requests, Georgia declared that the Ministry of Justice is the central authority (art. 15).

As for the language regime, Georgia declared that MLA-request must be in (translated into) either Russian or English.

[9] See CETS n° 024, *Explanatory Report*, p. 1-2 on the history of the creation of the Convention : "It was decided that such assistance should be *independent of extradition* in that should be granted *even in cases where extradition was refused*." – italics added.

Georgia defined the "judicial authorities", as the Constitutional Court, the courts of common jurisdiction and the General Prosecutor's Office, under art. 24.

Under CETS n° 099, Georgia declared that "(…) that until the full jurisdiction of Georgia is restored on the territories of Abkhazia and Tskhinvali Region, it cannot be held responsible for the violations on these territories of the provisions of Additional Protocol."

Under art. 8 (alleviating the fiscal offence exception), in particular with respect to art. 8.2 a), Georgia made the execution of MLA-requests re. fiscal offences dependent on the condition that the offence or its punishment is known to the Georgian legislation.

COMMENT : *This is basically the application of the double criminality condition. Furthermore, MLA-requests for the purpose of the execution of search and seizure re. fiscal offences will not be executed*.

As for art. 8.2 b), Georgia reserves itself the right not to accept the binding force of the provisions of Chapter II.

COMMENT : *Chapter II of CETS n° 099, consists of article 3, that enlarges the field of application of Chapter III of CETS n° 030, essentially the service of documents provisions (art. 7 and following), to the service of : a. documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings and b. measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement*.

From a recent discussion with Israel following their ongoing evaluation of the reservations and declarations to the CoE instruments Israel is Party to, I understood that Chapter II of CETS n° 099 has indeed a very limited added value in practise. The service of documents related to the execution of a sentence to a fugitive is normally not possible. Fugitives tend to be difficult to find and if found, an extradition request is the first action to be taken. In other situations, a notification before securing the sentenced person may well be an incentive to abscond again. In reality, Chapter II of CETS n° 099 is hardly used.

As for CETS n° 182, Georgia made the following reservations and declarations :

Regarding art. 4 on channels of communication (replacing art. 15 of CETS n° 030), Georgia declared that it maintains the direct transmission / communication between the central authorities, i.e. with the Ministry of Justice as regards MLA-requests. This means that, as a principle, Georgia does not allow direct communication between judicial authorities. The exceptions are :

a) *Spontaneous information* of an operative-investigation nature shall be addressed to the Ministry of Internal Affairs of Georgia ;

b) Requests for copies of convictions and measures as referred to in Article 4 of the Additional Protocol to the Convention shall be addressed to the competent authority defined by Georgia for the purposes of Article 4, paragraph 6, of the Second Additional Protocol (*i.e. copies of convictions and measures*) ;

c) Requests for mutual assistance related to *cross-border observations*, *controlled delivery* and *covert investigations* shall be addressed to the competent authority designated by Georgia for the purposes of Articles 17, 18 and 19 of the Second Additional Protocol.

Georgia declared to accept MLA-requests transmitted via electronic means of communication insofar the requests are urgent and its authenticity is undisputed and an original request is subsequently received within the period of time specified by the central authority.

Under art. 6 the judicial authorities are defined as : a) Prosecutors' Office in Georgia and b) Common courts of Georgia.

Under art. 11.4, re. *spontaneous information*, Georgia declared that it reserves the right not to be bound by the conditions imposed by the providing Party under paragraph 2 of Article 11, unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

Georgia declared that the *temporary transfer of a detained person* under art. 13, requires the consent of the sentenced person, prior to the temporary transfer.

COMMENT : *The consent of the detained person is required by most Parties, since an 'involuntary' temporary transfer could amount to a disguised extradition, even if the detained person is only a witness*.

On *cross-border observations* (art. 17) Georgia made reservation not to accept paragraph 2 of art. 17, *i.e. the (restricted) possibility to accept cross-border observations without prior authorisation*. Under paragraph 4, Georgia designated the Ministry of Internal Affairs, Central Criminal Police Department, as the central authority for cross-border observations.

As for *controlled deliveries* (art. 18), Georgia designated the Ministry of Internal Affairs, Central Criminal Police Department, as the central authority.

The same applies for covert investigations under art. 19.

As for the *data protection* clause under art. 26, Georgia declared that " (…) the personal data transmitted to another Party for the purposes of paragraph 1 of Article 26 of the Second Additional Protocol, shall not be used by it without the previous consent of Georgia."

26. Bilateral MLA-Conventions and MLA-Treaties

Georgia concluded eight bilateral MLA-Conventions, namely with Azerbaijan, Bulgaria* Greece*, Kazakhstan, Turkey*, Turkmenistan and Uzbekistan

The countries marked with * are CoE Member States and Parties to the MLA instruments.

27. UNODC Instruments.

II.B. *Domestic Legislation*

28. Apart from the 2010 ICCM-Law, Chapter II, the following legislation deals with MLA :

- The Law on International Police Cooperation, 4 October 2013 (Consolidated versions (08/07/2015 - 21/07/2018)
- Criminal Procedure Code, art. 113.11 & 12 (*voluntary* interviews of persons abroad via electronic means) ; art. 114.15 & 16 (MLA, summons and interview of witness in Georgia) ; art. 138^1 (obtaining documents or electronic data located in Georgia, *without an MLA-request*) ; art. 144.7 (requesting expert opinions abroad, *without an MLA-request*).

Articles 113.11 & 12, 138^1 and 144.7 are directly related to art. 5.9 of the ICCM-Law, which provides the general principle of outgoing (active) *informal cooperation*, i.e. without the need for MLA-requests, insofar the cooperation is voluntary and allowed by the legislation and / or practise of the "requested" State.

In practise, the United States are the only State to request voluntary interviews. These requests usually aim to interview a collaborating witness in Belgium, mostly at a lawyer's office. Belgium does accommodate these request within certain limits. In the first place the identity of the witness, who should not be a Belgian national, is verified. If the cooperating witness is the subject of Belgian (or a foreign) investigation, prosecution or the execution of a sentence, the request is denied.

II.C. *Specific Comments*

II.C.1. The prelude to MLA : International Law Enforcement – "Police to Police" – Cooperation - the Law on International Cooperation in Law Enforcement of 4 October 2013, n° 1441-Is

29. Police cooperation is the *prelude* to MLA. During MLA, it is also the accompanying mode of cooperation, for instance to discuss the preparation and the practical arrangements for the execution of the MLA-request. During the execution supplemental evidence may be found and needed. Police cooperation is able to prepare a supplemental MLA-request to cover the additional need for assistance. This is particularly important when police officers of the requesting State assist with the execution in the requested State.

Police cooperation is especially useful if it enables to *avoid MLA*. In many cases MLA-requests are made and transmitted *too soon*, meaning that requests contain insufficient information or are not sufficiently clear explaining the link with the requested State. Common Law based legal systems have often problems with understanding the facts of the case and the connection with their jurisdiction. The essential question any MLA-request should be able to answer is why the request is *necessary*. Hence the necessity to prepare MLA-requests via police cooperation. Police databases contain the information that should be incorporated in the MLA-request.

The question arises whether police information can be used as evidence without sending an MLA-request that seeks the exact same information. Article 39.2 CISA, allows to convert police information into evidence if the judicial authority of the requested Contacting Party consents[10]. Art 39.2 CISA is replaced by art. 1.4 of the Council Framework Decision 2006/960/JHA of 18 December 2006 *on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union*[11].

The Georgian Law on International Law Enforcement Cooperation (ILEC) does not contain a similar provision. Art. 2.6 requires the requesting (foreign) State to transmit an MLA-request in order to be able to use police information obtained from Georgia, to be used as evidence.

In today's world of high density law enforcement cooperation, which at the quantitative level has always been much more significant than judicial cooperation, the question arises whether a more simplified approach is warranted. A simple request for authorisation to allow for the judicial exploitation of already obtained police information would alleviate a lot of burden on the Georgian central and judicial

[10] "2. Written information provided by the requested Contracting Party under paragraph 1 may not be used by the requesting Contracting Party as evidence of the offence charged other than with the consent of the competent judicial authorities of the requested Contracting Party."

[11] *OJ*, L 386/89, 29 December 2006.

authorities. Moreover, some types of police information, basically police information that qualifies as personal data or as sensitive / confidential *is already submitted to judicial authorisation before that type of information may be provided to the requesting law enforcement authority* (art. 2.5). Taking into account that the need for - often vast amounts of - electronic data is already expanding at an almost exponential rate, every single State will need to simply and speed up cooperation processes, both ILEC *and* ICCM. The Cybercrime Convention's 24/7 police Points of Contact Network has a role in "(…) the *collection of evidence*, the provision of legal information, and locating of suspects."[12]. Inevitably, 'electronic' law enforcement cooperation, with judicial authorisations where necessary, will become the standard of ILEC and ICCM in a future that is nearer than we think today.

Another reason to rethink the thin or rather blurry line between ILEC and ICCM is the way in which ICCM will follow the ILEC's electronic ways of communication and transmission of pre-formatted requests. In a nearing future, MLA will become part of electronic traffic and the processing of MLA-requests will very much be like the processing of ILEC requests in the Schengen (SIS) and INTERPOL contexts. The 'judicial back office' is still far from there, but must follow in order to be able to continue to *function* at all on both the domestic and the international level. In this context I refer to both INTERPOL's E-MLA project and IBERRED's project on a general legal and logistical system to transmit ICCM-requests, similar to ILEC requests[13].

Finally, the restrictive approach to ILEC information versus the use of the same information as (potential) evidence is in contrast with the – albeit still rather limited – flexibility that MLA-instruments and legislation offers. Art. CETS n° 182 allows the Parties to provide spontaneous information (art. 11), depending on the conditions re. the use of that information, it is not excluded to allow that information to be used as (potential) evidence. In a similar fashion, Georgia is able to request the interviewing of witnesses outside the realm of MLA. Art. 5.9 offers fairly broad possibilities for the Georgian judicial authorities to request – and obtain, albeit within the limits of the "requested" State's authorities' legal and practical limits – evidence without sending an MLA, albeit only if the witness consents. CETS n° 182, art. 20, created the possibility to set up Joint Investigation Teams which are 'legal spaces' were evidence, not mere information, is directly made available to all the participating judicial and police authorities. A JIT is an *alternative to MLA* when the sheer complexity of the case makes MLA far too burdensome. JITs will likely become the standard way to conduct large scale transnational investigations.

Both existing legal possibilities testify of a growing need to 'circumvent' the burdensome application of MLA-instruments and laws. Already in the early '90ies, scholars have underlined the inefficiency of MLA due to formal, if not formalistic

[12] Article 35 Cybercrime Convention, CETS n° 185.

[13] See Chapter I, n° 22.

requirements[14]. In 2020 that critique is even more valid in a rapidly changing real and virtual world.

II.C.2. The MLA Provisions

29. The title of Chapter II suffers from a translation problem, since the terminology 'Provision of legal assistance in criminal case' is a bit strange. 'Mutual Legal Assistance' would be more logical and consistent with internationally accepted terminology.

Chapter II is constructed as follows :

Art.	Content (essence)	Comments
5	Describes the procedure for (a) sending an MLA-request abroad (active MLA) and (b) the processing of incoming foreign MLA-requests. Art. 5.9 allows for *informal cooperation*, limited to the voluntary interviewing of consenting witnesses abroad, insofar the foreign States' law and practise allows. The principle of "Locus regit actum" and, where applicable, "forum regit actum" is defined.	Active MLA. Informal MLA : limited to voluntary witness statements. "efficiency clause" to avoid burdensome MLA. Cf. art. 8, CETS n° 182
6	MLA-requests : content	
6[1]	Service of documents	
7	Summons of a person located abroad	Only active MLA
7[1]	Temporary transfer of a detained person located in Georgia to the requesting State	Only active MLA Introduced by Law n° 671 (2013) and amended by Law n° 3803 (2018)
8	Requesting and asking information on legislation	
9	Requesting and asking information or materials re. a criminal case	Compare w. art. 21 CETS n° 030 (laying of information) & Chapter IV ICCM-Law.
9[1]	Audio- and videoconference for the purpose of interrogation of a witness, expert or victim located in Georgia	Introduced by Law n° 671 (2013) and

[14] Paul GULLY-HART, "Loss of Time through Formal and Procedural Requirements in International Co-operation" in : Albin ESER and Otto LAGODNY (eds.), *Principles and Procedures for a New Transnational Criminal Law*, Max Planck Institute, Freiburg im Bresgau, 1992, p. 245 -266.

		amended by Laws n° 3156 & n° 3803 (2018)
10	Confidentiality	
11	Execution of incoming MLA-requests (in Georgia)	
12	Grounds for refusal of MLA	Amended by Law n° 671 (2013) and Law n° 3803 (2018)
12^1	Joint Investigation Teams	Introduced by Law n° 671 (2013) and amended by Laws n° 3156 & n° 3803 (2018)
13	Procedural status of persons (i.e. agents) of the requesting State that assist with the execution of their MLA-request in Georgia.	

30. The provisions of Chapter II do not require specific comments, apart from the more 'horizontal comments' that I have provided above. Chapter II covers the CoE's MLA provisions. As stated above, the opening towards informal cooperation is arguably one of the most interesting features of Chapter II. One final remark would be if Georgia is able to accommodate similar requests for voluntary cooperation from another State ?

Chapter III Extradition

31. Chapter III regulates extradition and contains 26 articles, 14-36, including the more recent articles 14^1 and 34^1 & 34^2.

III.A. *The International Framework*

32. Council of Europe : CETS n° 024 ; CETS n° 086 ; CETS n° 098 ; CETS n° 209 & CETS n° 212.

Georgia has signed CETS n° 209 (3rd. Additional Protocol) on 14 April 2014, CETS n° 212 (4^{th} Additional Protocol) is not yet signed by Georgia.

33. Reservations and Declarations

Georgia made reservations to the application of articles 1, 6, 21 and 23 of CETS n° 024. Additionally a declaration was made as regards (the non-application to) the regions of Abkhazia and Tshkhinvali.

With respect to art. 1 : extradition requests based upon arrest warrants or judgments issued by special courts (exclusion), a facultative ground for refusal for *humanitarian reasons* and a mandatory ground for refusal in case of a risk to be sentenced to the death penalty.

With respect to art. 6, Georgia reserved the right to extradite nationals on the basis of *reciprocity*. The extradition of nationals can be refused on the grounds of *public morality, public policy and State security*.

Regarding art. 21 on transit, Georgia declares that the convention applies to transit, which means that the same formalities and conditions apply.

Regarding art. 23, Georgia declared that it accepts extradition requests in either English or Russian or with either one of the translations into those languages added.

The reservations and declarations to CETS n° 086 : Georgia excluded Chapter I, yet reserves the right to decide on a case-to-case basis. Chapter I (art. 1) of CETS n° 086 excludes international crimes from the definition of a *political offence*. In that respect the exclusion of the application of CETS n° to the regions of Abkhazia and Tshkhinvali is repeated.

The reservations and declarations to CETS n° 098 : Georgia excluded Chapter V (art. 5), *excluding the direct transmission of extradition requests* between the central authorities of the Parties. Georgia indicates that the Prosecutor's Office is the competent authority dealing with extradition requests and maintains the diplomatic channel as the (sole) transmission channel.

COMMENT : *This reservation can be considered as outdated. Belgium made a similar reservation, yet in practise accepts extradition requests that are transmitted directly. Belgium will withdraw the reservation in order to be able to transmit and accept the direct transmission of extradition requests*.

The declaration excluding of the application of CETS n° 098 to the regions of Abkhazia and Tshkhinvali is repeated.

CETS n° 209 & 212 : not relevant.

34. Bilateral Extradition Conventions and -Treaties

Georgia has concluded 7 bilateral extradition Conventions. A convention with the United States is being negotiated. This will be the first extradition Treaty to allow the extradition of nationals, since the United States, like most Common Law based legal systems, extradites its own nationals without any limit or condition. The 7 existing

Conventions are concluded with : Armenia, Azerbaijan, Greece, Turkey, Turkmenistan, Ukraine and Uzbekistan.

UNODC Instruments.

III.B. *Domestic Legislation*

35. Apart from the 2010 ICCM-Law, Chapter III, the following legislation deals with extradition :

- Criminal Procedure Code : art. 171 (*grounds for arrest, esp. 171.2 g)*) ; art. 198-199, 206-207 (*measures of restraint*) ; art. 283[1] (*effects of speciality re. Georgian extradition requests for the purpose of the execution of a sentence*).

- Criminal Code : art. 71.3, 7 & 8 (lapse of time re. prosecution, in relation to extradition); art. 76.2, & 6 (lapse of time re. execution of sentences, in relation to extradition).

- Law on International Protection, n° 42-IS, 1 December 2016, as amended by Law n° 3099 of 5 July 2018, website, 11 July 2018, esp. articles 5 (*principle of confidentiality, esp. art. 5.3, exchange of information for the purpose of extradition and terrorism investigations, under international obligations*), 24 (*request for international protection*), 29 (*application: terms of review*, see exp. art. 29.7, *speedy review, in case of a concurrent extradition request*), art. 56 (*rights of the applicant*, art. 56 a), stating the *non-refoulement* principle with respect to extradition) & 71 (*role of the Prosecutor's Office in case of a concurrent extradition procedure*)

- Administrative Procedure Code (Law 23 July 1999, entered into force on 1 January 2000) : Chapter VII[6] 'Administrative Legal Proceedings Concerning an Application for International Protection for Granting Asylum' (articles 212[4] – 212[5]) – Chapter inserted by Law n° 3046 of 4 May 2010 - LHG I, No 24, 10.5.2010, Art. 165 and (amended by) Law n° 5371 of 6 December 2011 - website, 20.12.2011.

III.C. Comments to the Domestic Legislation

Art.	Content (essence)	Comments
14	Extradition to Georgia 1. Penalty threshold. 2. Opportunity principle (minimum 'gravity' of the foreign extradition request, taking into account several factors). 3. Duty to motivate a refusal of extradition	 Passive extradition only *Active* extradition only Georgia wants to avoid dedicating time and effort (and money) into extradition requests that may not lead to the effective continuation of the prosecution or the execution of the short prison sentence or that what remains of the sentence. Passive extradition.
14[1]	Provisional arrest requests: formal requirements	Translation problem: 'request for temporary detention', the internationally accepted wording is : 'request for provisional arrest'
15	Extradition requests : formal requirements	
16	The effects of the foreign extradition proceedings on the Georgian criminal proceedings 1. Taking into account the extradition detention. 2. Speciality principle and its exceptions (al. 3, 4 & 5)	Active extradition
17	Re-extradition	Translation : 'handing over to a third State' is less clear.
18	Extraditable offences : double criminality and minimum threshold	Passive extradition
19	Political Offences	Exception to extradition re. the facts
20	Military Offences	Idem.

21	Nationality: no extradition of nationals, unless an extradition Convention or Treaty allows (reciprocity requirement).	Exception to extradition re. the person sought. Thus far, Georgia has no bilateral extradition Treaty or Convention that allow the extradition of nationals. A bilateral extradition Treaty with the US is in the making, which will be the first extradition Treaty that allow the extradition of nationals.
22	Capital Punishment	
23	In absentia judgments	
24	Statute of Limitation (Lapse of time)	Cf. 71.7 (prosecution) & 76.6 (execution of sentences) Criminal Code Cf. 4th Add. Protocol
25	Asylum status, Amnesty & Pardon	Al. 1 mentions the non-refoulement principle – art. 33 Geneva Convention (1951). Cf. *Law on International Protection* - esp. art. 5.3, 24.4, 29.7, 56a) & 71 & *Administrative Procedure Code* (Chapter VII[6]).
26	Ne Bis In Idem	The ne bis in idem principle seems to be limited to the (same) *offence(s)*, but actually the the same *(f)acts* are meant.
27	Ongoing criminal proceedings (in Georgia) re the same crime	*Idem*: same offence(s).
28	Locus delicti	
29	Other grounds for refusal 1. Non-discrimination 2. Age, health and personality 3. Torture et al.	 Art. 14 ECHR Humanitarian clause. 'personality' is a vague notion. This may refer to mental illness. Art. 3 ECHR

	4. Special (exceptional) courts 4[1]. Ordre Public 5. Other hindering circumstances	Vague criteria. However: *This paragraph was introduced in the legislation in order to cover all other possible grounds for refusal which are or may be provided by any bilateral treaty (both already in force or concluded in future).*
30	Provisional arrest 30.12 : limitation to 9 months.	Translation problem: 'application of *remand* as preventive measures' is confusing. The term 'remand' means pre-trial arrest (UK terminology), which does not apply to provisional arrest or extradition detention (cf. art. 5 ECHR). This is a translation problem: the article deals indeed with provisional arrest (for the purpose of extradition) in the meaning of art. 16 CETS n° 024. A set time limit for the detention for the purpose of extradition (including the maximum 40-days period of the provisional arrest) forces the domestic administrative and judicial authorities to handle extradition requests in a speedy way. The mayor disadvantage is that, at some point, the person sought must be released

		before the extradition procedure is fully terminated.
31	Additional information	
32	Conflicting (extradition) requests	
33	'Deferred extradition and temporary handing over'	Translation problem: the article regulates postponed *surrender* and temporary *surrender*. The extradition as such is already granted, only the actual *execution of the final extradition decision or order* is conditional – compare w. art. 18 juncto 19 CETS n° 024.
34	Extradition Decision and appeal thereto	Passive extradition. This article regulates domestic extradition proceedings, i.e. the procedure after the (eventual) provisional arrest, the receipt of the extradition request, up to the (final) extradition decision, including appeals.
34[1]	Simplified extradition – procedure	Passive extradition. This procedure is highly time effective, thus efficient insofar the consent of the person sought excludes the need for an extradition request and the documents in support. Cf. 3rd Add. Protocol (CETS n° 202). The article anticipates art. 2.1 CETS n° 202. Georgia does not need to make a reservation to this provision – see art. 17.2 CETS n° 202.

34[2]	Idem. procedure as to provisional arrest / detention and the way by which the consent must be obtained and processed through the court system. 19 : consent also means : waiver of speciality	Different CETS n° 202 that provides for a double consent procedure. One consent for a shorter procedure (without extradition request) and another consent for eventual waiver of speciality – see art.4.1 and 5 CETS n° 202. Compare: art. 66 CISA (1990). A double consent system will inevitably lead to more simplified extradition procedure since many wanted persons or persons sought want to be extradited / surrendered in an expedient way, but do not want to waive speciality. The procedural consent may not be withdrawn, the waiver of speciality can be withdrawn. If both are connected and eligible for withdrawal, the procedure may be problematic, since there is no (timely) extradition request available.
35	Transfer of physical evidence	
36	Transit – Georgia is the transit-State	Georgia (still) applies a traditional approach to transit, insofar all the requirements for extradition have to be met

		in order to allow a transit on Georgian territory. Art. 36 is strictly speaking in line with art. 21 CETS n° 024, however the requirements of CETS n° 024 are hardly ever applied to their fullest extent in practise – see also below.

Comments that require more detailed explanation

36. Art. 14.2 : the opportunity principle

Dealing with extradition requests – or other types of requests for ICCM for that matter - that seem to be based on minor offences or short prison sentences is a challenge for every requested State or Party. The success of the European Arrest Warrant also brought to light it's disadvantages: the EAW is easy to use, since it boils down to filling out a form and no sometimes voluminous and translated annexes are required. As a consequence, some EU Member States were flooded with mainly Eastern European EAWs for the purpose of the prosecution of the theft of a bicycle or a couple of farm animals. Other EAWs were issued for the purpose of the execution of prison sentences of no more than a couple of months. The g-heart of this problem is that some States have a legal obligation to prosecute any offence and / or to execute any sentence, regardless of the relative 'weight' of the offence and its (financial) consequences or the brief duration of the (remaining) sentence. Prosecutor's offices and prison administrations do not always have the right to apply the opportunity principle.

It is difficult for the requested State to 'impose' opportunity to the requesting State, despite having the fullest right to manage the capacity of their administrative and judicial authorities that have to deal with in incoming requests. The subject has been and still is on the agenda of many international forays. For instance, the G-8 dedicated a study on the issue[15]. The problem with a provision that sets additional thresholds – beyond the internationally accepted minimum punishment / imposed duration of the sentence thresholds of e.g., art. 2 CETS n° 024 - is that it may create a *domestic ground for refusal that is not 'covered' by the applicable international instruments*. The

[15] G-8, Roma-Lyon Group, "Addressing Requests for Mutual Legal Assistance in *De Minimis* Cases", 2013, 9 p. The document was discussed during the 65th plenary meeting of the PC-OC : http://www.coe.int/t/dghl/ standardsetting/pc-oc/PCOC_documents/Documents%202013/de%20minimisreport.pdf.

'insignificance' of the foreign case, which is at the basis of the request is hard to define or to 'measure'.

The Georgian solution is indeed worthwhile pursuing for other States when (re-)considering their domestic extradition legislation, or even broader, their domestic ICCM legislation in general.

Opportunity is in the first place a responsibility for the requesting State. They should avoid overburdening their administrative and judicial capacities and at the same time have consideration for the limited resources in the (eventual) requested States. There is no use in transmitting an extradition or any other type of request, when the ultimate outcome will be the discontinuation of the prosecution or the immediate end of the execution of the sentence right after the person sought is surrendered.

The duration of the detention for the purpose of the extradition may be longer than the sentence that was imposed or the remaining portion of that sentence, or the sentence that is likely to be imposed may be shorter than the extradition detention. In all these cases, requesting extradition is a waste of time, energy and money. Art. 14.2 ICCM-Law of Georgia can serve a s a good legal practice for many other States.

37. Art. 24 : Lapse of time

In day to day reality and as far as my practice concerns, lapse of time is probably the most problematic feature of extradition. Both when requesting extradition as when dealing with incoming extradition requests, the issue of lapse of time does raise problems if the offence(s) or the sentence(s) are 'old(er)'. When extradition is refused, which does not happen too often, it is by far in most cases because of lapse of time issues. The difference between lapse of time re. the prosecution and lapse of the re. the – execution of – the sentence is in this context not significant. However, since the majority of extradition requests aim at continuing the ongoing prosecution in the requesting State, most lapse of time problems deal with time bars for the prosecution of the offences.

In order to fully assess lapse of time as a ground for refusal of extradition, interrupting and / or suspending legal acts or causes need to be taken into account. This means that specific legal concepts of the requesting State have to be understood and have to be 'translated' into the legal system of the requested State, hopefully leading to the conclusion that lapse of time is not reached for either the foreign prosecution or the execution of the foreign sentence.

The heart of the problem is that most Extradition Convention and Treaties (still) require that the *foreign* prosecution of the offences has not (yet) elapsed or that the execution of the *foreign* sentence has not (yet) elapsed *in accordance with your own*

law. The requirement of a *double* possibility to prosecute or to execute is, in essence, the procedural annex or consequence of double (dual) criminality. As for double criminality, lapse of time is also to be evaluated *in abstracto*, rather than *in concreto*, although some states may apply an *in concreto* assessment. The difference is important since an *in concreto* assessment means that the requested State converts the foreign prosecution or the execution of the sentence into its own legal system: as if jurisdiction can be exercised over the offence or the sentence. This *may* have as an effect that shorter lapse of time delays apply, resulting in the refusal of the extradition.

The central question is such a "double" requirement is valid when extradition is requested, i.e. when only secondary cooperation is asked for. In other words: the requesting State does not ask to prosecute their offences, nor is there a formal request to "take over" the execution of their sentence on the table. When a State just needs assistance, there is no added value at all, to verify – even *in abstracto* – if the requested would be able to prosecute the person sought for offences that were not even committed on its territory. If lapse of time in accordance with the law of the requested State is established and the extradition must be refused *for that reason only*, there is only one party that wins: the person sought. The requesting State is deprived of its legitimate possibility to continue its prosecution or to resume the execution of its sentence(s). At the same time, the requested State is obviously not even able to prosecute or to execute – rendering the general principles of international law 'Aut Dedere, Aut Judicare' or its more modern variant, 'Aut Dedere, Aut Exequie" moot.

The 2012 *4th Additional Protocol* to the European Extradition Convention (CETS n° 222), in particular art. 1.2, finally does away with the double possibility to prosecute / to execute, i.e. the traditional lapse of time clause by amending art. 10 of CETS n° 024. Just like the principle prescribed by the 1996 Extradition Treaty of the European Union[16] and the Framework Decision on the European Arrest Warrant[17], lapse of time in accordance with the law of the requested State is no longer a ground for refusal. However and quite unfortunately, the article allows Parties to make a *reservation* (see

[16] Council Act of 27 September 1996, adopted on the basis of Article K.3 of the Treaty on European Union, drawing up the Convention relating to extradition between the Member States of the European Union, *OJ* C 313, 23 October 1996, p. 12. Article 8 states:
"1. Extradition may not be refused on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested Member State.
2. The requested Member State shall have the option of not applying paragraph 1 where the request for extradition is based on offences for which that Member State has jurisdiction under its own criminal law."

[17] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* L 190, 18.7.2002, p. 1–20. Art. 4.4 states I a similar fashion as art. 8 of the 1996 EU Extradition Convention : "4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;" Lapse of time is therefore an *optional ground for non-execution* of a European arrest warrant.

art.1.3). By doing so, those Parties maintain the old system as contained in art. 10 of CETS n° 024. Despite the solution to eradicate a useless mandatory ground for refusal of extradition, it is very well *allowed* to miss that chance…

One of the Prosecutor's Office's comments to the draft of this opinion stated that Georgia is currently negotiating or preparing to negotiate a new bilateral extradition Treaty with the United States. The draft Treaty excluded the traditional mandatory ground for refusal for reason of lapse of time in accordance with either the requesting or the requested State's law. Lapse of time as a ground for refusal, would in this scenario be abolished right away. More recent bilateral extradition requests that the US has concluded do indeed exclude lapse of time in accordance with both the law of the requesting and the requested State[18].

The next best option is to inscribe specific rules on lapse of time in the domestic law that help to prevent refusing extradition for reason of lapse of time. One way and probably the only way to do this is to create a cause or multiple causes to either interrupt or suspend lapse of time for the specific purpose of extradition. Georgia did so in article 71.7 (lapse of time re. prosecution) and in art. 76.6 (lapse of time re. the execution of a sentence) of the Criminal Code. These articles must be read in combination with art. 24 of the ICCM-Law.

However, both these provisions are *only beneficial for Georgia as the requesting State* (active extradition) they do not necessarily help the requesting States when Georgia needs to assess lapse of time in accordance with art. 71 or 76 of the Georgian Criminal Code. Georgia can indeed take into account foreign causes of interruption or suspension of lapse of time. The legal obligation to do so, is indeed available in the Criminal Code, but only for the purpose of the transfer of proceedings under Chapter IV, esp. art. 42 ICCM-Law, (art. 71.8) and for the purpose of the transfer of the execution

[18] U.S.-**Cyprus**, 2006 : "Extradition shall not be barred because of the prescriptive laws of either the Requesting or the Requested State." ; U.S.-**UK**, 2003: "The decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State." ; U.S.-**Lithuania**, 2001 : "The decision by the Requested State whether to grant the request for extradition shall be made without regard to the law of either the Requesting State or the Requested State concerning lapse of time." ; U.S.-**Belize**, 2000 : "Extradition shall not be denied because of the prescriptive laws of either the Requesting State or the Requested State." ; U.S.-**Sri Lanka**, 1999 : "Extradition shall not be barred because of the laws relating to lapse of time of either the Requesting State or the Requested State." ; U.S.-**Dominica**, 1996 : "Extradition shall not be denied because of the prescriptive laws of either the Requesting State or the Requested State." ; U.S.-**Grenada**, 1996 : "Extradition shall not be denied because of the prescriptive laws of either the Requesting State or the Requested State." ; U.S.-**St. Kitts and Nevis**, 1996 : "Extradition shall not be denied because of the prescriptive laws of either the Requesting State or the Requested State." ; U.S.-**St. Vincent and the Grenadines**, 1996 : "Extradition shall not be denied because of the prescriptive laws of either the Requesting State or the Requested State." ; U.S.-**Jordan**, 1995 : "The decision whether to grant the request for extradition shall be made without regard to provisions of the law of either Contracting State concerning lapse of time.".

of a sentence under Chapter VI ICCM-Law (art. 76.7). Extradition is not covered by this *accommodating* double feature of Georgian Criminal law.

However, the lapse of time regulations are by themselves accommodating. The basic principles of lapse of time for prosecution are regulated in art. 71.1 (the basic lapse of time periods, according to the gravity of the offences), 71.2 (the delay starts running from the date the offence was committed and ends when formal charges, even in absentia are brought against the person) & 71.3 (suspension of lapse of time from the date the suspect or indicted person / defendant has absconded during the investigation or the trial. The suspension ends when the person is arrested or re-arrested, or when the person re-appears and confesses). If the requesting State indicates that the person sought was indicted and at what date that happened, Georgia considers lapse of time to be suspended. Another possibility to obtain the suspension of lapse of time re. the execution of the sentence in accordance with Georgian law is to provide information about the date the (sentenced) person sought has absconded, again this date will mark the beginning of the suspension of lase of time for Georgia.

Conversely, Article 71.7 regulates the situation when the extradition for prosecution is not fully granted and due to the rule of speciality requirement, Georgia is unable to immediately prosecute the extradited person for all the offences which have been requested, but not granted. However, according to various international treaties, Georgia still can prosecute the extradited person for such non-granted offences after passing the certain period of time from his/her final discharged as well as after the date when the extradited person has left Georgia after final discharge and voluntarily returned as prescribed by art. 14 CETS n° 024. A similar provision for the interruption of statute of limitations in case of enforcement of the sentence was introduced in Article 76.6.

The effects of a (partial) refusal of an extradition request made by Georgia (active cooperation) for the purpose of the execution of a sentence: art. 283^1 of the Criminal Procedure Code. More specifically, the mentioned Article regulates such situations where Georgia requests the extradition of its fugitives for the enforcement of the sentence and the respective foreign states do not fully grant extradition for certain reasons (e.g. dual criminality, lapse of time). In such cases Georgia has to comply with the rule of speciality and cannot execute the sentence for the offences for which extradition was refused. Despite this obligation, respective international treaties also provides the exception from this general rule such as art. 14.1 b) CETS n° 24, which allows the Georgia to either prosecute or enforce the sentence against the fugitive if the latter having had an opportunity to leave the country, has not done so within the prescribed time frame after the final discharge, or has returned to Georgia after having left Georgia. The reason for art 283^1 Criminal Procedure Code is that judgments are immediately enforceable as soon as the surrendered person is again under Georgian jurisdiction. In order to avoid the violation of the rule of speciality, Georgia needs to

have an effective mechanism under the domestic law allowing it to limit the actual execution of the judgment against the extradited persons for a certain period of time and to the extent permitted by the requested state and at the same to maintain the possibility to enforce the judgments against such persons at the later stage for the offences regarding which extradition has not be granted initially when the circumstances determined by art. 14.1 (b) CETS n° 024 are met. It is the court that imposed the sentence that decides on the application of art 283^1. There is a hearing without the participation of the parties because sometimes such procedures are carried out within the timeframe between the notification of the final decision on extradition by the requested state and actual surrender of the fugitive. The decision can be made any time after the Georgian authorities are notified about the decision of the requested state on extradition of Georgian fugitives. However, the decision must be taken within 48 hours after the surrender.

The latter part of art. 283^1.3 is to be understood as dealing with the situation whereby the extradition was sought for both the purpose of prosecution and the execution of a sentence. Extradition requests can be based upon multiple grounds – judicial "titles" enabling or rather ordering the deprivation of liberty – and may combine both purpose of an extradition request. However, it may occur that the extradition is only granted for the purpose of prosecution and not for the second "title", namely execution of the sentence (judgment). In that case the speciality principle prohibits the execution of the sentence, unless the person sought waived speciality. Paragraph 4 is quite clear and logical since a refusal of the extradition, even a partial refusal may have direct consequences in terms of *speciality*. The paragraph as well as paragraphs 7 and 8 rightly so, refer(s) to art. 16.2 of the ICCM-Law.

Georgian domestic legislation, both in the ICCM-Law, the Criminal Code and the Criminal Procedure Code, provide useful means to (1) allow to the extent possible the extradition to the requesting State by taking into account foreign interrupting or suspending acts and assess whether these have a similar legal effect in accordance with Georgian law. (2) Domestic legislation also allows to avoid lapse of time from running (suspension) in order to avoid impunity in Georgia, when Georgia is the requesting State. Dedicated provisions suspend lapse of time when speciality prohibits the prosecution or the execution of a sentence in Georgia. Until the circumstances that make an exception to speciality of art. 14 CETS n° 024 are reached, lapse of time is suspended.

For the future, the signing and ratification of CETS n° 222, the 4th Additional Protocol to CETS n° 024 should be carefully considered, alongside potential amendments to the ICCM-Law and the related provisions of the Criminal Code and Criminal Procedure Code. In an ideal world, lapse of time, esp. in accordance with the law of the requested State (in this case Georgia), should not be a bar to extradition.

38. Article 36: Transit.

Although art. 36 is consistent with art. 21 CETS n° 024, Georgia, as a comment to the draft of this opinion learns, is well aware that art. 36 is nowadays obsolete, just as art. 21 of CETS n° 024 no longer reflects the current views on a transit. In day to day practise, a transit is indeed a mere *surrender issue* and not so much an *extradition issue*. The structure of CETS n° 024, even in 1957, reflects that: art. 21 comes *after art. 18 that regulates the surrender*.

Transit requests are nowadays handled as a mere "itinerary issue". A flight happens to land in a third State or Party to CETS n° 024. Transit requests are no longer "extradition-like requests", but simple e-mail communications with a single signed one page letter request as an annex. The authorization is almost always given within a very short period of time. One example from personal experience: transit was requested and allowed within one hour from Munich, Germany in one, albeit a bit exceptional case. As always in international cooperation in criminal matters, it helps to know your colleagues…

38/a. The 'collusion' between extradition and international protection ('asylum') proceedings.

One of the most complicated and complicating factors in extradition is the co-existence or parallel progression of extradition and 'asylum' procedures. In many cases, an asylum request is made after the provisional arrest of the wanted person. Asylum procedures are in many cases exploited to try to avoid extradition. In order to avoid the artificial prolongation of extradition procedures and thus the prolongation of the detention for the purpose of extradition, some kind of coordination between the two procedures is necessary. In practice, the arguments against extradition are the same if not identical to the arguments made in order to obtain refugee status. In terms of content – not in terms of purpose – both procedures are essentially the same.

The Georgian solution is most interesting in that the asylum legislation provides for the exchange of information on the one hand and the acceleration of the asylum procedure in case the applicant is wanted for extradition. Still, asylum procedures make take too much time, especially when appeals are made. Given the maximum delay of 9 months of the extradition detention, there is a real risk that the person sought must be released for reason of the ongoing asylum procedure. Time limits for the asylum authority to handle the appeals is a possibility than may be considered in order to create an even better coordination between the two procedures.

Chapter IV Transmitting criminal case files

39. Chapter IV consists of 6 articles, 37 to 42.

IV.A. *The International Framework*

Council of Europe: CETS n° 024, art. 6§2 (*aut dedere, aut judicare when the nationality exception applies*) ; CETS n° 030, art. 21 (*laying of information*) ; CETS n° 073 (*not signed by Georgia*).

Georgia is not a Party to the Council of Europe Convention that regulates a mandatory form of transfer of criminal proceedings, the 1972 European Convention on the Transfer of Proceedings.

40. Reservations and Declarations: *not applicable*.

41. Bilateral (MLA-)Conventions and -Treaties

Georgia has concluded 5 bilateral Conventions that regulate the transfer of proceedings, namely with: Azerbaijan, Kazakhstan, Turkmenistan, Ukraine and Uzbekistan.

UNODC Instruments.

IV.B. *Domestic Legislation*

42. Apart from the 2010 ICCM-Law, Chapter IV, no other legislation deals (directly) with *laying of information* or the transfer of proceedings.

IV.C. *Comments*

43. To this date, Georgia did not sign CETS n° 073, which means that at least at the level of the Council of Europe, Georgia is not able to transfer proceedings to any of the Parties to the 1972 Convention, nor can Georgia accept and execute a transfer of proceedings request under this Convention.

Under CETS n° 073, Parties have a basic obligation to prosecute the offences for which the requesting Party requests that they will be prosecuted by the requested Party – if the formal and essential conditions (such as re. double criminality and lapse of time) of CETS n° 073 are met. In that respect and within the Council of Europe and unless bilateral conventions apply, Georgia cannot cooperate on a primary level, i.e. accept jurisdiction over the prosecution of offences. CETS n° 073 is an instrument that allows

to avoid jurisdictional conflicts by concentrating two ongoing prosecutions in one Party.

Apart from bilateral instruments, Georgia can only rely (both ways) on *informal* 'transfer of proceedings' systems such as the laying of information. This informal system has the advantage of being very flexible but at the same time, there is no obligation whatsoever to prosecute. In the end, laying of information allows the prosecution in the two Parties to coexist.

Article	Content (essence)	Comments
37	Conditions for the transfer of cases to the requested State	Active cooperation
38	Procedure for idem.	Idem.
39	Effects of outgoing requests	Idem.
40	Effect of the arrest of a suspect in Georgia while a request for transfer of proceedings was made to another State	Idem.
41	Inadmissibility of a trial in absentia	Idem. A request for the transfer of proceedings excludes a trial in absentia in Georgia.
42	Procedure in Georgia upon receipt of a foreign request for transfer of proceedings	Passive cooperation

44. The sole and obvious comment to Chapter IV is that the ratification of CETS n° 073 would make the options to cooperate in the field of transfer of proceedings complete, while assuring a legally binding primary cooperation in this field. Accordingly, the ratification would make some amendments to the ICCM-Law necessary.

Chapter V Transfer of sentenced persons

45. This chapter consists of 4 articles, art. 43 – 46.

46. V.A. *The International Framework*

Council of Europe: CETS n° 112; CETS n° 167 (except art. 2) and CETS n° 222 (*not yet signed by Georgia*).

47. Reservations and Declarations:

With respect to CETS n° 112, Georgia has made the following reservations and exceptions : Georgia excluded the 'continued enforcement' mode under art. 9.1 a (see also art. 10), which means that Georgia will *convert* the foreign sentence before executing the sentence, as indicated in art. 9.1 b and art. 11 of CETS n° 112.

Under art. 3(.1 a) Georgia declares that 'a national' is a Georgian national (having Georgian citizenship) *and a person having permanent residence in Georgia*.

As for the language requirement, Georgia declared under art. 17 that transit requests must be in or accompanied by a translation into either Georgian, English or Russian.

With respect to CETS n° 167, Georgia did not make any reservations or declarations.

48. Bilateral (Transfer) Conventions and Treaties

Georgia concluded 3 bilateral transfer (of sentenced persons) Conventions, all –dating from 1996: with Azerbaijan, Turkey and Turkmenistan.

UNODC Instruments.

49. V.B. *Domestic Legislation*

Apart from the 2010 ICCM-Law, Chapter V, no other legislation deals (directly) with transfer of sentenced persons.

50. V.C. *Comments to the Domestic Legislation*

Article	Content (essence)	Comments
43	General provision	Both active and passive Applies to Georgian nationals *and residents*
44	Transfer to a foreign State	Active cooperation

45	Transfer to Georgia	Passive cooperation
46	Transit	

51. The domestic legislation with respect to transfer of sentenced persons covers the available instruments. The procedure that is to be followed when a sentenced person is transferred to Georgia, is the conversion procedure, i.e. an exequatur, replacing the foreign sentence with a Georgian sentence see art. 9 b) & 11 CETS n° 112. Conversion is more complicated than the simple 'recognition' of the foreign sentence by simply continuing the execution, if needed after the adaptation of the sentence to the maximum sentence applicable in accordance with the executing State's legislation. Most Parties to CETS n° 112 have declared to apply the continued enforcement method. Such a change may be a possible subject for reflection, not so much for change, since the choice is indeed in line with the Convention.

The review of some of the reservations and declarations seems more of a priority in this field of cooperation.

Chapter VI Enforcement of judgments

52 Chapter VI regulates the transfer of the execution of sentences, also a primary form of international cooperation in criminal matters. The relevant instrument here is CETS n° 070 as well as art. 2 of the Additional Protocol to the Transfer Convention (CETS n° 067). The latter conventional basis is not about the transfer of sentenced persons and is therefore a bit of an oddity in a Protocol to the Transfer of sentenced persons Convention (CETS n° 112). Art. 2 is essentially identical to art. 68-69 of the 1990 *Convention implementing the Schengen Agreement* (SIAC)[19]. The same conditions

[19] 19 June 1990 : Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *OJ*, L 239 , 22 September 2000, p. 0019 – 0062.

Article 68

1. The Contracting Party in whose territory a penalty involving deprivation of liberty or a detention order has been imposed by a judgment which has obtained the force of res judicata in respect of a national of another Contracting Party who, by escaping to the national's own country, has avoided the enforcement of that penalty or detention order may request the latter Contracting Party, if the escaped person is within its territory, to take over the enforcement of the penalty or detention order.

2. The requested Contracting Party may, at the request of the requesting Contracting Party, prior to the arrival of the documents supporting the request that the enforcement of the penalty or detention order or part thereof remaining to be served be taken over, and prior to the decision on that request, take the sentenced person into police custody or take other measures to ensure that the person remains within the territory of the requested Contracting Party.

Article 69

The transfer of enforcement under Article 68 shall not require the consent of the person on whom the penalty or the detention order has been imposed. The other provisions of the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 shall apply mutatis mutandis.

apply: sentenced persons that have *absconded*[20] may be subjected to the transfer of the execution of their sentence. The requested State is obviously the State were the fugitive is located.

53. Chapter VI consists of 10 articles, art. 47 – 56.

VI.A. The International Framework

54. Council of Europe: CETS n° 070 (limited to the provisions re. sentences involving deprivation of liberty); CETS n° 167 (art. 2: transfer of the execution of sentences involving deprivation of liberty re. sentenced persons that have absconded).

55. Reservations and Declarations:
Apart from the declaration regarding the inability to apply CETS n° 070 in the territories of Abkhazia and Tskhinvali, Georgia has made reservations and declaration with regard to the application of art. 19 and 61.

With respect to art. 19, regarding the language requirements, Georgia declared that the requests and the documents in support have to be in Georgian, English or Russian or accompanied by a translation into either one of these three languages.

With respect to art. 61, one of the final provisions regarding reservations, Georgia reserves the right to refuse the enforcement of the sentence(s) in the following cases. These reservations relate to the (mandatory) grounds for refusal listed in art. 6 CETS n° 070:

"a. to refuse enforcement of the judgment, if it considers that the sentence relates to a fiscal offence;"

COMMENT: *This reservation is not related to any of the provisions of CETS n° 070, as the Convention does not mention fiscal offences: only political and purely military offences are mentioned in art. 6 b*.

"b. to refuse enforcement of a sanction, for an act which according to the legislation of Georgia could be dealt with only by an administrative authority;"

"c. to refuse enforcement of the judgment, which the authority of the requesting State rendered on a date when, under Georgian legislation, the criminal proceedings in respect of the offence punished by the judgment would have been precluded by the lapse of time;"

[20] 'Absconded' has a much wider meaning than merely 'escaped'. The term must be rather understood as 'wilfully avoiding the execution of one's sentence'. Discussions were raised regarding to how and to what extent, the convicted person was made aware of the conviction and / or the start of execution of the sentence.

COMMENT: *This reservation seems to me made under art. 6 l, however the reservation does not refer to lapse of time re. the execution of sentences, but to lapse of time re. the prosecution of offences. This means that even when the execution of the sentence is not elapsed, Georgia will not execute the sentence if the prosecution – if conducted in accordance with Georgian criminal law – would have been elapsed. Such a reservation would be logical insofar the transfer of the execution of the sentence(s) concerns an in absentia conviction that is (must be) eligible for a remedy, assuring a contradictory (re-)trial. In that case, the prosecution 'revives', meaning that lapse of time re. the prosecution of the offences may not have been reached in both the sentencing (requesting) Party and in the requested Party. However, since Georgia essentially excluded the application of the convention in case of in absentia convictions (see d., just below), the reservation is rather restrictive when applied to definitive and contradictory judgments.*

"d. to refuse enforcement of sanctions rendered in absentia and ordonnances pénales ;"

COMMENT: *This reservation is related to section 3, art. 21-30 of CETS n° 070. In principle and under certain conditions, the execution of in absentia judgments and ordonnances pénales is permitted, however like many other Parties, Georgia made a reservation that basically excludes the application of section 3, probably even when the conditions of section 3 are met, i.e. the formal notification to the in absentia sentenced person and the availability of an effective remedy, assuring a contradictory (re-)trial .*

"e. to refuse the application of the provisions of Article 8 where Georgia has an original competence and to recognise in these cases only the equivalence of acts interrupting or suspending time limitation which have been accomplished in the requesting State."

COMMENT : *Art. 8, states that – "(…)for the purposes of Article 6, paragraph 1 (strangely enough, art. 6 does not contain any paragraphs) - any act which interrupts or suspends a time limitation validly performed by the authorities of the sentencing State shall be considered as having the same effect for the purpose of reckoning time limitation in the requested State in accordance with the law of that State." From the ratio legis of CETS n° 070, it is logical to conclude that this lapse of time provision regards lapse of time with respect to the execution of the sentence. Georgia requires equivalency between interrupting and / or suspending acts, however this requirement applies only when Georgia has an original competence. The wording seems a bit confusing, since it would actually mean that Georgia has, from the onset, jurisdiction over the (foreign) sentence or rather the prosecution of the offences. This means that the offences that have led to a foreign judgment and sentence, were committed (in part) within the Georgian territory or that Georgia had extra-territorial jurisdiction over the offences. In practise such a case would be rather exceptional*.

56. Bilateral (transfer of the execution of sentences) Conventions and -Treaties

UNODC Instruments.

VI.B. Domestic Legislation

57. Apart from the 2010 ICCM-Law, Chapter VI, there is no other legislation that deals (directly) with laying of information or the transfer of proceedings.

VI.C. Comments to the Domestic Legislation

Article	Content (essence)	Comments
47	General principles to prepare and transmit a request for the execution of a Georgian judgment	Active cooperation Confiscations are excluded – see Chapter VII
48	Formal requirements	Idem.
49	Conditions	Idem.
50	General principles (conditions) for the enforcement of a foreign judgment in Georgia	Active cooperation Confiscations are excluded – see Chapter VI[1]
51	Procedure (exequatur) re. sentences involving deprivation of liberty	Idem.
52	Idem. Re. fines	Idem.
53	Idem. Other sanctions	Idem.
54	Provisional measures	Idem.
55	Conditions: grounds for refusal	Idem.
56	Effects of foreign judgments on proceedings conducted in Georgia	Idem.

58. The domestic legislation offers a complete 'implementation' of CETS n° 070. The execution of confiscations – as a sentence – is regulated in Chapter VI[1]. A possible expansion of the domestic law, may be the creation of a legal basis for the execution of alternative sanctions and / or the supervision of conditionally sentenced or conditionally released persons, as regulated in the *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released* Offenders, 30 November 1964, CETS n° 051, an instrument that is not signed by Georgia. However, the added value of the latter Convention is rather limited. Few Member States are Party

to CETS n° 051, and those that are, hardly ever apply the Convention. The main weakness of CETS n° 051 is the almost universal exclusion – by reservations – of Parts III and / or IV of the Convention, meaning that hardly any Party is able to execute the sentence or to take over the case (relinquishment) under Part IV in case the sentenced person violates the conditions of his / her conviction or release.

Given the PC-OC's request to review the reservations and declarations, Georgia may well look at the reservations and declarations made to CETS n° 070.

Chapter VI[1] International Cooperation in the Sphere of Property Seizure

59. Chapter VI[1] regulates international cooperation with respect to the search, seizure and confiscation of proceeds of crime. The Chapter consists of 9 articles, numbered 56[1] - 56[9]. Chapter VI[1] was inserted by Law n° 3156 of 20 July 2018 (website 6 August 2018).

VI[1].A. The International Framework

60. Council of Europe: CETS n° 070 (regarding the transmission of the execution of confiscations) ; CETS n° 141 and CETS n° 198.

The European Convention on the International Validity of Criminal Judgments, CETS n° 070, is a more or less comprehensive CoE Instrument regulating the transfer of the execution of a wide variety of types of sentences, including confiscations. CETS n° 070 also provides for the possibility to request provisional measures, i.e. the seizure of the proceeds of crime that are confiscated by the (criminal) court of the requesting Party. I refer more specifically to Part II, section 5 c '*Clauses relating specifically to enforcement of fines and confiscations*' (articles 45-48) of CETS n° 070. Under CETS 070, confiscation is considered as a sentence in the criminal (legal) sense of the term[21]. Apart from Common Law based legal systems, civil forfeiture or non-conviction based confiscation did not yet exist in or before 1970 in the majority of European, Civil Law based legal systems – I refer to Chapter VI of the ICCM-Law and the discussion above.

Under Chapter VI[1], the discussion will be limited to the relevant domestic legislation against the background of, mainly, CETS n° 141 and CETS n° 198, the two CoE instruments that specifically deal with the search, seizure, confiscation and to a limited extent, the eventual sharing of proceeds of crime.

[21] See the definitions of the terms 'sentence' and 'sanction' in CETS n° 070, art. 1 c and d, respectively and the Explanatory Report.

61. Reservations and Declarations

With regard to CETS n° 141, Georgia has made the following declaration: the designated central authority in accordance with art. 23 is the *Financial Monitoring Service*, the Financial Information Unit (FIU) of Georgia.

With respect to CETS n° 198, Georgia has declared that art. 3.1 only applies to offences that are punishable with deprivation of liberty for a maximum of more than one year.

In accordance with art. 53, Georgia has declared that art. 3.4 only applies to civil confiscation procedures.

As to article 24.2 (the requested Party is bound by the finding of facts of the requesting State), Georgia declared that this provision applies, subject to the constitutional principles and the basic concepts of the legal system of Georgia.

Georgia designated the Ministry of Justice as the central authority (art. 33).

As to art. 35.1, Georgia declared that it accepts requests received by electronic means, insofar the request is urgent, its authenticity undisputed and if requesting Party submits the original request afterwards.

Georgia declared that requests must be in Georgian or one of the official languages of the Council of Europe (English or French), or accompanied by a translation in one of these languages (art.35.3).

Under art. 42.2, Georgia declared that the use of the information and documents provided under Chapter IV (international cooperation) of CETS n° 198 is limited to the subject of the request, unless prior consent for other use(s) is provided by Georgia.

Georgia made a reservation excluding the application of art. 46.5. that obliges FIU's "(…) to provide all relevant information, including accessible financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties.". Georgia will thus require a formal request to obtain this type of information from its FIU.

The Georgian FIU is the Financial Monitoring Service (FMS) – art. 46.13.

The FMS will adopt the measures defined in art. 47 (International co-operation for postponement of suspicious transactions) "(…) as far as the legislation of Georgia permits.".

Bilateral Conventions and -Treaties (also) re. search, seizure, confiscation of proceeds of crime and asset sharing

UNODC Instruments.

VI[1].B. Domestic Legislation

61. Apart from the 2010 ICCM-Law, Chapter VI[1], the following legislation deals with laying of information or the transfer of proceedings:

The Civil Procedure Code (Law 14 November 1997), Chapter XLIV[1] (articles 356[1] – 356[6] – referring to articles 194 & 331[1] Criminal Code).

VI[1].C. Comments to the Domestic Legislation

62. The English translation of Chapter VI[1] uses the word *seizure* while actually *confiscation* or *asset recovery* is meant. I also refer to the Public Prosecutor's Office's comment to the draft version of this opinion. This is already obvious in the translation of the title of the chapter. Confiscation is, at least still in many states a type of sentence (a sanction within the meaning of the criminal law). Art. 56[1] clearly mentions 'confiscation' when defining the types of property that are eligible for seizure.

It should also be noted that Georgia's legislation provides for *non-conviction based confiscation* - civil confiscation, or in Common Law terms: civil forfeiture. Chapter XLIV[1] of the Civil Procedure Code defines the terms (racketeering, human trafficker, facilitator of drugs, member of the criminal underworld, … and includes the family members and other associates), defines the claim for confiscation, defines the declaration of unlawful and undocumented property derived from the defined activities, the attachment of property, the legal consequences (transfer of the illegal property to the legitimate owner or the State), default judgment, criminal liability (under art. 194 and / or art. 331[1] Criminal Code).

The Civil Procedure Code provisions have installed a form of non-conviction based confiscation procedure for certain types of crime and perpetrators and their associates such as family members and other persons connected to the perpetrator. In essence, the system applies to the proceeds of certain types of organized crime (racketeering, drug offences) and corruption. This type of civil confiscation also applies to "unexplained wealth" situations, whereby assets can be confiscated of which the ownership or possession cannot be explained on the basis of the documented, official income of the perpetrators.

The legislation is to be welcomed, since civil confiscation is a proven – Italy was one of the first countries to adopt similar legislation in order to tackle the Mafia more effectively – remedy against transnational organized crime.

Article	Content (essence)	Comments
56[1]	Definition of property eligible for confiscation	Cf. Chapter XLIV[1] Civil Procedure Code
56[2]	Types of international cooperation: Search, seizure and confiscation (possibly others such as the exchange of (financial) information.	
56[3]	Formal requirements of requests for search, seizure and confiscation.	
56[4]	Proactive provision: exchange of information re. proceeds of crime, either via *voluntary information* or via MLA	
56[5]	Procedures: execution of requests for seizure and confiscation in Georgia	Passive cooperation
56[6]	Conditions: grounds for refusal	Idem.
56[7]	Deferral: postponement of foreign requests in case of a conflict with ongoing proceedings in Georgia	Idem.
56[8]	Conflicting requests	Idem.
56[9]	Asset management: disposal of confiscated assets	Idem.

63. The recent Georgian legislation on search, seizure, confiscation and asset management & eventual sharing is highly compatible with both CETS n° 141 and CETS n° 198, as well as UNODC instruments, esp. UNTOC (2000) and UNCAC (2003). The most positive aspect is the creation of a civil forfeiture system inter alia based upon a legitimate presumption of "unexplained wealth" which stretches out to associates and the family of the 'suspect', individuals that assist in hiding and laundering the proceeds of organized crime or corruption. Georgia has all the contemporary legal instruments to fight (financing of) terrorism and organized crime.

IV Conclusions

64. My first impressions about the Georgian ICCM-Law and surrounding legislation was confirmed, in that the domestic legal tools are of high quality in terms of formal structure and content.

Given the wide ratification of the CoE instruments, apart from some of the more recent Conventions or Protocols, CETS n° 0473 being the only important exception, the legislation was able to cover a very broad range of forms in ICCM in one single law, an advantage that was apparent from the onset.

On the international level a thorough review of the reservations and declarations is warrant, however this remark is valid for all Parties to the CoE Conventions and Protocols.

In terms of additional ratifications, having to some extent an impact on (future) domestic legislation or amendments thereto, the 3th (CETS N° 202) and 4th Additional Protocol (CETS n° 222) to CETS n° 024 is in my view a priority. As for the simplified extradition procedure, the law is quite in line with CETS n° 202, except perhaps from the dual consent. CETS n° 222 is more important in terms of lapse of time and the further limitation of the effects of the speciality principle as well as electronic transmission of extradition requests. The simplification of transit is also in this latest addition to CETS n° 024, yet Georgia can simplify the current formalistic requirements by withdrawing its reservation and amending the ICCM-Law in its current version.

More importantly is the accommodation of future international regulations ion international cooperation in the field of *cybercrime* and more broadly MLA as such, since MLA today is to a great extent about obtaining evidence in electronic formats anyway. In this respect, I immediately arrive at the thinning line between Law Enforcement cooperation and Judicial cooperation, MLA in particular. Increased flexibility is needed in order to actually avoid making, transmitting and executing MLA-requests.

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Antwerp and Brussels, 10 June 2020