

## Effectiveness of Interceptions in Albania in the Fight Waged against Criminality

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### Abstract:

*This paper deals with several concepts of interceptions, the cases when applicable, the authorities charged by law to carry out such an action, the applicable legislation on procedural interception and communication. This paper also explores the right to privacy as a right of every individual to communicate freely, making use of all forms and means of this technology. It explores the rights and legal guarantees of the individual to safeguard him from illegal interception as arbitrary and indictable action. An analysis is made of the history of interception of telecommunications in Albania as a special and very efficient investigation method, which serves as an indispensable tool for seeking evidences in the procedural concept.*

*Additionally, is furthered the theoretical analysis of the fact that the use of the interception results by the prosecution body in the circumstances when the constitutional rights of citizens are affected, is subject to a preliminary judicial assessment process which focuses on the audit of the constitutional and legal criteria that justify the use of this procedural instrument.*

*Considerations are given for some case-by-case practices that indicate that the foreign judicial authorities have authorized interceptions for mobile or fixed telephone numbers of some of the Albanian telecommunications companies, interception allegedly carried out within the territorial borders of the Republic of Albania,*

*and have been considered by Albanian courts as procedural actions authorized by foreign authorities in violation of the territorial sovereignty of our country. Some recommendations are also presented with a view to making the application of procedural interception more efficient and taking appropriate legal measures to prevent and combat criminality.*

**Key words:** Interception, special methods, proof, sovereignty, recommendation

## 1. INTRODUCTION

Based on the investigative practice trailed over the years, we have noticed that information derived from categorized human resources is irreplaceable and indispensable. It is impossible to detect some of the criminal offenses of organized crime, or international trafficking, without this kind of information, despite the fact that relevant bodies run country-wise routine checks, including border crossing points and apply observations, surveys, or controls with high technology tools. It is this kind of information that guides you in the application of the interception and other special investigative methods, with the aim of obtaining information and establishes evidence towards successfully finalizing the fight against criminality.

According to conducted studies, it is noticed that traditional investigations are generally initiated on the basis of complaints or as a result of the witnesses' interviewing (with the purpose of establishing the evidence of a criminal case). Such investigative actions have not provided the expected results due to the fact that crime in general and corruption as well as organized crime in particular, have continuously suffered structural changes. But it is worth mentioning the fact that the verifications of allegations and charges against suspected persons, based solely on witnesses, is too difficult or almost impossible in this category of criminal offenses, since

the witnesses are absent, or may be anonymous, and in even in few cases when they are present for various reasons, excuses are sought not to make declarations, and avoid facing the defendant, or the consequences that may result from the statements given.

In face of such circumstances, it was necessary for the prosecution bodies to shift from seeking evidence by way of using traditional investigations to proactive investigations, which by its nature allows the proceeding authorities to detect and prohibit law violators not only during the commitment of the criminal offence but also by administering evidence of the entire "historical" course of crime. The administration of evidence in a specific criminal case of organized crime can be accomplished and provide the required results if other interceptions and other investigative methods are applied.

But even in cases where procedural interception is applied (as an indispensable tool for seeking evidences), it must be authorized by law enforcement authorities, while guaranteeing respect for constitutional rights and protection of privacy from unauthorized interception as one of the fundamental human rights, as envisioned in the European Convention on Human Rights.<sup>1</sup>

In our country, as in the other developed countries, the implementation of the Criminal Procedure and the legislation on the interception of communications has been adapted to respect for family and private life and in any case when this special investigative method is needed to be applied.<sup>2</sup>

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<sup>1</sup> Signed in Rome-Italy on November 4, 1950, approved by the Republic of Albania by law no. 8137, dated 31.07.1996 on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>2</sup> Article 3, paragraph 8 of Law No. 9157, dated 4.12.2003 "On the interception of telecommunications", as amended.

## 2. HISTORICAL DEVELOPMENT OF INTERCEPTION AS A MEANS OF SEEKING EVIDENCES

During the investigation phase, the proceeding authority for a particular category of criminal offenses, deems it necessary to authorize, among other evidence, the application of procedural interception or wiretapping as a searching tool for evidence. Through the application of the interception, the proceeding authority initially establishes the conviction regarding the existence of the factual criminal fact and the individualization of the authorship, as well as the benefit of the evidence derived from the application of the means for seeking the evidence, which retains its true character only after it becomes subject to judicial review.

After the change of the political power system in Albania (from single ruling party system to the democratic one), a number of legal changes took place, among which the Code of Criminal Procedure<sup>3</sup>, which in Chapter III, Section IV, provides for “means of seeking evidence in general” (examinations, checks or seizures), and interception of the conversations or communications, in particular, which is governed respectively by the provisions of Articles 221 to 226 thereof; Penal Code; Constitution of the Republic of Albania; as well as some special laws in the field of interception and electronic communications, more specifically law no.9157, dated 04.12.2003 “On the interception of electronic communications”, as amended, and Law No.9918, dated 19.5.2008, “On Electronic Communications in the Republic of Albania “, as amended. Interception of communications is provided inter alia by the Privacy Directive 97/66 / EC,<sup>4</sup> Electronic Privacy Directive 2002/58 / EC<sup>5</sup>, Data

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<sup>3</sup> By Law No. 7905, dated 21.3.1995, "The Criminal Procedure Code of the Republic of Albania", as amended.

<sup>4</sup> Council of the European Union (1997).

<sup>5</sup> Council of the European Union (2002).

Retention Directive 2006/24 / EC<sup>6</sup>, European Order Investigation Directive 2014/41 / EU <sup>7</sup>.

This term is used in Article 20 of the United Nations Convention, endorsed by the Albanian state by Law No. 8920, dated 11 July 2002, on the ratification of the United Nations Convention against Transnational Organized Crime and in its two Additional Protocols.<sup>8</sup>

Whereas, other special methods of investigation of simulative actions and infiltrated provocative agents have been unfamiliar to our doctrine and our criminal procedural practice prior to the entry into force of law no. 8750, dated 27.03.2001, "On Prevention and Fight against Trafficking of Narcotic and Psychotropic Substances ", as amended, as well as the relevant additions to the Criminal Procedure Code. This law for the first time disciplined the cases and the way of using these methods, and aimed at providing new means of documenting criminal activity in the field of narcotics, as a response to the respect of already established international normative acts, ( by laws ) that were already consolidated in this field. <sup>9</sup>

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<sup>6</sup> Council of the European Union (2006).

<sup>7</sup> Council of the European Union (2014)

<sup>8</sup> Article 20 - Special Investigative Techniques

1. Where permitted by the fundamental principles of the domestic legal system, each State- Party shall take appropriate measures to allow the proper use of controlled consignments and, where necessary, other special investigative techniques *such as electronic surveillance or other forms thereof and the undercover operations, within its capabilities and under the conditions laid down by its domestic law.*

<sup>9</sup> The United Nations Convention on Narcotic Drugs Trafficking, approved in Vienna on 20 December 1988, provides for in Article 11 the supervision of narcotics in the international field, the interception of the authorization of unlawful submissions under supervision. The provision on this area also provides for the Schengen Agreement, which in Article 73 refers only to the supervised submissions. Pursuant to, the Council of Europe Convention on Cooperation in the Criminal Matters between Member States has provided for in Articles 12 and 14 the supervised submissions and infiltration operations. The Convention Against Transnational Organized Crime signed in Palermo in December 2000 provides in Article 20 for the need to use special investigation

### 3. WHAT DO WE MEAN BY INTERCEPTIONS, WHO AUTHORIZE THEIR APPLICATION AND WHETHER OR NOT THEY ARE INTERFERING WITH PRIVACY?

By “Interception”, we understand the secret intervention to capture, hear, and record the content of communication and related data, between the point of departure and the point of arrival.<sup>10</sup> Interception as a searching tool for seeking evidences consists in obtaining the necessary information from the communication link between some persons. This communication may appear in different forms of telecommunications between persons at a distance who make use of the telephone, computer networks or telematics or may be between the present interlocutors. Interception takes for granted the conversation’s confidentiality, and this fact also outlines one of its features: It is as a surprise act and as a tool of seeking evidences during the preliminary investigation phase, does not urge the necessity of informing and making a debate about the necessity of using it.<sup>11</sup>

Interception involves the interference and the secret capture, *in lack of communicators’ awareness*, of the contents of a communication or conversation between two or more communicators who act in order to exclude third parties from private communication by choosing such forms of communication aimed at the exclusion of third parties. Interception is carried out by an authorized public entity, which is outside their communication, through a technical instrument

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techniques for serious crimes provided for in Articles 2 and 3 of the Convention.

<sup>10</sup> Article 3, paragraph 6 of Law No.9157, dated 4.12.2003 "On the interception of telecommunications", as amended.

No.00-2013-636 of the Decision (97), Decision of the Criminal College of the High Court.

that avoids the form of protection and privacy of communication.<sup>12</sup>

In countries with state-of-the-art technologies in the field of telecommunications, there are many opportunities to interfere with privacy and state secrets, as in the case of the internet, and for that reason they are constantly improving legislation with the aim of preventing any illegal interference. Law No.9918, dated 19.5.2008, “On Electronic Communications in the Republic of Albania”, as amended, and the provisions on interception in the Criminal Procedure Code (Articles 221-226), are mainly based on the European Convention on Human Rights.<sup>13</sup>

Freedom and secrecy of communications are part of those fundamental human rights and freedoms that are inseparable, inalienable, inviolable and remain the foundation of the entire juridical order, creating the necessary space for the development of the personality and dignity of the person in a democratic society and the state of the rule of law.<sup>14</sup>

The limitation of the interception’s extent deals with the respecting of a number of constitutional guarantees, such as the right to privacy, the secrecy of communication or the inviolability and the right to deny unlawful house and person search. Additionally, special protection is provided to the private property right which appears in the constitutional preamble confirming the commitment to protect the dignity and

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<sup>12</sup> No. 00-2016- 353 of the Decision (37), Decision of the Criminal College of the High Court.

<sup>13</sup> Article 8 - Title added by the provisions of Protocol No. 11 (ETS No. 155)

**The right to respect for private and family life**

1 Everyone has the right to respect for his private and family life, his apartment and his correspondence.

2. The public authority may not interfere in the exercise of this right *except in the extent provided for by law* and, where necessary, in a democratic society, in the interests of public security, public order, health or morals or for the protection of Rights and freedoms of others.

<sup>14</sup> No. 00-2016- 353 of the Decision (37), Decision of the Criminal College of the High Court.

human personality and the freedom of communication enshrined in Articles 35, 36, 37 and 41 of the Constitution of the Republic of Albania, Article 8 of the ECHR, Article 17 of the International Convention for Civil and Political Rights, as well as Article 121 of the Criminal Code.<sup>15</sup>

Meanwhile, the argument extends to whether or not it will be possible to allow legitimate interception, since interception as a procedural instrument of seeking evidences interferes with the fundamental rights and freedoms of the individual and specifically with the right of the individual to communicate freely and in complete secrecy.

Although procedural interception is very effective in detecting crimes, because it enables conducting thorough investigations, gathering new evidence, and expanding investigations in regard to the identification of criminal liability and the mechanism of the incident, not everyone can carry out such an action; on the contrary this action is performed solely by the institutions charged by law for such an action, and it is always based on the protection of human rights and fundamental freedoms. In view of constitutional guarantees, it is found that evidence-seeking tools tend to limit or violate the right to privacy and property, but compliance with these rights is guaranteed by law enforcement authorities. In Albania, the only responsible authority for recording a criminal proceeding is the prosecutor who, after being informed in advance of a particular event or circumstance, decides, as the case may be, the initiation or bringing to a close of the recording proceedings. Exactly, after the moment of registration of the criminal proceeding, it is necessary to carry out the

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<sup>15</sup> **Article 121-Unfair Interference in Private Life**

Placement of devices for listening or recording words or figures, listening, recording or transmission of words, fixing, recording or transmission of images, as well as preservation for publication or publication of such data exposing an aspect of private life without his consent, constitutes criminal offence and is punishable by a fine or up to two years of imprisonment.

necessary investigative actions in order to administer and establish the evidence to document the status of the suspect as guilty or innocent, as well as the use of special investigation methods.

According to the Albanian legislation there are some exceptional cases when the state itself has a duty to intervene, while at the same time limiting human rights. This freedom may be subject to restriction if used to carry out criminal activities, so it may be violated for the purpose of criminal proceedings under the rules provided for in the Criminal Procedure Code and Article 131 of this law, which permits only lawful surveillance of electronic communications,<sup>16</sup> guaranteeing privacy as well as privacy protection from illegal interception as one of the fundamental human rights. Such a restriction is also foreseen in Article 17 of the Albanian Constitution.<sup>17</sup>

Under the Albanian electronic communications legislation, the body overseeing the regulatory framework for the service in the field of electronic communications and postal services is the “Electronic Communications and Postal Authority” (AKEP). This authority, in its power of attorney issuing for companies offering electronic communications, among other things, sets conditions for allowing the surveillance by the competent authorities as laid down in the

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<sup>16</sup> - **Lawful interception of communications**

The lawful interception of electronic communications is done in accordance with the legislation in force. Entrepreneurs of electronic communications networks and services must fulfill the obligations, in accordance with the legislation in force

<sup>17</sup> **Article 17**

1. Restrictions on the rights and freedoms provided for in this Constitution may be imposed only by law for a public interest or for the protection of the rights of others. The limitation should be proportionate to the state that dictated it.

2. These limitations shall not affect the essence of the freedoms and rights and in no case may exceed the limits provided for in the European Convention on Human Right

legislation in force for the interception of telecommunications and the enforcement of obligations deriving from this legislation.<sup>18</sup>

However, despite the fact that AKEP issues general authorization to companies providing electronic communications which according to article 123 of the above law ensure that all communications are confidential,<sup>19</sup> and according to paragraphs 17 and 18 of Article 137 of this law, when they do not constitute a criminal offense, the law provides for administrative penalties.<sup>20</sup> In relation to the cases when legally authorized, the realisation of interception as a means of collecting evidence, the above lawmaker has foreseen that the interception or the violation of a right to be done through ways that affect as little as possible the citizens' freedoms, but simultaneously to be proportional to assessing the need to interfere with this right and the extent of this interference. Among others, the Court of HR has considered telephone interception as interference with the private life and correspondence, but this intervention is "in accordance with the

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<sup>18</sup> Article 15, letter "f" of Law No. 9918, dated 19.5.2008, "On electronic communications in the Republic of Albania", amended, "General Conditions".

<sup>19</sup> **Confidentiality of communication**

1. Confidentiality of communication includes:

a) the content of the communication; b) traffic and location data relating to communications; c) data on unsuccessful attempts to establish a connection.

2. All forms of surveillance, interception, interruption, recording, storage, transfer and diverting of communications as well as the data referred to in paragraph 1 of this article shall be prohibited, unless this is necessary for the transmission of messages, Fax, e-mail, voice mail, voicemail, short messages or cases provided by law.

<sup>20</sup> Ibidem, Article 17. Performs supervision, interception, interruption, recording, storage and deviation of communication and data contrary to the requirements of Article 123 paragraph 3 of this Law;<sup>20</sup>

ibidem, article 18. Fails to comply with the lawful interception obligations under Article 131 of this law;

law” and “deemed necessary in a democratic society” for reasons of “crime prevention”.<sup>21</sup>

#### 4. PREREQUISITES TO CONDUCT INTERCEPTION, AND THE DIFFERENCES BETWEEN THE TYPES OF EVIDENCE

The aim of the lawmaker through the relevant provisions of the Criminal Procedure Code envisaging “Interceptions” as one of the “means of seeking the evidence” is to establish clear procedural rules that enable their realization, because through interceptions are obtained declarations, evidences, which are

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<sup>21</sup> No.00-2011-946 of the Decision (129), Decision of the Criminal College of the High Court

In the decision concerning the case "**Lüdi v. Switzerland, no.12433 / 86, dated 15.06.1992**, cited as follows: "There is no doubt that **phone interception was interfering with the privacy and correspondence of the applicant. Such interference is not in breach of the Convention if it complies with the requirements of paragraph 2 of Article 8 (Article 8/2). At this point the Court was in agreement with the Commission. The measure in question was based on articles ... of the Code of Criminal Procedure ... which is applied by the Federal Court even in the preliminary investigation stage; where there is reason to believe that the criminal offenses are ready to be committed. Moreover, it aimed to "prevent crime" and the Court accepts, without any doubt, its necessity in a democratic society**

- In the decision concerning the case "**Panarisi v. Italy, no.46794 / 99, dated 10.04.2007**, case issued because of a telephone tapping during a drug and weapons trafficking, the court of HR has reconfirmed the general characteristics of allowing tapping of the telephone and the principles of not considering it as a violation of private life, within the meaning of Article 8/1 of the Convention. The Court of HR has acknowledged that telephone interceptions are interfering with "private life" but that they , **can not be considered as "violations"** as long as they are "**interventions provided by law, pursuing one or more legitimate interests under the second paragraph of Article 8, Moreover they are needed in a democratic society** ". "*The words provided by law* ", within the meaning of Article 8§2, require that the contravention (telephone interception) should have a basis in domestic law, but they are also in the quality of the substantive law because they require the availability of the person concerned, who should be able to foresee its consequences and compliance with the rule of law (Coban v. Spain, no. 17060/02, 25 September 2006)

directly used during the court decision-making process in adjudicating the underlying issue.

The third chapter of Criminal Procedure Code includes the regulation on the interception device, under normal conditions for interception, which is subject to permission by the court; the legal rules on interception operate on the basis of the prosecutor's request in court, whereas for interception to be carried out in public places, the prosecutor himself is the legitimate body for their disposition. Hence, in the provision of Articles 221 and following of the Criminal Procedure Code there are clearly stipulated limitations for allowing interception, those basic prerequisites, if disregarded cause the uselessness of the results obtained from them.<sup>22</sup>

Regarding the interception, the only authority that enables the application of such a procedural action is the court which, upon the submission of the request, decides, as the case may be, whether or not to allow such action. Such authorization may also be issued by the prosecutor, but only in urgent cases and where there are reasonable grounds for thinking that a delay may result in a serious damage to the investigation and the conditions for conducting interception are met, then the prosecutor decides to apply interception with a motivated act and informs the court immediately, but no later than twenty-four hours from the decision. Thus, in this case, the procedure for validating the prosecutor's decision by the court is foreseen, otherwise, the interception can not continue and its results can not be used.

The difference between the types of evidence lies in the fact that interceptions are characterized by the ability to provide trial evidence to the court, which are directly used during the court decision-making process. The probative ability of the types of evidences is generated at the moment of establishment and obtaining the type of evidence. While

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<sup>22</sup> Nö.00-2014 -1478 Decision (125), Decision of the Criminal College of the High Court.

*evidence seeking tools*, such as interception, are not in themselves a source of expostulation and assuredness, but they enable the obtaining of statements that have probative skills for the criminal process. Through evidence seeking tools (the means of probation) in relation to the moment of formation or obtaining of the type of evidence, are introduced elements of evidence that existed before.

In order to allow the procedural means of interception in the criminal proceeding, some fundamental conditions are required, the non-observance ( *sine qua non*) of which results in the uselessness of the results obtained from the interception. These prerequisites are: clear definition of the criminal punishment limit of the offense which is under proceeding; That is, if we are dealing with a criminal offense, which is expressly foreseen in the limit of permitting this type of evidence searching tool from the law; the subject legitimized to request the availability of the interception; the subject that possesses the interception records; the interested passive subject, the motivated act on the interception; the determination of the type of interception and its object; the reasons for the necessity of interception for the furtherance of investigations; and the presence of sufficient evidence to prove the charge; their execution, and relevant documentation of interceptive actions, as well as eventually the complaint and the right of the parties to consult the interception results.<sup>23</sup>

However, the fact that not all the data obtained from the interception even though the procedural requirements for conducting an interception were respected by the law enforcement bodies, are of interest to the investigation, thus it is imperative that the proceeding authority which ordered the interception (after administering the minutes and records until the decision becomes final) analyzes the results obtained in respect of human rights and fundamental freedoms by selecting

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<sup>23</sup> No. 00-2014-1532 of the Decision (123), Decision of the Criminal College of the High Court.

those data that are of interest to the investigation, whereas relating to the other data obtained, the prohibited documentation and the one that is deemed no longer necessary for the investigation, proceeds with the submission of the request to the court that has made the assessment of the tapping for their disposal, with the exception of the cases when they constitute material evidence.<sup>24</sup> Regarding the decision that allowed the interception, referring to the changes that the Albanian criminal procedural law has undergone, <sup>25</sup> is foreseen, inter alia, that the person concerned may appeal the decision to the court of appeal if it is alleged to be in breach of legal criteria, and in cases where the appeal is grounded by the court, proceeds with the annulment of the decision allowing the interception, concurrently ordering and deleting any material obtained from him

Vis-à-vis the results obtained from the procedural interception, it is legally prohibited and indictable (prosecutable) to be used, or worse, to make public those data relating to the private life of the person being intercepted. The proceeding authority has the legal obligation that even in cases when it concludes with the dismissal of the case, to notify the decision in writing to the court, which will again decide on the destruction of records and minutes/notes within the time limit set by it and inform the person tapped. At the request of the prosecutor, this notice may not be made in cases where there is a risk to the life or health of others or when a probe is put at risk.<sup>26</sup>

Regarding the rules concerning the publication of the contents of the interception or preliminary investigative acts, the legislator has foreseen not only the holding of disciplinary

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<sup>24</sup> Article 226 of the Code of Criminal Procedure

<sup>25</sup> Law No. 7905, dated 21.3.1995 "Criminal Procedure Code of the Republic of Albania", Article 222 / a, Appeal against a decision accepting interception (added by law no. 9887, dated 12.2.2004, amended point 2 with the law 35/2017).

<sup>26</sup> Articles 221-224 of the Code of Criminal Procedure.

responsibility under Article 104 of the Code of Criminal Procedure if the prohibition of publication is violated of the acts prohibiting their publication, but also of criminal liability.<sup>27</sup>

## **5. ATTITUDES HELD BY ALBANIAN COURTS REGARDING THE INVALIDITY OF INTERCEPTION CARRIED OUT BY FOREIGN AUTHORITIES DUE TO VIOLATION OF TERRITORIAL SOVEREIGNTY.**

Criminal laws as well as laws in general operate and are applicable throughout the territory of the state that issued them. Meanwhile, the Criminal Code of the Republic of Albania is applicable to Albanian citizens and to persons that enjoy other citizenship besides the Albanian one, for both criminal offenses they commit within our country as well as for offenses committed outside the territory of Albania, but the crime must be concurrently punishable and until a time when a final decision is not given by a foreign court. The condition for concurrent punishment in the territory of the other state is not applicable in the cases of corruption offenses in the public or private sector along with the exercise of unlawful influence.<sup>28</sup>

In the fight against criminality, law enforcement authorities in our country have continued cooperation with foreign judicial authorities, with which they exchange information, conclude agreements,<sup>29</sup> conduct joint

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<sup>27</sup> According to Article 103 of the Code of Criminal Procedure "*It is forbidden, even partial, publication of secret acts relating to the issue or just content through press or mass information.* Pursuant to Article 295 / a, the fourth paragraph of the Criminal Code, any person familiar with these acts shall be held criminally liable in the case of issuing secret acts or data containing secret acts for which the publication is prohibited.

<sup>28</sup> **Article 6 of the Albanian Penal Code**, Enforcement of criminal law for criminal offenses committed by Albanian citizens.

<sup>29</sup> **Article 10 of the Code of criminal procedure-Implementation of international agreements**

1. Relationships with foreign authorities in the penal field are governed by international agreements accepted by the Albanian state, by generally

investigations,<sup>30</sup> or transfer proceedings for the investigation of criminal offenses committed by Albanian citizens outside the territory of our country.

The exchange of information is carried out through rotatory letters to and from abroad, according to the provisions of the Criminal Procedure Code, articles 2, 24/1, 509-511,<sup>31</sup> and the provisions of the law no.10193, dated 03.12.2009 “On Jurisdictional Relations with Foreign authorities in criminal matters “, as amended.

In this context, as in other states, Albania has pursued with investigations, has exchanged and is exchanging information through rotatory letters sent to foreign judicial authorities regarding the implication of Albanian citizens in committing offenses outside the territory of the Republic of Albania. Foreign counterparts have conducted interceptions in addition to the other investigative actions in compliance with their legislation criminal procedure. The interceptions obtained along with the transcriptions of the respective records have been sent / are being sent for further execution through the rotatory letters.

Based on the case law of our country, it is found that different levels of courts have adopted dissimilar approaches, regarding the validity of interceptions authorized by foreign

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accepted principles and norms of international law, as well as by the provisions of this Code.

**Article 19**, Law no. 8920 of 11 July 2002 on the ratification of the United Nations Convention against Transnational Organized Crime and its two Additional Protocols.

#### **Joint Investigation**

*States- Parties shall consider the signing of bilateral or multilateral agreements on matters of inquiry, prosecution or judicial proceedings in one or more States under which the relevant authorities concerned may establish joint investigative bodies. In the absence of such agreements, joint investigations may be undertaken by agreement, on a case-by-case basis. States Parties concerned shall ensure **respect for the sovereignty of the State-Party, on whose territory such investigation shall take place.***

<sup>31</sup> Criminal Procedure Code of the Republic of Albania, approved by Law No. 7905, dated 21.3.1995, as amended.

authorities, with the justification that they have been committed in violation of territorial sovereignty of the Republic of Albania.

But for the purpose of analysing this situation, I am of the opinion that we should set out in advance the concepts of *sovereignty, territory and their protection*, based on the relevant legislation that articulates this aspect. More concretely, according to Article 2 of the Constitution of the Republic of Albania, it is foreseen that sovereignty in the Republic of Albania belongs to the people. The people exercise their sovereignty through their representatives or directly. For the safeguarding of national peace and national interests, the Republic of Albania may participate in a collective security system based on a law adopted by the majority of all members of the Assembly <sup>32</sup>.

The protection of the independence of the Albanian state is outlined by the lawmaker in its general section, Chapter I, Article 1 / b of the Criminal Code, as amended, approved by Law No. 7895, dated 27.1.1995. <sup>33</sup> The concept of territory in terms of criminal law is found in Article 5 of the Criminal Code <sup>34</sup>, whereas the protection of sovereignty is foreseen **in Article 4, paragraph 2 of** Law no. 8920, dated 11 July 2002, that enabled the ratification of the United Nations Convention

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<sup>32</sup> Approved by Law no. 8417, dated 21.10.1998, "Constitution of the Republic of Albania", as amended

<sup>33</sup> Article 1 / b, Criminal Code of the Republic of Albania. The criminal law of the Republic of Albania has the duty to protect the independence of the state and **the entirety of its territory**, *human dignity, its rights and freedoms, constitutional order, property, environment, coexistence and understanding of Albanians with national minorities, and Religious coexistence from offenses, as well as their prevention.*

<sup>34</sup>. Article 5, Criminal Code of the Republic of Albania. *The Territory of the Republic of Albania, in terms of criminal law, is called terrestrial space, the breadth of territorial and internal marine waters, air space extending over land space and territorial and internal sea waters, as well as any other country where sovereignty extends As the headquarters of Albanian diplomatic and consular missions, ships carrying the flag of the Republic of Albania, navy ships, military or civil aviation wherever they are.*

Against International Organized Crime and its two Additional Protocols, which provides for cases under which no State Party has the right to exercise jurisdiction in the territory of another State and to perform functions that are exclusive to the authority of another State under its domestic law,<sup>35</sup> as well as in law no. 9492 of 13 March 2006 on the ratification of the United Nations Convention against Corruption,<sup>36</sup> in Article 4 of which provides for the protection of the sovereignty and integrity of the territory of the state and of non-interference with the internal affairs of other states.

Regarding the various approaches that have been adopted by the Albanian courts in their decisions whether we are dealing with violations of sovereignty, at first instance I would like to state that, like every lawyer, I am in support of the principle that court decisions cannot be prejudiced, but they are always to be implemented. And, as far as opposing opinions and attitudes to the argument of the court's decision are concerned, the appeal to a higher-level court is always to be its only legal remedy.

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**<sup>35</sup> Article 4 - Protection of sovereignty**

1. The States Parties shall implement their obligations under this Convention in accordance with the principles of equality of sovereignty and territorial integrity of States and non-interference with domestic affairs of other States.

2. Nothing in this Convention ***shall confer on a State Party the right to exercise its jurisdiction in the territory of another State and to perform functions which are the exclusive right of the authorities of the other State under its domestic law.***

<sup>36</sup> **Law no. 9492** of 13 March 2006 on the ratification of the United Nations Convention against Corruption

**Article 4 - Protection of sovereignty**

1. States Parties shall comply with their obligations under this Convention **in a manner consistent with the principles of equality of sovereignty and integrity of the territory of the State and of non-interference with domestic affairs of other States.**

2. Nothing in this Convention shall confer on a State Party, in the territory of another State, *the exercise of jurisdiction and the exercise of functions reserved exclusively to the organs of that State under domestic law.*

As noted above, law enforcement actors before giving their opinions about whether or not state sovereignty is violated if interception is applied, it should be taken into account the fact that it is in the foreign authorities' right to initiate investigations and in accordance with their criminal procedural legislation, to authorize the interception of any criminal proceeding subject (even to an Albanian citizen), if they conduct criminal activity and use the antennas of the cellular companies of that state (which has concurrently granted the authorization to carry out an action, and there is no legal obstacle to the authorization of such interception when Albanian citizens have used the antennas of the cellular companies of that state, regardless of their physical location.

Investigations against them can also be extended to our country for offenses committed abroad by Albanian citizens, but the crime should also be punishable at the same time and no final court decision has been taken by a foreign court<sup>37</sup>. Correspondingly, these acts are taken in accordance with the provisions of the Constitution of the Republic of Albania,<sup>38</sup> the procedural criminal provisions,<sup>39</sup> international acts ratified by our country<sup>40</sup>, on the other hand, for the criminal offenses in the field of narcotics the following should be paid heed to: "Single Convention on Narcotic Drugs" of the United Nations Convention against Illicit Trafficking in Narcotic Drugs of

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<sup>37</sup> Article 6 of the Albanian Penal Code, Enforcement of criminal law for criminal offenses committed by Albanian citizens.

<sup>38</sup> According to **Article 122 of the Constitution of R.Albania**: "Any ratified international agreement constitutes part of the domestic legal system".

<sup>39</sup> **Article 10 of the Code of Criminal Procedure**: "Relations with foreign authorities in the criminal field are governed by international agreements accepted by the Albanian state, by generally accepted principles and norms of international law, as well as by the provisions of this Code."

<sup>40</sup> Convention on Mutual Legal Assistance in Criminal Matters ratified by the Republic of Albania by Law No. 8498, dated 10.06.1999

Psychotropic Substances “, in which Albania has adhered to Law No. 8722, dated 26/12/2000.<sup>41</sup>

For these reasons, we are of the opinion that if the the Albanian authorities requested provision of material evidence (part of which is the interception) and in order to execute them foreign authorities have been approached in reference to the aforementioned provisions, violations of the prohibitions of the Law can not be claimed, and consequently the unavailability of the acts and evidence administered by them. The Tirana first instance court for serious crimes has adopted such position.<sup>42</sup> Meanwhile, the High Court of Tirana has adopted a partially different position from the above, regarding the review of the same issue (for the part that the lower decisions were annulled), in which the reasoning was stated as following: “... here we face with violation of the sovereignty of the Albanian state, as a result of the uselessness of the acts of interception ... as it has been concluded by the Court of Appeal of Serious Crimes this is a “violation of sovereignty.”<sup>43</sup>

During the partial retrial of this case, the Tirana First Instance Court for Serious Crimes, inter alia, gave the following reasoning: “... Transcripts of the intercepted conversations in the telephone numbers of Italian operators in the territory of that State, are fully valid and can be used “. But the Court also reasoned that: “... regarding the telephone interception, this criminal panel considers it incomplete because of the inadmissibility of the documents accompanying the rotatory letter (always taking into account the tasks and orientations given by the Court High, which in the concrete

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<sup>41</sup> Article 5 /c of the United Nations Convention against Illicit Trafficking in Narcotic Drugs of Psychotropic Substances "The execution of a rotatory letter shall be conducted in accordance with the law of the party to which the request is addressed, taking into account the reservations set out in Articles 15.17 of this convention, as well as its Article 7/3.

<sup>42</sup> Decision No. 3, dated 11.01.2008, of the First Instance Court for Serious Crimes, Tirana, page 83.

<sup>43</sup> Decision No. 431, dated 05.05.2010 and 07.05.2010 of the Criminal College of the High Court, page 12.

case are mandatory for implementation); only in relation to the decrees that have enabled intercepting mobile and fixed telephone numbers that belonged to Albanian citizens and used within the territory of the Republic of Albania and those acts are fully usable ones obtained as a result of tapping telephone conversations of Italian mobile numbers, in the Italian territory, even being used by Albanian citizens.<sup>44</sup>

Regarding the subject matter of the trial, the prosecution has held that no problems can be raised in violating the sovereignty of the Republic of Albania, since this concept is related to the territory and the exercise of functions by the state powers. We point out once again that the intercepting devices are installed in the Italian territory and are activated whenever the call signals enter the space covered by the sovereignty of the foreign state and activate the signal converter equipment installed in the Italian territory, but under the sovereignty of this state. In a word, the evidence obtained is fully usable because the way of their taking is completely lawful, in accordance with the laws of the foreign state and the conventions regulating interstate cooperation in criminal cases.<sup>45</sup>

I find it reasonable to point out that the acts of authorizing interception of Albanian phone numbers, carried out by a foreign authority, are fully valid and the evidence stemming from this investigative action are fully used to convict the accused.

Likewise, it is valid the evidence deriving from the interception of conversations made on the Albanian mobile phone numbers, used by an Albanian citizen (whether initially identified or not), that were intercepted by foreign authorities by the relevant decisions/declarations. From the current

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<sup>44</sup> Decision No. 62, dated 18.11.2011, of the First Instance Court for Serious Crimes, Tirana, pg. 6-8.

<sup>45</sup> Final discussion of Prosecutor at Tirana Prosecutor's Office of Serious Crimes, Mr. Adnan Xholi, on the criminal proceeding No. 24 of 2004, dated 21.10.2011 (retrial), page 6.

practice, it turns out that foreign authorities have been intercepting all the incoming calls of some Albanian numbers making calls to the numbers of mobile phone companies operating in their country. The evidence presented in Albania proves that there were intercepted and recorded only conversations called by Albanian numbers in the use of an Albanian citizen (identified) whenever he called foreign numbers in use of the defendant (Albanian citizen but identified). Technically, in such cases, the signal is captured by end- devices that facilitate international communications, installed in the territory of a foreign country. It is impossible to intercept and record the conversations performed through this number, when it uses the equipment installed in the territory of the Republic of Albania.

This fact is also evident from the flux of conversations recorded from which it appears that no conversation by the Albanian number with the telephone numbers operating in the territory of Albania has been intercepted and recorded. It is proved that, while the telephone tabs show that all communications made through this number are recorded, foreign authorities could only record conversations with people in their state territory. From this statement it is clear that problems of violation of the sovereignty of the Republic of Albania can not arise- as this concept is related to the territory and the exercise of functions by the state powers.<sup>46</sup>

As mentioned above, we will face cases of invalidity and consequently the uselessness of the result of the interception and in violation of the territorial sovereignty of our country, only if the foreign authorities have authorized and intercepted cellular or fixed telephone numbers of Albanian telecommunications companies, or have used the signals of these antennas (regardless of whether they are in use by

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<sup>46</sup> Final Discussion of Prosecutors at the Prosecutor's Office of Serious Crimes Tirana, Mr. Adnan Xholi and Mrs M. Musabelliu, on the criminal proceedings No. 104 of 2005, dated 28.12.2009, page 27.

Albanian citizens or not) within the territorial boundaries of the Republic of Albania.

## **6. THE EFFECTIVENESS OF INTERCEPTION OF ELECTRONIC COMMUNICATIONS AS A MEANS OF SEEKING PROOF OF EVIDENCE.** <sup>47</sup>

Interception is an effective tool used to combat crime and to prevent risks threatening national security. Despite the practical difficulties of the tapping process in Albania, the results achieved in 2016 show that it is not only an important tool but also a necessary one for seeking evidences during the criminal process. During 2016, by using this investigative technique, it was achieved to arrest in flagrante 509 persons suspected of terrorism, murder, narcotics trafficking, corruption, arms trafficking, and other acts, avoiding incidents that could have caused grave consequence for life and national security. In some other cases on the data obtained during the interception, it was possible to register criminal proceedings mainly for the criminal offense of corruption of persons performing public functions. In total, during 2016, a total of 2,283 decisions were issued to allow the interception applied in respect of 676 criminal proceedings, taken by prosecutors in emergency conditions as well as decisions authorized by the court in preliminary investigations. The above has enabled the interception of 3943 suspected persons as involved in criminal offenses.<sup>48</sup>

## **7. CONCLUSION**

At the end of this paper it is worth mentioning that in Albania, in fulfilling the commitments undertaken internationally, the prevention of criminality should be strengthened as the

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<sup>47</sup> General Prosecution Report on Crime Situation Year 2016. Page 14-15.

<sup>48</sup> General Prosecution Report on Crime Situation Year 2016. Page 281.

Albanian state translated into concrete legal measures the general obligations imposed by international law within the framework of this uncompromising war against crime in general and organized crime and corruption in particular. However, despite the progress made in the qualitative and quantitative aspect of investigating these criminal offenses, as well as the application of special surveillance and surveillance methods, the challenge still remains to reinforce the fight against the phenomenon as one of the basic conditions for membership in European Union (EU). According to the Council of Europe (EC) Report, for 2016, the Working Paper of the Commission Staff -2016 report on Albania regarding the measures taken in the fight against corruption, no progress has been made on the change of the legislation on interception and surveillance<sup>49</sup>, timelines for investigating and admissibility of evidence before the court.

As above, for the Albanian state, it was necessary and an obligation to implement a number of changes in the Constitution of the Republic of Albania, the Criminal Procedure Code, and the legislation on electronic communications as well as the interception of communications in our country (taking place during the years 2016-2017), which in their entirety have been adapted to the respect of family and private life and in any case when this special investigative method should be applied. We also think that the above-mentioned legal changes make the fight of justice bodies more effective for the prevention and punishment of perpetrators of these offenses.

## 8. RECOMMENDATIONS

Regarding the interception, we will present some modest recommendations about the legal framework as well as some suggestions for improvements in these directions:

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<sup>49</sup> By Law No.35 / 2017 and 69/2017, a number of legal changes have been adopted in our country regarding the interception.

1. It is necessary to continue matching internal legislation with international conventions in regard to the application of interceptions and other special methods of investigation;
2. The number of investigations initiated by the proceeding body in the fight against crime should be augmented and the use of interceptions and other special methods of investigation should be applied;
3. Training of judges, prosecutors and judicial police should be consistently on-going in order to enable the acquisition of sufficient knowledge on applicable legislation and international standards in order to increase professional skills, but these training should be combined with the improvement of logistical working conditions, such as strengthening the capacity of expertise to respond promptly to the criminal investigation;
4. Another effect of these legal changes will also be the consolidation of judicial practice regarding the application of special methods of investigation.<sup>50</sup>

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<sup>50</sup> Eliona Elezi, on the topic "Special Methods of Investigation, Simulation Operations, Infiltrated Agent", School of Magistrates Tirana, 2017.

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