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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW OF GEORGIA

ON PROPERTY RESTITUTION AND COMPENSATION ON THE TERRITORY OF GEORGIA FOR THE VICTIMS OF CONFLICT IN THE FORMER SOUTH OSSETIA DISTRICT

on the basis of comments by

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Adopted by the Venice Commission
at its 67th Plenary Session
(Venice, 9-10 June 2006)

Table of contents

1. Following a first opinion on the draft law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict (CDL-AD(2004)037, adopted at the 60th Plenary Session, Venice, 8-9 October 2004), the Venice Commission gave an interim opinion on the draft law of Georgia on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict (CDL-AD(2006)007, adopted at the 66th Plenary Session, Venice, 17-18 March 2006). The Commission had appointed Messrs. Aurescu, Bartole, van Dijk and Hamilton as rapporteurs on this issue.

2. During the 66th Plenary Session, the Minister of Justice of Georgia, Mr G. Kavtaradze, asked the Venice Commission to give an opinion also on a revised version of the draft law. The Commission received the latest version which is the subject of the present opinion on 17 May 2006 (CDL(2006)043). The draft law passed the first reading in Parliament on 9 June.

3. On 30-31 March 2006, the Secretariat of the Commission participated in the "Georgian-Ossetian Dialogue Meeting on Compensation, Restitution and Restoration of Rights for the Victims of the Georgian-Ossetian Conflict" in Vladikavkaz, North Ossetia/Russian Federation, organised by the International Institute for Strategic Studies (IISS). This meeting was attended by authorities from Georgia, North Ossetia and Russia as well as refugee NGOs from North and South Ossetia, individual refugees and NGOs from Georgia.

4. On 17-18 May 2006, a delegation from the Venice Commission, led by Mr Hamilton, held meetings with the Ministry of Justice of Georgia, international organisations (UNHCR, OSCE and the EC Delegation) and the de facto authorities in South Ossetia. On 19-20 May, the delegation participated in a Round Table Meeting on "Restitution of Property and Restoration of Rights for the Victims of the Georgian-Ossetian Conflict" in Tbilisi, organised by IISS. The Venice Commission is grateful to the International Institute for Strategic Studies for organising the meetings in Vladikavkaz and Tbilisi and thus for providing occasion for consultation and dialogue on this issue.

5. The results of these meetings were taken into account in drafting the present opinion, which has been adopted by the Commission at its 67th Plenary Session in Venice on 9-10 June 2006.

1. General remarks

6. The present version of the law shows a **number of important improvements** as compared to the one assessed in the interim opinion, *inter alia* (references to paragraphs refer to the interim opinion):

1. The expulsion also of *bona fide* owners is included in the draft law (Article 29.2)
2. The drafters followed the suggestion of the Venice Commission to have the Ossetian and Georgian sides of the Commission on Restitution and Compensation (hereinafter the Restitution Commission) appointed by the international members who are to be appointed first (Article 9.3 / interim opinion para. 39).
3. The Venice Commission's proposal to divide the Restitution Commission into committees which would work in parallel has been taken up (Article 10.4 / para. 44).
4. The draft provides for a mechanism of internal appeal from the decisions of the Committees to the Restitution Commission (Article 28.1 / para. 46-48). The possibility of a further appeal to the Supreme Court remains however problematic.
5. The use of the terms refugees and internally displaced persons has been replaced by the term forced migrants (Article 2.e / para. 59).
6. The draft allows for membership of political parties for the international members (Article 11.6 / para. 75).
7. The idea of a special inquiry group has been abandoned (para. 102).
8. The reporting of the Restitution Commission has been clarified (Article 22 / para. 107).

7. Most importantly, by participating in the meetings sponsored by the IISS and by submitting the draft opinion to the Joint Control Commission (JCC), the **Georgian authorities have taken active steps towards consultation with the Ossetian side** (with North and South Ossetia and the forced migrants themselves).

8. Nevertheless, a number of problems remain open and a very delicate one (the title) has even come up additionally.

2. The title of the law

9. In an intermediary version of the draft, the title of the law has been changed from "draft law of Georgia on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict" to "draft Georgian Law on Rehabilitation and Restitution of Property of the Victims of the Conflict in the Former South Ossetia Autonomous District". In Vladikavkaz, the Ossetian side complained that this title gives the impression that the conflict took place only in South Ossetia whereas the bulk of the forced migrants came from other parts of Georgia. At the meeting in Tskhinvali, it turned out that a translation error in an early Russian version had created the impression that reference was made to the splitting of South Ossetia into three separate entities made under the former Georgian President Gamsakhurdia.

10. Following the negative reactions to the new title at the Vladikavkaz meeting, it was changed again to "Law of Georgia on Property Restitution and Compensation on the territory of Georgia for the Victims of Conflict in the Former South Ossetia District" but this title is still not acceptable to the Ossetian side.

11. In order to overcome this problem which has become a serious obstacle to consultations, the Venice Commission suggests the – admittedly cumbersome – title: "Law of Georgia on Restitution and Compensation of Property on the territory of Georgia for the Victims of the Armed Conflict in the Former South Ossetia District and of the conflict on the ethnic basis between the Georgian and Ossetian population on the territory of Georgia in the period of 1989-1992 and afterwards" (taking up the definition of the "conflict" already provided in Article 2 of the draft law, at the same time replacing 1990 with 1989 as the starting point of the conflict as claimed by the Ossetian side).

3. Scope of the law

12. Together with property restitution, the earlier versions of the draft law provided for the compensation of moral damages as one of the two main goals of the draft law ("rehabilitation of the rights and freedoms of the individuals, whose rights were violated as a result of the Georgian-Ossetian conflict due to their ethnic origin by the representatives of public or administrative bodies and for whom the effective legal remedies were not available due to the reasons incompatible with the constitutional state and democracy."). The Venice Commission recommended not to limit the compensation of moral damages to acts committed by public or administrative bodies and 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" (para 18).

13. A revised version of the draft law presented at the Vladikavkaz meeting limited the maximum amount to be paid to 5000 GEL (about 2200 Euros) for budgetary reasons. At the meeting the view was expressed that such a limitation would be humiliating for the victims. Therefore, and maybe also for financial reasons, the latest version does no longer contain any provisions on the compensation of moral damages. While this radical policy choice clearly simplifies the draft law and eliminates a number of problems related to the determination of the amount of damages it does not necessarily reflect the viewpoint of all the forced migrants. More consultation on this point with the forced migrants, with the perspective of some effective remedy for moral damages seems necessary. Admittedly, financial considerations may come into play as well.

14. Instead of a choice, the present version of the draft law gives a clear priority of restitution over compensation. This may be dictated by financial considerations but is in line with paragraph 2.2 of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (document E/CN.4/Sub.2/2005/ of 2 May 2005 – hereinafter the Pinheiro Rules), according to which "(s)tates shall demonstrably prioritize the right to restitution as the preferred remedy to displacement and as a key element of restorative justice.". However it runs counter to the wishes of the forced migrants as expressed at the Vladikavkaz meeting. Given that 15 years have passed since the conflict, for many of the refugees restitution and return will be impractical. It should be ensured that an **effective right for the sale of returned property at market price is available and that there are no obstacles to such a sale**.

15. The long **list of cases of exclusion of property restitution** has been shortened but a delicate general dynamic reference to an exclusion of property which is 'located within the area in which handing over of property to legal or physical persons is forbidden by the legislation of Georgia' has been added (Article 30.1.c). The exclusion list **should be set out explicitly in the law but should be reasonably shortened** as compared to previous versions, which referred for example even to tourist areas or houses for which a construction permit had been issued.

16. In any case, the rights to **restoration of property and the right to return should be clearly separated as two rights, which do not depend on each other.** This point was made repeatedly by UNHCR and is shared by the Venice Commission. The Ministry of Justice insisted that the current version did provide for these rights and it would only be a question of wording. However, even if the current draft might also be interpreted as giving these rights independently of each other, it is very important to make this distinction as clearly as possible (see also paragraph 19 of the UN Pinheiro Rules according to which States should neither adopt nor apply laws that prejudice the restitution process, in particular through arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations).

17. The latest draft for the first time also envisages the eviction of *bona fide* owners who can be expelled only after having received adequate substitute property or compensation (Article 29.2). The draft should make clear what happens if alternative housing is not provided. *Mala fide* owners have to quit immediately (Article 29.1.b). However, **temporary shelter would be necessary even for *mala fide* owners** under clearly defined provisions. The Restitution Commission should have some flexibility to avoid or delay eviction even of *mala fide* owners if the specific situation so warrants

4. The composition and structure of the Restitution Commission

18. The draft may create problems for the Ossetian side (North and South) to nominate members of the Restitution Commission: it provides that an "International organization, a political party, [a] non-commercial legal entity of private law or a group of at least 50 citizens are eligible to nominate candidates from the Georgian and Ossetian sides of the conflict" (Article 9.4). The definitions of "political party, non-commercial legal entity of private law" refer to entities under Georgian law, which in practice might exclude NGOs established in North and South Ossetia. Also, the nomination by 50 'citizens' will not help because most of the forced migrants now have Russian citizenship.

19. In discussions on this point, the Ministry of Justice referred to the possibility that Ossetian nominations could be made through international organisations, pointing out that this would include non-governmental international organisations. However, the use of the term "international organisations" in Article 9.9 seems to limit the choice of international organisations to those who sign a memorandum with the Government of Georgia. As a consequence, in order to achieve a balance on this important point, also **50 persons who were citizens at the time of the conflict and were displaced due to the conflict as well as non-governmental organisations who represent the forced migrants (wherever they are registered) should be entitled to make nominations**.

20. The system of rotation of chairs of the Restitution Commission and its committees provided for in the draft is not sufficient to ensure that the Ossetian and Georgian sides have successive chairs – a succession of two Georgian or two Ossetian chairs seems possible (Article 10.3). Apart from this technical question, the Venice Commission remains of the opinion that the **chairmanship should always be exercised by the international side** in order to avoid problems with the decisive vote of the chairperson in case of a tie vote.

21. The size of the Restitution Commission – 18 members divided into three committees of 6 members – would make operation of the Commission expensive. Also, it is easier to reach decisions in a small body. The even number of members both in the Restitution Commission

and the committee creates the problem of possible tie votes. This could be avoided if the **committees were to be composed of three members only**. In addition, further developing what had been said in the interim opinion of the Venice Commission, it would be preferable to have a **permanent appeal committee of another three members** rather than an appeal to the Restitution Commission excluding the members having taken the first instance decision. The Restitution Commission could start its work with a few committees and be enlarged if the workload so warranted. The Ministry of Justice agreed that this might be a possible set up of the Restitution Commission.

5. 'Court-like' status of the Restitution Commission and system of appeals

22. As the **draft law does not allow to overturn existing court decisions** (see Article 26.3.d and 26.4.e - even though the committees or the Restitution Commission are only 'authorised' to reject an application), both *bona* and *mala fide* owners cannot be evicted by the Restitution Commission if their title is based on a court decision. The Ministry of Justice pointed out that in such cases the displaced person will have to apply for a re-opening of the cases directly with the respective Georgian court on the basis that the fact of being a forced migrant would count as newly discovered evidence. Such a solution is clearly insufficient from the viewpoint of the forced migrants who do not trust Georgian courts. In order to overcome this problem, the **law should provide that the Restitution Commission has jurisdiction in these cases and that its decisions in favour of the applicant will lead to an expropriation of the property from the present owner, of course against fair compensation in line with the right to property.** Thus, the validity of final court decisions is not called into question.

23. The **system of appeals against decisions of the Restitution Commission is unclear**. The Restitution Commission decides on appeals against first instance committee decisions (Article 28.1, second sentence). The current draft can be interpreted to allow for an appeal against the Restitution Commission's decisions to the Supreme Court on procedural grounds (Article 28.1, first sentence) but as an alternative also to the Restitution Commission itself (Article 26.4.c). This parallelism was confirmed by the Ministry of Justice. It was pointed out that if the Supreme Court were to find a procedural violation, it would only annul the decision and refer the case back to the Restitution Commission for a new decision rather than to decide itself on the merits because the Supreme Court acts as a court of cassation. Even if this is clearly better than allowing for decisions by the Supreme Court on the merits, the Venice Commission insists that the appeal to the Supreme Court remains a clear problem for the acceptance of the law by the Ossetian side. **Confidence in the Supreme Court should be increased by providing for international advisers (separate from the members of the Restitution Commission) to sit and deliberate with the Court when it deals with appeals against decisions of the Restitution Commission** (a similar system was established with regards to the Constitutional Court of Croatia when it dealt with minority cases upon recommendation by the Venice Commission).

6. Citizenship

24. The Interim Opinion requests a constitutional amendment introducing the right to double citizenship for the victims of the conflict who in the meantime have acquired the citizenship of another country. In practice, most of the persons concerned have obtained Russian citizenship. Only a constitutional amendment to Article 12 of the Constitution could bring about such a right. The Georgian authorities exclude a constitutional amendment but propose to attribute temporary residence to applicants with the Restitution Commission and permanent residence for

those persons who obtain a property title from the Restitution Commission. Short of a constitutional amendment, this seems to be a reasonable solution.

25. However, double citizenship is possible under Article 12 of the Constitution of Georgia by a decision of the President of the Republic. Short of a constitutional amendment, **the Venice Commission encourages a public declaration that applications for double citizenship will be granted as being in the interest of Georgia**.

7. General measures of rehabilitation

26. The Ministry of Justice presented the draft law as **part of a package** including changes in **several other laws.** This package would be accompanied by measures to **improve the infrastructure of the areas concerned**.

27. In this respect, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted and proclaimed by United Nations General Assembly Resolution 60/147 of 16 December 2005) give some guidelines as to the scope of restitution: ″Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." Point 21.e of the Basic Principles call for "(p)ublic apology, including acknowledgement of the facts and acceptance of responsibility". This last element will be also be highly important as a confidence building measure.

28. In order to allow for reintegration of returnees, the draft law needs to be accompanied by economic and social integration measures, especially in devastated rural villages where the infrastructure may need to be re-built. Such a package has been announced by the Georgian authorities. In addition to the costs for the functioning of the draft law itself, these costs need to be taken into account in a full assessment of the financial burden.

29. During the Tbilisi Round Table representatives of the refugee NGOs also asked for security guarantees for returnees (but also for persons coming temporarily to Georgia to visit their property (to be) restored). Clearly, the Georgian authorities will have to ensure that the forced migrants would not be subjected to any pressure or violence.

8. Further points article by article

30. The definition of property restitution as "returning of residence or other immovable property, lost within the territory of Georgia as a result of the conflict to the rightful owners" (Article 2.m) should be widened to **include persons who sold their property under pressure** and for too little money.

31. Article 6 of the draft law provides for a nine year activity period for the Restitution Commission. A shorter - but if necessary extendable - period could be chosen. However, the Ministry of Justice pointed out that the duration of the existence of the Restitution Commission depended also on the limited budgetary means of Georgia. Therefore the costs had to be spread over nine years.

32. 32. Article 9.1 provides that international organisations appoint all 18 members. This is probably a drafting or translation error and also contradicts Article 9.3. Article 9.2 speaks of representatives of the Georgian, Ossetian sides and the international organisations. The word 'representatives' should be avoided because all members of the Commission shall not represent any side but act independently in their personal capacity

33. Article 9.3 provides for the appointment of international members by the international organisation(s). To the extent that the international organisations might be hesitant to make these nominations, they might have to be made by the Georgian authorities but the international organisations might be able to produce a list of suitable experts from among whom the international members of the Restitution Commission might be appointed.

34. Article 12.5 allows for the payment of the international members by the appointing international organisation. It may be difficult to find six highly qualified international experts who are prepared to work for nine years in the Restitution Commission exclusively. The draft should therefore **leave some scope for part time work (in sessions) for the international members**. In addition, the financial burden with respect to the international members would thus be reduced (see also the proposal above to reduce the number of members in general).

35. Given the legal nature of the work of the Restitution Commission and the fact that only part of its members will be lawyers, it seems very important that the **Secretary of the Restitution Commission** who will also assist in the preparation of the cases **be a lawyer** (possibly in addition to having working experience in the management field – see Article 14.4).

36. The **need for the intervention of a (Georgian) judge for visiting property** should apply only to private property but not to state property (Article 18.7.b). In general, this issue could be avoided if the Restitution Commission would be attributed a court like position by way of constitutional amendment (see above). The Ministry of Justice agreed to consider changing the scope of the need for the intervention of a judge but pointed out that this could create problems especially in case of military property.

37. The **rules on publicity** (Article 8 in combination with Article 21.1.a) deal to a good extent with the question of confidentiality. As pointed out in the interim opinion, the activities of the Restitution Commission have to be as transparent as possible – both in substance and financially – if they are to be conducive to confidence building.

38. **Fines for impeding the activity of the Restitution Commission and the committees should be imposed by the committees only** in order to allow for internal appeal within the Restitution Commission (Article 21.3).

39. The **reports of the Restitution Commission** (Article 22.1 and 22.3) should go also to international organisations and probably also to the Joint Control Commission. While the Ministry of Justice pointed out that the reports would be made public anyway, such a direct reporting, especially to the JCC, would be important as a confidence building measure. As a matter of wording but which can be important from a confidence building viewpoint again, the Restitution Commission could *inform* rather than *report to* Parliament and Government as well as the JCC.

40. The draft allows for meetings of the Restitution Commission at other places than Tbilisi (Article 23.2). During the meeting in Vladikavkaz, the issue of **an office of the Restitution Commission in North Ossetia allowing to make applications from North Ossetia** where most of the forced migrants live was raised. The Ministry agreed to this proposal and pointed out that this issue could not be dealt with in the law but only directly with the Russian authorities.

41. Even though this is probably intended by the draft law (Article 26.2) it **should be clearly set out that first instance decisions are always taken by a committee**, whereas in individual cases the Restitution Commission only acts upon an appeal against a committee decision.

42. The draft law provides for the use of the Georgian, the Ossetian and one international language (Article 27.2). International members will probably use English but at the same time **applicants should also be able to use another language (e.g. Armenian, Azeri or Russian) instead of the Ossetian language** for their applications.

43. Even though this might be indirectly construed out of the principles in Article 3, the draft law does not **explicitly provide for a hearing for all parties concerned**, the applicant on the one side and the current owner or user of the property or the State on the other. The current owners need to be notified of the application and should have a right to make submissions to the Restitution Commission and to call witnesses.

44. The **deadlines for dealing with cases** (15 days for admissibility and six months, once extendable to nine months for the final decision, Articles 26.2, 27.3 and 27.4) **could prove to be too short** if many cases were to flow in at the same time. The Ministry seemed confident that the Restitution Commission would be able to remain within the deadlines.

45. The draft provides that the **value of property** is estimated at current market value (Article 31.1). Article 31.2 provides that "(i)f there is difference between the value of the original property and other immovable property and the property to be restituted on the basis of the decision of the Commission or adequate (substitute) immovable property, this difference shall be covered from the fund of the Commission ...". This sentence is unclear. It might be interpreted to allow for a higher price than the current market value if the property concerned was more valuable at the time before the conflict (during which whole villages were destroyed). However, it does not seem to cover the case when there is no restitution but only compensation. In such cases, be there restitution or compensation **the higher of the two values should be taken into account**. Even if it seems likely that the market value of property is higher today than it was 15 years ago such a provision seems necessary as a safeguard. In any case, Article 31.2 would need to be reformulated more clearly.

9. Conclusion

46. While the revised draft law is clearer than previous versions and solves several problems, other issues remain open, especially if the law is also to function as a confidence building measure:

1. The title of the draft law should be changed in order to make it acceptable also for the Ossetian side and consequently to turn it into a confidence building measure.
2. The right to restoration of property and the right to return should be clearly separated as two rights, which do not depend on each other.

3. It should be ensured that an effective right for the sale of returned property at market price is available and that there are no obstacles to such a sale
4. The law should provide that the Restitution Commission has jurisdiction in cases already decided by ordinary courts and that its decisions, finding in favour of the applicant, will lead to an expropriation of the property from the present owner, of course against fair compensation in line with the right to property.
5. The list of cases of exclusion of property restitution should be made explicit but shortened as compared to previous versions.
6. The possibility to nominate candidates for membership with the Restitution Commission should include also former Georgian citizens who were displaced due to the conflict.
7. The draft law should leave some scope for part time work (in sessions), at least for the international members.
8. The chairmanship in the Restitution Commission and its committees should be exercised by the international side.
9. Committees should be composed of three members only and a permanent appeal committee of three members should be established.
10. It should be clearly set out that first instance decisions are always taken by a committee and fines should be imposed only by the committees in order to allow for an appeal with the Restitution Commission.
11. A hearing of all parties should be provided for explicitly.
12. The possibility of an appeal to the Supreme Court of Georgia remains a problem for the acceptance of the law by the Ossetian side. Therefore, confidence in the Supreme Court should be increased by including in it international advisers when it decides on appeals against decisions of the Restitution Commission.
13. The rules on publicity and transparency should be enhanced.
14. Applicants should be able to use Russian instead of the Ossetian language for their applications.

47. A future regulation of an effective remedy for moral damages of human rights violations that occurred during the same conflict should be announced. The legislative package needs to be accompanied by economic and social integration measures and to improve the infrastructure of the areas concerned. Before the draft law is to be enacted, the financial burden should be assessed in depth. This will be most important in order to assess the financial implications nationally but also from an international perspective.

48. Consultations between the Georgian authorities and civil society in North and South Ossetia have taken place in Vladikavkaz and Tbilisi. Further consultations will be necessary before the law should be adopted. The purpose of such consultations will be that all sides are properly informed and have the possibility to express their position. Both sides, in particular South Ossetia, are encouraged to participate in such consultations. Following the submission of the draft to the JCC, its discussion in the ad hoc sub-committee of the JCC would further contribute to this ongoing process, which should allow to take on board requests by the forced migrants as well as the above recommendations and those of UNHCR.

49. In any case, 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).