Analysis of the Draft Law on Restitution of Housing and Property to the Victims of the Georgia-Ossetian Conflict
ANALYSIS OF THE DRAFT LAW ON RESTITUTION OF HOUSING AND PROPERTY TO THE VICTIMS OF THE GEORGIAN-OSSETIAN CONFLICT

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Analysis of the Draft Law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict
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Analysis of the Draft Law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict

I. Executive Summary

Although UN Special Rapporteur, Paulo Sérgio Pinheiro, has concluded that “the principle of housing and property restitution has been enshrined in international and national law, reaffirmed by the international community and recognized by independent United Nations expert bodies”, there is little specific guidance on the standards applicable to such processes in individual cases. The Special Rapporteur has recognized the lack of such standards as a problem and proposed drafting “specific guidelines for the practical implementation” of post-conflict restitution programs. However, such guidelines have yet to be approved, leaving only existing practice in current peace-building settings to provide examples of ways forward.

It is CEELI's understanding that the Draft Law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict (“the draft law”) was based in large measure on the post-conflict property restitution laws of Bosnia-Herzegovina (BiH). The post-conflict property restitution process in Bosnia-Herzegovina, which has returned over 200,000 claimed properties to their pre-war residents, arguably provides the sole example of fully implemented restitution in a politically and legally complex peace-building environment. As a result, much of the assessment draws on the experience of that country in implementing that legislation. In addition, the assessment also draws on the recent experience of Kosovo, which established the Housing and Property Directorate (HPD) and Housing and Property Claims Commission (HPCC) to deal with similar issues.

It is commendable of the Georgian government to acknowledge the rights of those displaced by the Georgian-Ossetian Conflict and to attempt to ensure their right of return. The draft law provides a strong framework to regulate the restitution of property to internally displaced persons (IDPs) and to refugees and to establish a commission that would adjudicate property disputes related to the conflict. At the same time, however, certain provisions in the draft law are ambiguous or could lead to counterproductive outcomes. Moreover, there are issues that have not been contemplated in the law that deserve consideration. The assessment report highlights a number of

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key aspects of the draft law that illustrate these general conclusions and offers recommendations in the spirit of cooperation and collaboration toward supporting the rule of law in Georgia:

**Summary Recommendations**

- The government of Georgia should consider adopting a hybrid model for processing property claims that incorporates elements of the mass claims model and the individual claims model that allow for efficiency and fairness.

- To guarantee proper oversight of the restitution process and to strengthen the rights of all parties, decisions should be appealable to a separate appeals chamber or to the full Commission panel.

- Language should be added to the draft law to protect the rights of factual residents, including provisions prohibiting *ex-parte* decisions, entitling factual residents to a hearing, and requiring factual residents to be notified of claims against their current residence.

- The draft law needs to clarify a number of issues related to compensation for factual residents, including where alternative residence will be located, for how long the factual resident will be entitled to adequate residence, and what if monetary compensation will be made in lieu of a residence.

- The draft law should include a provision making it an affirmative duty of the government of Georgia to ensure the security of original residents who want to return to their residence.

- It is appropriate that the draft law requires refugees and IDPs to prove their law rights to their original residence and grants the Commission the authority to obtain information related to property claims. The draft law would also benefit from a provision that places an *ex-officio* duty on the Commission to seek out evidence when it is not available from the claimant.

- The draft law would benefit from language that clarifies the status of pre-Commission restitution cases pending before Georgian courts. In such instances, the government may wish to consider either requiring these cases to be turned over to the Commission or establishing a date by which all claims filed will be referred to the Commission.

- The draft law’s provisions recognizing the rights of claimants terminated by the 1983 Housing Code of Georgia is commendable. These provisions can be strengthened by adding language that balances use-contingent rights of apartments against the rights of factual residents.

- Article 3 of the draft law is admirable in offering claimants choices of remedy; however, the provision would be strengthened by the addition of language that clarifies who will choose the remedy offered and under what conditions.

- In addition, language clarifying the categories of persons that qualify as “original residents,” such as family household members, would also be useful.
• To facilitate the return of refugees and IDPs and economic sustainability, it is recommended that the draft law also include such commercial property as agricultural land and private business property within the scope of its application.

• Having a Commission with a balanced composition and international participation should contribute to confidence building on both sides of the conflict. The government may wish to consider several additional provisions that could help to strengthen the Commission, such as allowing proxy voting and giving the chairperson veto power and the authority to alter the composition of the Chambers.

• Although it is desirable to provide flexibility to the Commission in carrying out its tasks, the draft law provides little in the way of guidance for its rules and procedures. The government should consider adding provisions stipulating that the Commission’s regulations be consistent with the law and that it open its proposed rules to public comment.

• The government should consider adding a provision to the draft law that enables the creation of a secretariat to assist the Commission and its Chambers in carrying out its functions more effectively.

• The draft law rightly allows persons who were unaware of the filing deadlines to file claims thereafter; however, the reasons for allowing this should be clearly delineated. Moreover, clarity is needed on the status of claims made after the Commission’s mandate has expired.

• The obligation of the Commission to decide on claims within 30 days of receipt is laudable; however, it may be difficult to achieve. An alternative process should be considered in which preliminary reports will be issued within a specified time period with subsequent explanation.

• In order to handle claims successfully, the Georgian government should ensure that the Commission’s rules of procedure and claim intake infrastructure are in place before accepting claims.

• The draft law should elaborate how its provisions will relate to domestic law and what will happen if the Commission takes a decision that is contrary to Georgian law. In the latter instance, the government should consider giving the Constitutional Court authority to review the Commission’s decisions.

• Article 10 states that the Commission is entitled to enforce judgments; however, the draft law does not specify how enforcement will be carried out and what the parameters of enforcement will be.
II. Claims Process

There are two main models under which the Commission on Housing and Property Issues (“the Commission”) could function. These are the “mass claims” model and the “individual claims” model. The draft law currently envisions the use of the individual claims model.

A. Individual Claims Model

Under this model, each claim is considered individually in the order in which the Commission receives it. This process allows claimants to know the status of the processing of their claim relative to others. Chronology also strips the Commission of discretion over the order and timing of processing of claims, insulating them against inappropriate pressures to accelerate or delay particular cases.

This process values the right of the individual to have his/her claim considered on the individual merits over expeditious resolution of all claims. While the overall process may be slow and may take several years to complete, individual claims can be heard and decided immediately once the Commission becomes operational. Use of an individual claims model may however create inconsistencies in decisions because of competing claims may arise later.

B. Mass Claims Model

In contrast to the case-by-case method employed in the individual claims model, mass claims procedures are designed to treat all claims in a manner that emphasizes efficiency and speed. Claims are “batched” based on common legal criteria and factual scenarios. In this way, large numbers of otherwise unrelated claims can be resolved together. The Commission would have the discretion to hear cases in an order it deems appropriate. Under this system, however, the Commission would have to collect and process all claims in advance of making any decisions.

This model values the rights of the entire community of claimants to have their claims resolved over the rights of the individual claimant and presupposes that the expeditious resolution of property claims is the most important principle of the process. Proponents of this model assert that the Commission and the property restitution process will be judged by how efficiently all claims are resolved as opposed to how any individual case is decided. A mass claims model would likely be more efficient and provide for greater consistency in decision making than the individual claims model; however, it not necessarily an appealable process, which may raises questions of equity, and it cannot begin issuing decisions until all claims have been gathered.

C. Hybrid Approach

The appeal of the mass claims approach lays in its efficiency and consistency, which are important to the reconciliation process. However, giving the Commission the discretion to decide claims in any order it decides might leave the process open to manipulation or the perception of manipulation by the effected parties. Therefore, the Georgian government may want to consider a claims processing system that incorporates some of the elements of the mass claims model that promote efficiency and, at the same time, adopt some elements of the individual claims model that emphasize fairness.
Depending on the universe of common claim types, The Commission’s Chambers could specialize in one or more types of cases. For instance, one chamber could specialize in claims for abandoned property and destroyed property, while another could specialize in multiple occupancy cases and tenancy rights cases. This would help ensure consistency in decisions on cases that turn on the same principles, while allowing for cases to be considered individually and with any nuances. Cases that are deemed by the Commission to be particularly complicated, unique, or that challenge the current interpretation of the law could be referred to the complete nine-member Commission.

In addition, CEELI would emphasize the use of information technology to increase efficiency, as many mass claims processes have. The land registry data for the affected region should be incorporated into a database for access by the Commission. Additionally, claim information should also be entered into a database that can be cross-referenced with the land registry database.

To guarantee proper oversight of the restitution process and to protect the rights of all parties, decisions should be appealable. Providing such a mechanism may complicate or on occasion slow down the process, however, without such a possibility, the system could be open to abuse. Article 10 (4) allows decisions by the Commission to be appealed to the Regional Court of Georgia; however, in the interest of confidence building, it is recommended that a different appeals process be considered. If adequate funding is available, consideration should be given to the creation of a separate chamber that would only hear appeals cases (in this instance, the number of commissioners would have to be expanded as well). Otherwise, appeals could be heard by the full panel of commissioners.

III. Rights of the Factual Resident

A. Procedural Rights

Article 3 of the draft law leaves some doubt as to whether factual residents are entitled to a hearing or whether an ex-parte decision on their rights under Article 3 (2) can be taken. In the first instance, language should be added to clarify that factual residents are entitled to a hearing, and in the latter case, language should also be added prohibiting ex-parte decisions.

The Georgian government should also consider adding language to the draft law that clearly states factual residents will need to be individually notified about claims against their current residence, so that they can raise their own defense or prepare for their humanitarian needs. This would be in keeping with human rights standards of due process.

B. Right to Compensation

Article 5 addresses the right to adequate residence for factual and original residents; however, the provision leaves a number of issues unanswered. For example, it is unclear whether the provision of adequate residence will be governed by the Commission’s regulations or separate legislation. Moreover, there is no definition as to what constitutes adequate residence, what body will provide the residence, the length of time adequate residence must be provided, where the residence is to be made available, or if monetary compensation can be offered in lieu of a residence.

By way of comparison, the BiH law did not entitle factual residents to compensation except, in some cases, for necessary repairs made to the property during their occupation. Some factual
residents were eligible for temporary humanitarian shelter under the law, but such shelter was rudimentary, and the burden was on the factual resident to show entitlement, usually in a hearing with the competent administrative officials. Eligibility for such shelter was based on a comprehensive set of criteria set out in the law that tested whether the factual resident had the means to house him or herself in some other fashion. Such shelter was also explicitly on offer only as long as the beneficiary continued to meet the criteria. No general right to adequate residence (like that set out in Article 5 of the draft law) existed in the interim legal framework supporting postwar property restitution in BiH. To the extent that such a right exists in BiH, it is regulated in separate, and less provisional, law.

IV. Rights of Claimants

A. Security Guarantees

Article 3.1 states that the law applies to “those original residents who cannot return to their original residence because of the security reasons or absence of adequate residence,” but it does not call on the government to ensure the security of those original residents who may want to return. It would be prudent to include such a provision in the draft law, since a decision affirming the right to property and/or eviction of illegal occupants will not encourage claimants to return if security concerns exist. For instance, Annex VII of the General Framework Agreement for Peace (Dayton) exhorts the government of BiH and other authorities to “…ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination…” (Article 1.2).

B. Burden of Proof

Article 4 conditions a claimant’s right of return on his ability to “prove lawful rights” to his/her original residence; however, this may prove problematic in practice. Displaced persons often lack the documentation needed to prove their rights. Although they should be required to produce whatever evidence that can reasonably be expected, the Commission should have authority to obtain expeditiously public records that would verify the rights of claimants. It would also be reasonable to expect claimants without sufficient documentation to provide the Commission with the information necessary to allow it to undertake a targeted search of the public records (for example, such as dates of contracts, decisions, or allocations, and where and with whom concluded – in the court or an administrative body, with the government or with an employer.

In addition, further specification may be helpful in the actual decision-making process. For instance, although the Commission is given strong powers to demand information relevant to cases under Article 10 (3) (c)-(d), it is not clear how much and what type of evidence the claimant must present in order to meet his/her burden of demonstrating “lawful rights” to the claimed property in the terms of Article 4. Although the BiH provisions obliged claimants to present available proof of pre-war tenure status, they also placed an ex-officio duty on the administrative authorities to seek material evidence or information in cases when it was not available from the claimant.

C. Pre-existing Court Cases

There is little explicit indication in the draft law of how its passage would affect any attempts already initiated in the intervening decade by displaced persons to seek repossesson of their properties
through existing legal institutions. For instance, if displaced persons had already lodged property repossession claims before competent courts, would they be precluded from registering a claim with the Commission as well? As an example of one manner in which this issue can be regulated, the BiH laws simply specified that, as of the date of their entry into force, “[p]ending proceedings on the return of … property to the possession of the owner will continue, while new claims for the return of property shall be submitted to the responsible organ under … this Law.”

One issue the government will need to weigh with regard to pre-existing cases is whether allowing them to continue will encourage others to file claims in the court system prior to the law taking effect in the hope of obtaining a more favorable decision. Depending on the number of cases currently pending before the courts, the law could require that they all be turned over to the Commission. Alternatively, the law could state that all claims filed with the courts after a certain date be referred to the Commission to avoid undermining its role.

D. Pre-Conflict Legal Rights

The draft law’s provisions explicitly recognizing the rights of claimants that may have been terminated under Article 69 of the 1983 Housing Code of Georgia is a welcomed element. Specifically, such persons are included in the definition of “original residents” under Article 2 (c)-(e) (“right to use or own an original residence”), and as such entitled to “apply to the Commission” under Article 3 (1). Moreover, the law explicitly allows complaints to be made against past cancellation of possessory rights “adopted on the ground of Article 69 of the Housing Code of Georgia of 1983” (Article 3 (3)) and appears to give the Commission the power to demand the original termination decisions in individual cases (Article 10 (3) (d)).

In light of these provisions, claimants with relatively strong pre-conflict legal rights to their property, such as owners, are more likely to be found entitled to return to their original residence under Article 4 and to restoration of their property under Article 3 (1). However, the lack of a provision that balances use-contingent rights to apartments against the rights of factual residents could be problematic. The Commission may find itself cobbling together such a rule and awarding remedies on a case-by-case basis, leading to concerns in terms of legal certainty for all parties.

The challenge posed by contingent rights in post-conflict property restitution situations is illustrated by their significantly disparate status in Croatia and BiH. As constituent republics of the former Yugoslavia, both countries provided for use-contingent rights to urban apartments under nearly identical laws. In the course of the wars arising from the dissolution of Yugoslavia, rights to over 20,000 such apartments in Croatia and over 100,000 such apartments in BiH were effectively cancelled on the basis of the absence of the rights-holders. Croatia has insisted that the cancellations were legal and justified and has refused to provide a legal remedy to those who lost apartments, while permitting subsequent users to purchase them. In BiH, on the other hand, sustained international pressure and assertive human rights institutions resulted in laws that permitted restitution of such apartments, albeit under stricter conditions than those applicable to private property claims. As a result, nearly 90,000 such properties have been returned to their pre-conflict rights-holders in BiH, who are permitted to purchase them.

The inclusion of such contingent rights in the BiH restitution program was highly contested, and the relevant laws were amended on several occasions in order to establish:
1. An irrebuttable presumption that persons who fled during the conflict period were absent from their apartments on justified grounds and therefore entitled to restoration of their rights; and

2. the superiority of the pre-war claimant’s right to any rights acquired, even under color of law, by subsequent users, meaning that the claimant was entitled to re-establish possession of the specific apartment claimed, rather than another apartment or compensation.

Restitution of apartments in BiH was helped by the fact that these principles were established prior to entry into force of an apartment privatization law, meaning that the situation was arrested before subsequent users could acquire arguably bona fide ownership rights to such apartments. The ability of the international community, in the form of the Office of the High Representative (OHR) in BiH to issue or amend laws by decree was also crucial. These powers enabled the correction of insufficiently precise laws as soon as negative results were noted in implementation. These considerations may militate in favor of setting out the rights and remedies available to different classes of claimants as clearly as possible a priori in the Georgian draft law in order to avoid the political difficulties and legal uncertainty that could arise from later corrective amendments to the law.

E. Choice of Remedy

The right of post-conflict return is an internationally-recognized human right. Therefore, successful claimants must be given a legitimate option, unless there is good cause to deny them that option, in which case they must be fully compensated for their loss. Article 3.1 provides for an option, but it does not indicate who will get to choose and under what circumstances.

In terms of the process of filing a claim, it may be helpful to clarify the extent to which claimants are entitled to specify which remedy of the three set out in Article 3 (1) they would prefer. In BiH, legal provisions allowing claimants to seek compensation in lieu of return were never implemented due to a lack of funding and a general policy bias toward supporting return over resettlement. Instead, claimants who did not wish to return were expected to exercise their right to repossess their pre-war property (by proxy, in case of personal security concerns) and to fund their own resettlement by selling or renting it.

F. Application for Relief

It is to be commended that the draft law envisages a campaign to inform affected parties of their rights and obligations (Article 21 (3) & (4)). Within this context, it is recommended that language be added that clarifies who may apply to the Commission for relief. First, although claims may be submitted “individually or collectively” (Article 12 (1)), one presumes that claims submitted collectively would still, as a rule, be examined and determined on their individual merits. Second, it may be helpful to further specify the categories of persons who qualify as “original residents” and who are entitled to register a claim under Article 3 of the draft law. In BiH for instance, apartments could be claimed not only by their titular rights holders but also by any person who was a member of rights-holder’s family household prior to the conflict.
G. Commercial Property

To facilitate return and economic sustainability, the law needs to look beyond residential property. In Kosovo, the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) were only given jurisdiction over residential property, not commercial and agricultural property. Although the definition of “residential” was purposefully made broad to include “associated property” (defined as non-residential property that formed a single unit with the residential property – such as a ground-floor shop within a house or a farm surrounding a farmer’s home), this definition did not cover most agricultural land or private businesses that were not attached to the residential property. Displaced persons in Kosovo have difficult access to courts to resolve these claims, and lack of a method to claim non-residential property coordinated with claims to residential property has left some claimants unable to resolve their displacement issues effectively.

V. The Commission

A. Composition

Having a commission with a balanced composition of Georgians, Ossetians, and international representatives from the UN High Commission on Refugees (UNHCR) makes much sense from a confidence building standpoint. Both sides of the conflict are likely to feel that their collective interests will be protected. At the same time, the presence of experienced internationals on the Commission will strengthen the perception that the decision-making process is objective.

Still, the government may wish to consider several additional provisions to Articles 8 and 14 that should help to strengthen the Commission’s role. First, there may be a need for provisions allowing proxy voting and giving the chairperson veto power. Second, it may be inefficient to change the composition of the chambers once a year. Therefore, it would be sufficient to include a provision that the chairperson has the authority to alter the composition of the Chambers as appropriate. Based on the above two suggestions and recognizing the need for confidence building measures, consideration might be given to making an international the chairman of the Commission. Third, the government should also consider whether the law should include statements on privileges and immunities that might be appropriate for Commissioners. Finally, it may be worth considering adding provisions as to the composition of the Commission chambers, whether they should have one member chosen by the Ossetian side, one by the President of Georgia, and one chosen by UNHCR.

B. Commission Rules and Procedures

The draft law gives the Commission very little guidance with regard to establishing its rules and procedures. While it is desirable that a great deal of flexibility be left to the Commission in carrying out its tasks, the apparent delegation to the Commission of fundamental determinations may be inappropriate. For example, it is recommended that the government consider inserting language in the draft law that permits the Commission to develop its rules and regulations with a minimum quorum of six members and that allows the interim chairperson to be nominated by UNHCR in the interest of impartiality. Moreover, the government may want to add a provision requiring the Commission to adopt rules on conflicts of interest. Finally, Article 10(1) should stipulate that the regulations adopted by the Commission must be consistent with this law and must be open to public comment for a specified period.
C. Commission Bodies

For the Commission to resolve the many claims anticipated effectively, it will require the support of a secretariat. The Georgian law as drafted does not seem to include such a provision. In Kosovo, for example, the HPD, in addition to its own administrative mandate, also serves as the secretariat of the HPCC. The work of a secretariat is, in some respects, more important than the work of the Commission. The commissioners cannot be expected to visit every claimed property personally, serve notices, verify documents in the public record, prepare all of the cases, and carry out the delivery and implementation of decisions. It would therefore be recommended that the law, in addition to creating a secretariat, should also define the role of a secretariat verses the Commission and its Chambers.

Articles 10 and 11 appear to regulate the Chambers of the Commission; however, it is unclear which decisions must be taken by the Chambers and which by the whole Commission. Article 11.1 appears to make the Chambers mere fact-finders. For maximum efficiency, the Chambers themselves should have authority to make decisions without convening all nine commissioners. If a secretariat is properly organized, then it can conduct the fact-finding before it presents cases to the Commission Chambers. Although the vision for the HPCC in Kosovo entailed creating multiple three-member panels, it has operated with only its single original panel. Since the reorganization of the HPD (Secretariat) began in September 2002, it has been able to resolve two-thirds of the case load (20,000 claims) in two years and are on pace to complete all claims by 2005 (prior to the reorganization, the HPD had resolved only 448 claims in two-and-half years of operations).

D. Filing Deadlines

Article 12.3 allows individuals to file claims after the deadline if they “did not know or could not know about the rights provided” in this draft law. This formulation is unclear. It is important, first of all, that the promulgation of the law and the claims intake are well and widely publicized. However, having a rolling claim deadline is problematic. The reasons someone can be allowed to miss a deadline should be clearly delineated. This is particularly important in light of the time restriction on filing property claims under Article 12 (2)-(3), although the two-year, waivable deadline set out is relatively liberal.

Another area of the law that requires some reconsideration relates to claims made after the Commission’s mandate has expired. The failure to file a claim within the draft law’s timeframe would seem to suggest that the Commission cannot assist the owner in regaining of the property in question and that the owner would lose the right to compensation in lieu of his or her return. There is a presumption however that the right to property is inalienable and that the failure to make a claim with the Commission should not affect the validity of that property title. If the persons concerned have lesser forms of property rights such as tenancy rights or rights associated with use, then the failure to claim may impact on the associated rights. If there is no demonstration of an intention to claim, it may be possible for the Commission to deny usury rights.

In BiH, by way of comparison, a preclusive deadline was imposed on claims for rights to apartments. Although it was repeatedly extended, its ongoing application to bar late claims remains
controversial, especially as no alternative legal remedies exist. No deadline was imposed on claims for private property which may still, in theory, be received.

E. Decision Deadlines

The legal obligation of the Commission to decide claims, as a rule, within 30 days of receipt (Article 13) is commendable in its goal of swift processing, but may be difficult to achieve. There must be an analysis as soon as possible as to the available evidence to determine claims. If for example, property registers are updated and perceived as accurate, and the Commission will have access to these, then this will simplify matters, and would justify, to a certain extent, the very short claims processing deadlines that are envisioned in the law. If not, procedures will have to enable commissioners and secretariat staff to find other means to reconstruct the evidence and/or to conduct oral hearings with claimants – this is extremely time consuming, and therefore the deadlines set out in the law would be inappropriate.

In the latter instance, the government should consider an alternative process that would set a deadline for the Commission to provide a preliminary report to the claimant from the time the claim is received. In the report, the Commission would inform the claimant as to whether the formal requirements for filing the claim are met, and if the formal requirements are not met, the Commission will, within this time period, provide an explanation to the claimant about what documents are missing.

In BiH, with about 130 municipal offices processing over 200,000 claims, it was manifestly impossible to comply with a similar 30 day deadline. Ultimately, there may be procedural reasons to focus less on deadlines running from filing of claims and more on the principle underlying them – chronological order of processing. In BiH, where the deadlines became unmanageable, chronological processing was eventually settled on as a mechanism to at least allow affected parties to know the current status of their case relative to others, even if it was impossible to predict precisely when it would be resolved. As previously mentioned, chronology also strips the competent administrative body of discretion over the order and timing of processing of claims, insulating them against inappropriate pressures to accelerate or delay particular cases.

F. Establishment of Intake Procedures

Article 10.1 and Article 21.2 provide for the rules of procedure to be adopted 30 days after the constitution of the Commission. It is important that the rules and procedures be well thought out, transparent and very clear, and it is unlikely that such a short timeframe would permit such preparation. To handle claims successfully, an intake infrastructure must first be established to allow claims to be registered, entered into a database for easy searching and cross-referencing of information (which, in turn, requires such a database to be pre-developed), and for claim intake staff in the field to be trained. It may also be worth including a provision allowing the Commission to establish sub-offices in other locations if the need arises.

Claim forms will also need to be developed, based on rules of procedure. In Kosovo, the regulation establishing the HPD and the HPCC came into force in November 1999, claim intake started in May 2000, but the regulation establishing the rules of procedure for the HPD and HPCC was not passed until October 2000. As a result, the claim forms developed before the rules, and did
not adequately reflect the process required by the rules, causing additional lost time in claims processing. Claims intake teams were not fully operational until 2001, causing further delays. Georgia could learn from these opening mistakes in Kosovo by ensuring the establishment of the Commission, rules of procedure, and adequate resources for claim intake, including an extensive media campaign prior to accepting claims.

G. Compatibility with Domestic Law

It is also not clear precisely how the provisions set out in the draft law relate to domestic law. While the system of appeal to Regional Court (Article 10 (4)) is straightforward enough, the work of both the Commission and the judicial system in reviewing the Commission’s decisions, might arguably be assisted by explicit clarification of the draft law’s status as \textit{lex specialis} and reference to whatever gap-filling \textit{lex generalis} legislation might be useful, particularly in the areas of administrative procedure and enforcement. The provision in Article 7 stating that the Commission “obeys only the Constitution of Georgia, international agreements, and Georgian legislation” does not necessarily clarify the issue in its current form.

It is also not clear what will happen if a decision of the Commission is contrary to Georgian law or procedural rules, e.g., what laws take precedence, and how conflicts between Commission decisions and interpretations of Georgian laws will be resolved. If the work of the Commission is politicized, a typical form of obstruction would be the enactment of laws or procedural rules that would make it difficult in practice for persons to regain repossession of property. It may be appropriate for Commission decisions to be acknowledged as taking precedence over domestic decisions up to the level of the Constitutional Court, e.g., the only body capable of reviewing Commission decisions is the Constitutional Court – this provision would take away the capacity of local interference but ensure that the decisions fit within a local framework.

VI. Enforcement

The draft law does not set out detailed provisions on enforcement of its decisions, particularly those related to repossession of properties. This oversight could turn out to be significant, as the credibility of the restitution program will inevitably rest in its ability to transform positive decisions into actual repossessions, particularly where doing so requires forcible eviction of the factual resident.

This law relates to “restitution” yet nowhere in the law is it specified how restitution will be accomplished, e.g., what are the principles that will be employed for the valuation of real property rights or other usury interests in land or property? How will destroyed properties be valuated, and in cases where properties are destroyed, but owners wish in principle to ‘return’, should there be a ‘reconstruction credit’ built into the system?

Although Article 10 (3) (b) sets out the principle that Commission decisions are “obligatory for enforcement,” it does not specify who must carry out the enforcement and in accordance with what provisions of law. Other provisions of the draft law appear to imply that the Commission itself may have a role in enforcement. For instance, the Commission Secretary is charged with “supervising” the enforcement of Commission decisions under Article 15 (1) and Article 18 (1) states that the implementation of Commission decisions is to be financed from the financial fund of
the Commission. (The latter may be meant to refer solely to decisions awarding compensation, but should probably be explicit if that is the case.) Finally, under Article 7, “interference and influence” as well as “initiation of difficulties” to the activities of the Commission are “punishable under law.”

Meanwhile, the draft law appears to leave a number of other significant enforcement questions open:

- What is the time period from the issuance of a decision within which the factual resident must vacate the property in accordance with Article 3 (2)?
- If the factual resident fails to vacate the property, is the case referred to the police for forcible eviction? Do existing provisions of law require the police to render assistance in such cases upon the request of administrative authorities?
- If the responsible party does not provide adequate residence within the time period allotted for an eligible factual resident to vacate the property, must he or she vacate anyway?
- Is there any obligation to report and seek sanctions for acts of looting by factual residents vacating claimed properties (i.e. stripping of fixtures and/or personal belongings of the original resident)?

The BiH experience indicates that enforcement is key to successful implementation of property restitution programs and that police support is vital. In BiH, the law set out deadlines to vacate property on pain of forcible eviction and provided that failure to provide temporary accommodation to subsequent users entitled to it could not delay enforcement. Sanctions and reference to legal provisions requiring assistance in administrative enforcements were used to push local police to ensure the success of forcible evictions and arrest violent protesters.
Appendix A

The Draft Law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict
The Draft Law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict

Draft

The Georgian state,

Having acknowledged universally recognized human rights and freedoms by the Constitution of Georgia and the international law,

Namely, the right of each person to property and to an adequate standards of living regardless his/her race, color of skin, sex, language, religion or beliefs, political and other belonging, national, ethnic and social origin,

Bearing in mind the grave results of the 1991-1992 Georgian-Ossetian conflict causing displacement of a significant part of the population of Georgia from their own places of residence,

And responsibility of Georgian state to restitute rights of persons internally displaced as a result of the conflict in compatibility with standards recognized by the international law,

Considers necessary to regulate matters of restitution of housing and property to the victims of the Georgian-Ossetian conflict on the basis of a law

CHAPTER I.
GENERAL PROVISIONS

Article 1. Purpose of Law

The present law regulates the matters of restitution of housing and other immovable property of original residents, factual residents and other persons having suffered as a result of the Georgian-Ossetian conflict as well as the procedure of establishment and activity of Commission on Housing and Property Issues.

Article 2. Terms and Definitions

For the purposes of the present law the terms used hereby have the following meaning:

a) a refugee -- a person displaced from the territory of Georgia as a result of the Georgian-Ossetian conflict,

b) an internally displaced person (IDP) -- a person displaced within the territory of Georgia as a result of the Georgian-Ossetian conflict;

c) an original residence -- a residence of a refugee or IDP where he/she had the right to housing at the moment of leaving it;

d) an original resident - a person possessing residual rights over the original residence;
e) **Right to residence** - the right to use or to own an original residence.

f) **A factual resident** - a person who currently lives at the original residence of a refugee or IDP.

g) **a residence** - immovable property designed for living;

h) **Commission** - Housing and Property Issues Commission.

i) **other immovable property** - the land and immovable property firmly fixed on it, not designed for housing;

j) **Other persons** - Persons with lawful interests with regard to the residence who lost this property as a result of Georgian-Ossetian conflict and who are not refugees or IDPs.

**Article 3. Application of Law**

1. The present law is applied to those original residents who cannot return to their original residence because of the security reasons or the absence of the adequate residence and are entitled to apply to the Commission for return of the original residence and other immovable property or for provision of the adequate residence or compensation.

2. The present law also applies to those factual residents who shall, under the decision of Commission, leave the residences with or without of provision of adequate residence or compensation.

3. The present law recognizes the right of refugees, IDPs and other persons to complain before the Commission on all decisions adopted on the ground of Article 69 of the Housing Code of Georgia of 1983, which caused loss of residual rights of that person during or after the conflict.

**Article 4. Right on Freely and Voluntary Return**

It is acknowledged by the present law the right to return of all refugees and IDPs to their original residence should they wish to do so and if they can prove lawful rights on it.

**Article 5. Right on Adequate Residence**

The present law recognized the right of all refugees, internally displaced persons and factual residents on the adequate, safe and accessible residence.
CHAPTER II.
PROCEDURE OF THE INSTITUTION AND COMPETENCE OF THE COMMISSION FOR HOUSING AND PROPERTY ISSUES

Article 6. Institution of the Commission
1. The commission is established to discuss and adopt decisions on applications on the matters of residence and property filed by refugees, IDPs and other persons, in consistence with the requirements prescribed by law, also for implementation of competences envisaged by the national legislation.

2. The Commission is composed of 9 members, where 3 members are appointed by the Ossetian side, 3 are appointed by the President of Georgia and 3 by the UNHCR.

3. The chairman and secretary of the Commission are elected by the members of the Commission from themselves by 2/3 of votes by the secret ballot.

4. The term of the Commission is 3 years.

Article 7. Independence of the Commission and Guarantees to Activities
1. In execution of its authority the Commission is independent and obeys only the Constitution of Georgia, international agreements and Georgian legislation. Any interference and influence onto the activity of the Commission is prohibited and punishable under the law.

2. Initiation of difficulties to the activities of the Commission is punishable under the law.

Article 8. Member of the Commission
1. Any citizen of Georgia with higher legal education, five years of working experience in a legal field and a good knowledge of state language may be appointed as a member of the Commission.

2. The requirements of Citizenship and knowledge of the State Language envisaged in paragraph 1 of this Article shall not apply in relation to those members appointed by UNHCR and Ossetian side.

3. The member of the Commission is appointed for the term of 3 years.

4. The position of the member of the Commission is incompatible with any other position and paid activity, except of scientific and creative one.
Article 9. Pre-term Termination of Powers of the Member of the Commission

1. The pre-term termination of powers of the member of Commission shall be decided by the Commission with at least 6 votes of its members.

2. The ground of pre-term termination of the power of the member of the Commission is:
   a) His/her application;
   b) Failure to exercise his/her powers for more than 2 months or unjustifiably for 15 working days;
   c) holding position or carrying out activity incompatible with the status of the member of the Commission;
   d) his/her recognition as of incapable or lacking full capacity;
   e) termination of the citizenship of Georgia;
   f) entering into legal force of the judgment against him/her;
   g) Decease.

Article 10. Activity and Competence of the Commission

1. The competence, activity and structure of the Commission are determined by the present law and by the “Regulations of the Commission for Housing and Property Issues”.

2. If at least 6 members attend the session the Commission is entitled to take a decision. The Commission takes a decision by the two-third majority of the full composition unless otherwise is provided by Law.

3. According to the rule provided by Law the Commission:
   a) considers applications of refugees and internally displaced persons and other persons (or their representatives) on housing and property issues;
   b) takes decisions on basis of applications submitted by refugees, internally displaced persons (or their representatives) obligatory for enforcement on the entire territory of Georgia;
   c) is entitled to request and get information related to the applications accepted by the Commission for consideration from any physical and legal persons or governmental body;
   d) Is entitled to obtain enforced court decisions on criminal, civil and administrative cases related to submitted applications.

4. The decision of the commission can be appealed to Regional Court of Georgia according to remedial legislation of Georgia.

5. In case of revealing signs of criminal offence while consideration of the case, the Commission shall urgently forward them to respective bodies.
Article 11. Chamber of the Commission

1. For the timely consideration of applications and efficiency of the Commission the Chairman of the commission on the parity principles establishes three Chambers with three members out of the members of the Commission.

2. The composition of Chambers is changing every following year from the creation of the Commission.

3. For the entire, full and impartial study of the case the Chamber is authorized to gain all the information related to the case.

4. The Chamber submits to the Commission obtained materials and draft conclusions related to the case within the terms provided by item 3 Article 13 of the present Law.

Article 12. Right to Application to the Commission

1. Refugees, internally displaced persons and other persons can apply to the Commission individually or collectively.

2. In cases provided by present Law a refugee, internally displaced person or other person can apply to the Commission within 2 years from the date of exercising its authorities.

3. If refugee, internally displaced person or other person did not know or could not know about the rights provided by paragraph 1 of this Article, this person by the decision of the Commission can apply within 6 months from the time term indicated in paragraph 2 of this Article.

Article 13. Term of Acceptance and Consideration of Applications

1. The Commission shall consider the applications and take (publish) relevant decisions not later than 30 days from the beginning of consideration of the case.

2. In extraordinary cases, this term can be extended with additional 30 days according to the decision of the Commission.

3. The time term of preparation of the case in the Chamber and its submission to the Commission shall not exceed 20 days.

Article 14. Chairman of the Commission

Chairman of the Commission:

a) Presides over the plenary sessions of the Commission;

b) Participates in the activity of Chambers;

c) Administers the Commission’s Office;

d) Establishes the Chambers;

e) Assigns applications to Chambers;

f) Signs the decision of the Commission;

g) Exercises other authorities provided by regulation.
Article 15. Commission Secretary
1. Commission Secretary supervises the enforcement of the decision of the Commission.
2. Commission Secretary performs the duties of the Chairman in absence of the latter.

Article 16. Commission’s Office
Commissions Office is established for the organizational and technical security of the activities of the Commission. The structure and activities of the latter is determined by the Regulation of the Commission.

Article 17. Location of the Commission
The Commission sits at the City of Tskinvali.

CHAPTER III.
FINANCING and SOCIAL PROTECTION OF MEMBERS OF THE COMMISSION

Article 18. Financing
1. The activities of the Commission and implementation of it decisions shall be financed from the financial fund of the Commission.
2. The fund of the Commission shall be established according to this law and the Regulations of the Commission.
3. The fund of the Commission is established by the resources donated from Georgian State Budget, other states and/or international organizations as well as from private donations.
4. Donations to the Commission shall be transferred and registered on the account of the Commission in the National Bank of Georgia.

Article 19. Remuneration and Social Protection of the Commission Member
Remuneration and benefits of member of the Commission cannot be less than the remuneration and benefits of the Members of Parliament of Georgia. The remuneration of Commission member cannot be reduced during his/her exercising of authority.

Article 20. Effective Competence of the Commission
1. The competence of the Commission begins as soon as its Regulation is adopted.
2. The Commission begins to consider the applications from refugees, internally displaced persons and other persons after 15 days from the date of adoption of the regulation.
1. The first session of the Commission is chaired by the eldest member of the Commission until the chairman is elected. On the same session will be elected the chairman and the secretary of the Commission according to the Law.
2. The Commission shall adopt its Regulations within 30 days after the appointment of its 9-th member.
3. Within 30 days from the date of the enforcement of present Law the information about this shall be spread via mass media all over the country.
4. The local self-government and government bodies shall secure the availability of the present law for the population by its promotion in public places.
5. The Ministry of Foreign Affairs of Georgia shall secure to provide the text of the present law to the International Organizations, Accredited Missions acting in Georgia, to the Diplomatic Representations accredited in Georgia as well as to the Georgian Diplomatic Missions abroad.

Article 22. Enforcement
The present law is in force after its publication.
Appendix B

Article 69 of the Housing Code: Keeping the House for the Citizens on a Temporary Leave
Article 69 of the Housing Code: Keeping the House for the Citizens on a Temporary Leave

In case a family leaves its living environment temporarily due to being at another place their housing will be kept for the time period of six months.

The housing will be kept for a longer period of time in case of the following:

1. Get drafted by the military, or has to perform military duty. Go to the school of officers. Also if a person has a specific job with a military, in all these cases the time period is 5 years.

2. Temporarily leave their permanent living place due to work duty, or due to the education experience, the housing will be kept for the whole time period needed to fulfill these duties.

3. If a child is being raised by the state’s children’s establishment, or relative’s, or the guardian, and the housing which the child left has got other people living in it. Or if, due to some other reasons, it is impossible to move into this house, then after the time spent at the establishment, or relative, or the guardian, the child shall be given the housing without standing in any line, according to article 47 of this code.

4. Gone due to the duties of the guardian, the housing is kept the whole time until the duty is over.

5. Leave for medical treatments, the housing is kept for as long as the treatment takes.

6. In case a person is placed in a mental institute for compulsory treatment, the housing is kept for as long as the treatment takes.

7. If a person is arrested, the housing is kept through the investigation of the case or through the committal for trial.