Strasbourg, 4 March 2009

CDL(2009)046*

Opinino no. 516/2009

Engl.only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE LAW ON OCCUPIED TERRITORIES

OF GEORGIA

Mr James HAMILTON (R (Substitute Member, Ireland)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The Monitoring Committee of the Parliamentary Assembly of the Council of Europe has asked the Venice Commission to assess the law on Occupied Territories of Georgia which was enacted on 23 October 2008.

2. The purpose of the law is declared to be "to define the status of territories occupied as a result of the military aggression of the Russian Federation" and applies to the territories of the Autonomous Republic of Abkhazia and the former Autonomous Republic of South Ossetia.

3. The law purports to apply a "special rule" and a "special legal regime" in the two territories, to include "limitation of free migration, economic activities, real estate transactions and other activities".

4. So far as concerns free migration, the law purports to limit entry by foreign citizens and stateless persons to two crossing points from Georgia, one for each territory The effect of this is that an entry into either territory from the Russian Federation will constitute a criminal offence under Georgian law.

5. Transactions related to real estate "concluded in violation of the Georgian law" are void. I assume the practical effect of this will be that real estate transactions carried out according to the actual practices and laws *de facto* in operation in the two territories will not be recognized as valid in Georgian law. However, property can be inherited on the basis of a will or by the legal successors on an insterstacy.

6. All economic activity carried out in the territories which under the Georgian legislation requires a licence, permit or authorization is declared to be a criminal offence if such a licence has not been granted. I do not have information as to how extensive a list of economic activities does require such permission. On discussing the question with Georgian officials informally I was given the example of a mobile telephone licence. If a mobile telephone service provider wants to provide service in either of the two territories if it obtains a licence from the *de facto* authorities there but does not obtain a licence from Georgia it will commit an offence under Georgian law.

7. In addition certain other economic activities are prohibited absolutely, including trade in military products, air, maritime and railway traffic, use of national resources, organization of case transfer, and financing any of these activities.

8. There is a provision allowing for a special permission to do any of the prohibited economic activities "in order to protect the state interests of Georgia, promote peaceful resolution of the conflict or serve the de-occupation or humanitarian purpose".

9. Any breach of these provisions attracts criminal liability. This extends also to certain shareholders in companies which breach the rules.

10. Clause 7 of the law purports to impose duties on the Russian Federation to observe internationally recognized human rights law. Of course, the Russian Federation, in common with every other state, is under such a duty. It is difficult to see what the practical effect of incorporating such a provision in Georgian domestic law the clause is other than to make a political statement.

11. Clause 8 effectively declares the *de facto* authorities to be unlawful bodies and their acts invalid.

12. Of course, Georgia is not in fact in control of any part of the two territories. It is therefore not in a position to enforce the law insofar as it relates to internal economic activity within the territories or the movement of persons between the Russian Federation and the territories. It may be noted that the laws on movement of persons do not apply to Georgian citizens. In practice, however, most of the inhabitants of the territories until recently held Russian passports. Now that both territories have declared independence and this has been recognized by the Russian Federation I assume both the territories will issue their own passports. In those circumstances it is not clear to me what the status of holders of passports so issued will be in Georgian law – Georgian citizens or persons without citizenship?

13. So far as enforcement is concerned, Georgia may well be able to put some pressure on international businesses to comply – at least if they wish to do business in Georgia. In effect, they may force people to choose between doing business in the territories or in Georgia.

14. The fact that Georgia does not exercise authority over the territories does not in any sense absolve it from its duties under the European Convention on Human Rights. In *Ilascu and Others v Moldova and Russia* (Application No. 48787/99, 8 July 2004) in discussing the obligations of Moldova concerning events in Transdniestria, over which Moldova did not exercise effective control, the European Court of Human Rights stated the following:-

"§331 However, even in the absence of effective control over the Trnsdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.

§332 In determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden (see Özgür Gündem v. Turkey, no. 23144/93, § 43, ECHR 2000-III).

§333 The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining de facto situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organizations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.

§334 Although it is not for the court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.

§335 Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but that its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention."

15. A particular concern arises in relation to international humanitarian relief. The Council of Europe's Commissioner for Human Rights in his report of 16 December 2008 (Comm DH(2008) 37) expressed his concern as follows:-

"73. In his last report, the Commissioner drew attention to the draft law being prepared by the Georgian Government on occupied territories[10]. The Georgian Parliament adopted this draft law on 23 October 2008. The legislation provides for a special legal regime, applicable to both the "Tskhinvali region (former Autonomous District of South Ossetia)" and Abkhazia. It restricts the freedom of movement of foreigners and stateless persons by stipulating specific entry points to the two regions. It further restricts the exercise of economic activities, both commercial and non-commercial, and property rights in these areas. An exception clause for humanitarian activities has been incorporated[11]. Ad hoc special permits can however be issued by the Georgian government, if the activity is deemed to serve the state interests of Georgia, peaceful settlement of the conflict, de-occupation or humanitarian purposes.

74. A number of questions were raised with the Commissioner in his discussions with the international community regarding this legislation's compliance with the European Convention on Human Rights. The issues ranged from how this law would impact on the rights of the South Ossetian inhabitants, including the issuance of birth or marriage certificates, identification documents, inheritance issues, transfers of funds to cover the costs of an international presence or aid project. It was unclear what the envisaged permissions by the Georgian Government would mean in practice when it comes to the execution of activities or programmes. The practical impact could, according to some interlocutors, even be increased difficulties for the returnees.

75. The Minister for Reintegration informed the Commissioner that an implementation decree was being drawn up and would be submitted to the relevant actors for their comments in the coming weeks. An inter-agency committee was being set up to handle the special permits. A distinction had to be made between the nature of activities and the procedures to follow. The Georgian Government was not against activities, if deemed appropriate to them, in the occupied territories. An exemption existed for humanitarian aid, but there would be no exceptions as regards from which direction to access these territories. All international actors needed to enter from the south.

76. For the Commissioner it is of utmost importance that access is not politicised, that displaced persons are not faced with additional obstacles on their return and that international organisations are not hampered in their provision of aid to these traumatised victims.

77. The Commissioner reiterated his call to all concerned authorities to grant unimpeded access from all directions to all areas affected by the conflict for humanitarian and early recovery actors, so that they can reach internally displaced persons and other civilians at risk without delay. He further calls upon those authorities to refrain from any further steps that may impede or complicate access or the execution of the mandates of these actors. "

16. I would respectfully share the concerns expressed by the Human Rights Commissioner. I have not seen the implementation decree. It is probably premature to express a definite opinion on how this law will work in practice but the effect of it is, in theory, is likely to make criminal a wide range of economic activities pursued in South Ossetia and Abkhazia. So far as concerns supporters of the breakaway regimes this may not in practice make any difference. However, if there are any ethnic Georgians still in the two territories it may create difficulties for them in the future. It seems at the very least likely to present an obstacle to the return of refugees and internally displaced persons. On the face of it it imposes obstacles to free movement which would seem difficult to justify as a reasonable or proportionate response to the current problems. The provisions relating to real property are also in principle on their face an interference with the right to peaceful enjoyment of property.

17. One area where there seem likely to be practical difficulties is in relation to humanitarian relief. I do not believe it is satisfactory that agencies engaged in such work should be asked to seek special permission or make a case that the situation is exceptional. It is obvious that humanitarian relief in a war zone requires the possibility of access from both sides. The law should simply exclude humanitarian relief from the scope of the limitation of movement provisions.

Conclusion

18. It is difficult at this stage to assess what practical effect the Law on Occupied Territories will have. At the least, however, it seems likely to prove an obstacle both to humanitarian assistance in the area and to any moves to allow the return of refugees and internally displaced persons. Insofar as they are enforceable at all (and this may be limited to people who retain links with the unoccupied parts of Georgia) on the face of it they seem at the least to raise difficulties both in relation to free movement of persons and the right to peaceful enjoyment of property.