

# Enlargement Report on Georgia – „Human Rights Perspective“\*

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## 1. Introduction

Before I turn to selected individual demands that the European Commission (EU-Commission) is making of *Georgia* in the area of human rights, please allow me to make a few general comments. - Where exactly does *Georgia* stand on its path towards accession to the European Union (EU) from the perspective of the EU Commission?

a) How should the Enlargement Report on *Georgia* be categorised politically?

As is known, the EU Commission adopted its 2023 Enlargement Package on November 8th 2023. In it, it recommends that the European Council grants *Georgia* - unlike the other potential candidate country *Kosovo* - candidate country status at its summit on December 15th/16th 2023. This requires unanimity, meaning the approval of all 27 member states. This is the first annual enlargement report on *Georgia*. It replaces the previous annual Association Implementation Reports.

How is the accession process progressing? - What phases does *Georgia* still have ahead of it?

If the European Council follows the European Commission's recommendation, this does not mean, contrary to widespread opinion, that the EU will start accession negotiations with *Georgia* immediately afterwards. As the examples of *Ukraine* and *Moldova* show, accession negotiations with these countries will not begin until March 2024 at the earliest, although both have been candidate countries since June 2022. In the meantime, the two countries still have to adopt certain key measures. The European Council is only expected to adopt a negotiation framework for these in December 2023.

## b)The EU Commission's Assessment of issues with Human Rights Relevance

If you want to narrow the focus - as we want to do here - to topics related to human rights, you need to look at pages 1 to 53 of the enlargement report. Of great importance here are pages 9 to 12, which deal with the state of the implementation or fulfilment of the 12 priorities in the EU Commission's opinion of June 17th 2022. The statements by the EU Commission on pages 28 to 41 of the enlargement report should also be analysed. In Chapter 23, the EU Commission monitors *Georgia's* progress in the area of what it calls „respect for fundamental rights in law and in practice“.

What „report card“ does the EU Commission give *Georgia* in this area?

Literally on page 20: „Overall...*Georgia* has some level of preparation; limited progress was made.“ It is interesting to note that on page 28 of its enlargement report, the EU Commission only categorises priorities 8, 9, 11 and 12 as relevant to human rights, although other priorities - such as priorities 4 (data protection) and 7 (freedom of the media) - are also relevant.

As a result, the EU Commission only considered three of the 12 requirements to be fulfilled, namely requirements 9, 11 and 12. The assessment presented by the EU Commission is largely in line with the assessments of the Civil Society Organisations in *Georgia*. In their EU Candidacy Check 6.0 of September 15th 2023, they concluded: One priority is fully implemented, two priorities are mostly fulfilled, seven priorities are partially fulfilled and two priorities are to be fulfilled. The EU Commission's enthusiasm or euphoria about *Georgia's* successes is therefore limited, as can easily be seen from the fact that it only issued its recommendation for candidate status „in the light of the results achieved“. At the conference „*Georgia`s Road to the European Union*“ on November 22th 2023, the Speaker of the Georgian Parliament, *Shalva Papuashvili*, announced that he intends to present a plan for the implementation of the remaining 9 priorities in the near future.

If you look at the EU Commission's statements in detail, you will notice the following again and again: The legislative and institutional framework on fundamental rights is largely in place, meaning that it is in line with EU standards. However, problems exist in the actual implementation, that is in legal practice. There are numerous instances of malpractice.

Please allow me an excursus: The enlargement report not only deals with the aforementioned Chapter 23, but also - in six clusters - with 32 other chapters. These concern the so-called economic criterion and the so-called *acquis* criterion of the *Copenhagen criteria* from 1993. The total of 33 chapters mentioned in the enlargement report already represent the future negotiation chapters, meaning the areas in which *Georgia* will have to prove that it has adopted the EU standards once the accession negotiations have been opened. The fact that Chapters 34 and 35, which are also included, are not mentioned here is due to the fact that they generally only become relevant at the end of the accession negotiations. In any case, this does not indicate that the EU Commission believes *Georgia's* accession is still „a long way off“.

### c)The EU Commission's Legal Basis of Assessment

If one wants to draw conclusions from the enlargement report on *Georgia* for future reform steps in the area of human rights, one must look at the assessment basis on which the EU Commission made its judgement:

Firstly, the EU Commission's assessment reports of the state of play, takes stock of *Georgia's* reform progress up to November 2023. The EU Commission's assessment is to a certain extent „frozen“ at this point in time.

Secondly, the period from February 1st 2023 was under particular observation, when the EU Commission published its „*Analytical Report on Georgia`s alignment with the EU acquis*“, completing the EU Commission`s opinion of June 17th 2022.

Thirdly, the legal basis for the EU Commission's assessment was - how could it be otherwise - the European Convention on Human Rights (ECHR). The opinions of the Venice Commission, which advises states on the preparation of legislation, and the relevant case law of the European Court of Human Rights played an important role in this context.

Why, you may ask, did the EU Commission not also refer to the EU's fundamental rights text, the European Charter of Fundamental Rights? At the moment of accession - i.e. with the conclusion of the accession agreement under international law, meaning up to the date of accession - it automatically becomes binding for *Georgia*. As binding law the Charter than „grows“ into the national legal order as a priority right.

The reason for this lies in the limited scope of application of the European Charter of Fundamental Rights. Essentially, a so-called cross-border situation is required for its application. Only a situation that is not purely domestic, exclusively national, legitimises the creation of EU law.

Fourthly, an observation on my part to conclude! It should be noted that reform efforts in *Georgia* were often only undertaken „at the last minute". This applies to the adoption of legislative acts as well as policy actions in the form of political action or guidance plans.

For example, the *Law on Broadcasting* was only amended again in October 2023, as was the *Law on Assemblies and Demonstrations*. Cooperation agreements with Georgian civil society also only began in October 2023, and the follow-up action plan to the *2022 to 2030 National Human Rights Strategy* is still in preparation. In addition, many requests to the Venice Commission were only launched in September 2023 – that is shortly before the EU Commission's stocktaking (examples: the *Electoral Code*, the *Law on the Protection of Personal Data*, etc.).

These late efforts have not exactly made the EU Commission's assessment any easier. This is - as I interpret it - the reason why it refers to the „forthcoming" development in many places in its enlargement report and gives *Georgia* - in the absence of a more up-to-date basis for assessment - instructions for action for the future, a to-do list, so to speak „in the coming year"

## **2.Human Rights Protection through Procedures**

Before I turn to individual areas that the EU Commission criticised in its enlargement report as precarious for the human rights situation in *Georgia*, I would like to focus on an issue that affects the realisation of all human rights equally: Human rights can only be exercised effectively if certain organisations and procedures are in place to safeguard them. The EU Commission summarises these organisational and procedural components, this necessary infrastructure, on several pages of its enlargement report under the term „institutional set-up".

How does the EU Commission assess *Georgia's* efforts in this regard?

The institutional set-up provides *Georgia* with some level of preparation to further reforms; *Georgia* achieved limited progress. This is the conclusion of the EU Commission. At this point, it positively highlighted the creation of legislative mechanisms to ensure reference to the European Court of Human Rights decisions - priority 11 - and the establishment of a Public Defender's Office - priority 12; as a result, the EU Commission considered both requirements to be completed. Some progress is also attested to *Georgia* in the fight against corruption; the establishment of an *Anti-Corruption Bureau* and the strengthening of the *Special Investigation Service* are particularly emphasised here. A functioning and independent judiciary is of course also an organisational component that safeguards human rights; such a system is indispensable. This is where the EU Commission sees the greatest need for reform: On page 20 of its enlargement report, it complains that the most important recommendations of the Venice Commission as stated in March and October 2023 - regarding a comprehensive reform of the *High Council of Justice* and the selection process of the *Supreme Court* Judges, reforms to ensure full independence, accountability and impartiality of judicial institutions - have not yet been addressed by *Georgia*. I will not make any further comments on this here. In many areas - as the EU Commission also states - the administrative capacity for effective enforcement is still lacking. One example is the realisation of citizens' rights to access to public information.

### **3. Deficits in the Area of Human Rights from the Perspective of the EU Commission**

None of the enlargement reports published by the EU Commission on November 8th 2023 omit a detailed analysis of the human rights situation in the respective candidate country. This can be explained by the fact that, according to Article 49 and Article 2 of the Treaty on European Union, respect for human rights is a mandatory prerequisite for accession to the EU.

The EU Commission's criticism of the human rights situation in *Georgia* can be read on pages 28 to 41 of its enlargement report - Chapter 23! To repeat once again: The EU Commission recognises here only *limited progress* by *Georgia* for the reporting period. The relevant legislative and institutional framework is largely in place; however, there are problems with the practical implementation of human rights protection. This may be considered wrong or at least unfair, but unlike *Georgia*, the EU Commission recognises *substantial progress* (not only *limited progress*) for *Ukraine* and *important progress* for *Moldova* in achieving their reform goals.

I would now like to take a few examples of selected topics for which the EU Commission has issued assessments:

## a) Prohibition of Inhuman and Degrading Treatment - Article 3 ECHR

*Georgian* authorities have a legal responsibility to care for the conditions in police detention centres and pre-trial detention/prison facilities, especially to provide detainees with adequate medical treatment. This was a major problem in *Georgia* in the past; there are many decisions on this by the European Court of Human Rights. On pages 31 to 32 of its enlargement report, the EU Commission emphasises that this deficit is now being addressed at an organisational level and that the *Special Investigative Service*, the *Prosecution Service of Georgia* and the *National Prevention Mechanism* are fulfilling their investigative duties in this area, even if violations are still reported to occur in individual cases. The EU Commission refers to the *Georgian Criminal Code* and welcomes the fact that a new *Penitentiary Code* has been under development since June 2023.

## b) Freedom of Expression and Information, Media Freedom - Article 10 ECHR

In its comments on pages 33 to 36 of the enlargement report, the EU Commission states that *Georgia* has made only limited progress in this area during the reporting period. Nevertheless, *Georgia* improved its position in the so called *World Press Freedom Index* by 12 places (from 89th position in 2022 to 77th in 2023). Its detailed assessments of the state of play focus on issues relating to the safety of journalists in *Georgia*, the independence of the *Georgian* media supervisory authority - the *Georgian National Communications Commission* - and the combat against hate crimes and hate speech. With regard to the second and third points, the EU Commission is calling for an amendment to the *Georgian Penal Code* and a further adaptation of the *Law on Broadcasting* to the core principles of the *Audiovisual Media Services Directive*. With regard to the first point - intimidation of journalists, for example at the so-called *Tbilisi Pride Festivals* this year and in previous years - it is calling on *Georgia* to provide stronger police protection and more consistent criminal prosecution.

All of these points were already the subject of the EU Commission's opinion of June 17th 2022 and led to priority number 7. I have already reported on this.

Please allow me to make a comment of my own at this point:

If the threat to the freedoms protected in Article 10 ECHR comes from private parties, it is the task of the state to protect the holders of these rights from this. In addition to the function of human rights as a subjective right of defence against state interference, there is also a state duty to prevent human rights violations by private parties. This is known as an objective duty to protect! This is the case law of the European Court of Human Rights. State authorities are therefore not allowed to stand idly by when journalists or media representatives are intimidated, threatened or physically attacked by private parties in their sphere of freedom. State authorities must intervene here; there is a subjective legal right to do so.

### c) Rights to Freedom of Assembly and Association - Article 11 ECHR

In the opinion of the European Court of Human Rights, freedom of assembly and association represent the „collective continuation" of individual freedom of expression and its exercise. According to Article 11 ECHR, these freedoms are human rights; they cannot be invoked only by national citizens, as is the case in some national constitutions. The European Court of Human Rights considers formal registration or authorisation requirements in the right of assembly to be interferences with the freedom of assembly; these must be justified.

Having said this, in its enlargement report, the EU Commission primarily complained about disproportionate interference with freedom of assembly by *Georgia*. On pages 36 and 37, it refers to the violent intervention by law enforcement officers during the mass demonstrations in front of the *Georgian* parliament in March 2023, which resulted in numerous complaints - including from human rights defenders and activists.

How does the EU Commission assess the relevant legislative framework?

Firstly, she points out that *Georgia* has not yet reformed its old administrative offences system. This is because it is still based on a *Law on Administrative Offences* from *Soviet* times, which lacks substantial procedural safeguards. The EU Commission, secondly, identifies shortcomings in the harmonisation of the current *Georgian Law on Assemblies and Demonstrations*. As is well known, planned amendments to the law in October 2023 were stopped following protests.

### d) Right to Data Protection, Right to Privacy - Article 8 ECHR

The human right to the protection of personal data is legitimised by Article 8 ECHR; Article 8 ECHR protects - in a broader sense - the right to respect for private life. In this context, the EU Commission refers to the new *Law of Georgia on the Protection of Personal Data* of June 14th 2023, the main parts of which are not due to come into force until March 2024.

On pages 32 and 33 of its enlargement report, the EU Commission is very cautious in describing the improvements compared to the old legal situation from 2011; however, it is impressed by the intensive and successful monitoring activities of the *Personal Data Protection Service* and emphasises these positively. It names rules on international data transfers and certain exemptions/limitations to data protection rights as issues which are still to be addressed. I am not aware of any statement from the Venice Commission on this in response to the request sent to it in September 2023; the EU Commission referred to such a request in its enlargement report.

If you ask me for my opinion, I consider this view of the EU Commission to be extremely restrictive. I confirmed my impression that the *Georgian* legislator has carefully analysed the relevant EU law - namely the *General Data Protection Regulation (GDPR)* - and identified the relevant areas that the *GDPR* does not regulate; only in this area there is still room for national data protection law after joining the EU. What I cannot understand at all is the EU Commission's call to create regulations for data transfers to third countries and international organisations. If Georgia joins the EU, the relevant Article 45 of the *GDPR* will automatically apply to the country.

According to the EU Commission, however, inadequate protection of personal data is to be deplored in the case of measures under the *Criminal Procedure Code*, such as undercover investigations, surveillance and wiretapping measures. The new *Georgian* data protection law does not apply here.

Last but not least:

## e) Principle of Non-Discrimination - Article 14 ECHR

As priority 8, the EU Commission instructed *Georgia* in its opinion of June 17th 2022 to strengthen the protection of human rights of „vulnerable groups“. This refers to the prohibition of discrimination against such groups of people, for whom special equality rights exist. On pages 37 to 41 of its enlargement report, the EU Commission provides examples of some of these „vulnerable groups“: Women, people with disabilities, LGBTIQ persons and



ethnic and religious minorities. According to the EU Commission, their disadvantages are of a very different nature. While women do not feel sufficiently represented in Georgia's society, which is still dominated by men, people with disabilities demand equal participation and financial support for a self-determined life. LGBTIQ persons - one of the most marginalised groups - are fighting against hate speech and hatred, while national minorities are striving for recognition of their languages and equal treatment in education and at the political level.

What conclusions has the EU Commission reached?

It is interesting to note that these vary according to the position and status of the respective „vulnerable group" in *Georgian* society. Where there is a legislative framework, the EU Commission describes it as largely in line with EU standards. For certain „vulnerable groups" - people with disabilities, ethnic and religious minorities - *Georgia* limits itself to a so-called strategic policy - through strategic documents, action plans or enforcement packages. The upholding of the rights of LGBTIQ persons - states the EU Commission - still „remains a challenge". Not even the aforementioned action plan to the *2022 to 2030 National Human Rights Strategy* is supposed to include rights for this group of people.

## 4 Conclusion

In its „*Key Findings of the 2023 Report on Georgia*", the EU Commission vividly summarised the level of alignment with EU standards that *Georgia* had achieved by November 2023 and the efforts the country still has to make in the future as follows:

As regards the fundamental rights – the so called political criterion (one of the *Copenhagen criteria* from 1993), overall, the legislative and institutional set-up provides *Georgia* with some level of preparation and limited progress only, due to late reform steps in the second and third quarter of 2023. The enforcement of a serious human rights policy requires more substantial improvements.

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\*Lecture given at Ivane Javakhisvili Tbilisi State University as part of the „Human Rights Week" from 2 to 11 December 2023.

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