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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION
ON THE 2013 DRAFT AMENDMENTS
TO THE LAW ON THE OCCUPIED TERRITORIES
OF GEORGIA

Adopted by the Venice Commission
at its 97th Plenary Session
(Venice, 6-7 December 2013)

On the basis of comments by
Mr Bogdan AURESCU (Substitute member, Romania)
Mr James HAMILTON (Substitute member, Ireland)

I. Introduction

1. By a letter of 12 November 2013, the Permanent Representative of Georgia to the Council of Europe requested the opinion of the Venice Commission on a set of draft amendments to the law on the Occupied Territories, the Administrative Code and the Criminal Code of Georgia (see para.7 below).
2. Mr Bogdan Aurescu (substitute member, Romania) and Mr James Hamilton (substitute member, Ireland) were appointed as rapporteurs.
3. The present opinion, based on their comments, was adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013).

II. Background

4. 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 raised several issues which should be addressed by the Georgian authorities to ensure the compatibility of the law with international law.
5. In August 2009, the Parliament of Georgia submitted a set of draft amendments and annexes (CDL(2009)151) to the “Law on Occupied Territories” to the Venice Commission for assessment. The Venice Commission adopted an interim opinion on it in October 2009 (CDL-AD(2009)046), whereby it recommended that further changes be made to this law.
6. On 4 December 2009, a revised version of the draft amendments (CDL(2009)186) was submitted to the Venice Commission for assessment. A final opinion (CDL-AD (2009)051) was adopted by the Commission at its 81st Plenary Session (Venice 11-12 December 2009), whereby it acknowledged the efforts made by the Georgian authorities to respond to its concerns and recommendations,¹ but recommended further changes to this law. It also stressed that it was essential that the “Law on Occupied Territories”, and in particular its Article 4, be interpreted in a manner which conforms to the international obligations of Georgia. The Commission further stressed that it was important that future monitoring reports by international and humanitarian organizations on the conditions of granting humanitarian assistance be taken in due consideration by the Georgian authorities and that the latter take prompt action to ensure that any kind of problems be eliminated, if such problems occur.² The amendments to the law were subsequently adopted by the Georgian parliament (CDL-REF(2013)056).
7. On 12 November 2013, new draft amendments to the “Law on Occupied Territories” (CDL-REF(2013)052) were submitted to the Venice Commission for assessment, together with related draft amendments to the Criminal Code (CDL-REF(2013)053) and the Administrative Code of Georgia (CDL-REF(2013)054). According to the Georgian authorities, these amendments were already adopted by first reading before they were submitted to the Venice Commission. The Georgian authorities also provided the Venice Commission with a “Non paper on the amendments to the Law of Georgia on the Occupied Territories and other relevant laws” (CDL-REF(2013)055) explaining the rationale behind the proposed modifications.

¹ Paragraph 26.

² Paragraph 27.

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

8. The present Final Opinion has to be seen as a follow-up to the first opinion given on the “Law on Occupied Territories” (CDL-AD(2009)015), to the subsequent Interim Opinion on draft amendments to the “Law on Occupied Territories” (CDL-AD(2009)046, hereinafter “the interim opinion”) and to the subsequent Final Opinion on draft amendments to the “Law on Occupied Territories” (CDL-AD(2009)051, hereinafter “the final opinion”). The general comments contained in opinion CDL-AD(2009)015 (paras. 5-8) are also valid for the present final 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.

IV. Comments on the new draft amendments to the Law

9. The new draft amendments are limited to changes of article 4 of the Law (paragraphs 2, 3 and 4). As presented in the Explanatory Note to the draft law on amending the “Law on Occupied Territories”, the reasons of the amendments are, mainly, to align the text of the “Law on Occupied Territories” to certain foreseen changes of the Criminal and Administrative Codes of Georgia, in connection to the legal regime set forth in article 4 of the “Law on Occupied Territories”.

10. The draft amendment to paragraph 2 of article 4 of the “Law on Occupied Territories” reads as follows: “2. *Citizens of foreign countries and persons without citizenship shall be prohibited to enter the Occupied Territories from any other directions except the ones specified in Paragraph 1 of this Article; violation of this requirement shall lead to responsibility according to the rule as defined by the laws of Georgia*”. The text in force reads that “2. *Citizens of foreign countries and persons without citizenship shall be prohibited to enter the Occupied Territories from any other directions except the ones specified in Paragraph 1 of this Article; violation of this requirement shall lead to punishment under the Criminal Law of Georgia.*”

11. The amendment therefore consists in replacing the last part of the paragraph “*violation of this requirement shall lead to punishment under the Criminal Law of Georgia*” with “*violation of this requirement shall lead to responsibility according to the rule as defined by the laws of Georgia*”. This modification is motivated in the Explanatory Note to the draft law on amending the “Law on Occupied Territories” by the related changes in the Criminal and Administrative Codes of Georgia to the sense that the “responsibility of a person who violates the entry procedures for the occupied territories of Georgia is moved from the realm of Criminal Law to that of Administrative Law”.

12. More precisely, according to the changes foreseen in article 322¹ of the Criminal Code (“*Violation of the Rule for Entry to the Occupied Territories*”), a person violating the entry procedures for the occupied territories has criminal responsibility only in case he/she commits the act after the respective person was already held responsible under the Administrative Code of Georgia. This takes into account Article 36 of the Criminal Code of Georgia, which provides that persons who did not know or could not know that their act was illegal should not be punished. At the same time, another modification is introduced in the Administrative Code of Georgia, by adding a new article (Article 199¹ – “*Violation of Rules for Entry to the Occupied Territories*”), according to which “*Entry to the occupied territories by a citizen of a foreign country or a person without citizenship in violation of the rule defined by the Law of Georgia on the Occupied Territories shall invoke fine in the amount of GEL 400.*” The modification of the Criminal Code provides that the penalty of violating the rule of entry to the occupied territories shall be also a fine, unless the violation was committed collectively, with violence or threat of violence or repeatedly, in such cases the sanction consisting in prison from 3 to 5 years (according to draft paragraph 2 of article 322¹ of the

Criminal Code).

13. These draft amendments of the “Law on Occupied Territories” and of the Criminal and Administrative Codes have the effect of relaxing the regime of sanctioning the violations of the rules on entry in the occupied territories of Georgia. In practical terms, as a result of these modifications, a first breach of the prohibition will attract only an administrative sanction punishable by a fine, with only a second or subsequent breach of the prohibition attracting criminal liability. Even when the criminal offence is made out, it is punishable only by a fine, unless committed collectively, with violence or the threat of violence, or repeatedly.

14. The Venice Commission welcomes these amendments.

15. It would have nonetheless have appeared even more appropriate that sanctions for the violation of the rules regarding the entry to the occupied territories be fully decriminalized and included, without exceptions, under the Administrative Code. Such a measure would have provided even more flexibility and would have encouraged the engagement policy with the occupied territories.

16. Moreover, according to the information provided by the Georgian authorities³, the statistics provided by the Ministry of Internal Affairs reveal that a considerable number of the persons punished under Article 322¹ of the Criminal Code are foreign sailors who could never have been aware of the situation in Georgia and of the existence of its Law on Occupied Territories. The punishment of such persons was not grounded, and took place by evading Article 36 of the Criminal Code. According to the information available to the Venice Commission, there were numerous cases when the entry of foreign sailors into the maritime spaces under the legal regime set forth by article 4 was only due to situations of *force majeure* (the entry was the result of bad weather, and ships were obliged to find shelter in order to safeguard the ships and crew). Moreover, the geographic coordinates of the limits of the respective maritime spaces are not advertised publicly in an appropriate manner. Such situations plead for the full decriminalization of such acts, or for the inclusion of *force majeure* in article 4 (e.g. in paragraph 4) as a reason for the responsibility to be excluded.

17. Another proposed modification of article 4 refers to paragraph 3; the draft amendment reads as follows: “3. *In extraordinary cases special permission to enter the Occupied Territories, which is issued by the Georgian Government with its order, can be granted to persons covered by Paragraph 2 of this Article if doing so serves the protection of the state interests of Georgia, promotion of peaceful conflict resolution, de-occupation, confidence building or humanitarian purposes.*” The wording “*which is issued by the Georgian Government with its order*” is supposed to replace the current wording of the text in force – “*in compliance with the rules stipulated in the relevant normative document of the Georgian Government*”.

18. It will be recalled that in its previous opinions, the Venice Commission criticised the lack of transparency and clarity of the provision whereby special permissions were to be granted by the Georgian government “in conjunction with a normative document” the contents of which, or indeed even its existence, were obscure to the reader of the text: “*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.*” (CDL-AD(2009)015, § 19; CDL-AD(2009)046 § 6 and CDL-AD(2009)051 § 7)

³ Including the “Non paper on the amendments to the Law of Georgia on the Occupied Territories and other relevant laws” (CDL-REF(2013)055).

19. This is now replaced with a provision that permission “is issued by the Georgian government with its order” and can be granted “if doing so serves the protection of the state interests of Georgia, promotion of peaceful conflict resolution, de-occupation, confidence building or humanitarian purposes”. These general criteria are vague, particularly the criterion of “state interests”. In addition, the text as it is drafted is unclear as to the mechanics of the grant of this “special permission” and the nature of order of the government; it is unclear in particular if a general document of the government is still considered to be necessary before the government may issue the special permission on the basis of the general criteria now contained in the law. According to the explanations of the Georgian authorities, there is no intention for the government to issue further norms to regulate the exceptions to the prohibition of entry into the occupied territories; the “government order” referred to in the draft modification of paragraph 3 is intended to represent the special permission as such and will be granted or refused in each individual case. This matter should be clarified and paragraph 3 should be rephrased accordingly.

20. The proposed amendment to paragraph 4 of article 4 consists in adding a new paragraph, reading as follows: “*d) Persons having entered/entering the Occupied Territories from a prohibited direction without the special permission of the Georgian Government, but given the state interests of Georgia, having received the special permission of the Georgian Government after the entry to the occupied territories.*” This addition complements the list of situations excepted from prohibition or responsibility for entry into the occupied territories set forth in paragraph 2 of article 4. This new addition is logical; as a matter of fact, it results from the interpretation of paragraph 3 – if a person was granted special permission (even after the physical entry in the occupied territories), one cannot consider the entry as a violation of the legal regime provided by article 4 of the Law. The Venice Commission therefore welcomes this clarification to be introduced in the text of the Law.

V. Conclusions

21. The Venice Commission welcomes the new draft amendments to the Georgian “Law on Occupied Territories”, which aim at relaxing the sanctioning regime of illegal entries into the Occupied territories. At the same time, the Commission notes the limited character of these amendments, and considers that they can be further improved, as suggested above in the present opinion.

22. The Venice Commission finally notes that a number of concerns and observations included in the three previous opinions of 2009 on the “Law on Occupied Territories”, as synthesized in the Final Opinion (see paragraphs 9-12,⁴ 14-15,⁵ 17,⁶ 18,⁷ 20⁸) are still not

⁴ “9. In relation to the newly added draft paragraph 4 of Article 4, the Venice Commission welcomes that entry from the forbidden direction without prior notification is now made possible in certain circumstances (asylum-seekers, victims of human trafficking, persons rendering humanitarian assistance). In relation to the previous draft amendments, the Commission had expressed concern that the wording “*necessary humanitarian aid in the Occupied Territories in emergency circumstances*” (emphasis added) might be interpreted restrictively in a manner not in line with the provisions of the relevant Security Council and PACE resolutions.

10. The Georgian authorities have now responded to this concern in two manners: first, they have changed the wording from “*necessary humanitarian aid (...) in emergency circumstances*” to “*emergency humanitarian aid*” (emphasis added). Second, they have provided arguments aiming to prove that this wording is in line with the international obligations of Georgia under humanitarian law, thus expressing their commitment to ensuring that the interpretation of the relevant provision of the law on occupied territories is in conformity with such obligations.

11. The Venice Commission acknowledges the efforts of the Georgian authorities to respond to its concerns. It welcomes this further amendment, which represents an improvement. While taking note of the arguments presented, it reiterates that it is essential that this provision should not be interpreted restrictively. For this reason, the Commission considers that it is important that future monitoring reports by international and humanitarian organisations on the conditions of granting humanitarian assistance be taken in due consideration by the Georgian

addressed. The Venice Commission expresses its availability to further assist the Georgian authorities as far as the “Law on Occupied Territories” is concerned.

authorities and that the latter take prompt action to ensure that any kind of problems be eliminated, if such problems occur.

12. The Commission’s recommendation to clarify the legal consequences of failure, by the persons exempted from the obligation to seek authorisation, to provide the requested information has not been followed.”

⁵ “14. It further welcomes the replacement in paragraph 2 of the term “observed” with the stronger term “protected”; however, this does not affect the fact that there is no direct guarantee that the case law of the European Court of Human Rights will be respected and implemented.

15. The Venice Commission regrets in addition that article 5 is still covered by the retroactive application of the Law (see para. 12 of the Interim Opinion).”

⁶ “17. As concerns the exclusion from criminal liability, the Commission reiterates its strong recommendation that the term “emergency humanitarian assistance” be interpreted in a non-restrictive manner (see para. 11 above).”

⁷ “18. The Venice Commission’s 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 (see para. 9 of the Interim Opinion).”

⁸ “20. In reply to the Venice Commission’s concerns 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), the Georgian authorities have submitted references to relevant pieces of legislation of Georgia. The Commission however is not in the position of analysing these legal texts. It remains of the opinion that the Article 6.1 will have a wide application.”