



Strasbourg, 8 December 2009

Opinion no. 552 / 2009

CDL(2009)187*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

On the basis of comments by:

Mr Bogdan AURESCU (Substitute Member, Romania)
Mr James HAMILTON (Substitute Member, Ireland)
Ms Angelika NUSSBERGER (Substitute Member, Germany)

**This document has been classified restricted at 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.*

I. Introduction

1. *The Republic of Georgia adopted the “Law on Occupied Territories” on 23 October 2008. Further to a request by the Committee on the Honouring of Obligations and Commitments of the Parliamentary Assembly, the Venice Commission adopted an opinion on this law at its 78th Plenary Session (Venice, 13-14 March 2009). In its opinion (CDL-AD(2009)015), the Commission found that the “Law on occupied territories” of Georgia raises several issues which should be addressed by the Georgian authorities to ensure the compatibility of the law with international law.*

2. *In August 2009, the Parliament of Georgia submitted a set of draft amendments and annexes (CDL(2009)151) to the “Law on Occupied Territories” to the Venice Commission for assessment. The Venice Commission adopted an interim opinion on it in October 2009 (CDL-AD(2009)046), whereby it recommended that further changes be made to this law.*

3. *On 4 December 2009, a revised version of the draft amendments (CDL(2009)186 was submitted to the Venice Commission for assessment. This text had been prepared with the intention of meeting the concerns expressed by the Commission in its preliminary opinion.*

4. *The present opinion is based on comments by Mr Aurescu, Mr Hamilton and Ms Nussberger. It was adopted by the Commission at its ... Plenary Session.*

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

5. The present Final Opinion has to be seen as a follow-up to the first opinion given on the “Law on Occupied Territories” (CDL-AD(2009)015) and to the subsequent Interim Opinion on draft amendments to the “Law on Occupied Territories” (CDL-AD(2009)046, herein after “the interim opinion”). The general comments contained in opinion CDL-AD(2009)015 (paras. 5-8) are also valid for the present final opinion: the Venice Commission is not called upon to examine the question of the legal status of South Ossetia and Abkhazia, which is therefore not the object of the present opinion.

III. Comments on the amendments and annexes to the Law

6. The revised draft amendments include further important changes to Articles 4 to 7 and Article 11 of the Law. The Venice Commission welcomes these changes as they reflect an effort to respond to the concerns raised in its previous opinions on the Law and the proposed amendments to it.

Limitations on Free Migration on the Occupied Territories (Article 4)

7. In its interim opinion (paras. 6 and 7), the Commission had welcomed the inclusion in Article 4, para. 3 of “confidence building” among the reasons for issuing special permits to enter the occupied territories from the forbidden direction; the Commission had however regretted the reference which had remained in the law to a “normative document of the Georgian Government” regulating special permissions. The revised draft amendments have not addressed this concern.

8. The Venice Commission reiterates its positive assessment of the amendment to paragraph 3, Article 4 which now specifies that “a special permission to enter the Occupied Territories” is only necessary for the entry from another side than the one accepted in Article 4. para.1.

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

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

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

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

Limitations of transactions of real estate property rights (Article 5)

13. The Venice Commission reiterates its positive assessment of the deletion of restrictions to inheritance of real property.

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

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

Limitations of economic activities (Article 6)

16. The Venice Commission reiterates its positive assessment of the re-formulation of Article 6, para. 1 with its explicit reference to the UN Convention on the Law of the Sea.

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

18. The Venice Commission’s concerns relating to the question of the legal consequences of the non-observance of the obligation to inform the government of Georgia about the start and the end of the intended activity remain (see para. 9 of the Interim Opinion).

19. The Commission reiterates its high appreciation of the abolition of the retroactive criminalisation of the economic activities related to humanitarian assistance on the basis of the amendment to Article 11.

20. In reply to the Venice Commission's concerns relating to the very broad wording of the restrictions contained in Article 6.1, to the legal sanctions for performing forbidden economic activities on occupied territories, as well as to illegal corporate activities (Article 6, para. 3), the Georgian authorities have submitted references to relevant pieces of legislation of Georgia. The Commission however is not in the position of analysing these legal texts. It remains of the opinion that the Article 6.1 will have a wide application.

Protection of Human Rights and Cultural Monuments (Article 7)

21. Article 7 of the "Law on the occupied territories of Georgia" now more correctly reads that the responsibility of the Russian Federation *shall be determined on the basis of international law*.

Stipulation on "illegal authorities" (Article 8)

22. The Venice Commission welcomes the replacement of the wording "shall take place" with "shall be guaranteed", in accordance with its recommendation (see para. 18 of the Interim Opinion), while it does not have information concerning the details of the Georgian regulation.

Retroactive application of the law (Article 11)

23. The Venice Commission welcomes the explicit provision that no retroactive application of criminal law is possible pursuant to this law. This fully responds to the relevant recommendation of the Venice Commission (see para. 20 of the Interim Opinion).

Revision of the law

24. In its opinion of March 2009 (see para. 49), the Venice Commission had suggested to give the regime of the "occupied territories" a transitory character, notably by foreseeing that the law be reviewed periodically when the circumstances pertaining to the territories change.

25. The draft amendments now foresee at para 4 of Article 11 that "*Taking into account the progress in the process of de-occupation, the Parliament of Georgia will consider the possibility of amending the law by January 1, 2012.*". The Venice Commission welcomes this provision, which will allow reflecting in the legal order of Georgia the progress in the settlement of the conflict which, in time, will hopefully be made. It might be recommendable to leave some flexibility for the process of review and not to exclude a review of the law before 1 January 2012.

III. Conclusions

26. The Venice Commission acknowledges the efforts made by the Georgian authorities to respond to its concerns and recommendations. Indeed, the revised draft amendments to the “Law on Occupied Territories” address most of the main concerns previously expressed by the Venice Commission. In addition, these draft amendments foresee the possibility of revising the law on occupied territories in two years’ time, when hopefully progress in the settlement of the conflict will have been made.

27. The Venice Commission hopes that these amendments will soon be adopted by the parliament of Georgia. It stresses that it is essential that the “Law on Occupied Territories”, and in particular its Article 4, be interpreted in a manner which conforms to the international obligations of Georgia. The Commission further stresses that it is important that future monitoring reports by international and humanitarian organisations on the conditions of granting humanitarian assistance be taken in due consideration by the Georgian authorities and that the latter take prompt action to ensure that any kind of problems be eliminated, if such problems occur.