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COMMENTS

ON THE LAW
ON OCCUPIED TERRITORIES

OF GEORGIA

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General Remarks

1. The Law of Georgia on Occupied Territories (hereinafter referred to as "the Law") adopted on 23 October 2008, after the August 2008 conflict, has the declared purpose (in its Article 1) to "define the status of the occupied territories" of South Ossetia and Abkhazia, in order to establish a "special legal regime on the above territories".

2. The legal premise on which this piece of legislation is based is mentioned in the Preamble – the fact that "the presence of military forces of any other state on the territory of Georgia, without an explicit and voluntary consent expressed by the state of Georgia, shall be deemed illegal military occupation of the territory of a sovereign country". This statement is correct from the international law point of view.

3. The overall perspective of the Law is that of a piece of legislation of a punitive character, which sets forth a number of unilateral sanctions covering a large range of limitations of the freedom of movement of persons, of economic activities, including real estate transactions.

4. Besides the unilateral measures to be taken by the Georgian authorities, according to Article 9 (2) of the Law the Government of Georgia will conclude bilateral agreements with other countries in order for these countries to implement sanctions against persons breaching the Law.

5. Such pieces of legislation regarding occupied territories exist also in other similar situations connected to the so-called "frozen conflicts". An example is the *Law no. 173-XVI of 22 July 2005 of the Republic of Moldova concerning the basic provisions of the special legal status of the localities located on the left bank of river Nistru (Transnistria)*. But, in contrast with the Georgian Law, the Moldovan piece of legislation does not have a punitive nature, being conceived as an element of confidence building within the overall effort to settle the conflict regarding the separatist Transnistria, by granting it a certain autonomous status inside the Republic of Moldova (even if the effects of its adoption were not those foreseen by the initiator).

Observations article by article

6. Article 2 letter c) includes a number of terms which are quite confusing, probably due to an inaccurate translation into English. For example, the denominations of the sea zones included in the scope of the Law: "the neighbouring zone" is in fact the "contiguous zone" defined, together with its legal regime, by the 1982 UN Convention on the Law of the Sea - UNCLOS (and not the "UN Convention on Maritime Law", as it is denominated in the Law); the "special economic zone" is in fact the "exclusive economic zone" (EEZ) and the "continental trail" is in fact "the continental shelf" (both terms and their legal regime being also defined by UNCLOS). It has to be noted, in relation to the definition of the maritime zone included within the scope of application of this Law, that a maritime delimitation between Georgia and the Russian Federation is still to be effected.

7. Article 4 provides for a special restriction of the access of "citizens of foreign countries and persons without citizenship" (stateless persons) in the occupied territories. These two categories of persons are allowed to enter the respective territories only from certain directions exhaustively indicated in the Law. This provision seems quite restrictive, especially when taking into account the fact that violation of this provision is punished as a crime according to the Criminal Law of Georgia. Even if this provision does not seem to target international officials, it may be noted that Security Council Resolution S/RES/1808 of 15 April 2008 provides for in its paragraph 14 for the "freedom of movement throughout the zone of conflict of UNOMIG, the CIS peacekeeping force and other international personnel". Also, the Security Council Resolution S/RES/1866 of 13 February 2009 sets forth in its paragraph 3 the need "to ensure, without distinction, … the right of persons to freedom of movement …"

8. Article 5 refers to real estate transactions in the occupied territories: real estate can be acquired only in conformity with the Georgian law, which is a correct and normal condition of validity and that all the transaction concluded in violation of the domestic law shall be deemed void from the moment of their conclusion. The second paragraph prescribes that real estate can be inherited only by way of succession *ab intestat* or by will if the beneficiary is one of the legal successors.
It is true that the right to heritage is not recognized as such by the ECHR, as this instrument only protects the present right over a certain property. However, the succession is a way of acceding to a property that will benefit of the guarantees of the rights to peaceful enjoyment of possessions. If a person acquired a property on the basis of an act, including acts *mortis causa*, at a time when the law permitted such an acquisition, the annulment of the acquisition act after a long period of time and without any compensation represents a violation of the right to peaceful enjoyment of one's possessions. It is to be noted that:

- any legal act, after the passing of the period when one could dispute its validity, enters the civil circuit and generates new legal effects; its annulment is likely to affect the legal certainty;

- in its case-law (*Jahn and others v. Germany* [GC], 30 June 2005), the ECtHR recognized the possibility for a State to demand the reassignment of a property without compensation from the heirs of the owners, if exceptional circumstances justify such a measure. But in its conclusions on non-violation of the right to peaceful enjoyment of possessions, the ECtHR put great emphasis on the short period of time elapsed between the acquisition moment and the reassignment of property and on the specific context, of a transition to democracy and the need for social justice. In the present case, the effects of the law go back in time and could affect acts concluded years ago (the situation in the occupied territories is not a recent one, so a "contemporary" reaction of this kind of the Georgian Government might be considered as excessive).

9. Article 6 "Limitation of Economic Activities on the Occupied Territories" introduces, at least apparently, a certain contradictory approach, if paragraphs 1a) and 2 are read together. Paragraph 1a) reads that "any economic activity" is prohibited „if under the Georgian legislation a license, permit, authorization, registration or agreement is required for the implementation of such economic activity but it has not been granted". This is correct *per se*. But paragraph 2 sets forth that „implementation of activities stipulated in Article 1 of this Clause[1] shall be allowed only in exceptional cases, based on a special permission granted in compliance with the rules stipulated in the relevant normative document of the Georgian Government". These two provisions, read together, give the impression that any economic activities on the occupied territories are in fact not subject to regular/ordinary authorizations provided by the Georgian legislation for any business, but to the special permission provided in paragraph 2, which seems to be excessive.

10. On another hand, the prohibition of paragraph 1 b) of Article 6 ("Import and/or export of military products or products that have double designation") may be justified, as well as the prohibition of paragraph 1 d) ("Use of national resources").

11. It is to note that the effects of the prohibition set forth in paragraph 1 c) of Article 6 ("International air traffic, maritime traffic and railway traffic, also international automobile transportation of cargo") amount in fact to an economic embargo or blockade. So, the provisions of the Georgian Law prohibiting international maritime and air traffic must be examined from two perspectives:

- their main goal is to block the access to the occupied territories (all ways of communication are prohibited);

[1] Paragraph 1 of Article 6.

- however, another effect that they have is that they affect the freedom of navigation and overflight of *third* States' flag ships and aircrafts. This prohibition is likely to come against the legal regime of navigation and overflight in the EEZ.

In this respect, as far as the navigation and overflight are concerned, the EEZ enjoys the same regime as the high sea, namely all States have the freedom of navigation and overflight. As a consequence, the coastal State must respect the exercise of these freedoms and must not regulate the activities in its EEZ in a manner that is inconsistent with the relevant international law of the sea. However, the interests and rights of the coastal State may justify some exceptions and limitations to the exercise of the freedom of navigation and overflight.

Regarding the *exceptions*, the coastal State may close the access of *third* States' flag ships in certain areas, as long as these areas are clearly defined and the interdiction is temporary. Such areas may be major fishing grounds, marine protected areas, areas in which the coastal State tests weapons or carries on weapons exercises.
As far as the *limitations* are concerned, the coastal State has the right to regulate the navigation of ships carrying dangerous or noxious substances; in their transit the third States' flag ships must respect the peace, order and security of the coastal State and must not interfere with the protection of the latter's environment.

12. Article 6 (4) and (5) provides that the legal sanctions are to be applied also to the "related persons" (persons having a certain equity or shares in the companies involved in economic activities prohibited by the Law). According to the case-law of ECtHR (*Dragotoniu and Militaru-Pidhorni v. Romania,* 2007, para. 33), extending the scope of application of a crime to persons assimilated (by analogy, for instance) to the active subjects defined by the criminal law is excessive.

13. On a general note, it is important that any kind of sanction avoid producing negative effects upon the civil population – which is already affected by the conflict. It may be noted that Security Council Resolution S/RES/1808 of 15 April 2008 provides in its last paragraph of the preamble that "economic development is urgently required in Abkhazia, Georgia".

14. The provisions of Article 7 "Protection of Human Rights and Cultural Monuments on the Occupied Territories" are in line with the current international law, provided that there is an effective overall control by a foreign State on the respective territory. This approach was confirmed for instance by the ECtHR in its 2004 judgment *Ilascu and others v. Russian Federation and the Republic of Moldova* (see *inter alia* paras. 382-385) and is in line with the 2008 Venice Commission Report on the Democratic Control of the Armed Forces (document CDL-AD (2008)004 (see paras. 305-306). At the same time, this provision only reiterates the existing international law rules (a domestic law cannot create *per se* obligations for another State), so – from a strictly legal point of view – its inclusion in the Law would not have been necessary. On another hand, the provision in Article 7 (1) excludes any responsibility of Georgia for the occupied territory. But it may be noted that the whole Law is an indication of Georgia's concern for the said territory, and taking into account the case-law of the ECtHR (*Ilascu and others v. Russian Federation and the Republic of Moldova*), the intention of the State to regulate the legal relations within the occupied territory may represent an indication of *its* responsibility for the respective territory.

15. The provisions of Article 8 "Illegal Authorities" are also correct.

16. Article 11 (2) provides for a retroactive application of the Law. In light of the fact that violations of the Law entail criminal responsibility, it has to be examined whether this provision of the Law is in line with Article 42 (5) of the Georgian Constitution ("No one shall be held responsible on account of an action which did not constitute a criminal offence at the time it was committed. The law that neither mitigate nor abrogate responsibility shall have no retroactive force.")