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COMMENTS

ON THE LAW ON OCCUPIED TERRITORIES

OF GEORGIA

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Introduction

The Monitoring Committee of the Parliamentary Assembly has asked the Venice Commission to assess the law of Georgia "On occupied territories of Georgia" which was enacted on 23 October 2008. The reporters were provided with an English translation of the relevant law as well as with additional information, i.e. an extract of the Criminal Code of Georgia (Articles 322/1 and 344), an extract of the Georgian Law on General Education (Article 63/1) and an extract of the Georgian Law on High Education (Article 89/1). They were also sent "Information regarding the criminal charges being brought against foreigners having breached the law on occupied territories".

The "Law on Occupied Territories of Georgia" is based on the perception that the two break-away regions of the Republic of Georgia, Abkhazia and South Ossetia, are part of the Republic of Georgia, but are illegally occupied by the Russian Federation. This understanding is clearly expressed by the reference to the sovereignty and integrity of Georgia in the preamble to the law and the qualification of the presence of military forces as "illegal military occupation of the territory of a sovereign country". Article 1 of the Law indicates as purpose of the law "to define the status of territories occupied as a result of military aggression of the Russian Federation"; Article 2 defines the "occupied territories and territorial waters".

This assumption is diametrically opposed to the point of view of the Russian Federation claiming that both Abkhazia and South Ossetia have proclaimed their independence and have been recognized as independent States by Russia. According to the Russian interpretation Abkhazia and South Ossetia are not occupied territories, but independent States. Consequently, Georgia could not pass any law applicable in those territories.

The question of the legal status of South Ossetia and Abkhazia is not subject of the present opinion; the Preamble as well as Article 1 and 2 will not be commented upon.

Starting-point of the comment on the "Law on Occupied Territories" are the two resolutions of the Parliamentary Assembly of the Council of Europe, Resolution 1633 (2008) on "The consequences of war between Georgia and Russia" and Resolution 1647 (2009) on "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia" where it is stated: "The Assembly condemns the recognition by Russia of the independence of South Ossetia and Abkhazia and considers it to be a violation of international law and of the Council of Europe's statutory principles. The Assembly reaffirms its attachment to the territorial integrity and sovereignty of Georgia and reiterates its call on Russia to withdraw its recognition of the independence of South Ossetia and Abkhazia and to fully respect the sovereignty and territorial integrity of Georgia, as well as the inviolability of its borders."[1]

Relevant acts of international law

The Hague Convention "Respecting the Laws and Customs of War on Land of 18 October 1907" has been ratified by Russia (18.10.1907, in force since 27 November 1909), but not by Georgia. But most of the rules contained in the Convention can be considered as reflecting customary international law. They are integrated and further elaborated in the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, ratified by the Russian Federation on 10.5.1954 and by Georgia on 14.9.1993.

[1] Parliamentary Assembly, Resolution 1647 (2009). The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia, http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1647.htm.

According to the Hague Convention "a territory is considered occupied when it is actually placed under the authority of the hostile army" (Article 42 para 1). Furthermore, it is stipulated that "the occupation extends only to the territory where such authority has been established and can be exercised" (Article 42 para. 2). Another basic provision is Article 43 as it regulates the interaction between the measures applied by the occupying power and the laws enacted by the *de iure* government: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Articles 47 et seq. of the Geneva Convention IV are directly applicable to the regime on occupied territories.

Furthermore, Resolution 1866 (2009) adopted by the Security Council at its 6082nd meeting on 13 February 2009 and Resolution 1839 (2008) adopted by the Security Council at its 5992nd meeting on 9 October 2008 as well as all preceding resolutions concerning the same topic are binding both on the Russian Federation and on Georgia on the basis of Article 25 UN-Charta. According to Provision No. 4 of Resolution 1866 (2009) the Security Council calls for "facilitating, and refraining from placing any impediment to humanitarian assistance to persons affected by the regional conflict, including refugees and internally displaced persons, and further calls for facilitating their voluntary, safe, and dignified and unhindered return".

All the relevant regulations of international have to be taken into account when commenting the "Law on Occupied Territories in Georgia".

In addition, it might be worth mentioning that the "Law on the occupied territories of Georgia" is mentioned in the report of the Secretary-General on the situation in Abkhazia, Georgia, pursuant to Security Council resolution 1839 (2008). There the relevant part of the text reads: "On 23 October, the Parliament of Georgia adopted a law declaring Abkhazia and South Ossetia "occupied territories" and the Russian Federation a "military occupier". The law, signed on 31 October by the President of Georgia, declares null and void all legislative and administrative acts issued by the de facto authorities in Abkhazia and South Ossetia. It also restricts access to these territories and prohibits economic and financial activities that do not comply with Georgian law. These restrictive provisions raised concerns within the international community with regard to humanitarian access to the conflict affected areas."

Comments on specific regulations in the "Law on occupied territories"

Limitation on Free Migration on the Occupied Territories

Article 4 restricts the access to Abkhazia and South Ossetia for foreigners and Stateless persons. Three groups of persons can be discerned to which the law applies: (1) Third country nationals, especially the personnel of international organisations and non-governmental organisations, (2) Russian citizens, be they soldiers or civilians, and (3) Citizens living either in Abkhazia or in South Ossetia and having acquired the Russian citizenship. For the last group it is not clear how Georgia officially qualifies their status. If they are considered to have lost their Georgian citizenship, they fall under the law. If they have a dual citizenship it is not clear if the law will be applied to them. If they are still considered to be Georgian citizens, the law would not apply to them.

All foreigners and Stateless persons are allowed to enter the territory only from the Georgian side and are liable to criminal punishment for violations. In extraordinary cases a special permission to enter the relevant territories can be granted.

The relevant provision raises several problems.

First, it has to be read in conjunction with Article 322/1 and 344 of the Criminal Code of Georgia. The wording of the criminal indictment is very broad. There are no exceptions for emergency situations. The entry in the country is punished whatever the intention of the person; it also applied to persons providing necessary humanitarian aid.

The following aspects have to be taken into account in this respect:

If Russia is considered to be an "occupying power" it is obliged by international law to provide aid and shelter (cf. e.g. Article 55, 56, 59 of the IV Convention) and must not be hindered in fulfilling this duty.

If the law is applied to people living in South Ossetia and Abkhazia it might deteriorate their humanitarian situation and cause unnecessary hardship.

If the law is applied to the personnel of international organisations it must be assured that the provision of humanitarian aid is not rendered more difficult. Otherwise it might be at odds with Georgia's obligations on the basis of the Security Council Resolutions and also the resolutions of the Parliamentary Assembly of the Council of Europe.

Secondly, the provision refers to a "normative document of the Georgian Government" regulating special permissions. It is not known if such a document already exists. In any case, in order to enhance transparency it would be preferable to define any such rules on the basis of the law itself and not on the basis of an act of the executive.

It might also be mentioned that the text of the law is not clear. On the one hand, Article 4 para. 1 restricts the access to the Abkhazia and South Ossetia only in regard to the entry chosen. On the other hand, Article 4 para. 3 mentions "a special permission to enter the Occupied Territories". This wording suggests that the entry to Abkhazia and South Ossetia always requires a special permission, and not only the entry from another side than the one accepted in Article 4 para. 1.

Limitations of transactions of real estate property rights

According to Article 5 of the Law any transaction related to real estate property concluded in violation of Georgian law is deemed to be null and void. Furthermore, the right to inheritance of real property is restricted.

According to The Laws and Customs of War on Land, which constitutes a reflection of international customary law, private property cannot be confiscated (Article 46). Furthermore, the already mentioned Article 43 of the Hague Laws and Customs of War on Land stipulates that the occupying power has to respect the law in force in the country. Therefore, according to international law it can be required that transactions of real property observe the formal and material preconditions defined in Georgian law. This is all the more true as the return of the fugitives must not be rendered impossible or made more difficult – this would be the case if their property could be transferred to third persons on the basis of new regulations not compatible with Georgian law.

A more detailed commentary on this point is not possible as the relevant provisions in Georgian real property law are not known. Therefore it cannot be evaluated if they set any insurmountable barriers to the transfer of property that might be in contradiction to Article 1 of the First Protocol to the ECHR and the principle of proportionality.

As the provisions are applied retroactively to transactions that took place during the period between the early 1990s and the entry into force of the law (Article 11 para. 2) there might be problems with the guarantees enshrined in Article 1 of the First Protocol to the ECHR. For transactions in this period it might be necessary to find regulations balancing the interests of the old and the potential new owners in order not to violate Article 1 of the First Protocol to the ECHR. [2]

Limitations of economic activities

Article 6 of the relevant Law prohibits a large range of economic activities. Although the different economic activities are explicitly enumerated the prohibition seems to apply to almost every economic activity. The law refers to "any economic activity … if under the Georgian legislation a licence, permit authorization, registration or agreement is required". As the Georgian legislator is not restricted in requiring permits, theoretically even economic activities necessary for the survival of the population can be included in the regulation. The other restrictions contained in Articles 6 para. 1 b) to f) are worded in a very broad way as well. "Organisation of cash transfer" as well as "use of national resources" can also be applied to almost every economic activity. Humanitarian aid is not excluded as the law explicitly refers to "any economic activity (entrepreneurial or non entrepreneurial), regardless whether or not it is implemented for receiving profit, income or compensation". The clause on the prohibition of "international automobile transportation of cargo" might for example be applied to humanitarian aid.

A restriction and criminalisation of economic activities necessary for the survival of the population in occupied areas as well as a (potential) restriction and criminalisation of humanitarian aid is contrary to the rule of customary international law that the well-being of the population in occupied areas has to be a basic concern of those involved in a conflict (cf. the preamble to the Hague Convention). It is the underlying idea of the IV Geneva Convention as well.[3]

The regulation on criminal responsibility in Article 6 para. 3 is incomplete as there is no concrete legal provision fixing criminal responsibility. The same applies to the legal sanctions against "persons directly or indirectly participating in the capital and/or influencing decisions of entities involved in activities listed." The regulation is not compatible with the principle nulla poena sine lege. According to the jurisprudence of the European Court of Human Rights all criminal sanctions must be "provided for by law", i.e. fixed in advance in a clear and understandable manner.

Protection of Human Rights and Cultural Monuments

Article 7 of the "Law on the occupied territories of Georgia" explicitly fixes the responsibility of the Russian Federation for human rights violations, moral and material damage and the destruction of cultural heritage in Abkhazia and South Ossetia. As a rule, questions of international responsibility cannot be regulated on the basis of national law, but are solved on the basis of international law. Concerning human rights violations the ECHR can be applied. According to the jurisprudence of the European Court of Justice, an extraterritorial application of the ECHR is possible if the State exercises "effective control" over a certain territory.[4] This seems to be the case both for the Russian Federation both in Abkhazia and in South Ossetia.

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[2] *Kopecký v. Slovakia* (Application No. 44912/98), Judgment, 28.09.2004, 35-61; *Brumărescu v. Romania* (Application no. 28342/95), Judgment, 28.10.1999, 66-80; *Jahn and Others v. Germany* (applications nos. 46720/99, 72203/01 and 72552/01), Judgment, 30.06.2005, 77-117; *Pincová and Pinc v. The Czech Republic* (Application no. 36548/97), Judgment, 5.11.2002, 42-64; *Zvolský and Zvolská v. The Czech Republic* (Application no. 46129/99), Judgment, 12.11.2002, 56-74.

[3] Cf. also the Advisory Opinion of the ICJ on the legal consequences of the construction of a wall in the occupied Palestine Territory, 9 July 2004, para. 124 et seq.

[4] Cf. *Loizidou v. Turkey* (Application no. 15318/89), Judgment, 23.03.1995, 62; *Ilaşcu and Others v. Moldova and Russia* (Application no. 48787/99), Judgment, 8.07.2004, 314.

But it has also to be realised that the responsibility of the occupying power based on the extraterritorial application of human rights conventions does not completely exonerate the other State from any responsibility.[5]

The reimbursement of "moral and material damages inflicted on the Occupied Territories" regulated in Article 7 para. 3 will also have to be fixed on the basis of international law. Georgian courts would not be competent to adjudicate on claims against the Russian Federation according to the principles of State immunity.

The Hague Customs of War and Land stipulate that "the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." (Article 56). Legal responsibility is not explicitly regulated; it is part of international customary law; the ILC draft articles on the Responsibility of States for Internationally wrongful acts provide some guidance. The regulation of Article 7 para. 4 on cultural monuments contained in the Georgian law constitutes a repetition of the international regulations applicable, but goes even one step further. It stipulates that the Russian Federation is not only responsible for the destruction of cultural heritage, but also responsible for the protection. This aspect can be relevant, if, for example, Georgian cultural heritage is destroyed by South Ossetian militia. In this context difficult questions of the attributability of wrong-doings will arise. The relevant questions will have to be solved on the basis of international law[6] and not on the basis of the national law of one of the parties involved.

Stipulation on "illegal authorities"

A State has the right within its territory to determine who has the power to exert authority; this is an evident attribute of sovereignty. In (illegally) occupied territories this power exists *de iure*, but not *de facto*. *De facto* the authorities of South Ossetia and Abkhazia exert State authority.

The regulation in Article 8 touches upon the recognition of the acts of the non-recognized States South Ossetia and Abkhazia by Georgia. According to this provision not only the authorities of the non-recognized States are considered to be illegal, but also any act they issue "shall be deemed invalid and shall not lead to any legal consequences".

Generally speaking, each State is free to recognize or not to recognize acts of State issued by other States. On the basis of international customary law there is no obligation to recognize such acts. Nevertheless, this freedom ends where basic human rights would be violated. If Georgia refuses to accept e.g. basic documents concerning the personal status such as birth or death certificates, that would violate Article 8 of the ECHR. It is therefore to be welcomed that special regulations have been adopted concerning degrees of general and higher education. According to the report of the Georgian authorities birth and death certificates are also acknowledged in a simple procedure.

It is therefore to be expected that practical problems arising in this regard will be solved in a pragmatic way. Nevertheless, it might be helpful to insert a clarifying provision into the text of the law.

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[5] Cf. the explanations in *Ilaşcu and Others v. Moldova and Russia* (Application no. 48787/99), Judgment, 8.07.2004, para. 322 et seq. on the responsibility of Moldova.

[6] Cf. on the question of State responsibility, due diligence, and the "obligation to protect" the Decision of the International Court of Justice in the case Bosnia-Hercegovina v. Serbia and Montenegro, 26 February 2007, para. 430.

Obligations of the Georgian Government

According to Article 9 of the Law the Government of Georgia shall use all mechanisms provided for in Georgian and international law in order to protect the lawful interests and safety of Georgia. Furthermore, the Government shall conclude bilateral agreements in order to ensure that other States use sanctions against persons violating the provisions of the Law.

Both provisions are to be understood more as political tasks than as normative regulations. The Parliament as legislative body relies on its competence in foreign policy (Article 48 of the Constitution); according to Article 78 of the Constitution the Government has to act in accordance with the legislation. But the "advices" given are rather vague. Neither is it clear to what "mechanisms" the law refers to nor with which States bilateral agreement should be concluded.

Retroactive application of the law

The retroactive application of provisions fixing criminal liability is neither compatible with Georgian constitutional law (Article 42 para. 5) nor with international human rights standards (Article 7 ECHR, Article 15 ICCPR).