

'State Obligations Towards the Rights to Freedom of Movement – Case of Georgia'¹

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Preface

The Georgian language concept paper on arguing the rights of inhabitants of Abkhazia and South Ossetia to equally exercise the right to freedom of movement – was submitted to the Parliament of Georgia in June 2015² by ICCN. The cover letter was addressing the Temporary Commission of Territorial Integrity of the Parliament of Georgia to organise Parliamentary Hearings on the issue and ensure the keynote speakers' (from ICCN) presence during the presentation. After several months of internal discussions the Parliament of Georgia organised joint Hearing 2 Committees on September 28th, 2015 and invited ICCN to present the concept paper 'State Obligations towards the Rights to Freedom of Movement – Case of Georgia'. A 35-page package was submitted to the Parliament of Georgia and the presentation was followed with active debates and discussions on Georgia's responsibility to ensure equal access to the fundamental human right – the Freedom of Movement for inhabitants of Abkhazia and South Ossetia - through all and different measures to be offer. The issue of having huge limitations for IDPs to freedom of movement was in place and deeply touched during the discussion. Nevertheless the approach submitted to the Parliament of Georgia is actual yet and needs to be more widely discussed among our societies.

The basic provisions of the Concept Paper

The Right to Freedom of Movement – under the International Law:

Freedom of movement is a fundamental human rights concept including the right of individuals to travel from place to place within the territory of a country, and to leave the country and return to it.

The limitations to freedom of movement are occurring serious problems to keeping alive family ties, performing religious practices, receiving medical care and benefit from welfare services - *thus* preventing people from enjoying other fundamental rights.

As it is expressed in the article 13 of the Universal Declaration of Human Rights (1948)³,

¹ The English translation is a basic provision of the document of Georgian language Concept Paper "საქართველოს ვალდებულებები აფხაზეთში და სამხრეთ ოსეთში მოსახლე ადამიანების უფლებათა კრილიში", by N.T-K.

² 2nd of June 2015 the Package was officially submitted to the Parliament of Georgia. N.T.K.

³ <http://www.un.org/en/universal-declaration-human-rights/>

- a citizen of a state in which that citizen is present has the liberty to travel, reside in, and/or work in any part of the state where one pleases within the limits of respect for the liberty and rights of others and
- **a citizen has the right to leave any country, including his own, and to return to his country at any time.**

Later on, within the Article 2, paragraph 3 (also para 1,2) of the Protocol #4 (1963) of European Convention of Human Rights (ECHR, 1950)⁴

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the care of **ordre public**⁵, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In Article 12 of the International Covenant on Civil and Political Rights (ICCPR, 1966 / entered into force 1976)⁶:

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. **The above-mentioned rights shall not be subject to any restrictions** except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. *No one shall be subjectively deprived of the right to enter his own country.*

Georgian Legal Approach to the Right to Freedom of Movement:

Such a right to **Freedom of Movement** is provided in the Constitution of Georgia as well as in constitutions of numerous states – as in all related documents reflecting norms of international law.

In general, Georgian legislation takes a similar approach, guaranteeing fundamental rights and freedoms to “everyone”⁷. The Constitution of Georgia contains the following general provision: “Foreign citizens and stateless persons living in Georgia have the rights and obligations equal to the rights and obligations of citizens of Georgia with some exceptions envisaged by the

⁴ http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁵ In private international law, the **public policy doctrine** or **ordre public** concerns the body of principles that underpin the operation of legal systems in each state. The fundamental policy in the operation of a legal system is that **ignorantia juris non excusat** (ignorance of the law is no excuse).

Also, ‘The Sense of Justice: Empathy in Law and Punishment, Markus Dirk Dubber, New York University, 2006

⁶ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁷ Under Article 1 of the European Convention on Human Rights: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” ECHR, 1950.

Constitution and law.”⁸ This constitutional provision makes it clear that the fundamental rights and freedoms are provided not only to Georgian citizens, but also to citizens of other States or stateless persons.⁹

Under the Constitution 17¹⁰ human rights are applicable to “everyone”, including **Freedom of Movement** (Article 22) and 4¹¹ rights are applied only to citizens.

Under the Article 22 of the Constitution of Georgia there are 3 paragraphs ensuring the right of individuals to travel from place to place within the territory of a country, and to leave the country and return to it:

1. Everyone lawfully within the territory of Georgia shall have the right to liberty of movement and freedom to choose his/her residence within that territory.

2. **Everyone** lawfully within the territory of Georgia shall be free to leave the country.

3. The above rights shall not be subject to any restrictions, except the restrictions provided for by law are necessary to protect national security, public safety, public health, or to prevent crime or to administer justice insofar as is necessary to maintain a democratic society.

4. A citizen of Georgia shall be free to enter Georgia.¹²

Along with the Constitution of Georgia there are several national laws ensuring freedom of movement. In particular:

- a) **The Law of Georgia on Rules for Georgian Citizens' Temporary Exit and Return into Georgia** (1993)¹³ provides the right to the citizen of Georgia for returning and/or leaving any time. Under this law the Article 16 provides the right to enter Georgia without any permission.
- b) **The Law of Georgia on the Legal Status of Aliens and Stateless Persons** (1993)¹⁴ regulates the subject of Freedom of movement for mentioned individuals and/or groups. This Law regulates the legal basis and mechanisms for entry, stay, transit, and departure of aliens into/in/through/from Georgia;¹⁵ protects universally recognised rights of aliens and stateless persons irrespective of race, colour, language, gender, religion, political, and other views, nationality, ethnic and social belonging, origin, property status and rank¹⁶; strengthens the rights of free movement¹⁷ and free choice of residence, as well as the free choice of activity and profession as guaranteed by the Constitution of Georgia.
- c) The Criminal Code of Georgia (1999) establishes the basis of criminal liability for illegal obstruction in exercising the right to freedom of movement in Georgia. (Imprisonment up to 3 years and a fine).¹⁸

⁸ Para. 1, Article 47 of the Constitution of Georgia.

⁹ COMPATIBILITY OF GEORGIAN LEGISLATION WITH THE STANDARDS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS. Konstantin Korkelia and others, European Commission and the Council of Europe, 2004

¹⁰ Right to life (Article 15); Prohibition of torture (Article 17(2)); Right to work (Article 30(1)); Right to privacy (Article 18); Right to a fair trial (Articles 40, 42 and 85); No punishment without law (Article 42(5)); Right to respect for private and family life (Article 20); Freedom of conscience (Articles 9 and 19); Freedom of expression (Articles 19 and 24); Freedom of assembly and association (Articles 25 and 26); Right to marry (Article 36(1)); Right to an effective remedy (Article 42(1)); Prohibition of discrimination (Article 14); Protection of property (Article 21); Right to education (Article 35); Freedom of movement (Article 22); Equality between spouses (Articles 36(1)). The Constitution of Georgia, 1995. <https://matsne.gov.ge/en/document/view/30346>

¹¹ Right to free election (Article 28); Prohibition of expulsion and extradition of nationals (Article 13(3)(4)); Right to access to the information maintained by the governmental bodies (Article 41); Protection of labour rights abroad (Article 30(3)). The Constitution of Georgia, 1995. <https://matsne.gov.ge/en/document/view/30346>

¹² <https://matsne.gov.ge/en/document/view/30346> LEPL Legislative Herald of Georgia

¹³ <https://matsne.gov.ge/en/document/view/93850> LEPL Legislative Herald of Georgia

¹⁴ <https://matsne.gov.ge/en/document/download/2278806/0/en/pdf> LEPL Legislative Herald of Georgia

¹⁵ Article 1, paragraph 2 of the Law of Georgia on the Legal Status of Aliens and Stateless Persons (1993). <https://matsne.gov.ge/en/document/download/2278806/0/en/pdf> LEPL Legislative Herald of Georgia

¹⁶ Ibidem (7).

¹⁷ Ibidem (7).

¹⁸ <https://matsne.gov.ge/ka/document/view/16426> LEPL Legislative Herald of Georgia

Travel documents:

Issuing passports, or other identity for travelling

There is a big issue of validity of the travelling documents that are issued by a government of secessioned territory. The issue is even worsened if the former government does not have any more a **de facto** control over the part of the territory which it claims to be under its jurisdiction.

- Third States often are afraid that the acceptance of travel documents may be perceived as a prejudiced behaviour in favour of one or the other of the parties that are facing a territorial dispute or as an undue intervention in existing dispute.

In such a situation the identification of the subjects, or entities, under the primary obligation to ensure the enjoyment of the right of free movement - is particularly difficult. Even formal identification appears to be linked to the **status** of the subjects involved the territorial disputes. Such situations seriously affect the right to freedom of movement of the individuals residing in the territories under dispute.

These individuals may be depressed of their right to leave their home country as well as of the right to return to it.

As a result of any secession (by a self-declared independence of one or more regions), people are also often depressed of the right to move freely to other parts of the territory of origin where they keep significant personal or economical interest, or where they could enjoy welfare services. The same time implementation of effective actions in favour of the population can not be postponed until a solution of the territorial disputes is achieved. It is clear that any limitation to freedom of movement causes an obstacle in: keeping alive family ties, performing religious practices, receiving medical care and benefit from welfare services. All these limitations are preventing people from enjoying other fundamental rights.

In order to find an acceptable solution, the issue of the protection of individual's human rights must be separate from the settlement of the territorial disputes and from any other issues related to exercise sovereign powers by the parties.

This is only possible to refer to the respective declarations of governments internationally obliged to ensure the right of free movement.

In the case of Georgia, the existence of an international duty to ensure the enjoyment of the right to freedom of movement and other fundamental rights that interact with it, is primarily founded in the European Convention on Human Rights (**P4 ECHR**) and the International Covenant on Civil and Political Rights (**ICCPR**), to which Georgia is a party.

The HRC¹⁹ through its comments has specified that the fulfillment of such obligations may requires the adoption of legislative, judicial, administrative and educational measures, which should be appropriate under the circumstance of the case²⁰. The reference made by the

¹⁹ Human Rights Committee, UN

²⁰ General Comment n. 31, CCPR/C/21/Rev.1/Add.13, par. 7

Committee to “**other appropriate measures**” implies that whenever the ordinary means used to fulfill the obligation are not sufficient to prevent the violation of the rights protected in the CCPR, the **state must adopt any other means** that under the circumstances of the case ensure the effectiveness of those rights.

With regard to the freedom of movement, the nature of the obligations under the ICCPR means that “the right to leave a country must include the right to obtain the necessary travel documents”.²¹

That means:

- 1) Firstly the issuance of such travel documents does not exhaust the obligation upon the state;
- 2) Secondly those documents do not necessary have to be passports, as it is mentioned in the Comment – ‘a document required for international travels’.

It is appropriate to recall the opinion expressed by the International Court of Justice (ICJ)²². The ICJ stated that the non-recognition of the authorities governing a territory should not result in depriving the people of that territory of any advantages derived from international cooperation.

In the case of Georgia, the territorial and subjective scope of the obligation to ensure the enjoyment of the freedom of movement and the nature of the obligation, as described above, together with the duty to take any appropriate measure in order to avoid that the non-recognition of Abkhazian and/or South Ossetian sovereignty results in a situation harmful to the people who live in that territory, implies at least two specific obligations of Georgia:²³

- As far as the recognition of the documents issued by the Abkhazian and/or South Ossetian authorities is concerned, they should be recognized, for the mere purpose of facilitating the freedom of circulation through the territories over which Georgia asserts its jurisdiction and the right to leave from and to return to those territories, as a valid certification of the identity of the individual. **This recognition is of course without prejudice to the assessment or recognition of the nationality of the individual in whose favor the document is issued.**
- With respect to the advantages derived from international cooperation mentioned by the ICJ, Georgia, while it is free not to recognize Abkhazia and South Ossetia as a state, cannot refuse to negotiate with the authorities which exercise *de facto* governmental powers on the territory and to **pass jointly any appropriate measure in order to ensure the effective enjoyment of the freedom of movement to the individuals** that Georgia claims to be under its jurisdiction.²⁴

There is an attempt to offer and provide with. There is a need for movement. There is a matter for the dialogue.

²¹ General Comment No. 29 (CCPR/C/21/Rev.1/Add.9, par. 9

²² The Advisory opinion of 28 June 1971, Legal consequences for states of the continued presence of South Africa in Namibia (South WEST Africa) notwithstanding Security Council resolution 276(1970).

²³ Council of Europe post-conflict programme, Georgian-Abkhazian meeting, 27-30 April 2015, La Granja, (Segovia, Spain). Recommendations submitted by invited Expert, by Mr. Fausto Pocar, Professor Emeritus of International Law, University of Milan; Appeals Judge, ICTY and ICTR; President, International Institute of Humanitarian Law (Sanremo).

²⁴ *ibidem* (21).