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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

INTERIM OPINION

ON
THE DRAFT AMENDMENTS AND ANNEXES
TO THE LAW ON OCCUPIED TERRITORIES

OF GEORGIA

Adopted by the Venice Commission
at its 80th Plenary Session,
(Venice, 9-10 October 2009)

On the basis of comments by:

Mr Bogdan AURESCU (Substitute Member, Romania)
Mr James HAMILTON (Substitute Member, Ireland)
Ms Angelika NUSSBERGER (Substitute Member, Germany)

I. Introduction

1. The Republic of Georgia adopted the “Law on Occupied Territories” on 23 October 2008. Further to a request by the Committee on the Honouring of Obligations and Commitments of the Parliamentary Assembly, the Venice Commission adopted an opinion on this law at its 78th Plenary Session (Venice, 13-14 March 2009). In its opinion (CDL-AD(2009)015), the Commission found that the Law on occupied territories of Georgia raises several issues which should be addressed by the Georgian authorities to ensure the compatibility of the law with international law.

2. By a letter dated 27 August 2009 the Parliament of Georgia asked the Venice Commission to give an opinion on draft amendments and annexes to the Law on Occupied Territories (CDL(2009)151) which have been prepared with the intention to respond to the Commission’s concerns and bring Georgian legislation in conformity with international law.

3. The present opinion is based on comments by Mr Aurescu, Mr Hamilton and Ms Nussberger. It was adopted by the Commission at its 80th Plenary Session (Venice, 8-9 October 2009).

II. General comment to the “Law on Occupied Territories”

4. The present Interim Opinion has to be seen as a follow-up to the first opinion given on the Law on Occupied Territories (CDL-AD(2009)015). The general comments contained in opinion CDL-AD(2009)015 (paras. 5-8) are also valid for the present interim opinion: the Venice Commission is not called upon to examine the question of the legal status of South Ossetia and Abkhazia, which is therefore not the object of the present opinion.

III. Comments on the amendments and annexes to the Law

5. The draft amendments and annexes include major changes to Articles 4 to 7 and Article 11 of the Law. The Venice Commission welcomes the changes as they generally reflect an effort to address problematic issues pointed out in its previous opinion on the Law.

Limitations on Free Migration on the Occupied Territories (Article 4)

6. Article 4 restricts the access to Abkhazia (Georgia) and South Ossetia (Georgia) for foreigners and Stateless persons and regulates the criminal liability for the irregular entry into those territories. The Commission welcomes the inclusion of “confidence building” among the reasons for issuing special permits to enter the occupied territories from the forbidden direction in Article 4, para. 3. On the other hand, it may be regretted that the relevant provision has kept the reference to a “normative document of the Georgian Government” regulating special permissions, and did not address the concerns expressed by the Commission in this regard in CDL-AD(2009)015.

7. The Commission welcomes the amendment of paragraph 3, Article 4 which now specifies that “a special permission to enter the Occupied Territories” is only necessary for the entry from another side than the one accepted in Article 4. para.1.

8. The newly added draft paragraph 4 of Article 4 now provides for the explicit exception for the persons who render “necessary humanitarian aid in the Occupied Territories in emergency circumstances” for population in order to maintain their right to life, through the provision of food, medicine and emergency items, for foreign citizens or stateless persons who seek asylum

from the Georgian Government, and for persons who are victims of human trafficking. A better wording could have been chosen in order to avoid that this exception be interpreted restrictively in practice. In order to enhance transparency and prevent restrictions, the Commission strongly recommends removing the terms “necessary” and “in emergency circumstances” from the relevant provision. This deletion would allow for humanitarian assistance to take place in line with the provisions of the relevant Security Council and PACE resolutions.

9. The draft paragraph 5 requires persons falling under the exception of Article 4, para. 4 to provide certain information to the Government of Georgia. It remains unclear what kind of legal consequences may follow in case of a failure to observe this provision. The persons in question might incur administrative responsibility or might no longer fall under the exception of Article 4, para. 4 and thus be criminally liable. This wording should thus be further clarified.

Limitations of transactions of real estate property rights (Article 5)

10. 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. The deletion of the provision setting forth that “real estate can be inherited by will only if the beneficiary is one of the legal successors” is to be welcomed. However, a number of other problematic issues remain: while the amendments to Article 5, paragraph 2 now specify that the “property rights in the occupied territories are observed and regulated by the Georgian legislation”, this is – at best – only an indirect guarantee that the jurisprudence of the European Court of Human Rights will be respected and implemented in this regard.

11. Further, according to article 11 para. 2 of the draft amendments and annexes to the Law, article 5 still figures among those covered by the retroactive application of the Law. The Venice Commission thus reiterates its concerns expressed in CDL-AD(2009)015, especially regarding the fact that the annulment of an acquisition act after a long period of time and without any compensation may represent a violation of the right to peaceful enjoyment of one’s possessions:

“It is to be noted that:

- any legal act, after the passing of the period when one could dispute its validity, enters the civil circuit and generates new legal effects; its annulment is likely to affect the legal certainty;*
- in its case-law¹, the ECtHR recognized the possibility for a State to demand the reassignment of a property without compensation from the heirs of the owners, if exceptional circumstances justify such a measure. But in its conclusions on non-violation of the right to peaceful enjoyment of possessions, the ECtHR put great emphasis on the short period of time elapsed between the acquisition moment and the reassignment of property and on the specific context, of a transition to democracy and the need for social justice. In the present case, the effects of the law go back in time and could affect acts concluded several years ago (the situation in the occupied territories is not a recent one, so a “contemporary” reaction of this kind of the Georgian Government might be considered as excessive).*

¹ See ECtHR, Jahn and others v. Germany [GC], 30 June 2005.

Limitations of economic activities (Article 6)

12. Article 6 generally restricts economic activities on the Occupied Territories. The Venice Commission stressed in CDL-AD(2009)015 that the restrictions must not contradict international law. In this context, the re-formulation of Article 6, para. 1 is welcomed as it explicitly refers to the UN Convention on the Law of the Sea.

13. The Commission notes that the new draft paragraphs 6 and 7 exclude the persons rendering “necessary/emergency” humanitarian assistance to the population of the occupied territories from criminal liability. While this change is to be welcomed, the Commission reiterates its concerns as to the interpretation of the terms “necessary/emergency” humanitarian assistance in practice (see above, para. 8). It therefore strongly recommends removing these terms from the relevant provisions.

14. Further, the concerns relating to the question of the legal consequences of the non-observance of the obligation to inform the government of Georgia about the start and the end of the intended activity remain the same as with regard to draft Article 4, para. 5 (see above, paragraph 8).

15. The abolition of the retroactive criminalisation of the economic activities related to humanitarian assistance on the basis of the amendment to Article 11 is highly appreciated.

16. It may be regretted that other concerns and observations expressed by the Venice Commission in CDL-AD(2009)015 in particular, relating to the very broad wording of the restrictions contained in Article 6.1; to the legal sanctions for performing forbidden economic activities on occupied territories, as well as to illegal corporate activities (Article 6, para. 3) were not addressed by the draft amendments to Article 6.

Protection of Human Rights and Cultural Monuments (Article 7)

17. 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 (Georgia) and South Ossetia (Georgia). By including an explicit reference to the relevant rules of international law, the new draft paras. 3 and 4 of Article 7 represent a step forward in the right direction. The current wording however, is not clear. The Commission assumes that it is to be read to mean that the responsibility of the Russian Federation *shall be determined on the basis of international law*.

Stipulation on “illegal authorities” (Article 8)

18. The regulation in Article 8 touches upon the recognition of the acts of the *de facto* regimes of South Ossetia (Georgia) and Abkhazia (Georgia) by Georgia. According to this provision, not only are the authorities considered to be illegal, but also any act they issue “shall be deemed invalid and shall not lead to any legal consequences. A new draft paragraph 3 of Article 8 now states that the “establishment of facts of civil importance in the occupied territories shall take place in accordance with the Law on “Registration of Civil Acts” of Georgia. While this change is to be welcomed, it would be more precise to state that “The establishment of facts of civil importance in the occupied territories shall *be guaranteed* in accordance with the Law on “Registration of Civil Acts” of Georgia.”

19. It remains unclear however, whether the quoted Law on “Registration of Civil Acts” of Georgia” provides for special regulations or just applies the general regulations in the Occupied Territories as well. It is not known either what are the details of the regulation. The Commission assumes that the detailed regulations respond to the practical needs of the citizens concerned and do not contain any discriminatory elements.

Retroactive application of the law (Article 11)

20. With the exception of abolishing the retroactive criminalisation of economic activities related to humanitarian assistance (see above, para. 14), the new draft Article 11 remains problematic. Indeed, as long as paragraph 3 of Article 6 of the law remains applicable and paragraphs 1, 2, 6 and 7 of Article 6 are applied retroactively, criminalisation becomes retroactive, too. It is therefore appropriate to quote the Venice Commission's comment on the relevant provision made in CDL-AD(2009)015:

“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).”

III. Conclusion

21. The draft amendments and annexes to the Law on Occupied Territories address a certain number of the main concerns which the Venice Commission expressed in its previous opinion on this Law in this respect, and they are therefore to be welcomed. In relation to the amendments to Article 4, para. 4 and Article 6. paras. 6 and 7, the terms “necessary” and “emergency” should be removed from the relevant provisions in order for humanitarian assistance to take place in line with the provisions of the relevant Security Council and PACE resolutions.

22. A certain number of issues remain problematic as not all the observations made in CDL-AD(2009)015 were addressed by the draft amendments and annexes. The following recommendations remain valid:

- the criminalisation of irregular economic activities might be too vague, and might not respect the principle of legality; at any rate, criminal sanctions should not be applied to “related persons”;
- as a matter of principle, the retroactive application of the criminalisation of irregular economic activities is in breach of the prohibition to create retroactive offences, even if it is meant to be declaratory;
- the retroactive annulment of real estate transactions may raise issues under Article 1 of Protocol No. 1;
- the questions of the international responsibility of the Russian Federation cannot be regulated on the basis of national law, but on the basis of international law;
- the recognition in Georgia of certificates and similar documents issued by the authorities of the occupied territories through simplified procedures should be guaranteed through an explicit provision in Georgian law;
- the regime provided by this law should only have a transitory nature, and be subject to periodical review in order to take into account the progress in the settlement of the conflict which will hopefully be achieved over time.

23. The Commission has been informed by the Georgian authorities that they are willing to modify the draft amendments under consideration in line with its recommendations. The Commission welcomes this constructive attitude and stands ready to assist them further.