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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT AMENDMENTS

**AND EXPLANATORY NOTES
WITH AN ANNEX**

TO THE LAW

**“ON OCCUPIED TERRITORIES”
IN GEORGIA**

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DRAFT AMENDMENTS

Article 1.

The following amendments and annexes shall be made in Law “on Occupied Territories” of Georgia (“Sakhartvelos Sakanonmdeblo Matsne”, 28,30.10.2008, Art. 172):

1. Article 4 paragraph 3 shall be formed in the following way:

“3. In a special case, a special permit to enter the occupied territory from the forbidden direction can be issued to persons stipulated in paragraph 2 of this Article under the rule set by the Government of Georgia, if it serves national interests of Georgia, the purposes of peaceful settlement of conflict-resolution, de-occupation, confidence building or humanitarian purposes.”;

2. The following paragraphs 4 and 5 shall be added to Article 4:

“4. The prohibition and corresponding punishment stipulated in paragraph 2 of this Article shall not be extended to:

a) A citizen of foreign country or person without citizenship to Georgia who seeks asylum from the Government in compliance with the Constitution of Georgia in case his/her action bears no other criminal signs, also to a person in case he/she perpetrated the mentioned act due to being a victim of human trafficking before the acquisition of a status of a victim of human trafficking;

b) That persons who render emergency humanitarian aid for population in the Occupied Territories in order to maintain their right to life, through the provision of food, medicine and emergency items.

5. Persons stipulated in paragraph 4 of this Article before the entrance into occupied territories from the forbidden direction and in case of impossibility, aftermath within a reasonable period of time shall inform the Government of Georgia about time of entry and exit in the occupied territories, while the persons stipulated in sub-paragraph “b” of paragraph 4 of this Article shall also to submit information about provided assistance to population.”;

2. Article 5 paragraph 2 shall be formed in the following way:

4. Article 6 paragraph 1:

a) sub-paragraph “a” shall be formed in the following way:

“Any economic activity (entrepreneurial or non entrepreneurial), regardless whether or not it is implemented for receiving profit, income or compensation, if under the Georgian laws on “Licences and Permissions”, on „Entrepreneurs”, on “Apiculture”; on “Museums”, on “Water”, on “State Registry”, on “Electronic Communications”, “Georgian Code of Sea” or “Georgian Civil Code” a license, permit, authorization or registration is required or if under the Georgian legislation an agreement is required for the implementation of such activity, and it has not been granted;”;

b)_sub-paragraph “c” shall be formed in the following way:

“c) International air traffic and maritime traffic, except circumstances stipulated in the UN Convention on Law of the Sea (1982);”;

5. The following sub-paragraph “c¹” shall be added to Article 6 paragraph 1:

c¹) Railway traffic and international automobile transportation of cargo;”;

6. Article 6 paragraph 2 shall be formed in the following way:

“2. On occupied territories, realization of forbidden activities envisaged under paragraph 1 of the present Article shall be allowed only in special cases with special permit issued in accordance with the decree of the Government of Georgia, if they serve national interests of Georgia, the purposes of peaceful conflict-resolution, de-occupation, confidence building or humanitarian purposes.”;

7. The following paragraphs 6 and 7 shall be added to Article 6:

“6. The prohibition stipulated in paragraph 1 of the present Article and the criminal responsibility stipulated in paragraphs 3, 4 and 5 shall not extend to persons rendering emergency humanitarian aid to the population in the Occupied Territories in order to maintain their right to life through provision of food, medicine and emergency items to the population;

7. Persons stipulated in paragraph 6 of the present Article, before the implementation of the activity stipulated in paragraph 6 of the present Article and in case of impossibility, aftermath, within reasonable period of time shall inform the Government of Georgia about commencement and end of the implemented activity in assistance provided to the population.”;

8. Article 7 paragraph 3 shall be formed in the following way:

“3. The responsibility of Russian Federation, as a state exercising military occupation, for compensation of material and moral damage inflicted upon the citizen of Georgia, stateless persons and foreign citizens who are present in Georgia on the basis of relevant permit and entered occupied territories, shall be determined on the basis of the rules and principles of international law.”;

9. Article 7 paragraph 4 shall be formed in the following way:

“4. The responsibility of the Russian Federation, as a state exercising military occupation, for protection of cultural heritage on the occupied territories shall be determined on the basis of the rules and principles of international law.”;

10. The following paragraph 3 shall be added to Article 8:

“3. The establishment of facts of civil importance in the occupied territories shall be guaranteed in accordance with Law on “Registration of Civil Acts” of Georgia.”;

11. Article 11 paragraph 2 shall be formed in the following way:

“2. The provisions of Article 5, Article 6 and Article 8 shall be extended to relations formed since 1990. The retroactive application does not apply to any provision of these articles referring to the criminal liability.”;

12. The following paragraph 4 shall be added to Article 11:

“4. Taking into account the progress in the process of de-occupation, Parliament of Georgia will consider the possibility of amending the law by January 1, 2012.”.

Article 2.

This law shall enter into force from the publication.

EXPLANATORY NOTE

In March 2009, on its 78e Session, European Commission for Democracy through Law (Venice Commission) adopted Opinion on the Law on Occupied Territories of Georgia. Parliament of Georgia reconsidered the Law on Occupied Territories of Georgia in light with the Opinion and proposed following amendments:

1. According to the Venice Commission the criminalization of irregular entry into the occupied territories with no explicit exclusion of humanitarian aid and no explicit exception for emergency situations must not contradict the rule of customary international law that the well-being of the population in occupied areas has to be a basic concern of those involved in a conflict and to Security Council Resolution 1866(2009).

Parliament of Georgia took into consideration the opinion and introduced relevant exceptions. Thus, if a person falls within the scope of these exceptions he/she will not be criminally liable. The exceptions are set as following:

a) Persons providing necessary humanitarian aid in emergency situations for the protection of right to life and survival of the population are allowed to enter the Occupied Territories from foreign countries without a prior permission;

b). Exceptions are set for asylum seekers and victims of trafficking. Those who seek for asylum or are victims of trafficking are allowed to enter Occupied Territories from foreign countries without a prior permission. It has to be noted that such exception already existed in the Criminal Code of Georgia where criminal sanction is defined for an irregular entry on the occupied territories of Georgia.

However, persons who fall within the scope of these exceptions have to provide a report to Georgian Authorities regarding the time of entry and departure from the Occupied Territories. In addition, persons providing necessary humanitarian aid are obliged to present information on the humanitarian aid they have provided to the population. The report has to be available if possible before entering the territory, while in case it is impossible after entering the Occupied Territory within reasonable period of time.

In case if the entry does not fall within the scope of the above mentioned exceptions Government of Georgia has authority to issue a special permission if there is one of the legitimate goals as prescribed in Paragraph 3 of art. 4.

In addition, the list of such legitimate goals is complemented by “confidence building” measures.

1. a) In addition, according to the Interim Opinion of the Venice Commission of October 2009 a better wording could have been chosen in order to avoid that this exception be interpreted restrictively in practice. In order to enhance transparency and prevent restrictions, the Commission recommended removing the terms “necessary” and “in emergency circumstances” from the relevant provision.

Parliament of Georgia has considered the recommendation and following amendment has been made to the Law: the phrases “necessary humanitarian aid” and “in emergency situations” is replaced with the phrase “emergency humanitarian aid”. (**Article 4, paragraph, 4 subparagraph “b”**).

At the same time the Parliament of Georgia is not persuaded that the removal of the term “emergency” would be appropriate and is required under the international law for the reasons presented in the annex.

2. According to the Venice Commission the restriction and criminalization of economic activities necessary for the survival of the population in occupied areas as well as a (potential) restriction and criminalization of humanitarian aid must not contradict the rule of customary international law that the well-being of the population in occupied areas has to be a basic concern of those involved in a conflict and to Security Council Resolution 1866(2009).

Parliament of Georgia took into consideration the opinion and introduced relevant exception. Thus, if a person falls within the scope of these exceptions he/she will not be criminally liable. The exception is set as follows:

Persons providing necessary humanitarian aid in emergency situations for the protection of right to life and survival of the population are allowed to conduct such activities on the Occupied Territories without a prior permission even though this activity is restricted on Occupied Territories.

However, persons who fall within the scope of these exceptions have to provide a report to Georgian Authorities regarding commencement and the end of the activity on the Occupied Territories, as well as on the humanitarian aid they have provided to the population. The report has to be presented if possible before starting the activity, however if it is impossible reports have to be presented after the activity has commenced on the Occupied Territory within the reasonable period of time.

In case if the entry does not fall within the scope of the above mentioned exceptions Government of Georgia has authority to issue a special permission if there is one of the legitimate goals as prescribed by Paragraph 3 of Art. 4.

In case if the an activity does not fall within the scope of the above mentioned exceptions Government of Georgia has authority to issue a special permission if there is one of the legitimate goals as prescribed by Paragraph 2 of Art. 6.

In addition, the list of legitimate goals for permission is complemented with “confidence building” measure.

2. a) In addition, according to the Interim Opinion of the Venice Commission of October 2009 a better wording could have been chosen in order to avoid that this exception be interpreted restrictively in practice. In order to enhance transparency and prevent restrictions, the Commission recommended removing the terms “necessary” and “in emergency circumstances” from the relevant provision.

Parliament of Georgia has considered the recommendation and following amendment has been made to the Law: the phrases “necessary humanitarian aid” and “in emergency situations” is replaced with the phrase “emergency humanitarian aid”. **(Article 6, paragraph 6)**

At the same time the Parliament of Georgia is not persuaded that the removal of the term “emergency” would be appropriate and is required under the international law for the reasons presented in the annex.

3. According to the Venice Commission the blanket limitation of freedom of navigation and over flight of third States' flag ships and aircrafts may be against the legal regime of navigation and over flight in the Exclusive Economic Zone.

Parliament of Georgia took into consideration the opinion and now it is specified that navigation of third States' flag ships is forbidden only in waters where according to the UN Convention on the Law of the Sea (1982) Government of Georgia is allowed to restrict navigation. Therefore, in Exclusive Economic Zone limitations will not be set if in contradiction with the UN Convention.

4. According to the Venice Commission the criminalization of irregular economic activities might be too vague, and might not respect the principle of legality.

Following opinion was not considered as according to the Georgian Law economic activities that require license, permission or authorization are strictly defined by Georgian Laws. With this regard, there is no difference between regulations applicable on Occupied Territories and on the rest of Georgia. At the same time exception have been made to allow activities related to the necessary humanitarian aid for the survival of the population in emergency situations (see par.2).

4. a) In addition, according to the Interim Opinion of the Venice Commission of October 2009 concern to the very broad wording of the restrictions contained in Article 6, paragraph 1 was not addressed by the draft amendments to Article 6.

Therefore, in order to make the wording of the Article more precise, Parliament of Georgia amended the Article 6 paragraph 1. sub-paragraph "a" by introducing a reference to an exhaustive list of Georgian Laws requiring license, permit, authorization or registration. (**Article 6, paragraph 1 , sub-paragraph "a"**).

5. According to the Venice Commission as a matter of principle, the retroactive application of the criminalization of irregular economic activities is in breach of the prohibition to create retroactive offences, even if it meant to be declaratory.

According to the proposed amendment to Article 11, only paragraph 1, 2, 6 and 7 of Article 6 are retroactive. Retroactivity, even if it has declaratory nature does no longer apply to paragraphs 3, 4 and 5 of Article 6 which set criminal liability for illegal economical activity.

5. a) In addition, according to the Interim Opinion of the Venice Commission of October 2009 despite the previous amendments, the law still raised questions regarding its retroactivity in relation to the criminal liability.

Therefore, Parliament of Georgia has added a new sentence to the Article 11.2. on retroactivity, which clearly states that the retroactive application shall not apply to any provision of these articles referring to the criminal liability (**Article 11, paragraph 2**).

6. According to the Venice Commission the retroactive annulment of real estate transactions may raise issues under Article 1 of Protocol No. 1. The restriction of management of a property - Real estate can be inherited only by way of succession ab intestate or by will if the beneficiary is one of the legal successors is against ECHR.

Parliament of Georgia took into consideration the opinion and abolished the following provision: "real estate can be inherited by will only if the beneficiary is one of the legal successors". Consequently, the inheritance rights are fully guaranteed according to the Georgian Legislation.

In addition, new paragraph is introduced in Art. 5 guarantying the right to property on Occupied Territories in accordance with Georgian Law. Therefore, retroactive acquisition of property is also regulated according to the Georgian Legislation.

6. a) In addition, according to the Interim Opinion of the Venice Commission of October 2009 Article 5, paragraph 2 gives an indirect guarantee that the jurisprudence of the European Court of Human Rights will be respected and implemented in this regard.

Parliament of Georgia welcomes the appreciation by Venice Commission of amendments to the article 5, paragraph 2 and at the same time decided to give a better wording to the article. According to the new amendment, the property rights are fully respected and the regulation of property rights on occupied territories is fully subject to the ordinary Georgian legislation applicable to property rights without any exceptions (**Article 5, paragraph 2**).

7. According to the Venice Commission the questions of the international responsibility of the Russian Federation cannot be regulated on the basis of national law, but on the basis of international law.

Regarding the responsibility of Russian Federation the relevant provision addresses this issues in context of International Law.

7. a) In addition, according to the Interim Opinion of the Venice Commission of October 2009 the wording of the Article 7 is to be read to mean that the responsibility of the Russian Federation shall be determined on the basis of international law.

Therefore, in order to stress the role of international law in this regard Parliament of Georgia has amended the article and formed in a way recommended by the Commission (**Article 7, paragraph 3 and paragraph 4**).

8. According to the Venice Commission the recognition in Georgia of certificates and similar documents issued by the authorities of the occupied territories through simplified procedures should be guaranteed through an explicit provision in Georgian law.

It is specified that the recognition in Georgia of civil status related facts that occurred on Occupied Territories (birth, death certificates, etc) is guaranteed according to the Georgian Law on Registration of Civil Acts.

8 a). In addition, according to the Interim Opinion of the Venice Commission of October 2009 it would be more precise to state that “the establishment of facts of civil importance in the occupied territories shall *be guaranteed* in accordance with the Law on “Registration of Civil Acts” of Georgia.”

Therefore, Parliament of Georgia took into consideration this recommendation and following amendment was made to the law: the phrase “take place” has been replaced with the phrase “be guaranteed” (**Article 8, paragraph 3**).

9. And finally, according to the Opinion of Venice Commission of March 2009 and the Interim Opinion of the Venice Commission of October 2009 the regime provided by this law should have transitory nature and take into account the progress in the conflict settlement.

Therefore, Parliament of Georgia introduced new paragraph to the law which states that the Parliament of Georgia will consider the possibility of amending the law by January 1, 2012 taking into account the progress in the process of de-occupation (**Article 11, paragraph 4**).

ANNEX

HUMANITARIAN ASSISTANCE IN THE OCCUPIED TERRITORIES OF GEORGIA

I. Introduction

As a result of the aggression carried out in the territories of Georgia by the Russian Federation in 2008 (August War), the latter one was declared as Occupying Power of Georgia's territories, namely: Abkhazia and South Ossetia. In this relation, on 23 October 2008, the Parliament of Georgia adopted the Law on "Occupied Territories" stating that presence of military forces of the Russian Federation or any other state on the territory of Georgia, without an explicit and voluntary consent expressed by the State of Georgia, shall be deemed as illegal occupation of the territory of a sovereign country (Georgia).¹

The mentioned legal instrument regulates a legal regime of the occupied territories in line with relevant international treaties governing occupation of the territory.

On 17 March 2009, the Venice Commission issued recommendation to amend the Law and include relevant provision ensuring explicit exception for the entry into the occupied territories in emergency situations in order to maintain humanitarian assistance to the civilian population of occupied territories of Georgia.² The recommendation was taken into account and has been already incorporated in Draft Amendments and Annexes to the Law on "Occupied Territories".³ The present non-paper provides basic information on rules, emergency items, extent and other relevant issues of humanitarian assistance governed by International Humanitarian Law in line with the International Human Rights Law during international conflicts/wars and in particular during occupation.

I. Background on Humanitarian Assistance under International Law

The Fourth Geneva Convention relative to the Protection of Civilian Persons of 1949 in line with the Additional Protocol I of 1977 represents major treaty based document aimed at protection of the civilian population in times of occupation.

The right to humanitarian assistance is ensured under both International Humanitarian Law and International Human Rights Law. With respect to civilians' rights, the Universal Declaration of Human Rights 1948 as well as International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966) are applicable and specifically underline the right of individual's *to survive* as in peacetime as in cases which have arisen of armed conflict or occupation⁴.

In line with this, the humanitarian assistance under international law reflects two main areas. --- Firstly, the right of civilian beneficiaries to require or obtain humanitarian relief. Secondly, the duty of a State to provide or the duty to allow third parties (other States or humanitarian organizations) to provide humanitarian relief.⁵

¹ Preamble of the Law on "Occupied Territories" of Georgia;

² CDL-AD(2009)015 "Opinion on the Law on Occupied Territories of Georgia adopted by the Venice Commission At its 78th Plenary Session", Strasbourg, 17 March 2009, paras. 17, 50;

³ CDL-AD(2009)046 "Interim Opinion on Draft Amendments and Annexes to the Law on Occupied Territories of Georgia", Strasbourg, 13 October 2009, para. 8;

⁴ Ruth Abril Stoffels, Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps, 855 Int'l Rev. Red Cross 517 (2004);

⁵ See B. Jakovljevic, "The Right to Humanitarian Assistance: Legal Aspects," International Review of the Red Cross, vol. 27, 1987, p. 469 at p.473; Yoram Dinstein, The Right to Humanitarian Assistance, Naval War C. Rev., Autumn, 2000, at 77, 77-78 (2000); Ruth Abril Stoffels, Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps, 855 Int'l Rev. Red Cross 515, 517-18 (2004);

It should be noted that the beneficiaries of humanitarian assistance can be civilian population, including internees and the prisoners of war (POWs). In no case combatants and persons taking active part in hostilities (irrespective of the fact whether humanitarian assistance was offered or requested) could benefit from such assistance.⁶ According to Geneva Convention IV as well as Additional Protocol I priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers that are to be accorded privileged treatment or special protection.⁷

II. Humanitarian Assistance in Times of Occupation

When the territory of a State is under a belligerent occupation, the fact that civilian population should be provided with emergency items is the clearest. The primary obligation to maintain protection of the population is incumbent upon the Occupying Power as it is prescribed by paragraph 1 of Article 55 of the Geneva Convention IV.⁸ According to it, the Occupying Power is under the obligation to the fullest extent of the means available to it to ensure that its population is provided with the basic needs such as food and medical supplies for their survival.⁹

In this regard, Article 69 of the Additional Protocol I, is considered as an addition to paragraph 1 of Article 55 of the Geneva Convention IV which extends supplies from food and medical to clothing, bedding, means of shelter, as well as *other supplies essential to the survival of the civilian population of the occupied territory* and objects necessary for religious worship.¹⁰

However, on the other hand, if the Occupying Power has failed to fulfill its primary obligation or has not carried out it in a proper manner, in this case it should allow impartial humanitarian organization to implement the mentioned duty.¹¹ In this relation, Article 59 of Geneva Convention IV reads as follows:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.”

As the ICRC Commentaries to Geneva Convention IV interprets “the obligation on the Occupying Power to accept such relief is unconditional” which means that Occupying Power must accept offered humanitarian relief from third parties (either States or impartial humanitarian organizations such as the International Committee of the Red Cross). As it would be discussed below though, the consistency of relief schemes is exhaustively listed in article 59 as consignments of foodstuffs, medical supplies and clothing.

Apart from this, rights of the Power granting free passage to consignment should be also considered. Pursuant to Article 59 of Geneva Convention IV, the Power granting free passage to consignments on their way to territory occupied by an adverse party to the conflict shall have the right:

⁶ Yoram Dinstein, The Right to Humanitarian Assistance, Naval War C. Rev., Autumn, 2000, at 77, 77-78 (2000);

⁷ Article 23 of Geneva Convention IV; Article 70 of Additional Protocol I;

⁸ ICRC Commentaries of the Article 55 of the Geneva Convention IV;

⁹ Article 55 of Geneva Convention IV; G.A. Resolution 46/182 (Dec. 19, 1991);

¹⁰ Article 69 of Additional Protocol I;

¹¹ Article 59 of Geneva Convention; Yoram Dinstein, The Right to Humanitarian Assistance, Naval War C. Rev., Autumn, 2000, at 79, 77-92 (2000);

- (a) to search these consignments;
- (b) regulate their passage to prescribed times and routes and
- (c) check whether these consignments are to be used for the relief of needy population and not for the benefit of Occupying Power.¹²

Thus, parties to the conflict have a right *to supervise the operation and impose certain restrictions*, such as the arrangement of transits in accordance with a precise timetable and itinerary, and the search of conveys.¹³ It should be noted that consignments should be subject to strict and constant supervision from the moment they arrive until they have been distributed.¹⁴ In this regard, the State that grants free passage can check the consignment of humanitarian organization in order to verify whether these consignments do not contain military equipments or weapons or any other supplies used for military purposes.¹⁵

In line with this, the general provision applies to all high contracting parties to the conflict given in Article 23 of Geneva Convention IV. The mentioned provision guarantees the right to free passage of humanitarian organizations and their consignments which must not be considered as war contraband and cannot be seized. However, the right is subject of numerous conditions for the implementation of the right to free passage.¹⁶

Similar to article 59, the provisions of article 23 of Geneva Convention IV stipulate that the State authorizing free passage has the right to prescribe the technical arrangements under which such passage is allowed. The Power authorizing free passage is entitled *to check the consignments and arrange their forwarding at prescribed times and on prescribed routes*.¹⁷ This right authorizes the state concerned to verify whether these consignments do not contain military equipments or weapons or any other supplies used for military purposes.¹⁸

III. Emergency Items

Relief consignment shall include only essential emergency items¹⁹, such as Food, Water, Medical supplies, Clothing, Bedding, Means of shelter and Other supplies essential to the survival of the civilian population of the occupied territory and Objects necessary for religious worship.

Article 23 of Geneva Convention IV specifies two types of consignments.²⁰ First relates to consignments of medical and hospital stores and objects necessary for religious worship which are used only for civilians. Second relates to consignments of essential foodstuffs, clothing, and tonics which are used solely by children under fifteen, expectant mothers and maternity cases.

Additionally, it should also be noted that under Article 81 of Additional Protocol, the International Committee of the Red Cross may also carry out any *other humanitarian activities* in favour of

¹² By Randle C. DeFalco, 'The Right to Food in Gaza: Israel's Obligations Under International Law', 35 *Rutgers L. Rec.* 11, 2009, p. 18;

¹³ Christa Rottensteiner, 'The denial of humanitarian assistance as a crime under international law', *International Review of the Red Cross* No. 835, p. 555-582 (30-09-1999) at p. 556;

¹⁴ ICRC Commentaries of the Article 23 of Geneva Convention IV relative to the Protection of Civilian Persons of 1949;

¹⁵ ICRC Commentaries of the Article 59 of IV Geneva Convention relative to the Protection of Civilian Persons of 1949;

¹⁶ ICRC Commentaries of the Article 23 of Geneva Convention IV relative to the Protection of Civilian Persons of 1949;

¹⁷ Ibid;

¹⁸ ICRC Commentaries of the Article 59 of IV Geneva Convention relative to the Protection of Civilian Persons of 1949;

¹⁹ Article 55 of Geneva Convention IV; Article 69 of Additional Protocol I;

²⁰ ICRC Commentaries of the Article 23 of Geneva Convention IV relative to the Protection of Civilian Persons of 1949;

these victims that is *subject of the consent of the Parties to the conflict concerned (Occupied Power and Affected State)*. However, as a rule, humanitarian organizations may provide only those significant items that are necessary for *the survival of the civilian population* and not in any case extend beyond the imposed restriction.²¹ If the humanitarian organizations have an intention to provide another type of assistance, in this case this issue should be a subject of consent by States concerned.

IV. Consent of the Affected State

As a rule, the duty to provide adequate emergency items is incumbent upon the Occupying Power or if it is unable or failed to act, the role of the relevant humanitarian organizations comes forward. However, it should be taken into consideration that Affected State also shall be engaged as a party who retains the sovereignty over the occupied territory as well as is directly interested in provision of the humanitarian assistance to the civilian population in occupied territory.

The international law thus carefully balances the role of the occupying power and of the affected state, since as noted above the endorsement of the humanitarian assistance requires consent of the parties to the conflict. This issue is closely linked to the principle of sovereignty of States which obliges impartial humanitarian organizations to obtain relevant endorsement from the Affected State.²² “

In Addition to abovementioned, Article 10 of Geneva Convention IV reiterates that humanitarian activities of the International Committee of the Red Cross or any other impartial humanitarian organization are subject to the consent of the parties to the conflict.²³ All these humanitarian activities are subject to one final condition -- *the consent of the Parties to the conflict*.²⁴

Apart from treaty rules which have acquired universal acceptance, similar line of arguments has been shared by the international organizations such as the United Nation. For example, the United Nations General Assembly Resolution 46/182 on 'Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations' directly refers to the state sovereignty in case of humanitarian relief. The mentioned resolution not only encourages the Affected States to facilitate the access of humanitarian organizations²⁵ but at the same time underlines the fact that *“the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country”*.²⁶

In order to receive consent from the Affected State, the organization should not be only humanitarian in its nature, but additionally, it should meet necessary conditions of impartiality and neutrality. In this regard, the Affected State must give its consent when all necessary

²¹ Yoram Dinstein, The Right to Humanitarian Assistance, Naval War C. Rev., Autumn, 2000, at 77, 77-78 (2000);

²² Mominah Usmani 'Restrictions on Humanitarian Aid in Darfur: The Role of the International Criminal Court', 36 Ga. J. Int'l & Comp. L. 257, 2007, p. 262; M. Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds,'" International Review of the Red Cross, vol. 32, 1992, p. 228 at p. 232; See also, Yoram Dinstein, The Right to Humanitarian Assistance, Naval War C. Rev., Autumn, 2000, p. 82;

²³ ICRC Commentaries of the Article 10 of IV Geneva Convention relative to the Protection of Civilian Persons of 1949; See also Article 81 of Additional Protocol I;

²⁴ ICRC Commentaries of the Article 10 of IV Geneva Convention relative to the Protection of Civilian Persons of 1949;

²⁵ See also G.A. Resolution 43/131 (Dec.8 1988) and 45/100 (Dec. 14 1990) on 'Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations';

²⁶ G.A. Resolution 46/182 (Dec. 19,1991), para. 3;

requirements are fulfilled, such as the humanitarian relief must be humanitarian, impartial and neutral by its nature.²⁷

As an exception to this principle, one must note ICRC Commentaries to Protocols arguing that a required consent does not mean that the decision on a relief operation is left to the discretion of the parties: *“If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place (...) [A] refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat (...)”*.²⁸ Thus the commentary carefully balances state sovereignty with the emergency circumstances based on proportionality criteria – when the survival of the population is at stake.²⁹ In such instances, the opinion of ICRC would be that a state should allow an impartial humanitarian organization to deliver relief items as listed above.

V. Situation in Georgia

The Law on “Occupied Territories” of Georgia and the proposed package of amendments stand in line with the aforementioned international law standards. The Law defines the legal entrance points to the occupied territories from the south – territories falling under control of Georgian authorities.³⁰ Since Georgian authorities do not control the borders of the occupied territories, the entrance into the occupied territories from other than prescribed routes is forbidden and punishable by law. The Law and its amendments provide for three types of exception in this regard:

- Firstly, they allow subject to the consent of the state, permission to enter into the occupied territory from the forbidden routes; in addition, Georgia has defined the considerations relevant for acquiring consent – the purpose/s served by the entrance should be peaceful settlement of conflict-resolution, deoccupation, confidence building or humanitarian purpose/s.
- Secondly, they allow a safeguard clause for asylum seekers and victims of trafficking who enter the occupied territories from the forbidden directions. They are exempted from any criminal liability;
- And thirdly, persons who render emergency humanitarian aid in Occupied Territories (that is representatives of the impartial humanitarian organizations) for population in order to maintain their right to life through provision of food, medicine and emergency items shall also be exempted from the aforementioned prohibition in similar manner. Impartial humanitarian organizations merely need to provide notification (information) regarding the entrance into occupied territories from the forbidden directions prior or aftermath to the entrance. In addition, impartial humanitarian organizations have to present information on the humanitarian aid they have provided to the population.

Hence, the proposed Law and its amendments take into consideration existing regulations regarding humanitarian assistance to the fullest extent and expressly provide for the situation when even the consent of the Affected State is limited due to humanitarian considerations.

²⁷ Christa Rottensteiner, ‘The denial of humanitarian assistance as a crime under international law’, *International Review of the Red Cross* No. 835, p. 555-582 (30-09-1999) at p. 556.

²⁸ Article 70 of Additional Protocol I; Article 18 paragraph 2 of Additional Protocol II; See also Christa Rottensteiner, ‘The denial of humanitarian assistance as a crime under international law’, *International Review of the Red Cross* No. 835, p. 555-582 (30-09-1999) at p. 556; Joakim Dungel, *A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality, and Legitimacy: Practical Proposals to Practical Problems*, *J. Humanitarian Assistance*, May, 2004, <http://www.jha.ac/articles/a133.htm>;

²⁹ Mominah Usmani ‘Restrictions on Humanitarian Aid in Darfur: The Role of the International Criminal Court’, *36 Ga. J. Int’l & Comp. L.* 257, 2007, pp. 262-3;

³⁰ See article 4 of the Law on Occupied Territories of Georgia.