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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

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

on the basis of comments by

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Table of contents

1. By letter dated 5 December 2005, the then Minister of Justice of Georgia, Mr. Kemularia, requested the Venice Commission to give an opinion on the draft law of Georgia on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict (CDL(2006)003). The Commission appointed Messrs. Aurescu, Bartole , van Dijk and Hamilton as rapporteurs on this issue. Their comments are available as documents CDL(2006)014, 006, 005 and 015 respectively.

2. On 8-9 February, a delegation of the Venice Commission composed of Messrs Aurescu and Hamilton, accompanied by Mr. Buquicchio, Mr. Dürr and Ms Mychelova, visited Georgia and met with President Saakashvili, the Speaker and Deputy Speaker of Parliament Ms Burjanadze and Mr. Machavariani, as well as representatives of majority and opposition parties, the Prime Minister Mr. Noghaideli, the Minister for Justice Mr. Kavtaradje, as well as Deputy Minister for Justice Vardzelashvili, the Ministers for Civil Integration, Conflict Resolution Issues, European and Euro-Atlantic Integration, Refugees and Resettlement, the Deputy Minister for Foreign Affairs, resident ambassadors of the OSCE, the UNHCR and the European Commission Delegation. The delegation also met representatives of a number of NGOs active in Georgia and from South Ossetia. The results of these meetings are taken onto account in drafting the present [draft] opinion.

3. The present [draft] opinion has been adopted by the Venice Commission at its ... Plenary Session on ...

A. General remarks

4. At its 60th Plenary Session (Venice, 8-9 October 2004) the Venice Commission has given an opinion on a previous version of the draft law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict (CDL-AD(2004)037).

5. The information on the historical background and applicable standards set out in the previous opinion (sections II, III and IV of document CDL-AD(2004)037) are valid also for the present opinion and need not be repeated *in extenso* (see also Briefing no. 38 of 19.4.2005 of the International Crisis Group).

6. For the present opinion it is sufficient to recall that the Commission has identified the right to return to one's original home as a basic international standard to be applied. The Commission has also recognised the legitimate public interest purpose and respect of the principle of proportionality as a pre-condition for limitations of the right to property and as the key in deciding on whom to attribute the immovable property, especially in the relationship between the original owner or resident and a *bona fide* successor.

7. The Venice Commission has also received the UNHCR Observations on the Georgian Draft Law on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict, dated 27 February 2006. The Commission supports these observations, which are mostly complementary to the present opinion.

1. Introduction: Confidence building

8. The adoption of a Rehabilitation and Restitution Law has to be seen in the wider context of the settlement of the Georgian-Ossetian conflict. Within the framework of President Saakashvili's peace-plan for the settlement of the conflict on which the Venice Commission has given informal comments, this Law is to constitute an important element of confidence building between the parties.

9. According to information received from NGOs, there are between 60,000 and 100,000 refugees and internally displaced persons (IDPs), mostly in North Ossetia. About 30% of them originally come from South Ossetia, and 70% from other parts of Georgia. In the opinion of these NGOs few if any of these refugees would now wish to be resettled in Georgia. They estimate that at most some elderly people might opt for resettlement in the event of a settlement of the conflict. Probably very few would do so under existing circumstances and they would not feel it safe to do so. The refugees have now been 15 years or more in North Ossetia and have made their lives there. They speak the language and hold the passports of their host country. Even if land or homes were restored to them, in many cases their homes were in villages which have been destroyed or simply dilapidated to an extent which makes them unfit for living. The restitution of property would not in itself create the social and economic conditions in which a return to Georgia would be possible. A wider effort of re-integration is necessary.

10. Dialogue between the two sides to the conflict seems to be very limited. There has not been consultation with the Ossetian side (authorities or NGOs) much less a negotiation. Of course, if the restitution law had to await a resolution of the conflict it could be delayed indefinitely. Indeed, there is the risk that the *de facto* authorities in South Ossetia will not cooperate on the law if there are no serious efforts for consultation being made. It is clear that an ineffective law will do nothing to build confidence.

11. In order to allow for effective consultation, dissemination of the text within the Ossetian community is of key importance in the drafting phase of the law. Civil society can be an important partner in this context.

12. As also ethnic Georgians have been victims of the conflict, restitution in South Ossetia is also likely to be required. Given that it is not yet sure whether the *de facto* authorities in South Ossetia will respect the decisions of the Commission on Restitution and Rehabilitation, the law should clearly provide that the non-execution of the decisions by one side cannot be a reason for the other side not to execute decisions concerning them (exclusion of the reciprocity principle).

2. Purpose and scope of the draft law

13. The title of the draft law speaks of "rehabilitation and restitution" as the purpose of the law. From **Article 1** of the draft it appears that "rehabilitation" refers to the rehabilitation of the violation of rights and freedoms of individuals by the authorities as a result of the Georgian-Ossetian conflict due to their ethnic origin, while "restitution" concerns the restitution of property of the victims of the Georgian-Ossetian conflict, including compensation both of property damage and of non-property damage. This raises several questions about the scope of the draft law.

14. Rehabilitation of the violation of rights and freedoms (**Article 1.a**) is a very broad concept, which may cover several incidents and situations, ranging from killings and torture to infringements of the freedom of speech and the freedom of religion. Since the prohibition of discrimination constitutes an integral part of the protection of fundamental rights and freedoms, rehabilitation of violations of rights and freedoms on ethnical grounds, even if related to the Georgian-Ossetian conflict, would in other circumstances be covered by the regular judicial and administrative remedies. **Article 4.5** of the draft law indicates that the draft law concerns violations of human rights and freedoms for which no effective legal remedies were available. This still keeps the scope of the law very broad and undefined.

15. The concept of "property and non-property damage" in **Article 1.b** seems to be very broad and would risk overburdening the Commission with applications if no element of a certain severity of damage were to be included.

16. As a consequence, the Venice Commission's delegation discussed the possibility of confining the scope of the activities of the Commission on Restitution and Rehabilitation to property damage only or to providing for non-property damage to be separately evaluated. However, because in many cases where people were displaced it is alleged that they were also subjected to other human rights violations, the Venice Commission is of the opinion that such an approach would prevent the Restitution Commission from fully addressing the complaints of displaced victims of the Georgian-Ossetian conflict and to serve the overall objective of confidence building.

17. The draft law restricts the scope of rehabilitation to acts by state authorities. During the discussions with the delegation an example was cited where courts confirmed the dismissal of ethnic Ossetian Georgian language teachers from public schools. It is likely however that a wide range of other violations occurred, which may not easily be attributed to public authorities, e.g by militias. The attribution of human rights violations to public authorities will probably create evidentiary problems in some cases. For this reason but more importantly in order to provide just rehabilitation and promote conciliation, the inclusion of human rights violations other than by the authorities should be considered.

18. A possible solution might be to **confine the scope of the law to persons who had been displaced in the conflict (both refugees and IDPs) but to allow them to be compensated not merely for property loss but for any other serious human rights violations** which took place. Redressing any other human rights violations of persons who were not displaced and for whom no other effective remedy is available resulting from this (and possibly other) conflict(s) should be attentively considered by the Georgian authorities, as soon as possible, in order for the confidence building objective be fully achieved. The Venice Commission is, of course, prepared to assist in this endeavour.

19. From **Article 4.5** it is not clear whether compensation of damages is the only measure to be taken in the case of severe violation of the human rights and freedoms, or whether other measures can or should be taken. Moreover it raises the question which is the yardstick to distinguish severe violation from violation which is not severe.

20. **Article 4.3** seems to indicate that only those refugees, IDPs and other individuals are covered by the law, against whom a decision under Article 69 of the Residence Code of 1983 has been taken, and not also those who lost their house or other real property as a consequence of the Georgian-Ossetian conflict but with respect to whom no such decision has been taken. It is noted that **Article 9.b** is formulated without the said restriction and such a restriction would also not seem to be appropriate. Why should a person against whom a decision under Article 69 has been taken have a right to restitution or compensation while persons would not be eligible who had to leave their residence but against whom not even such decision was taken? Forced selling and selling of property under duress needs also to be taken into account. In these respects the scope of the draft needs clarification. This should then also be reflected in the goals or functions of the Commission in **Article 9** (unless this article will be merged as suggested *infra*, § 69).

3. Restitution of real property vs. compensation

21. The principles for restitution and criteria for compensation should be set out clearly and unambiguously. The right to return and the right to restitution are the basic principles upon which the draft law should be built. As set out by UNHCR in its Observations relating to article 4 of the draft law the latter right should be distinct and not be made dependent on the actual return of the persons concerned. Several situations need to be distinguished:

22. For property which is not occupied by new owners, restitution clearly would seem to be preferable. Account has to be taken, though, of the devaluation of the property through destruction or dilapidation, which may have made the property unfit for living. In such cases compensation should (additionally) be provided. It may not be possible in all cases to pay full compensation for the devaluation but a reasonable proportion needs to be maintained (European Court of Human Rights, The Holy Monasteries v. Greece, Series A no. 301-A, para. 71).

23. More difficult is the question of real property which is now occupied by new owners. In many cases housing left unoccupied by the victims was assigned to new inhabitants according to Article 69 of the Residence Code of 1983. While Article 4.3 of the draft law provides for the possibility to invalidate such decisions, evicting the current inhabitants will of course result in the need to provide adequate compensatory housing to these persons.

24. During the discussions with the delegation, the Georgian authorities expressed a preference for compensation for property which is now occupied by other persons rather than to return the property in kind, in order to avoid a problem of resettlement of the current owners.

25. The draft law remains indeed ambiguous on this point: while Article 4.3 seems to allow for the invalidation of court decisions according to Article 69 of the Residence Code of 1983, Article 1.b does not give a preference to either restitution or compensation. The same applies to the wording of Article 4.1, and also to Article 5, which, however, gives the impression that the choice lies with the initial resident concerned.

26. A distinction between *bona* and *male fide* owners seems appropriate. The European Court of Human Rights held: "However, it [the Court] considers it necessary to ensure that the attenuation of those old injuries does not create disproportionate new wrongs. To that end, the legislation should make it possible to take into account the particular circumstances of each case, so that persons who acquired their possessions in good faith are not made to bear the burden of responsibility which is rightfully that of the State which once confiscated those possessions." Pincova and Pinc v. the Czech Republic, para. 58, 5.2.2003, not yet published but available via the HUDOC web-site).

27. According to Article 35.1 of the draft law restitution seems to be the preferred solution when the property is presently owned by the government or by a *mala fide* owner. The government is considered to be the owner when the property was handed over by the government for loan, rental or use (Article 35.2). It may be assumed that this rule regards the present situation. This seems to imply that restitution has to be provided for even if the property is occupied by a *bona fide* person who received it from the government for loan, rental or use during or after the conflict. The housing needs of this person have, however, to be taken into account

28. Article 35.4 provides for the substitution of other real property of adequate value as a form of restitution of property which was owned or destroyed, demolished or reconstructed by a *bona fide* owner during or after the conflict. Article 35.6 speaks about pecuniary compensation when the restitution of a property is not possible. Shall pecuniary compensation be given also to a person who before the conflict received for loan, rental or use real property then owned by the government, and who cannot get his title restored because restitution is not possible?

29. These issues need to be set out more clearly. Given that more than a decade has passed since the conflict it may not be easy in all cases to distinguish between *bona fide* and *mala fide* owners. Is a person who purchases for full value from the *mala fide* owner himself *mala fide* if he knows of the circumstances in which the previous owner came by the property?
Assuming the law provides for actual restitution rather than monetary compensation at least where the property is owned by a *mala fide* owner, the displaced person should still have a right to opt for monetary compensation if he or she prefers. This is because the changed circumstances of the displaced person since the hostilities took place may make restitution impractical.

30. In principle, immovable goods which were **owned by victims** of the conflict should receive a different legal treatment than immovable goods which were **owned by the government** and were handed over for loan, rental or use. These differences are not very clearly dealt with by the draft. 31. In the meantime, in many cases property has been privatised since the end of the conflict. Due to their absence, the victims 'missed out' on the possibility of taking part in the process of housing privatisation. Nevertheless, the draft should regulate whether and to what extent compensation for the deprivation of private property has to be higher than the compensation for the deprivation of an immovable good owned originally by the government.

32. While in the case of people who lived in the past in houses owned by the government, the granting of an adequate residence could substitute (in absence of other damages) for the payment of financial compensation, in the case of the deprivation of private property the granting of an adequate residence for rent is clearly not sufficient. Either restitution of the original property, the offer of a substitute property, or the payment of monetary compensation will be required.

4. Fair trial – hearing of all parties

33. Three different personal positions are normally at stake in the situations dealt with in the draft, i.e. the positions:

1. of the public authorities which are in charge of implementing the purposes of the law,
2. of the victims of the conflict who had properties before the conflict and were deprived of them, or who had got in the past government properties for loan, rental or the right to use and
3. of the present owners or users of the properties, who can be *bona* or *mala fide*.

All of these subjects have an interest in the procedure for the restitution of the concerned real property because all of them have an interest in the procedure, that is 1) the authorities because they have the responsibility of adopting the necessary measures, 2) the victims who are interested in the restitution and 3) the incumbent owners who may be deprived of the properties in view of the implementation of the law. All of these subjects should have a say in the procedure if the rules of the procedure are stated in conformity with the principle of due process of law.

34. This principle is not explicitly mentioned in Article 3, even if points c) and d) of that article may be read as elements thereof. However, the interested parties should have not only the right "to have comprehensive information on the issues related to him/her" and the right "to be provided with ...remedies", but also the right to submit and explain their arguments in the development of the procedure. Thus, for instance, a person should have the right to explain his or her reasons in view of the qualification of his/her position as *bona* or *mala fide*. A person who is found to be a *mala fide* owner/user by the Commission on Restitution and Rehabilitation, should benefit from the principle of the rule of law and, therefore, have the right to put forward counter-arguments and to appeal against the qualification given to him or her by a committee of the Commission.

5. Composition of the Commission on Restitution and Rehabilitation

35. The rules concerning the establishment of the Commission in Article 10 are still rather vague. In his letter of 5 December to the Venice Commission, the then Minister of Justice of Georgia pointed out that the mechanism for establishing the Commission on Restitution and Rehabilitation remained to be defined and asked for advice in this matter.

36. The Venice Commission approves the choice of the drafters for the basic principles of parity between the Georgian and the Ossetian side as well as international participation, and underlines that the participation of both sides is pivotal for the success of the Commission. On the other hand, a refusal to co-operate by one side should not be a reason to delay rehabilitation and restitution for the benefit of the victims of the conflict.

37. Concerning international participation, **UNHCR** is certainly a key actor. It may be advisable though to provide also for participation of other international organisations like the **European Union, OSCE and the Council of Europe. Provided that these organisations agree, each of them could nominate one member of the Commission**. The members should act in their individual capacity and not take any instructions.

38. The draft should only mention that the members of the Commission are to be nominated by international organisations, without naming them. The rest of the procedure could be included in an explanatory memorandum.

39. As concerns the participation of the Ossetian and Georgian members, **nominations could be made both by the authorities in Georgia and South Ossetia and civil society (**in Georgia as well as in South and North Ossetia) and by the international organisations involved. From these lists, which should be made public by the Ministry of Justice, the **international members could co-opt their Ossetian and Georgian peers** taking into account - to the extent possible - a balance between nominations by authorities and from civil society as well as between the different parties in the conflict with, for the Ossetian side a geographical distribution according to the residence of the victims in South or North Ossetia.

40. In order to guarantee a smooth functioning of the Commission, the appointment of substitute members could be considered.

41. It would seem advisable to have either an odd number of members in view of the simple majority rule of Article 19.2 of the draft or to give the chair (in the plenary as well as in the committees) a casting vote. In order to keep the balance between the parties in the conflict, the chair should be one of the international members.

42. The draft provides for a single nine year term of the Commission. A shorter but if necessary renewable term might be more appropriate.

43. **Article 10.3:** It would seem advisable, if not necessary, that at least part of the members of the Commission consists of lawyers. Moreover, the concepts of "capable" and "working experience" seems too broad. These concepts should be defined in relation to the function of the Commission to make sure that the members of the Commission have qualifications and experience relevant to the work of the Commission.

44. A clear distinction between rehabilitation for human rights violations, on the one hand, and restitution and compensation of property rights, on the other hand, is difficult to draw. The Venice Commission suggests **dividing the Commission into committees** not according to substance but rather to create three committees with the same attributions, working in parallel on the caseload.

45. Such a split into smaller committees would also allow for the formation of a ‘large’ committee composed of the members of the two other committees, which could deal with appeals against decisions of a committee see below).

6. Appeals against the decisions of the Commission

46. In order to avoid the problems caused by suspicion against Georgian courts which seems likely to exist amongst many Ossetians it would be desirable to avoid an appeal from the Commission to the Georgian courts but instead to establish an **appeal mechanism within the Commission**. This could be done if the Commission were to be divided into committees. An appeal could be held to a larger appellate committee comprising the Commission members from the committee which had not made the original decision. Thus, the appellate committee would have the same tripartite composition like each individual committee and the Commission as a whole.

47. Article 42.1 of the Georgian Constitution provides that "Everyone has the right to apply to a court for the protection of his/her rights and freedoms." If a mechanism can be found to make the Commission a court within the meaning of Article 42.1 of the Georgian Constitution then all that is needed is to provide that no further appeal shall lie from a decision of its appellate committee. If not, it would be necessary to add to the Constitution a provision deeming the Commission to be a court for the purpose of Article 42.1 and providing that no further appeal should lie against a decision of its appellate committee.

48. In order to ensure the effectiveness of the Commission, the decisions of the Commission or its committees against which no further appeal is possible should have the value of *res iudicata* equivalent to a final court decision. The Ministry of Justice should be charged with supervising the execution of decisions.

7. Citizenship of victims

49. It seems that nearly all of the victims concerned have obtained Russian citizenship and many would probably not like to give it up even if they were to return to Georgia. It is important that having had to spend fifteen years as refugees in the Russian Federation (or other countries) and having built up ties there (not the least of which is the entitlement to Russian pensions) they should not have to abandon their citizenship of Russia as a precondition to having their homes in Georgia restored to them.

50. Article 12.2 of the Constitution of Georgia provides that: "A citizen of Georgia shall not at the same time be a citizen of another state, save in cases established by this paragraph. Citizenship of Georgia shall be granted by the President of Georgia to a citizen of a foreign country, who has a special merit for Georgia or grant the citizenship of Georgia to him/her is due to State interests."

51. The Venice Commission's delegation was informed that under Article 12.2, the President of Georgia would be granting double citizenship to Ossetians who wished to retain Russian citizenship. In the Commission's view they should however be entitled to it as a matter of right and not of grace and favour.

52. The Commission recommends to **amend Article 12 of the Georgian Constitution** to the effect that victims of ethnic conflicts having obtained another citizenship has not lost their Georgian citizenship (in the 1990s, Austria chose this model for persons having left Austria between 1938 and 1945 in order to avoid the problem that upon a re-application for Austrian citizenship these persons might lose their new citizenship). The time needed for such an amendment should however not block the adoption of the draft law and the start of the activity of the Commission.

53. On the other hand, it is very important that the Law provides that citizenship of the applicants is irrelevant for the purposes of this Law, both as far as the right to apply and to obtain restitution or compensation is concerned, and as to the consequences of the implementation of the Law in their regard: returning, exemption of any taxes (customs etc), registration and others.

8. Monetary basis for compensation and funding

54. The law needs to clarify the proper monetary basis for compensation. If property is not being restored the compensation ideally should reflect present day values unless the property is now worth less than it was as a result of the conflict, in which case the compensation should be based on the value the property would now have but for the events which transpired. The loss of use of the property since displacement should also be compensated. Open-ended compensation for other human rights violations associated with the displacement would be likely to prove very expensive. While full compensation cannot be provided, recognition of past wrongs is already a key both for individual justice and for building confidence between the communities. Therefore, other human rights violations may need to be compensated according to a fixed scale for various types of violations to be established in the law. The Commission should however have the powers to assimilate a violation to similar violations if it is not explicitly provided for in the scales. The establishment of a fixed scale would also tend to assist the settlement of claims since the probable amount of compensation could more easily be assessed by the parties.

55. There would not appear to have been any sufficient assessment by the Georgian authorities of the size of the problem or the likely uptake of the proposed scheme or of its cost. It would be highly desirable to **make such an assessment as quickly as possible**. On the other hand, the absence of a final registration should not block the entry into force of the restitution scheme, given that the Restitution Commission will act on a case by case basis.

56. During the meetings, the Deputy Speaker of the Georgian Parliament, Mr. Machavariani, insisted that the Georgian Parliament must have **a clear financial basis** before adopting any law. However, he also pointed out that a certain percentage of the budget could be set aside for restitution and rehabilitation in South Ossetia. He mentioned the figure of one per cent of the annual budget. Such an amount might be enough for the Commission to start its work.

57. In order to avoid any form of pressure on the members of the Commission or even corruption, the **Financial Fund of the Commission** (Article 44) **should be absolutely transparent** to the extent that even the bookkeeping of any financial transfer of the Commission (including salaries and administrative expenses) should be posted on-line via the Internet. Such transparency could certainly contribute to the willingness of donors to contribute to the scheme, a willingness on which the success of the draft law will certainly depend to a good part.

9. Working Languages of the Commission

58. The law should make provision for applicants to be entitled to apply equally in the Georgian and in the Ossetian and Russian language, and for these languages to be working languages of the Commission. Provision needs also to be made for the participation of the international members of the Commission for whom translation and interpretation may be necessary.

B. Further comments on an article-by-article basis

59. **Article 2.b:** The abbreviation IDP is not explained correctly. In contrast with the "refugee" under a), the IDP stands for: Internally Displaced Person even if in the present context only IDPs having left their residence due to the Georgian-Ossetian conflict are of relevance.

60. **Article 2.d:** Following the provision under 2.c, here as well the words "at the moment of leaving the latter due to the Georgian-Ossetian conflict" should be added.

61. **Article 2.e**: In the definition of "right to reside" in Article 2.e, the clause "usage and ownership" should be replaced by "usage or ownership" to avoid the suggestion that both usage and ownership are required, and that initial residents who did not own the house, would not have a right to restitution or compensation and would be covered only as "other individuals" in Article 2.i.

62. **Article 2.i:** The term "legitimate interests" is very broad and needs further specification.

63. **Article 3.c:** The expression "information on issues related to him/her" is too broad. It should be specified that only information that is at the disposal of public authorities and is related to public administration is covered. In that sense, the right to information could be combined with the principle of accountability under Article 3.e.

64. **Article 4.4:** The last part of the sentence should read: "if, *according to the decision of the Commission*, the value of their initial residence exceeds the received compensation or the value of the substitute residence".

65. **Articles 5 and 6** set out principles of the law and could consequently be merged with Article 3. In general, the draft would be easier to read if basic principles, criteria for compensation and the Commission's procedure were respectively grouped together and clearly separated.

66. **Article 6:** The words "safe and available" are not very clear. What is meant by "a safe residence" and how can it be guaranteed by the authorities? And what is meant by "the right to available residence"? Does it imply the restriction that the right to a residence will be honoured only to the extent available, or does it imply that the government has the obligation to ensure the availability of sufficient adequate housing for those who wish to return?

67. According to its title**, Article 7** regulates the public character of the procedure provided by the law. However, the exceptions formulated in the first three paragraphs of the article would seem to have so broad a scope that publicity is the exception rather than the rule. The principle of effective legal remedies referred to in **Article 3.d**, implies as a rule a public procedure under certain strict exceptions. This public character is in the general interest ("justice must also be seen to be done") but also in the interest of third parties for whom the outcome of the procedure may have certain consequences. Therefore, the grounds for secrecy have to be defined more explicitly and restrictively in Article 7.

68. The status of the Commission is an essential feature of the draft. According to **Article 8** it is a legal entity of public law, which is an independent body and is not subordinated to any of the state institutions. Its impartiality should also be stated.

69. The purposes of the draft Law in Article 1 and the principles of the Law in **Article 3** overlap partly with the goals of the Commission in **Article 9**. The latter Article could be deleted from the draft in order to avoid any ambiguity as to whether the draft law in general and the Commission in particular have divergent purposes. It is also not the direct purpose of the Commission to facilitate the resolution of the conflict. Such general goals should rather be part of the introductory part of the law only.

70. **Article 11.1:** "From its own staff" should read: "from its membership" but this might just be a question of translation.

71. **Article 11.2 and 11.2:** It would be advisable to provide that the chair is always one of the international members of the Commission. In that case rotation of the chair within the period of nine years would not be necessary. The chair could be elected for three years with the possibility of re-election, which would benefit the continuity of the functioning of the Commission.

72. **Article 11.4:** It would seem advisable to provide that the composition of the staff reflects the two parties of the conflict on an equal basis, preferably also with an international element.

73. **Article 11.6:** The composition of the two (or three?) committees is not regulated here. **Article 22.1,** provides that the committees will be composed on a parity basis. It is not clear whether that also means that the three groups will be represented in the committees with an equal number. In any case it would seem advisable to have the committees reflect the tripartite composition of the Commission (Georgian, Ossetian and international). Moreover, it is recommended to provide that one of the international members of each of the committees will be its chair.

74. **Article 12.1.e** concerns the issue of conflict of interests and deals with the previous experience of the members. Persons who directly participated in the armed conflict or openly called for violence and ethnic discrimination and enmity, are excluded from membership. The draft is silent about the position of person who had political responsibilities during the conflict or had the power of deciding about the deprivation of properties and the assignment of them to the incumbent owners. It would be advisable to complete the list in these respects additions.

75. **Article 12.1.b:** The exclusion of members of a political party seems unnecessarily strict, especially with respect to the international members. For the members on the Georgian and Ossetian sides it would seem sufficient to exclude those persons who have, or at the time of the conflict had, a function in a political party.

76. **Article 12.1.d:** The provision prohibiting any other paid work - except pedagogic, scientific or artistic - would also seem unnecessarily strict. It is recommended to provide that members of the Commission may not perform any other function that is incompatible with an independent, impartial and efficient performance of their membership, to be judged by the chair or a majority of the Commission. Especially as concerns the international members of the Commission it is unlikely that they will be appointed on a full time basis. They should, therefore, be allowed to have another paid occupation at the same time

77. **Article 12.5:** It is not clear why not at least the "conflict of interest" mentioned under Article 12.1.d is exempted from the notification obligation. Moreover, different from Article 12.4, Article 12.5 does not indicate what consequences would have to be drawn from the "conflict of interest" mentioned there.

78. **Article 13.f** should be redrafted, as to mention a final and irrevocable criminal decision of a Court, providing a sentence to prison or another high sentence, as a ground for terminating the mandate of a member. Anyway, the formula "detention for …indefinite term" is unusual.

79. **Article 14.1.b:** Here, again, it should be provided that the chair takes into account the principle of even distribution among the different groups.

80. **Article 16.b:** It is not clear which powers the Secretary has to supervise the fulfilment of the decisions of the Commission. Do the decisions constitute a writ of execution under Georgian

law? Does the Secretary refer the case to a court or to the Commission in case of failure of execution? In the latter case, what powers does the Commission have to enforce its decisions?

81. **Article 18:** The title should read: Guarantees of Independence and Impartiality of the Commission.

82. **Article 18.1 and 18.3:** Complaints about lack of independence or impartiality on the part of one or more members of the Commission should be addressed, at first instance, to the relevant committee of the Commission itself, which should judge upon it without the participation of the members involved. If the person concerned is not satisfied with the outcome of the complaint procedure, appeal should not lie with any court. Given the status of the Commission, it is recommended that the appeal committee composed of the two other committees (see section A.6 above) should judge on the complaint in second and final instance.

83. **Article 18.2:** The character of the prohibition should be specified: does it involve a criminal act and, if so, what will be the sanction? "Trampling" on independence and "creation of obstacles for the activities" are not clearly enough defined.

84. **In Article 18.3** the term "illegal pressure" should be replaced, as it might create the impression that other forms of pressure ("legal") are allowed, which is not desirable.

85. **Article 19.1:** The quorum requirement should be an odd number of members in view of the simple majority rule of the second paragraph.

86. **Article 19.2:** There should be a provision for the situation of an equal division of votes, e.g. a casting vote for the chair.

87. **Article 20:** The Commission seems to be granted power to adopt resolutions as normative legal acts without any specification of the areas to which these resolutions will have to relate and without any other limitations of the Commission's normative power than "the rules set by the legislation within the limits of its authority". From the fourth paragraph it appears that these resolutions do not concern the internal functioning of the Commission. If there was a need for such a normative competence, it would be advisable providing in the draft a clarification of the character and scope of these resolutions. In any case, it should be expressly stated that all the acts of the Commission have to be adopted in conformity with the law.

88. **Article 21** should clarify that the statutes of the Commission are adopted by the Commission itself within the limits of the Law. In order to save the Commission the time to elaborate detailed statutes, by default the Code of Civil Procedure should be applicable.

89. **Article 21** remains silent about the participation of the persons concerned in the procedure, the examination of the information and the data which are collected and the inspection of the physical condition of the property at stake. These conclusions are relevant for the interpretation of Article 7, which guarantees the publicity of the Commission's procedure, but - at the same time - allows for secrecy of acts of the Commission. The principle of due process of law requires a narrow interpretation of secrecy in view of insuring the transparency of the procedure and effective supervision of the liability of the members of the Commission.

90. **Article 21.2.a:** The Commission is authorised to "revise applications of victims, their attorneys or other parties concerned". This power is quite unusual, not only in civil law but also in administrative law. Of course, an application may be rejected or granted in part, and a subsidiary claim may be granted instead of the primary claim, but in those cases the decision is still based upon the application as brought before the Commission. It is recommended to clarify the authority of the Commission; "decide on applications" would be a more appropriate wording.

91. **Article 21.2.d** provides that the Commission, together with its annual report, sends to Parliament and the President a "package of recommendations for measures for compensation and rehabilitation of rights of the victims of the conflict attached". This gives the impression that the Commission has only recommendatory power and that the final decision about compensation and rehabilitation is made by Parliament and the President. This would seem to be at odds with the whole structure of the law, with Article 21.5 stating that the decisions of the Commission are mandatory, and with Article 16.b of the draft concerning execution of the Commission's decisions, while Article 32.5, also speaks of "final decision". It would also cast doubt on the independent status of the Commission.

92. Moreover, it is not clear in what way the power to decide on the recommendations of the Commission are divided between Parliament and the President. Finally, the words "the conflict attached" are not clear, since the application of the law will be restricted to the Georgian-Ossetian conflict.

93. There would seem to be some inconsistency between **Article 21.2.d** that speaks of "annual reports" and **Article 28.1**, which speaks of "periodic reports" "every six months".

94. **Article 21.3.c:** It would not seem appropriate that the Commission, which has to take a decision on an application, may itself assist in preparing the application, since this could affect the objective impartiality of the Commission. It is, therefore, recommended to establish a separate office or unit within the Commission, but not under its direct instructions, to assist applicants in preparing their applications. An alternative would be to assign that task to a legal aid bureau.

95. **Article 21.4** provides that the Commission has to refer any case immediately to the relevant agencies (probably the public prosecutor) when there are signs of a crime. As the work of the Commission involves also "severe violations of human rights and freedoms" (Article 4.5) it is not unlikely that such signs will appear frequently. It should be considered whether the nature of the Commission, which incorporates certain elements of a reconciliation commission, would not require some discretion on the part of the Commission to initiate the involvement of prosecution bodies. In any case, such a "referral" should not result in the termination of the rehabilitation procedure before the Commission itself.

96. **Article 22.2:** It is not clear whether "staff" here means "membership". It would not seem advisable to change the complete staff of the committees at one and the same moment since this would jeopardize the continuation and consistency of the work of the committees. But the same would be true for the membership of the committees. It is recommended to provide that each year one third of the members will rotate between the committees.

97. **Article 22.4:** From this provision it ensues, more or less implicitly, that the committees do not take a decision themselves but prepare a draft decision for the Commission. This

seems to be using up a lot of energy as the case has first to be dealt with in the committee and then again in the plenary. From a viewpoint of procedural economy, decisions should be taken by the committee itself. An appeal to the 'large' committee (see section A.6 above) should then be possible as set out above. In any case, it is recommended to regulate the relationship between the Commission and its committees in a more specific and clear way.

98. **Articles 23 to 25** deal with the collection of information and evidence by the committees of the Commission and, therefore, deal with inspections and the hearing of witnesses. The draft should specify these powers are mandatory for the persons and are assimilated to those of judicial authorities. Some elements can be drawn from Article 26. However, that article does not specify whether and to what extent the decisions of the bodies can be enforced with the help of the public authorities.

99. **Article 23.2c:** It is not mentioned here that the committee submits a draft decision to the Commission. It is recommended to clarify whether that should always be done or whether it is for the committee to choose to do so.

100. **Article 23.3 and 24.3**: Why should the committees send monthly reports to the Commission if anyway they have to provide information on individual cases to the Commission under Article 23.2.c and Article 24.2.e, respectively? If on the other hand the committees decide themselves no reporting seems necessary because the decisions would be available to all members of the Commission. Such an intensive reporting might create unnecessary paperwork.

101. **Article 24.2.e:** This provision should also make it clear whether the committee should always submit a draft decision to the Commission. It should also specify, with a reference to Article 21.4**,** what should be done with the information concerning the alleged violators of the human rights concerned and whether and in what way it makes a difference if the alleged perpetrator is a public official or a private person.

102. **Article 25.1:** It is not clear from this provision whether the Inquiry Group is composed of staff members of the Commission and, if that is not the case, whether after its establishment the Inquiry Group forms part of the staff or constitutes a separate body with its own staff. In view of its task, and the trust it must raise with the possible victims, the composition of the Group, with even division among the groups, would also seem important. It seems more expedient to leave each committee in charge of its own inquiry rather than to establish an inquiry group.

103. **Article 26:** It is very important that the taking of evidence takes into account the difficult situation of refugees and IDPs to provide documentary proof of their property claims. As indicated in the UNHCR observations, in addition to land registry data, other documents or witnesses should be accepted as evidence.

104. **Article 26.1.a:** The extent to which third parties have access to the files of pending procedures, will have to be decided by the competent committee.

105. **Article 26.1.b:** Entering a detention centre should always require previous consultation with the authorities concerned; entering private homes should require an express decision by a judicial authority.

106. **Article 26.1.c, 26.2, and Article 27.1.b:** A provision should be made concerning official and professional confidentiality.

107. **Article 28.7:** While the Commission has to report every six months and may make recommendations, the President of Georgia must report on implementation measures only once, six months "after termination of the activities of the Commission", which could mean: after nine years. It is recommended to distinguish between reporting on measures taken for the implementation of recommendations in individual cases, and on general measures for the implementation of any final recommendations of the Commission. Regular reporting on implementation could be provided for by the Minister of Justice rather than the President of the Republic.

108. **Article 28.8:** This provision is not clear, probably due to the translation "dismiss". Since the Commission will have to present a report every six months, it cannot be dismissed every three months thereafter. In any case, an executive body should not be allowed to dismiss the Commission while it is still dealing with cases.

109. **Article 30** should include also the heir(s) among the persons entitled to apply to the Commission, as Article 32 does.

110. **Article 32.1.c:** The concept of "public organisation" is not clear. It is recommended to give access to the Commission also to (certain) non-governmental organisations.

111. **Article 32.1.d:** It is recommended to also include gross violations of human rights by private persons, as their investigation and assessment may also be of great importance to facilitate regulating the conflict and the alleged victims may not always be in the position to bring an application themselves.

112. **Article 32.2:** The period of 15 days would seem to be unrealistically short given the sometimes very complicated facts and the long time that may have passed since those facts took place. Moreover, the assessment of whether an effective remedy has been available to the victim may also be a complicated issue.

113. **Article 32.3.b**: In order to decide on the admissibility of a case, an allegation of the absence of effective legal means that is not manifestly ill-founded should be sufficient. Otherwise a decision on the merits would in fact be taken in deciding on admissibility.

114. **Article 32.4:** A case should be rejected only if it goes beyond the authority of the Commission. An incorrect assignment to one of the committees by the Commission itself must not result in the rejection of the case by the committee.

115. **Article 33:** Especially for victims residing abroad, provision should be made that they can – but do not have to – be represented at the hearing by a lawyer or another person of their choice. The latter provision would allow for the acting of interested NGOs on behalf of victims.

116. **Article 33.5:** As a matter of translation, "staff of the Commission" should read: "members of the Commission". This rule can lead to undecided situations when there is a simple but no 2/3 majority for only partial satisfaction or rejection of the claim. In all cases a simple majority should be sufficient.

117. **Article 33.6:** As a matter of translation, "justified" should read: "reasoned".

118. **Article 36** does not deal with the situation in which a *bona fide* person is the present resident of a forfeited or confiscated real property. **Article 37** apparently aims at taking in consideration the position of a *bona fide* owner and provides for the adoption of a measure different from restitution.

119. **Chapter IV:** According to its title, chapter IV contains general rules of damage compensation. However, its articles reveal that this chapter is only concerned with restitution and compensation related to property and non-property damage, not with rehabilitation and moral compensation in cases of violation of other human rights than the right to property, unless Article 41 is supposed to deal with such cases. If the latter is the case, the regulation should be more specific. If it is not meant to cover rehabilitation and moral compensation, a specific chapter should be added for that purpose.

120. **Articles 35-37:** The concept of "unfair owner" (read: *mala fide* owner) should be defined. It is not clear from these provisions whether and to what extent an initial resident of non-State property, who was not the owner of the house, may also claim restitution of residence.

121. **Article 35.5:** It would seem necessary to define the clause "the same place" more exactly.

29. The scope of **Articles 38, 39 and 42** is unclear**:** Have these rules to be applied even to cases of real property owned by the government and assigned to people for loan, rental or use? Could and should the rules defining destroyed or restored properties also be applied to real property given for loan, rental or use? According to what criteria should the amount of compensation be fixed which has to be paid in case of real property given for loan, rental or use that cannot be restored? Are the heirs to be considered as interested parties in relation to the payment of compensation also in these last cases?

122. **Article 44.3:** Since the grants and contributions from other sources are not guaranteed, it must be secured that the sources from the State Budget will be sufficient to cover at least the early part of the work of the Commission.

123. Since the funds needed to implement the decisions of the Commission are not part of financing the Commission, these funds and their sources are not regulated in the draft law. It is recommended to include a provision regulating and guaranteeing these funds.

124. **Article 47.2:** The election of the two Deputy Chairs should be included.

C. Conclusions

125. The Law on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict will be very important for providing justice and for building confidence between the parties to the conflict. It should be approved taking into account the present opinion and implemented without undue delay.

126. The current text represents an improvement as compared to the previous draft. Several of the recommendations of the Venice Commission have been included. Nevertheless, further amendments, additions and clarifications need to be made to improve the law. In particular:

- The material and personal scope of the draft law needs to be specified more precisely. The scope of the law should be confined to persons who had been displaced in the conflict (both refugees and IDPs) but they would be compensated not merely for property loss but also for any other serious human rights violation.
- The principles applicable for rehabilitation and restitution should be set out more clearly: the criteria for compensation and its amount (scale) should be specified; a clearer distinction between and definition of *bona* and *mala fide* owners should be made.
- The draft should make a better distinction between the rights of owners and the rights of persons who lived in state owned housing.
- The Law should apply to the victims concerned irrespective of citizenship.
- The right to a hearing should be better guaranteed.
- The Venice Commission approves the basic choice of a tripartite Rehabilitation and Compensation Commission (Georgian, Ossetian, international) and recommends the appointment of the Georgian and Ossetian members by the international component.
- A right of appeal against decisions should be available within the Commission.
- Refugees and IDPs who obtained another citizenship since their displacement should have a right to obtain double citizenship if they so wish.

127. In order to induce trust in the rehabilitation and restitution scheme, it will be indispensable to consult with the Ossetian side (*de facto* authorities - to the extent possible - and civil society in South and North Ossetia). Such consultation but also full transparency in the establishment of the Commission and its activities may help to turn the restitution and rehabilitation scheme into a means of justice and confidence building alike.

128. The success of the draft law will depend on the availability of sufficient funding, which at least partially may have to come from international sources. The quality of the consultation process and that of the law itself may contribute to convince possible donors of the viability of the scheme.