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COMMENTS

ON THE DRAFT LAW ON RESTITUTION OF HOUSING AND PROPERTY TO THE VICTIMS OF THE GEORGIAN-OSSETIAN CONFLICT

OF THE REPUBLIC OF GEORGIA

by

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Introduction

1. Giorgi Papuashvili requested the Venice Commission to prepare an opinion on the draft law on “Restitution of housing and property of victims of the Georgian-Ossetian conflict” which was prepared by Young Lawyers’ Association and is in the process of review by the Ministry of Justice of Georgia.

2. The rather long previous history of drafting a law addressing the problem produced a series of reports. The present opinion took into consideration the report prepared in 1998 by Mr Scott Leckie, UNHCR consultant who focused on the international legal perspectives of the issue; the mission report of Mr Ivan Koedjikov, political advisor of the Council of Europe (1998); and the review of the draft legislation by Mr Marcus Cox (2000) on demand of OSCE/ODIHR and the Council of Europe.

Political background

3. Before the breaking up of the Soviet Union lived 164 thousand Ossetians in Georgia out of a population of approximately 5 million (3,3 %). Only two-fifths of this population lived in South Ossetia, an Autonom Territory with the capital Tskhinvali. The Georgian-South Ossetian conflict in 1990-1992 forced 53 thousand persons to leave their homes. These include 39 thousand persons who fled to North Ossetia–Alania that forms part of the Russian Federation – in the terminology of the draft law they are called *refugees*. 3000 ethnic Ossetians moved to South Ossetia from Georgia proper while 11 thousand ethnic Georgians left South Ossetia to Georgia proper. They are the so-called *internally deplaced persons* (IDP) who were displaced within the territory of Georgia. As resulting from these numbers some 10-15,000 property claims might be expected in connection with this conflict.

4. The refugee problem is obviously dramatic in Georgia, however, the number seems manageable compared to not only other countries similar problems (e. g. Bosnia) but to the number of refugees as a result of the Georgian-Abkhazian conflict (estimated to more than 200 thousands).

5. The political problem that caused the war has not been solved yet, although the peace-building process for years seemed to be promisingly progressing. In the summer of 2004 tensions grew again, and led even to military conflict though the crisis talks – with Russian mediation - ended with a peace accord.

The return of refugees

6. Despite the uncertain legal status of South Ossetia within Georgia, several efforts were made to solve the problems of refugees and of the IDPs, especially with regard to housing. The aim of the Government of Georgia is to assist all refugees and IDPs to return home.
In order to encourage the voluntary return of Ossetian and Georgian refugees to their original homes Georgian President Eduard Shevardnadze and Ossetian leader Chibirov declared 1998 to be the ‘Year of Return’.

7. In February 1997 the first Georgian-Ossetian document on the *Procedure of Return of Refugees and IDPs Displaced as a Result of the Georgian-Ossetian Conflict to Their Places of Former Permanent Residence* was adopted. According to the available source materials this document provides the right of voluntary return to places of former permanent residence,

offers security guarantees (except for war criminals), and aimes at the restoration of property rights for those who were deprived of their property during the conflict. This procedure presupposes the voluntary departure from refugee and IDP homes now occupied by secondary occupants who are currently refugees or IDPs themselves. The procedure does not address what to do in the event that a permanent residence of a refugee or IDP remains occupied.

8. The report prepared by Scott Leckie rightly points out that "these and other procedures are non-legal, and like most activity to date on this question, remain essentially political in nature. While important in generating confidence and good will, these procedures have only induced small scale, sporadic and reciprocal returns, which - while important - do not seem capable of forming the basis for a comprehensive solution of these problems."[1]

9. The UNHCR report, supported by OSCE/ODIHR and the Council of Europe recommended among others:

- adopting of a new law on Housing and Property Restitution;
- establishment of a Housing and Property Claims Commission, to guarantee the right to effective remedy for all persons and to enforce the new law.

10. Different draft of this law were circulated, and the present one has been drawn upon the comments made by reviewers of international observers and organisations.

General provisions

11. The general provisions are dedicated to form the legal basis of remedy for the victims by defining the scope of the law. Article 1 identifies the purpose of the law:

- to regulate the restitution of housing and other immovable property (objects of the restitution),
- the subjects of the restitution, and
- the procedure of the restitution.

Article 2 defines the terms used by the law like "refugee", "internally displaced person", "original residence" and "original resident", etc.
The law applies to two main groups of those peoples who cannot return to their original residence:

- those who cannot return because of the lack of security, or
- who lack adequate residence.

12. By adding a further condition the law applies to those who *"are entitled to apply for to the Commission for return of the original residence and other immovable property or for provision of adequate residence and compensation"*.

13. The basis of the entitlement is defined in articles 4 (right to free and voluntary return) and 5 (right to adequate residence). The important is how can these abstract rights under the here reviewed draft legislation turned into realisable entitlements?

1 Scott Leckie, Housing and Property Restitution Issues in the Context of Return to and within Georgia: An International Legal Perspective (1998) p. 5.

The right to an adequate residence

14. Article 5 of the draft law provides that all refugees, internally displaced persons and secondary occupants have a right to “an adequate, safe and accessible residence”. This is a very positive general statement of principle. It is based upon on the General Comment no. 4 on the right to adequate housing (article 11.1 of the Covenant). Paragraph 8 of General Comment no. 4 specifies in details the seven aspects of adequacy: security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

15. But in this aspect considerable practical difficulties might raise again. The conflict between the right to return and the right of the secondary occupants has to be solved. As noted above, the draft law does not offer guidance to the Commission how to assess the housing needs of secondary occupants who are required to leave their accommodation as a result of a claim.

Preferential treatment of the victims of the Ossetian conflict

16. *The right to adequate residence* is the more ample provision recognizing the right of all refugees, internally displaced persons and factual residents to “adequate, safe and accessible residence”. It is not clear whether this right is recognised for :

- refugees etc. of the Abkhazian conflict,
- to other citizens not involved in wars and conflicts?

17. Here one can raise the requirement of equal treatment and the problem of discrimination.

18. The draft law is intended primarily to deal with displacement in the South Ossetian conflict, where the search for a political settlement is further advanced. However, the draft formally applies to the whole territory of Georgia, and will inevitably create precedents for dealing with the Abkhazia situation. As mentioned above, displacement of ethnic Georgians from Abkhazia is more extensive, numbering in excess of 200,000 individuals. Most of these are accommodated in collective accommodation or with host families in Georgia, but some are occupying housing abandoned as a result of the Georgia-South Ossetia conflict.

19. Under the *Quadripartite Agreement on Abkhazia*, “Displaced persons/refugees have the right to return voluntarily to their places of origin or residence irrespective of their ethnic, social or political affiliation under conditions of complete safety, freedom and dignity.” It is a weakness of the draft law that its scope is limited to the housing problem of the South Ossetian conflict, and does not address the problems of the victims of the Abkhazian conflict. This solution creates a discrimination on national scale among the victims of the two conflicts, and offers a preferential solution to the refugees and IDPs of the Ossetian war. The law should address this problem by offering justification for the differentiation between the two groups that are formed of the citizens of the same country, and indicate the objective basis for the preferential treatment of the favoured victims.

Rights of refugees to return

20. The right to return to one's home is a well established international principle, recognized in several documents. They come to the forefront especially in peace agreements, and whenever reconciliation is sought. In addition to the *Universal Declaration on Human Rights* (Article 13), the *United Nations International Covenant on Civil and Political Rights* – which was signed by Georgia - (Article 12) recognizes the right to return to one's own country and the right of freedom to choose one's residence. Various agreements go even further and accept the right to return *to one's original home*.

21. Among others UN General Assembly resolution 35/124 acknowledged 'the right of refugees to return to their homes in their homelands'. The Security Council in a resolution related to Georgia recognized "the right of refugees and displaced persons to return to their homes" (Resolution 876 of 19 October 1993 on 'The Situation in Abkhazia"). 'General Recommendation XXII with regard to refugees and displaced persons' adopted by the UN Committee on the Elimination of Racial Discrimination on 16 August 1996 obliges States to prohibit and eliminate racial discrimination and emphasizes that all such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety, that States are obliged to ensure that their return is voluntary, and that the displaced have, upon return, the right to restoration of property or adequate compensation when this is not possible.[2]

22. Under the Georgian draft legislation the right to free and voluntary return means the right of all refugees and IDPs to their original residence if they can prove lawful rights on it. This is a clear and definite basis for the desired process providing for the return of the refugees and the restitution of their property. It makes possible the unilateral action on the part of the Georgian authorities.

23. However, the law is silent on how can one prove his lawful rights? Here the background rules of the legal system form the basis of the interpretation. Thus the lawful rights to residence has to be put into the context of the other rules regulating housing and related questions.

24. There is a general agreement on that the vigorous application of article 69 of the 1983 Housing Code formed the basis for most of today's housing and property problems in urban areas of return. In order to understand the situation we should be aware that in the Soviet Union most of the apartments were in State property. Residents lived in State-owned flats assigned to them under an administrative procedure by the local executive committee. In case the title-holder (the tenant) was absent for more than six months "without a valid reason", under Article 69 a partly administrative, partly judiciary procedure existed to examine

2 *Further examples are quoted by Leckie p. 11.*

whether the absence was valid or not. Based on a report of local authority a Court ordered withdraw the title from the absent person to return the flat to the common housing fund. The law stipulated eight 'valid' grounds for absence (such as military service, work obligations, compulsory medical treatment, etc). During the Georgian-Ossetian conflict, people who fled

25. their homes and became refugees were considered to be absent without a valid reason, their flats were given to others and subsequently privatised. The Georgian Housing Code was partially replaced by provisions of the Civil Code, and some returnees in the late 90es tried to appeal these earlier decisions before the courts. However, they found that the application of the six-month rule was upheld. The courts routinely refused to consider the Georgian-South Ossetian conflict as having been a valid reason to abandon one's home.[3]

26. Article 3(3) of the draft law would radically change this situation by explicitly recognizing the rights of refugees, IDPs and other persons to complain before the Commission on all decisions adopted on the ground of Article 69 of the Housing Code. Thus the law admits that the application of Article 69 caused the loss of residual rights during and after the conflict, and offers effective remedy against these injustices. This important provision puts an end to the wrongs created by the provision that survived the collapse of the Soviet system.

Rights of secondary occupants

27. The adoption of the draft law would provide the basis for restitution, compensation and justice for affected persons. Its primary aim is to redress violations against the property of those who had to flee from their homes. But the situation is more complex. In the meantime, homes of the refugees and IDPs has been occupied by persons who themselves were also refugees. Later, the flats have been privatised to the secondary occupants. In solving the difficult situation, the legitime interests and the aquired property rights of the secondary occupants have to be taken into consideration, too. The European Convention on Human Rights obliges States to ensure a 'fair balance' with respect to either the control over or interference with property or housing. This doctrine adopted to the housing and property disputes in Georgia and South Ossetia means that any legislation adopted to address these disputes fairly balances the rights of the original inhabitants (i.e. refugees and IDPs) on the one hand and the rights of the secondary occupants, on the other. The law must be formulated in such a manner that it ensures that the rights of *all persons* are respected, protected and fulfilled. Moreover, the State is under the obligation of guaranteeing the prevention of homelessness.[4]

28. The fair balance principle established by the case law of the Strasbourg Court requires that *bona fide* third parties are either protected from losing their property, or else guaranteed substantial compensation.

29. An earlier version of resolving the problem was heavily drawing on the voluntary restitution of the houses by secondary occupamts. As by now most or all of the claimed property is in private ownership, the voluntary return of property seems not a feasible option.

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3 *Leckie p. 7.*

4 This problem is addressed by both Leckie p. 30, and Marcus Cox, Review of May 2000 Draft of Law of Georgia on Restoration and Protection of Housing and Property Rights of Refugees and Internally Displaced Persons p. 11.

30. Expropriation would be another possibility. Under the Strasbourg case law where the property has to be expropriated from a *bona fide* third party in order to be returned to a former occupant, the ECHR does require substantial compensation to be paid, related to the market value of the property being taken.[5] This would apply in all cases where the secondary occupant has purchased the apartment for a fair value on the open market. The Commission would face serious difficulties in setting guidelines for deciding under what circumstances was the occupation of the empty houses in *bona fide*. The draft law does not give assistance to that. Moreover, the necessary compensations would require a solid financial background. According Article 18 of the draft the activities of the Commission and implementation of its decisions would be financed from a financial fund managed by the Commission itself. The fund would be filled by resources from the Georgian State budget, by othes States, by international organizations and by private donations.

The Commission

31. The so-called Commission for Housing and Property Issues is established to discuss and adopt decisions on applications related to matters of residence and property filed by refugees.

32. The Commission is not part of the judicial system. Nevertheless, its establishment does not violate the right to access to courts. The Strasbourg Court has held that restrictions on the right of access may be imposed where the right of access "by its very nature calls for regulation by the state, regulation which may vary in time and place according to the resources of the community and of individuals".[6] This is precisely the situation in Georgia, where the only way to provide an effective remedy to large numbers of displaced persons is to create a temporary administrative tribunal, which operates with rapid, relatively informal procedures.[7] The Commission can achieve a more effective remedy (especially in terms of speed). Its independency, and universal access to it is guaranteed.

33. The Commission is composed of nine members. Three members are appointed by the President of Georgia and three by the United Nations High Commissioner's Representative. Three further members are appointed according the law by the "Ossetian side". This last definition though explicable is rather vague, and does not specify the responsible Ossetian organ.

34. The term of the Commission is three years. It is not clear whether it would function only for three years, and has to finish its work during that time, or after three years another Commission will be elected. In that case may the former members who were originally appointed for three years under Article 8(3) be reelected?

35. The members of the Commission are independent. Their independence is protected by penal sanctions, too. Any interference with and influence onto the activity of the Commission is punishable under the law. How will this criminal sanction be executed? By amending the Penal Code or by subsuming this activity under an existing provision of the Penal Code? The present law does not deal with this question.

36. Among the causes by which the office of a member may end before the expiration of the three-years term, features the "entering into legal force of a judgement against him/her". It

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5 *James v. UK (A98; 1986).*

6 *Golder v. UK, (1975), para.38.*

7 *Cox p. 16.*

would advisable to specify the judgement that serves as basis for discharge, e.g. criminal conviction, for how serious crimes, etc.

37. It is an important provision that the decisions of the Commission can be appealed to the Regional Court (this opportunity was missing from the previous drafts).

38. The efficiency of the work of the Commission is fostered by several provisions of the law. Three chambers, each composed of three members, obtain materials and present draft conclusions for the case. Strict time-limits are set for the procedure of the Commission. The time term of preparation of the case in the chamber shall not exceed 20 days. The Commission shall take decisions within 30 days from the beginning of the consideration of the case. The beginning of the consideration is not a clearly defined term, it would be better to fix it to the receipt of the application.

39. The applicants can submit their applications within two years from the date the Commission begins to exercise its authorities. This term may be extended with additional 6 months for those who did not or could not know about their rights to apply. This provision is flexible enough to provide the necessary time for submitting the applications.

40. The seat of the Commission would be in Tskhinvali, the capital of South Ossetia.

Execution of Commission decisions

41. The draft law does not specify which body is responsible for carrying out the execution of Commission decisions. This undermines both legal certainty, and the effectiveness of the procedure. Serious measures might be taken in executing the decisions, effecting fundamental human rights. The decisions might result for example in evictions of secondary occupants. The draft law does not specify neither the official organs responsible for the execution, nor the procedural guarantees. General laws on enforcement proceedings might apply (that are unknown for the reviewer) but in this case the draft should at least refer to these rules.

International and European standards in housing and property restitution

42. International human rights law recognizes various manifestations of housing rights. Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (CESCR) defined first and has remained the primary international legal source of the right to adequate housing: *"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."*

43. Under article 17 of the *Covenant on Civil and Political Rights* "no one shall be subjected to arbitrary or unlawful interference with his home", and "everyone has the rights to the protection of the law against such interference or attacks". The Covenants have been ratified by Georgia.

44. As for the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), Georgia acceded to the Council of Europe on 27 April 1999, and the ECHR entered into force on 20 May 1999. The ECHR does not impose any obligation on the Georgian State to remedy injustices which occurred before the ECHR entered into force, because of the doctrine of *rationae temporis*. However, the Georgian government, among

others forced by the above mentioned international obligations, decided to begin a process of restitution. The case being this, the principles laid down in the ECHR have to be observed.
If the restitution process interferes with the property rights of third parties, it must comply with Article 1 of the First Protocol (*peaceful enjoyment of possessions). "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

45. We should note that the Strasbourg case law on property rights under Article 1 of the First Protocol has developed in the context of private property in stable societies and market economies. It is an open question and not predictable how the Court would adjudicate restitution and property cases connected to dislocation of vast population due to military conflicts. In cases related to the implementation of restitution laws in Central Europe, the European Commission on Human Rights (not the Court) upheld court rulings in favour of the original owner against a secondary owner. We might expect that the original entitlement to the residence would be considered as "possession".[8]

46. The *right to privacy and respect for the home* provision of Article 8 also might play a role:*"Everyone has the right to respect for his private and family life, his home and his correspondence."*

47. A number of cases arrived to the Strasbourg Court regarding the forced evictions of Greek Cypriots. In the case of Akdivar and others v. Turkey (99/1995/605/693, judgment 16 September 1996) the Court declared: *"The Court is of the opinion that there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of possessions. No justification for these interferences being offered by the respondent Government - which confined their response to denying involvement of the security forces in the incident -, the Court must conclude that there has been a violation of both Article 8 of the Convention and Article 1 of Protocol No. 1".*[9]

48. It is outstandingly important that a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights.[10] This has to be taken into consideration in the relation of those claiming the rights to their original residence and the rights of the factual residents (secondary occupants). None party has to bear "an individual and excessive burden".[11]

49. Furthermore, the principle of proportionality should prevail. This means that the restitution process should have not only a legitimate aim in the public interest, but there must exist a reasonable relationship of proportionality between the means used and the ends sought to be advanced.[12]

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[8] *In case No. CH/96/28 "M.J" against Republika Srpska the Human Rights Chamber for Bosnia and Herzegovina has decided that "occupancy right… constitutes a "possession" within the meaning of Article 1 of Protocol 1 to the ECHR".*

[9] *Similarly Cyprus v. Turkey , 4 EHRR 482*

10 Sporring and Lonnroth case, Series A no. 52, p. 26, para. 69.

11 Ibid., p. 28, para. 73.

12 See the decision of the United Nations Human Rights Committee: Simunek, Tuzilova and Prochazka v. Czech Republic (Communication No. 516/1994, 23 July 1996).

50. A compensation should be provided for those who were evicted from their property. The compensation might be the restitution of the original residence.[13]

51. Last but not least the restitution process itself must not contain any discriminatory or arbitrary elements.

52. The problem with the draft law is that these principles are not addressed by it. This leads us to the most serious problem of the draft legislation under review.

Lack of substantial rules

53. Generally speaking one can observe that there is a gap among the concise provisions on the basis of the rights and entitlement, and the more accurate and lengthy procedural rules. The basic substantial matters are regulated very shortly, while there are much more detailed procedural and institutional rules on the Commission. Important substantial rules are missing; it would be necessary for example to regulate when and how can the Commission replace the refugee or IDP to his original residence; when and how can vacate the residence; what are the deadlines for leaving the residence and return it to the original resident; how are the rights of the factual resident protected; under which conditions can be evicted; how can the factual resident receive a new accomodation; just to mention a few of the several questions raised by the lack of substantial rules from the law. Instead of the substantial provisions there is only a vague reference in Article 6 that the decisions should be "in consistence with the requirements prescribed by law". Former drafts of the law contained provisions regarding such issues, defining e.g. the conditions under which the secondary occupant could continue to reside within the original home. It is a serious schortcomings of the draft that it does not regulate the substantial (material) questions that are necessary to decide cases. The rights are mentioned but not elaborated. It is missing the guidance that could help the Commission in deciding the applications. Thus the decision on the merrits of the case remains quite to the discretion of the Commission and the court of appeal. The lack of guidance and clarity violates the principle of legal certainty that is the foundation of rule of law.

Conclusions

54. The draft law has many positive aspects in trying to settle a complicated problem.

1. The draft law reflects the commitment to foster the return of refugees and to restitute housing and other immovable property to original residents. This definite aim has been achieved after a long and time-consuming procedure. The adoption of the draft law would provide the basis for restitution, compensation and justice for affected persons. Its primary aim is to redress violations against the property of those who had to flee from their homes.

2. The draft law sets up a Committee that would manage the restitution and return process. The procedure outlined in the law would be effective in achaiving the goals set by the law. Its independency, and universal access to it is guaranteed.

[13] *General Comment No 7 on 'Forced evictions', adopted on 16 May 1997 by the UN Committee on Economic, Social and Cultural Rights stipulates clearly that: "States parties shall also see to it that all individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected" (para. 14).*

3. The law admits that the application of Article 69 caused the loss of residual rights during and after the conflict, and offers effective remedy against these injustices. This important provision puts an end to the wrongs created by the provision that survived the collapse of the Soviet system.

55. However, there are lot of considerations that make necessary further improvements.

4. This solution creates a discrimination on national scale among the victims of the two conflicts, and offers a preferential solution to the refugees and IDPs of the Ossetian war. The law should address the problem of discrimination among the victims of the Abkhazian and Ossetian conflicts. It has to offer justification for the differentiation between the two groups that are formed of the citizens of the same country, and indicate the objective basis for the preferential treatment of the favoured victims. The law must be formulated in su

5. The draft law does not specify which body is responsible for carrying out the execution of Commission decisions. This undermines both legal certainty, and the effectiveness of the procedure.

6. The basic substantial matters are regulated very shortly, while there are much more detailed procedural and institutional rules on the Commission. Important substantial rules are missing. The lack of guidance and clarity violates the principle of legal certainty that is the foundation of rule of law.

56. A final note: the subject of the present review is evaluation of the draft law from strictly legal aspect. The report does not address the social and political chances of its implementation.