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COMMENTS

**ON THE DRAFT LAW
OF GEORGIA
ON REHABILITATION AND RESTITUTION OF PROPERTY
OF VICTIMS OF THE GEORGIAN-OSSETIAN CONFLICT**

by

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1. General remarks

1. Being conceived as a (*unilateral*) *confidence building measure* by the Georgian authorities, aimed at positively influencing the final resolution of the Georgian-Ossetian conflict, it is important that this piece of legislation be adopted and implemented *as soon as possible*. At the same time, it is highly important that:

- the necessary modifications be introduced in the draft, in order for the future mechanisms be efficient; in this context, the Venice Commission suggestions should be taken into account, that is the adoption of the draft by the government should take into account the consolidated draft opinion of the Commission, if not the final opinion as adopted by the plenary on 17-18 March;
- all interested parties be consulted: the relevant NGO's, including South-Ossetian, the opposition, and, if available, the South-Ossetian "authorities";
- the dissemination of information regarding the purposes, the advantages and procedures of the law for the direct beneficiaries be conducted both during the process of adoption, and after;

So, these above mentioned elements should be considered in connection with the calendar of adoption.

2. *The financial implications* of the law should be carefully assessed. During the visit, these implications were vaguely envisaged by the authorities. Using the services by the Council of Europe Bank and/or a Donors Conference might be taken into account for covering the expenses.

3. The number of persons who might apply should be also assessed, together with the evaluation of the properties that could be restituted.

2. Scope and purpose of the Law

Concerning the scope of the law, two options could be envisaged:

- keeping it as designed by the current version of the draft (covering both restitution/compensation of properties and rehabilitation of other violated rights), if the overall burden of the Commission is not too big; in this case, the draft should clearly regulate in detail the second task, which currently is set forth vaguely (see art. 41), especially as to the way of redressing the violations and the exact criteria of compensation, including the levels of compensations to be granted (alternatively, the law can provide that a first decision of the Commission should regulate the levels,

- but the law should set the criteria and the general rules); as well a modification of the title of the Commission is desirable in order to cover properly both tasks;
- restricting the scope to the properties issue; in this case, a Commission in charge of redressing the violations, other than those related to properties and real estate, for all conflicts, not only the Ossetian one, should be created as soon as possible; the law could mention this, and the Venice Commission opinion should recommend it expressly.

I would strongly favor the first option, if feasible in practice; a recommendation of the VC for the second should not be perceived as one favoring the narrowing of the responsibilities of the Georgian government, if it is willing (and able) to do more for the victims.

Concerning the purpose of restitution/ compensation for properties, if this is to promote returning of the refugees and IDP's, the Law should set, as a matter of principle, the rule of the prevalence of the restitution, and only if this is not possible for various reasons, the compensation rule. In case the Law will set restitution and compensation on equal footing (the option rule), it is even more necessary that the draft establish clear and detailed criteria for compensation (as it is drafted now it is vague); otherwise, the purpose of building confidence will not be reached.

Concerning the criteria and levels of compensation, the draft should take into account the imperative that the amount of payment be "reasonably related" to the value of property, according to the relevant case-law of ECHR (see, *inter alia*, "The former King of Greece and others"-para.89, "James and others"-para.54, "Broniowski"-paras.176, 182, 186).

3. Establishment, Composition and Working Languages of the Commission

Following the visit to Georgia, it resulted that the best option would be that the international organizations (UNHCR, OSCE, EU, CoE) nominate the members of the Commission: first, the four international members, than the Georgian (nominated by the Georgian authorities) and the Ossetian (nominated by the Ossetians, and if not, those Ossetian personalities, as recommended by NGO's, international organization's missions/offices in the area, other sources). In this last category may be included not only South-Ossetians from South-Ossetia, but also from the communities of refugees of North-Ossetia. The draft should only mention that the members of the Commission are to be nominated by international organizations, without nominating them. The rest of the procedure could be included in the explanatory memorandum of the Law.

I suggest that the Law provide that the selection of Georgian and Ossetian members be effected out of a larger list of candidates (for instance, if the number of members for each side is 4, the list should include at least 8 candidates; the rest of the candidates of the list could as well play the role of substitute members, ready to replace a member if in impossibility to continue his/her assignment).

I also suggest that the president of the Commission be an international, with casting vote. Another option would be an odd number of the members of the Commission- instead of four internationals, five.

The Law should also mention the working languages of the procedures (Georgian and Ossetian), as well as the possibility for free of charge translation, upon request.

4. Character of the Commission, Relations between Committees and Commission, Right to Appeal the Decisions

As resulting from the current draft, the Commission is an independent body with administrative character (“a legal entity of public law” – art.1para.2), with quasi-judicial functions, and the capacity to adopt normative acts (- art.20 para.2); so, its legal status should be clearly stated.

In order for the Commission to be efficient, I suggest the draft to give the power of decision-taking to the Committees, and not only to the full Commission. The Law should provide the right to any interested person, natural or moral, to appeal a decision of a Committee, either in front of the plenary of the Commission, or in front of a panel composed of the international members, or of a panel composed of those members of the Commission who did not take part in taking the appealed decision. Further to this way of appeal, I suggest to keep open the second possibility of an appeal to the Supreme Court of Georgia against the first appeal, and not only on procedural grounds, but also on the substance (in this respect, art.34 should be amended accordingly).

5. Other Comments

1. Article 9 (“The Goals of the Commission”) should also include a reference to the objectives of the Law.
2. Article 13 (“Termination of Authority of a Member...”), para.1)f) should be redrafted, as to mention a final and irrevocable criminal decision of a Court, irrespective if providing a sentence to prison or other sentence, as a ground for terminating the mandate of a member. Anyway, the formula “detention for ...indefinite term” is unusual.
3. Article 18 (“Guaranties of Independence of the Commission”)- the term “illegal pressure” should be replaced, as might create the impression that other forms of pressure (“legal”) are allowed, which is not desirable.
4. Article 20 (“Legal Acts of the Commission”) should be more explicit as to the field in which the Commission will adopt normative acts. Anyway, these acts could not add to the Law, but to regulate the details of some aspects set forth by the Law (see Section II above: for example, the Law should regulate the criteria and rules for compensation and the Commission the levels and some procedural details not provided by the Law).
5. Article 21 (“Functions and responsibilities...”) should clarify what are and who adopts the statutes of the Commission and which is the content of the “package of recommendations” to be submitted to the parliament and president.
6. Article 26 (“Inquiry”) para.1)b) should set the necessity of a mandate of a judge for inspecting a private area.
7. Article 30 (“The Right to Apply to the Commission”) should include also the heir(s) among the persons entitled to apply, as art. 32 does.
8. It is extremely important that the Law provides that citizenship of the applicants is irrelevant for the purposes of this Law, both as far as the capacity to apply and to obtain restitution or compensation, and the consequences of the implementation of the Law in their regard: returning, exemption of any taxes (customs etc), registration and others.