



Ivane Javakhishvili Tbilisi State University

Faculty of Law

Journal of Law

№2, 2017

The following issue is dedicated to the bright memory of the prominent representative of Georgian legal science, Professor Emeritus Guram Nachkebia



უნივერსიტეტის
გამომცემლობა

UDC(uak) 34(051.2)
s-216

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ISSN 2233-3746

Ioseb Gabaraevi*

Liability for Commission of Rape with Omission

Criminal law distinguishes between causality of action and causality of omission, whose scope is determined under Article 8(3) of the Criminal Code of Georgia and provides for liability for commission of crime with omission in the case of presence of specific circumstances.

The article represents the peculiarities of the rape committed with omission and theoretical possibility of criminal liability of the person who committed the mentioned offence. This legal analysis which is collated and is based on the opinion of Georgian and foreign scientists, demonstrates that the applicable version of the Criminal Code of Georgia makes possible to bring criminal prosecution against a person for both, perpetration and complicity in rape committed with omission (for mediate perpetration).

The following issues are discussed in the paper: Complicity and co-perpetration in a rape committed with omission, their objective and subjective components, possible subjects and expected legal consequences;

Keywords: *Causation, omission, guarantor, perpetration (joint principal), complicity in a crime, sexual assault, rape.*

1. Introduction

According to the opinion established in dogmatics of criminal law, rape, as a general tort (and not a special one) of an act may be committed only with action, using one or several ways described in disposition. However, in public relations regulated by law, except for consequences caused by active actions, harmful consequences may be caused by omission as well, when a subject abstains to act actively due to his/her social role, which leads to the consequence that could be prevented by the action of the subject.¹

Regardless the fact, that there has been no judicial practice regarding decisions adopted on rape committed with omission, it does not hinder, and on the contrary, analysis of applicable legislation demonstrates possibility of theoretical reasoning of sexual assault committed with omission.

Generally, omission of a person is a broader concept. That is why any omission may not be causally related to the result provided for in criminal law. Law, unlike the causality of action, provides for liability for omission only in the case of presence of certain circumstances, thus, scope of causality of omission shall be determined by relevant regulations of criminal law.

The grounds for liability during omission is causality of omission, which generally implies wrongful nature of omission. Causality of omission has the normative nature and its legal regulation is provided in Article 8(3) of the Criminal Code of Georgia, which is significantly different from causality of action and constitutes a evaluative (normative) category.² Although normative causality forms a factual character and causes changes in a real life.³

In the theory of criminal law the omission is divided into two parts, such as pure and mixed omissions. If obligation to act during omission is derived from the relevant article of the Special Part of the Criminal Code

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¹ *Nachkebia G.*, Criminal Law, General Part, Tbilisi, 2011, 257.

² *Turava M.*, Criminal Law, Overview of the General Part, Tbilisi, 2008, 175.

³ *Gamkrelidze O.*, Definition of the Criminal Law, Tbilisi, 2008, 96.

(e.g.: Article 129 of the Criminal Code of Georgia), it is a tort of pure omission (*delicta ommissiva*), when a person infringes the obligatory regulation and he/she shall be imposed liability only for omission; whilst, if the obligation to act is derived from special regulation provided for in special section of the Criminal Code, in particular from Article 8(3), it is a tort of a mixed omission (*delicta com missiva per ommissionem*), whose commission is possible with both, act or omission, and a person shall be liable for being passive, what means not only non-performance of the action but also failure to perform the action that might prevent the consequences of the offence.⁴

Thus, Article 8(3) of the Criminal Code of Georgia shall be applied only to crimes of mixed omission, which is ‘the exact reflection of torts to be committed by the active actions’.⁵

A certain tort with omission shall be deemed to be committed if there is a special obligation to act with other two conditions of omission, such as ability to act and prevent the consequences; absence of one of them during omission excludes presence of causation but it does not exclude the guilt. A person shall be denounce only if he/she physically and actually was capable to perform action.⁶

Article 8(3) of the Criminal Code of Georgia does not determine the group of persons who shall be imposed special legal obligation to act, neither determines the elements to establish obligations for a guarantor. The law-makers rely on dogmatics of criminal law and the judicial practice in resolving these issues.⁷

The above mentioned makes available theoretical reasoning of a rape committed with omission (mixed omission). The applicable version of the Criminal Code of Georgia relates the punishability of a person (guarantor) to the failure to fulfil obligations of a guarantor (Article 8 of the Criminal Code of Georgia), when a guarantor was obliged to make a certain decision or provide otherwise responses on the basis of a relevant regulation/rule. When dealing with omission in criminal law, it is referred not to the absolute inaction of a special subject but abstinence from a certain action that was expected from this subject.⁸ ‘Omission by a person in the presence of certain persons is not “nullity” or emptiness, but constitutes definite behaviour’⁹. Omission may be a motive, which has determined behaviour of other persons; it may force those persons to perform some active actions.¹⁰

A person shall be liable for mixed omission if (1) one guarantor encourages another guarantor in omission (a guarantor to a guarantor) and does not hinder occurrence of a result (co-perpetration); (2) or the guarantor, with deliberate failure to interfere, persuades a person to be under his/her protection (incapable due to mental illness) to commit a sexual assault (mediate perpetration); (3) or an incapable person commits a sexual assault against an incapable person, who is under supervision of a guarantor (assistance).

In all three cases omission of a guarantor has a certain definition. He/she creates a motive for a certain type of conduct of other persons by his/her omission. A subject (guarantor) does not fulfil obligation of active lawful action, does not interfere in the course of events and does not prevent the unlawful result; failure to fulfil obligations does not mean passive ‘omission’ but implies failure to perform certain legally stipulated measures. The type of obligation, imposed on an addressee of the regulation shall be established objectively in each case.

However, only establishing the fact that a guarantor has been obliged to act due to the conditions or imposed obligations in a certain way, is not sufficient to establish causality of omission. It is necessary that a person, who has not fulfilled imposed obligations, shall have factual ability to fulfil these obligations.¹¹ A guarantor is required to perform such active lawful act if he/she was objectively able to prevent wrongful consequence as a result of such act and consequences would be prevented by performing obligatory and possible act.

⁴ *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Certain Forms of Identifying Crimes, Tbilisi, 2011, 328.

⁵ *Wessels I., Boilke V.*, General Part of Criminal Law, Crime and its Structure, Tbilisi, 2010, 421.

⁶ *Ibid*, 427.

⁷ Authors’ Collection, Criminal Law, Overview of the General Part, Textbooks, Tbilisi, 2016, 137.

⁸ *Tsereteli T.*, Problems of Criminal Law, Vol. II, Tbilisi 2007, 379.

⁹ *Piontkovsky A.A.*, The Doctrine of Crime, 227, cited *Tsereteli T.*, Problems of Criminal Law, Vol. I, Tbilisi, 2007, 278.

¹⁰ *Tsereteli T.*, Problems of Criminal Law, Vol. I, Tbilisi 2007, 279.

¹¹ *Ibid*, 290.

2. Co-Perpetration (Joint Principal) in a Rape with Omission

Article 22 of the Criminal Code of Georgia distinguishes three types of perpetrators: immediate perpetrator, co-perpetrator (joint principal) and mediate perpetration. In order to consider an inactive person as a co-perpetrator with omission, he/she has to be imposed an obligation of a guarantor.

Co-perpetration of guarantors implies the cases, where a guarantor (a person with special obligation to act) encourage omission of another guarantor or does not prevent occurrence of the result with his/her omission. In such cases co-perpetration with omission takes place.

Both guarantors shall be liable for co-perpetration committed with omission, if another guarantor, who does not prevent occurrence of the result with his/her omission, is imposed obligation of protection and care, similar to the first guarantor. In this case, the co-perpetrators shall be liable for failure to fulfil their own obligations and not for each other's omission.¹²

Co-perpetration is rape committed with omission, implies liability of guarantors for mediate perpetration. It is obvious, that number of guarantors, as a reason of a joint consequence of an unlawful result, will affect the qualification of rape in respect of aggravation of their criminal liability. Both guarantors shall be liable for rape committed jointly if the result was caused by their joint omission (co-perpetration in rape - Article 137(2)(c) of the Criminal Code of Georgia).

In other words, if each mediate perpetrator is able to cause the same result with their omission or failure to fulfil their special obligations that cause in the course of joint omission (with mediate co-perpetration), in such a case they are parallel perpetrators. Although, differentiation of a co-perpetration from a parallel perpetration does not bear practical importance¹³ and they shall be liable for a rape committed jointly with omission.

For more obviousness, it is appropriate to analyse briefly the following example. Where a guarantor, with intentional failure to hinder, persuades a person incapable due to his/her mental illness, who is under his/her protection, to commit a rape against the other person and the second guarantor encourages the omission of the first guarantor or together with him/her does not hinder the occurrence of the result with his/her omission, both guarantors shall be considered as mediate perpetrators.

At the same time, omission of guarantors constitutes a supportive reason for occurrence of the wrongful result¹⁴ (infringement of a sexual freedom that is specific legally protected interests). It is absolutely sufficient to consider a person as a co-perpetrator in rape committed with omission. Nevertheless, the both guarantors affect the further development of the causation without physical interference and do not perform the components of an act themselves. They participate in commission of one of the crimes as mediate perpetrators. Both of them dominate on act committed by the 'live weapon' and use another person who is blindly obedient, not only as a blind weapon to perform his/her will, but as a person who physically commits a crime and shall not be liable for committed offence.

In such case, these co-perpetration by these persons take place,¹⁵ which is referred as a 'mediate co-perpetration' by O. Gamkrelidze.¹⁶ Taking into consideration that the mediate perpetration is similar to perpetration,

¹² *Mchedlishvili-Hedrich K.*, Criminal Law, General Part II, Tbilisi, 2011, 353.

¹³ Authors' Collection, Criminal Law, General Part, Textbooks, Tbilisi, 2016, 371.

¹⁴ There is a dominated opinion in legal literature (see *Gotua Z.*, Liability for a Rape, Tbilisi, 1994, 7; *Tsulaia Z.*, Criminal Law, Special Section, Vol. 1, Tbilisi 2000, 179; *Zhuravlev M.P.*, *Nikulin S.I.*, (Red.), Criminal Law, General and Special Part, 2nd edition, 2008, 382.), that rape constitutes a formal crime, a tort of an abstract threat. However, this opinion has opponents as well (see *Lekveishvili M.*, *Todua N.*, *Mamulashvili G.*, Special Section of Criminal Law, Vol. I, 6th ed., Tbilisi 2016, 216; *Jishkariani B.*, Special Section of Criminal Law, Crimes against Humans, Tbilisi 2016, 246), according to whose appropriate opinion, a rape shall be deemed as substantive component if a victim had not incurred serious harm of his/her health and the initiated sexual intercourse was not fully completed. Even in such case sexual freedom, honest and dignity of a victim have been abused, that is already quite a grave consequence of the rape.

¹⁵ *Tsereteli T.*, Complicity in Crimes, Tbilisi, 1965, 131.

¹⁶ *Gamkrelidze O.*, Definition of the Criminal Law, Tbilisi, 2008, 186.

and co-perpetration implies two or more perpetrators, they (both guarantors) will be considered as co-perpetrators (mediate co-perpetrators).

It is impossible to impose liability on the second guarantor as an abettor in rape, as the first guarantor, as a mediate perpetrator of a rape committed through a 'live weapon', has not made decision on participation in a rape with omission as a result of the second guarantor's influence. Abetting at mixed omission shall take place if the second guarantor persuades the first one and forces him/her to make a decision not to fulfil special obligation imposed on him/her. A guarantor encouraged by an abetting guarantor acts with intention and he/she manages the omission.

Taking into consideration the fact that the mediate perpetrator is a type of a perpetrator, in order to qualify the act of a mediate perpetration, it is not necessary to refer to Article 22 of the Criminal Code of Georgia. This rule shall be applied to qualification of co-perpetration of an act and mediate co-perpetration.

The issue of guarantors' liability shall be otherwise decided during complicity in rape (see Chapter IV). When a capable person commits a rape against an incapable person who is under supervision of a guarantor, like the second guarantor, in the case of his/her engagement in the causation chain, like the first guarantor, shall be liable for assisting with omission in sexual assault committed with act, with reference to Article 24(3) of the Criminal Code of Georgia.

2.1 Subjective Part of the Co-Perpetration (Joint Principal) in Rape Committed with Omission

Subjective attitude of co-perpetrators is manifested in the intent of their behaviour. Irrespective the fact, that sometimes co-perpetrators act in prior agreement (on the basis of a general plan), their prior agreement is not necessary. In order to impose liability on a co-perpetrator for sexual assault committed with omission, apart from the presence of the causation between guarantor(s)' omission and the occurred result, both guarantors shall have a common purpose¹⁷ and their intentional act be guilty. Both of them must bear certain obligations, and be able to influence the forces which threaten legally protected individual (particular) interest, such as sexual freedom of a person.

When participating in a rape committing with omission in a form of a mediate perpetrator, it is necessary that another guarantor be aware that he/she commits an omission together with the first guarantor, where like the first guarantor, he fails to fulfil imposed liability intentionally and at the same time, enables another guarantor not to hinder the 'live weapon' to commit a rape with act. In such case, another guarantor, like the first one, shall be liable for both, mediate perpetration and failure to fulfil special legal obligations imposed on him/her.

3. Mediate Perpetration in Rape Committed with Omission

Similar to the co-perpetration, the concept of mediate perpetration shall be distinguished from the concept of a perpetrator. Mediate perpetration is not a type of complicity, and when dealing with the mediate perpetration, complicity shall be excluded. This is the case when the act of another person is involved in the chain of causation through which the mediate perpetration fulfils his/her intention. The offender influences the further development of causality without his/her own physical interference and uses blindly obedient person as the blind weapon for fulfilling his/her own intent, as well as the physical perpetrator of the crime who either is not completely liable or is liable for another crime. The offender shall be a real, liable person as a mediate perpetrator and not an aider or abettor.¹⁸

¹⁷ *Authors' Collection*, Criminal Law, General Part, Textbooks, Tbilisi, 2016, 154.

¹⁸ *Sauer W.*, General Criminal Law, Berlin, 1955, 213-216. According to *Sauer W.*, creating mediate perpetrator's character artificially is a great methodological mistake and a mediate perpetrator with his concept and nature, as well as with the

In terms of criminal law, persons who rendered assistance with advice and weapon to a person of legal age or a capable person in committing a crime and a person who provided a mentally unhealthy person with such advice may not be judged similarly and deserve similar punishment. Mediate perpetration is not limited only with 'abetting' or 'rendering assistance' to 'a live weapon'. According to the appropriate opinion of M. Kovalov, 'mediate guiltiness is not only a surrogate of abetting but it is quite independent event which may be manifested in such an act that is like abetting or in the act, which resembles an assistance.'¹⁹

'Use of "a live weapon" for criminal purposes is substantially different from the use of mediate perpetrator for the same purposes, who is capable and acts with intent.'²⁰ Use of the 'live weapon' with its nature equals to the mediate perpetration by a person, who abuses this 'live weapon'. Such person, as a blind weapon, shall not be liable for his/her act that caused an unlawful consequence, is not his/her wilful act, he/she is incapable and is not aware of his/her act. It is obvious that encouraging or support of a capable person or a person of full legal age to commit a crime, shall not be considered as a mediate perpetration.

In dogmatics there is the opinion expressed regarding impossibility of mediate perpetration in torts of omission. According to the opinion of one part of the scientists, the mediate perpetration is impossible in the torts of mixed omission.²¹ This opinion in the referred sources is mentioned by the authors when discussing torts of pure omission, in which, in my opinion, exclusion of a mediate perpetrator in torts of pure omission is implied, that is related to fulfilment of special obligations which are personal and defines the nature of the tort. This is definitely true as the latter are torts of obligation and their commission is possible only with omission.

The issue is otherwise raised when it is dealt with possibility of mediate perpetration in torts of mixed omission whose commission is possible with both, act and omission.

To illustrate the above mentioned, it is appropriate to briefly analyse the following example: An incapable person is placed in a psychiatric facility due to his/her mental state.²² A supervisor/doctor (guarantor) of a psychiatric facility shall be obliged to prevent incurring harm by the patient against the other persons. His, as the guarantors certain obligations regarding particular legally protected interests of his/her patient (sexual freedom) shall be emerged from the obligation to supervise the third persons,²³ although he/she may be imposed the obligation of both, a supervisor and a protector. To supervise the process of psychiatric support is his/her official duty.²⁴ He/she shall also have an official obligation for protecting life and health (including sexual freedom) of the patient placed in the psychiatric facility as well as for ensuring protection of the employees of the psychiatric facility from a person suffering from mental illness.

extent of his/her punishment, is much closer to an abettor and even to a mental aider, than to a mediate perpetrator who him/herself perform an executive act. That is why he requires to expel this concept of a mediate perpetrator completely from the field of criminal law and blend it with the concept of complicity in crime. Cited. *Tsereteli T.*, Problems of Criminal Law, Vol. II, 2007, 120.

¹⁹ *Kovalev M.I.*, Complicity in Crime, Part II, Sverdlovsk, 1962, 19.

²⁰ *Solnarzh V.*, Accompliceship on Criminal Law of Czechoslovakia Socialist Republic, 1962, 94, Cited. *Tsereteli T.*, Problems of Criminal Law, Vol. II, 2007, 121.

²¹ Gamkrelidze denies the possibility of mediate perpetration in torts of mixed omission, see *Gamkrelidze O.*, Problems of Criminal Law, vol. I, Tbilisi, 2011, 195-196; *Gamkrelidze O.*, Problems of Criminal Law, Vol. III, Tbilisi, 2013, 268; Mchedlishvili-Hedrich K. also excludes the mediate perpetration of torts of mixed omission (tort of obligations). See also *Mchedlishvili-Hedrich K.*, Criminal Law, General Part II, Tbilisi, 2011, 360-361.

²² medical and preventive treatment facility holding an appropriate licence, whose primary function is providing medical and other types of specialised psychiatric support to the persons suffering from mental illness. See the Law of Georgia on Psychiatric Care.

²³ *Wessels I., Boilke V.*, General Part of Criminal Law, Crime and its Structure, Tbilisi, 2010, 439.

²⁴ Supervising the process of psychiatric support implies supervision of workers employed in the psychiatric facility, relations between administration and patients, which is regulated by the relevant Order of the Minister of Labour, Health and Social Affairs of Georgia.

In practice, a mentally ill patient (incapable) who is placed in the psychiatric facility may attack a woman employed in the psychiatric facility (or another patient) for the purpose of establishing sexual intercourse, while a supervisor observes the fact who is imposed function to supervise the source of threat and/or third persons and shall be obliged to avoid any threat to legally protected interest. Nevertheless, he/she does not prevent the fact and does not prevent fulfilment of intention of a person who is incapable due to his/her mental illness and who cannot be aware of the nature of his/her act and cannot manage his/her behaviour; if a supervisor/doctor who is under supervision of a guarantor, commits corpus delicti of the rape with act in such circumstances, a supervisor guarantor sees it and does not prevent his/her action, a guarantor shall be punished as a mediate perpetrator.

In the presented example, an incapable person who is under supervision of a supervisor who performs the corpus delicti of the act, shall not be imposed criminal liability as a 'live weapon', as he/she acts in the circumstances excluding capability (mental state), as he/she acts non culpably without intent, which exclude his/her and supervisor's (guarantor's) general liability on the basis of general guilt. Each accomplice shall be charged or jointly charged.²⁵ Absence of this condition exclude liability of a guarantor for co-perpetration in sexual assault (rape) committed with omission.

Acts of a 'live weapon' is directed by the intentional acts of the other person (guarantor). A supervisor shall dominate the act which is performed not directly by him/her, but he/she use a 'live instrument' for performing the act acting without guilt, in order to impose liability on him/her; within the scope of dominating over it becomes possible to reason presence or absence of mediate perpetration. If it is impossible to establish the fact of mediate perpetration, it has to be established whether abetting took place in part of a guarantor.

A mediate perpetrator, as a rule abets, does not hinder or eases committing a crime with his/her omission to 'a live instrument' for committing unlawfulness and aids him/her in committing unlawfulness. Although such an act cannot be considered as a complicity in a crime as in accordance with Article 23 of the Criminal Code of Georgia, complicity in a crime shall mean joint participation of two or more persons in the commission of an intentional crime. Thus, in order an act to be considered as complicity in a crime, unity of both, objective and subjective parts is necessary. According to A. Trainini, when an immediate perpetrator of a crime acts without intent ... it is so called mediate perpetration of a crime. In such cases, a perpetrator in a crime is not an instrument ..., but a person who had used this instrument, who at the same time is the author of this intentional crime.²⁶ "A live weapon' commits a criminal unlawfulness and not a crime; as he/she in the most of the cases is characterised by some 'defect'²⁷ and this very 'defect' is used by a mediate perpetrator through 'a live instrument' to commit a crime and commit a corpus delicti through another person.²⁸ On one hand, this makes possible that a supervisor of a psychiatric facility finally will be considered as a mediate perpetrator in a rape as a general tort committed with omission.

Taking into consideration criteria established for subjectivity, mediate perpetration is excluded in torts to be committed under special obligations and on the own of a person, mediate perpetration shall be excluded. Accordingly, someone who cannot commit corpus delicti him/herself, he/she cannot commit this corpus delicti through 'a live weapon' either.²⁹ Mediate perpetration is the same as perpetration, since a mediate perpetration is one of the types of perpetration.

On the other hand, it should be noted that a supervisor (doctor) of a psychiatric facility, as a guarantor (who has undertaken a function of a legal guarantor) of incapable persons, who is either mentally ill or is a minor, is

²⁵ *Tagantsev N.S.*, Russian Criminal Law, General Part, Vol. 1, Tula, 2001, 573.

²⁶ *Traynin A.N.*, Teaching About Complicity, Chapter Eight, Moscow, Jurid. Publishing House of the NKJ USSR, 1941, 112, <<http://law.edu.ru/book/book.asp?bookID=6451>>, [28.11.2016].

²⁷ *Kindhauser U.*, General Part of Criminal Law, 3rd ed., Berlin, 2008, 11, 27, 39.

²⁸ *Gamkrelidze O.*, Problems of Criminal Law, Vol. I, 2011, 190.

²⁹ *Gamkrelidze O.*, Definition of the Criminal Law, Tbilisi, 2008, 187.

imposed an obligation of supervision and protection and regardless the grounds of emerging his/her obligations, he/she shall be obliged to protect legally protected interests.³⁰

In order to establish causation between omission and occurred harmful consequence, first of all, it shall be established whether or not a particular person had been engaged in the common factors of relations determined by his/her prior action and at what extent this engagement stimulated development of these relations. Specific conditions of an individual imposes him/her functions due to which they are expected to act relevant to this expectation in the specific situation and if this reasoned expectation is not justified, when a person turns away from specific situation and enables forces causing unlawful consequences, omission turns into the condition of a harmful consequences.³¹

In general, this opinion complies with disposition content of Article 137(1) of the Criminal Code of Georgia, which, although does not specify type of act, or the rape shall be committed with act or omission, penetration of sexual nature, if judging by literary definition of this word, its commission is impossible without an active act; content of Article 8(3) of the Criminal Code of Georgia theoretically does not exclude rape committed with omission. In the torts of mixed omission a guarantor abstinent to act, bears prevention of consequences and his abstinence, in terms of assessment, equals to implementation of *corpus delicti* with action,³² as it leads to the same consequence, as the act.

Article 8 of the Criminal Code of Georgia, as the general regulation, interprets preconditions of causality with a result in one of the elements of the classical concept of the crimes, such as types of acts during the act or omission. Due to its general nature, it applies to the *corpus delicti* provided for in Article 137 of the Criminal Code of Georgia and according to the relevant opinion of O. Gamkrelidze, referring only to a result does not always imply fulfilment of this result with omission in the course of a rape,³³ if a person at the same time is not imposed a special obligation and a real ability to act in parallel to this obligation, and if with an obligatory and possible acts a consequence could be avoided.

Since a mediate perpetrator is the same as the offender who acts individually, he/she shall be punished as a perpetrator. Referring to Article 19 of the Criminal Code of Georgia in the case of mediate perpetration shall be inadmissible.

The fact that reasoning of theoretical possibility of a rape committed with omission, does not raise the problem and enables to qualify the act in the case of sexual assault (rape) committed with omission, if such an act occurs and the person imposed a legal guarantee meets all conditions with his/her omission necessary for establishing causality; and only the fact that currently there are no cases of rape committed with omission in judicial practice and it shall not be a weighty argument rejecting possibility of consideration of a rape committed with omission.

3. 1. Subjective part of a mediate perpetration in a rape committed with omission

Subjective part of a mediate perpetration does not differ from a subjective part of a complicity. A mediate perpetrator also acts with a direct intent.

A guarantor, together with obligation to protect (protection of beneficiaries/patients from any threat) shall be imposed obligation to supervise (he/she shall be obliged to prevent commission of a crime by an incapable person), which cannot be fulfilled due to their incapacity and a guarantor shall be imposed obligation within the entire term of his/her authority.

³⁰ *Shonk A., Schroeder H.*, Criminal Code, Munich, 2006, 16.

³¹ *Tsereteli T., Tkesheliadze G.*, Doctrine of a Crime, Tbilisi, 1969, 303.

³² BGHSt GrS 16,155, citation *Wessels I., Bolike V.*, General Part of Criminal Law, Crime and its Structure, Tbilisi, 2010, 421.

³³ *Gamkrelidze O.*, Problems of Criminal Law, Vol. III, 2013, 181.

In order to impose liability on a supervisor (guarantor) as on the mediate perpetrator for rape committed with omission, guarantor shall necessarily know the consequences of criminal unlawfulness committed by a 'live weapon', who is under his/her supervision, and the guarantor has to be willing to do so and attend rape committed by or against such an incapable person. It is inadmissible to bring formal charges against a person for omission if he/she is not on site physically.³⁴

A guarantor, together with the non-performance of obligatory and objectively possible intention, in respect with the function of a legal guarantor, shall have awareness that an incapable person, who is under his/her supervision, within the limits of his/her ability, independently, with failure to fulfil his/her obligations 'cannot commit an unlawful act and violate legally protected rights of other persons, or he/she can do it within the limits of his/her ability'.³⁵ This very extent of unlawful act committed by an incapable person, together with the extent of the unlawfulness shall determine the extent of the guilt of a guarantor. A person shall be denounced only if he/she had possibility of performance an action. Accordingly, inability of a special legal obligation to act excludes causation, as well as the guilt, since Article 8(3) of the Criminal Code of Georgia establishes the liability for omission only if a guarantor has a real ability to act preventing harmful consequence.

Guilt of a 'live weapon', who is under supervision of a guarantor, for a criminal unlawfulness committed by him/her shall be excluded on general grounds due to his/her incapacity.

4. Complicity in a Rape Committed with Omission

The current applicable Criminal Code of Georgia, unlike its previous version, provides for co-perpetration in a narrow sense and an accomplice is no longer considered as a type of co-perpetrator. Although the aider, similar to the organiser and abettor, do not perform corpus delicti provided for in the Special section of the Criminal Code of Georgia, although they jointly perform common unlawfulness, - joint wilful act, and they are called as accomplices by lawmakers.

Mixed omission, in general, may be committed with participation of accomplices,³⁶ perpetrator of which has to be a capable person. Due to the accessory nature of complicity in crime, an aider shall be liable for support with omission of the perpetrator.

In practice, it is problematic to differentiate between the issues of a perpetrator and accomplice during the mixed omission, when it shall be legally assessed the participation of a guarantor with omission in active acts performed by the non-guarantor. This problem may be demonstrated with more intensively when the matter deals with such offences committed with mixed omission of specific corpus delicti of sexual offences as a rape.

In order to illustrate the issue, we the following example may be provided: The caretaker guarantor sees that a legally capable person (non-guarantor) is committing a rape against the person under his/her protection who is incapable due to his/her age or mental state (and a guarantor is imposed an obligation of both, protection and supervision) and the guarantor does not hinder it. It is interesting how to decide the issue of liability of a guarantor and if a guarantor shall be liable for assistance with omission in rape.

In the given example, when a capable person, who is an immediate perpetrator with an act, is committing a rape against an incapable person who is under supervision of a guarantor and who shall be protected (due to the age or mental state) and a caretaker guarantor does not intentionally hinder rape committed by the other capable person against a person to be under his/her protection (incapable), a supervisor, who acted with intentional

³⁴ *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Tbilisi, 2011, 306.

³⁵ *Kutalia L.-G.*, Guilt in Criminal Law, Tbilisi, 2000, 501; the same, see *Nachkebia G.*, Criminal Law, General Part, Textbook, Tbilisi, 2011, 311.

³⁶ *Baumann / Weber / Mitsch*, AT §15 / Rn.35; *Shonk / Schreder-Kremer-Hain*, §25 / Rn.99, Cited, *Mchedlishvili-Hadrich K.*, Criminal Law, General Part, Certain Forms of Identifying Crimes, Tbilisi, 2011, 351.

omission, shall be liable as an aider. He/she (a supervisor/guarantor), as a co-perpetrator, does not hinder (supports, assists) with his/her omission the accomplice in occurrence of wrongful consequence, on the contrary, he/she creates conditions supporting occurrence of tortious results and in thus he/she makes easier commission of rape that finally increase the possibility of occurrence of the result. Assistance may be expressed in providing a guarantor with an advice necessary for committing a crime or in rendered mental assistance.³⁷

A guarantor (with omission) and a perpetrator (with an act) commit a common unlawfulness. Both of them abuse and harm the same legally protected interests of sexual freedom, that is why both, the accomplice (as a guarantor aider) and perpetrator, due to accessory nature of complicity in crime, they are prosecuted for incurring harm to the same legally protected interests. Due to such common factors, a perpetrator is the main character whose act, in terms of the objective unlawfulness, determines the scope of liability for assistance.³⁸

At the same time, omission of a guarantor is not mandatory to be a necessary condition, i.e. *Conditio sine qua non* for committing a crime.³⁹ He/she shall be liable as an aider even if it is established that the perpetrator was committing a rape without his/her assistance. To qualify the assistance of the guarantor as an aid, it is primarily necessary to establish whether or not his/her, as the aider's omission was involved in certain consequential causality and if it preceded in time his/her, as the accomplice's (aider's) omission, to the act of the perpetrator and the occurred consequence in general.

However, currently, there is a difference of opinions in dogmatics of Georgian criminal law on aiding with omission. O. Gamkrelidze bases his opinion regarding the assistance with omission,⁴⁰ on the lack of the appropriate cases in judicial practice and agrees with the opinion expressed in German literature, according to which a protecting guarantor who does not fulfil their imposed obligations, is always a perpetrator;⁴¹ whilst M. Turava Considers assistance with omission to be possible.⁴² Possibility of an accomplice in rape committed with omission (assistance in rape - Articles 25 and 137) is also recognised by N. Todua,⁴³ however, he excludes perpetration with omission in rape.⁴⁴

If following the opinion of O. Gamkrelidze, in this particular case, a caretaker guarantor, who is imposed the function of a protector guarantor and does not perform specific imposed function, shall be liable for his omission as a perpetrator (co-perpetration) in sexual assault committed with omission. Although the above mentioned is in compliance with and does not contradict dominating opinion in dogmatics of criminal law expressed by T. Tsereteli regarding possibility of co-perpetration with both, act and omission,⁴⁵ but this opinion does not comply with the theory on domination over the act, based on which it is possible to affirm that only an immediate (capable) perpetrator with act dominates over the act. Omission of a guarantor is not domination over the act. In the present case, the described crime has a (capable) person committing crime with an active act who dominates over the act, and this very element, - domination over the act, - makes the inactive guarantor (supervisor) a secondary character, such as an aider; the inactive person attending the crime shall be liable for aiding in crime

³⁷ *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Certain Forms of Identifying Crimes, Tbilisi, 2011, 352.

³⁸ *Makharadze A.*, Criminal Liability for Assistance in Crime, Tbilisi, 2006, 199.

³⁹ *Turava M.*, Criminal Law, Overview of the General Part, 9th ed., Tbilisi, 2013, 89.

⁴⁰ Generally, assistance with omission is recognised in Georgian criminal law as well. The author, likely does not consider assistance with omission to be impossible, but he, in all his presented examples, has such consideration, where both, perpetrator committing an act and a person committing an omission perform functions of a guarantor. see example, *Gamkrelidze O.*, Interpretation of the Criminal Code, 2nd ed., Tbilisi, 2008, 200; *Turava M.*, Criminal Law, Overview of the General Part, 8th ed., Tbilisi, 2010, 273.

⁴¹ *Ebert U.*, Criminal Law, General Part, 3rd ed., Heidelberg, 2001, 192.

⁴² *Turava M.*, Criminal Law, Overview of the General Part, 8th ed., Tbilisi, 2010, 274.

⁴³ *Lekveishvili M., Todua N., Mamulashvili G.*, Special Part of Criminal law, Vol. I, 6th ed., Tbilisi, 2016, 212;

⁴⁴ The author considers it impossible to commit rape with violence or threat of violence. Due to the above mentioned judgement, if taking into consideration that law stipulates liability for omission only in specific circumstances, perpetration in rape with omission is quite possible.

⁴⁵ *Tsereteli T.*, Complicity in Crimes, Tbilisi, 1965, 141.

only if he is obliged to prevent the unlawful consequence, or imposed the function of a guarantor.⁴⁶ Failure to fulfil these very obligations is in causation with infringement of legally protected interests, causing his/her, as an aider's liability. Regardless the fact that in this case a guarantor does not dominate over the act during his/her omission, he/she shall be obliged to prevent unlawful consequences, although he/she acts as a inactive attending person and shall be liable for both, infringement of imposed obligations and for failure to prevent the occurred result.

When qualifying a supervisor/guarantor's, as an aiders act in sexual assault committed with omission, the act will also be qualified as co-perpetration with acting assistance and Article 24 of the Criminal Code of Georgia shall be referred. On the other hand, the issue to collate a perpetrator from an aider is a matter of an independent judgement and indeed, it is not subject to in-depth consideration at the present stage. We would like to make a general notice with respect of the issue in question.

4. 1. Subjective Composition of Complicity in Rape Committed with Omission

In subjective part, a guarantor, as an aider must act with intent. He/she has to be aware that he/she contributes, aids an accomplice in committing a crime with his /her omission, and perform a common unlawfulness, which implies connection of their acts with common intent.⁴⁷ A guarantor is aware of basic elements of unlawful act of an accomplice and acts with a direct intent. By expressing the act of an accomplice, plan and nature of act of an accomplice is obvious for a guarantor, without knowing of which it is impossible to be a co-perpetrator.⁴⁸ At the same time, it is not necessary that an accomplice to know about omission of the co-perpetrator, i.e. co-perpetration is not always characterised by 'inter-knowledge'.⁴⁹

At the same time, the guarantor, with his/her omission is becoming an accomplice of perpetrators purpose and abides his/her purpose to it, which is implemented through the perpetrator's act.⁵⁰ The result is desired to the extent of the wish of the perpetrator, thus to achieve his/her goal, a guarantor, who shall be liable for assistance, which complies with the opinion expressed in the doctrine of criminal law that in order to be a co-perpetrator in a crime, it is necessary a perpetrator and an accomplice have one common goal,⁵¹ as an accomplice and a perpetrator commit unlawfulness together with common objective and subjective elements, otherwise it is impossible to commit a common unlawfulness; F. Burchak has similar opinion: '... Co-perpetrators are related to each other with common purpose, general aim, and such unity is possible only in such crimes which are committed with the direct intent'.⁵² That is why the supervisor of a psychiatric facility shall be liable as an assistance in committing general unlawfulness.

In the case if a person shall not be imposed a special obligation to act, obliging him/her to perform such an act intended for avoiding the result, and he/she will merely attend commission of crime and will not assist in crime, in such a case, taking into consideration the fact that a sexual assault is the crime of a grave category, such a non-guarantor person shall be liable for failure to inform about the above mentioned.⁵³

⁴⁶ *Baumann J., Weber U., Mitsch W.*, Criminal Law, General Part, 11th ed., Bielefeld, 2003, 214.

⁴⁷ *Gamkrelidze O.*, Interpretation of the Criminal Law, 2nd ed., Tbilisi, 2008, 200.

⁴⁸ *Traynin A.N.*, Teaching About Complicity, Chapter Eight, Moscow, Jurid. Publishing House of the NKJ USSR, 1941, 112 <<http://law.edu.ru/book/book.asp?bookID=6451> > [28.11.2016].

⁴⁹ See *Tsereteli T.*, Problems of Criminal Law, Vol. I, Tbilisi, 2007, 63-64; *Turava M.*, Overview of the General Part, 8th ed., Tbilisi, 2010, 270.

⁵⁰ *Makharadze A.*, Criminal Liability for Assistance in Crime, Tbilisi, 2006, 199.

⁵¹ *Dvalidze I.*, Impact of the Motive and Purpose on Qualification of an Act and Criminal Liability, Tbilisi, 2008, 110.

⁵² *Burchak. F.G.*, The Doctrine of Complicity in Soviet Criminal Law, Kiev, Kiev Book Factory No. 1, 1969, 120, <http://www.economics.com.ua/writer/4095/textbook/11742/burchak_fg/uchenie_o_souchastii_po_sovetskomu_ugolovnomu_pravu >, [06.10.2017].

⁵³ *Ebert U.*, Criminal Law, General Part, 3rd ed., Heidelberg, 2001, 215. See the same *Tsereteli T.*, Complicity in Crimes, Tbilisi, 1965, 176.

5. Conclusions

The above mentioned theoretical discussion presented in the paper is based on proper, logical judgement, which is the sufficient basis for further discussion of the issue in the context that the present issue has not been subject to discussion yet.

Regardless the fact that result, - abuse of sexual inviolability, - provided for in Article 137(1) of the Criminal Code of Georgia, typically occurs with act, the above mentioned theoretical discussion presented in the article and legislative stipulation of corpus delicti of a sexual assault and legislative record provides sufficient basis to conclude possibility of the same result committed with omission.

It is significant, that in the legislative record of Article 137(1) of the Criminal Code of Georgia there is no reference to sexual assault as the type of act prohibited by law - whether the abuse of sexual inviolability be committed with act or omission. That is why, both act and omission are implied in this case, which creates solid foundation to the above mentioned opinion on committing sexual assault with act or omission.

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