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SPECIAL FOLLOW-UP MISSION TO THE AREAS AFFECTED BY THE SOUTH OSSETIA CONFLICT:

**Implementation of the Commissioner's six principles
for urgent human rights and humanitarian protection**

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Executive Summary

Right to return

By mid-November, 85 percent of all persons displaced from the previous “buffer zone” had returned to their homes. There are some important gaps in the humanitarian support provided to the returnees, which need to be swiftly addressed. Private construction work is under way and commendable efforts are being made by international inter-governmental and non-governmental humanitarian organisations to secure adequate living conditions for the victims. Livelihood and income generating projects are urgently needed to allow them to meet their daily needs to prevent new movements of displacement. The aid must also be extended to the persons who never left the areas during the hostilities, notably elderly and mixed families and to assist them in getting through the winter.

The great majority of those who fled to Russia have returned. Ethnic Georgians who fled southwards have not been able to move back. The Commissioner discussed the principle of the right to return with the de facto authorities in Tskhinvali. The de facto authorities indicated that they accepted and would respect this principle, provided that those who wished to return fulfilled certain criteria. These were non-participation in the hostilities and becoming a citizen of South Ossetia. This policy should be reviewed and brought in line with the European Convention on Human Rights. The Commissioner intends to continue his human rights dialogue with the relevant actors on this issue.

Rights of displaced persons to care and support

Some 37 500 individuals continue to be displaced and their living conditions need to be urgently addressed with winter approaching. The Commissioner expresses his serious concern over the fact that the Georgian government, despite the substantial assistance of the international community, still has not managed to secure adequate living conditions and support to a number of those who continue to be displaced. Government efforts are equally needed to guarantee the rights of the more than 223 000 IDPs from previous conflicts. Income-generating projects are urgently required for their daily needs to be met.

The Commissioner emphasises that both the displaced and the returnees should be consulted when devising temporary or longer term solutions for them. There is a need to step up information efforts as regards their entitlements, benefits and choices.

The measures taken towards improving the situation of IDPs are no substitute for their right to return and they must be able to end their displaced status, including through local integration if they so choose. The Georgian government has committed itself to finding a durable solution for all displaced persons by 2011, irrespective of whether they originate from the 2008 or 1991-92 conflicts.

Right to be protected against dangers from remnants of war

Major efforts by the Russian forces were made in a short time span to clear large areas of the former “buffer zone” and other affected areas from unexploded ordnance and remnants of war. A major obstacle to the safety of returnees in the adjacent areas to the administrative border with South Ossetia is the large quantity of sub-munition “duds” from cluster bombs. International non-governmental organisations such as Halo Trust and Norwegian People’s Aid have so far cleared, with the help of locally trained civilian volunteers, some 900 pieces in the areas adjacent to the administrative border but more work is needed to secure all inhabited and cultivated areas. International aid should continue to support this important task. The Commissioner proposes that an international, independent and impartial investigation be launched into the use of cluster bombs during the hostilities.

Right to protection against lawlessness

One of the most serious problems is the security and safety of the returnees to the former “buffer zone”, particularly in the areas adjacent to the administrative border with South Ossetia. With the initiation of patrols by the European Union’s civilian monitors and the deployment of Georgian police in the area, the vast majority has moved back. The returnees voiced concerns over their security situation. In response, the European Union Monitoring Mission (EUMM) plans to increase the number of its patrols, also during the night.

Protection of detainees, prisoners of war and persons in hiding

Significant efforts have been made by the Commissioner, the International Committee of the Red Cross (ICRC) and the Patriarch of the Georgian Orthodox Church, Ilia II, to help bring about the release and exchange of prisoners of war and other detainees and to enable persons who are in hiding to return and reunite with their families. Progress has also been made in the identification of mortal remains. It is crucial to prevent further kidnappings, detentions or hostage-taking. Under the Commissioner’s auspices, one adolescent and his father, who had been detained for over a month, were handed over to Tskhinvali by the Georgian authorities. Ten bodies were transferred from Tskhinvali to Tbilisi, thereby contributing to the clarification of the fate of missing persons.

International presence and monitoring for the protection of human rights

Since the withdrawal of the Russian troops from the former “buffer zone”, the efforts of the international community, notably the EU Monitoring Mission, have concentrated on the normalisation and stabilisation of the situation. All international observer missions present in the affected areas are now mobilised to contribute to the genuine protection of human rights. The Council of Europe is providing the EUMM with training in the European Convention on Human Rights. Coordination efforts to analyse information and to provide a rapid response to urgent situations as well as to patterns of violations of human rights or humanitarian law are under way. Several actors, including non-governmental organisations, stated that the monitoring of the human rights situation in the areas affected by the conflict should be extended. Effective international and impartial monitoring, in particular of minority rights, is needed in this post-conflict situation.

The problem of free and unhindered access of international organisations and of humanitarian and early recovery aid has been further complicated by the recent adoption by the Georgian Parliament of the “Law on occupied territories”. The law restricts foreigners’ freedom of movement, property rights and economic activities in these areas. It is imperative that all humanitarian organisations are given access to all the relevant areas, from all directions and at all times.

The Commissioner believes that impartial investigations into allegations of human rights violations and breaches of international humanitarian law are necessary also in order to facilitate or victims to seek justice and restitution or compensation for violations committed.

The Six Principles for Human Rights and Humanitarian Protection

The Commissioner presented on 3 September 2008 six principles for human rights and humanitarian protection of the victims of the conflict to the Committee of Ministers of the Council of Europe and called upon the parties and the international community to address urgently the problems identified. These principles are enumerated here for easy reference¹:

1. *The right to return of those who fled or were displaced must be guaranteed. This requires that their safety is protected and that their homes are made liveable again. The repair of damaged houses is an urgent priority. Affected persons have the right to be informed about relevant developments and no one may be returned against his or her will.*
2. *Those who fled or were displaced must be ensured adequate living conditions until they can return home. This requires competent coordination of the assistance from both governmental and intergovernmental actors. Not only material needs but also psychological and psycho-social damages must be addressed.*
3. *The whole area affected by the conflict must be de-mined. Cluster bombs, mines, unexploded ordnance and other dangerous devices must be located, removed and destroyed. Until this is done the targeted terrain must be marked and the population clearly informed about the dangers. The parties to the conflict need to declare what type of weapons and ammunition were used, when and where. International contribution to this effort will be required and should be welcomed by both parties.*
4. *Physical assault, torching of houses and looting must be totally stopped and persons responsible for such crimes apprehended and held to account. The problem of the 'policing vacuum' in the so-called buffer zone between Tskhinvali and Karaleti must be resolved urgently.*
5. *Prisoners of War, other detainees and persons stranded in unsafe situations must be protected and rescued through continued humanitarian efforts. The established mechanism for dialogue and mutual exchanges of such cases – which the Commissioner assisted during his visit - should be kept in place and fully supported, including by the international community. There is a need to establish a coordinated system for assembling and acting upon information on missing persons.*
6. *International presence and assistance are needed in the area affected by the conflict. The programmes of UNHCR, UNICEF, ICRC and other agencies should be supported and the OSCE given authority and resources to expand its mission. Apart from cease-fire observers and police presence, there is a need for specialised human rights monitors, who could also operate in coordination with the domestic ombudsmen. The protection of minorities must be a key priority and positive inter-community relations must be encouraged.*

¹ Cf. Paragraph 5 of CommDH(2002)22.

The mission programme

1. The Commissioner began his third follow-up visit on 11 November 2008 in Tbilisi by meeting non-governmental human rights organisations, the Public Defender (Ombudsman) Sozar Subari and the Chairman of the Defence and Security Committee of the Parliament, Givi Targamadze².
2. On 12 November 2008, the Commissioner travelled to Tskhinvali and had meetings with the de facto President Eduard Kokoity and the de facto Ombudsman David Sanakoev. The whole delegation met with the European Union and UNHCR. The delegation also had meetings with the UN Resident and Humanitarian Coordinator, heads or representatives of the OSCE Mission to Georgia, European Union, UNHCR and UNICEF.
3. On 13 November 2008, the Commissioner visited Gori and the former "buffer zone" including the villages of Dvani, Takhtisdziri, Pkhvenisi and Kvemo Khviti, where he listened to the concerns of returnees and met with the non-governmental organisation Halo Trust.
4. On 14 November 2008, the Commissioner visited the former Military Hospital, which hosts some 800 displaced persons, mainly from the Georgian villages north of Tskhinvali (Patara Liakhvi, Didi Liakhvi, and Znauri areas). The Commissioner proceeded to meet with the Minister for Reintegration, Temuri Yakobashvili, and the First Deputy Foreign Minister, Giorgi Bokeria.
5. He also held talks with the Special Representative of the Secretary General of the United Nations for Georgia and head of UNOMIG, Ambassador Johan Verbeke, the head of the EU Monitoring Mission, Ambassador Hansjörg Haber, and French Ambassador Eric Fournier representing the Presidency-in-office of the EU. Finally, the Commissioner had a meeting with the Patriarch of the Georgian Orthodox Church, His Holiness Ilia II.
6. Since the Commissioner's last visit at the end of September, major developments had taken place on the ground. On 1 October 2008, the civilian EU Monitoring Mission (EUMM) started patrolling the former "buffer zone", while the Russian forces began dismantling their checkpoints. In parallel, the Georgian police and its special forces began deploying in the area. By 8 October 2008, the Russian forces had completely withdrawn from this zone, but continue to have a presence along the north side of the administrative border.
7. At the time of the visit, the situation along the administrative border line was still volatile with a few so-called "hot spots".

I. THE RIGHT TO RETURN

8. The Commissioner underlined in his conversations with the relevant authorities the need for unconditional implementation of the right to return for all persons displaced, irrespective of their ethnicity or nationality³. This right is underpinned by provisions in the European Convention on Human Rights and its Protocols, intrinsically linked with the freedom of movement⁴, the peaceful enjoyment of one's property⁵ and the respect for one's home and family life⁶. This individual right corresponds to the contracting state's "positive obligation" to facilitate its exercise. It can only be waived by the beneficiary voluntarily and on the basis

² The Commissioner was accompanied by Ulrika Sundberg, special adviser, and Bojana Urumova, adviser.

³ Cf. Paragraphs 32 to 40 of CommDH (2008)22 and paragraphs 24 to 35 of CommDH(2008)33.

⁴ Cf. Articles 2 to 4 of Protocol 4 to the ECHR.

⁵ Cf. Article 1 of Protocol 1 to the ECHR.

⁶ Cf. Article 8 of the ECHR.

of an informed decision. The options must be made clear to him or her: voluntary, safe and dignified return, voluntary resettlement, or local integration.

9. It is incumbent on all concerned governments to do everything possible in order to protect the right of displaced persons to return to their homes without discrimination of any kind. Those who are unable to return to their homes because they have been destroyed or are occupied are entitled to restitution or full and effective compensation. The Commissioner reiterates that this right to restitution or compensation is distinct from the right to return.
10. This right must be fully and effectively respected in any attempt to broker a sustainable and durable solution to this conflict, as this right persists even when the sovereignty over the territory is contested or has changed hands. The dispute about the future status of South Ossetia is no justification for denying any one of those displaced his or her right to return.
11. In his conversation with the Commissioner in Tskhinvali, de facto President Kokoity stated that his authorities were - in principle - committed to the right of return for everyone. However, the exercise of this right would not be automatic. Ethnic Georgians who wished to return to their villages north of Tskhinvali would have their cases examined individually to verify that they have not participated in the hostilities. Furthermore, they would need to acquire South Ossetian passports and renounce their Georgian citizenship. However, it was considered permissible to have dual (concurrent) Russian and South Ossetian citizenship.
12. It should be noted that Russian legislation on nationality permits dual citizenship on the basis of bilateral agreements. After the break-up of the Soviet Union, Russian legislation provided for all inhabitants of the former Soviet Union the possibility of obtaining Russian citizenship through a simplified procedure, irrespective of national or ethnic origin. This regime is still in force and used by the Ossetians.
13. However, the Commissioner is concerned by the position expressed by the de facto authorities as regards the issue of citizenship. The dispute about the status of South Ossetia is no justification for denying anyone of these displaced persons their right to return home, without preconditions⁷. According to general principles of human rights, national legislation on nationality may not arbitrarily deprive a person of her or his nationality, nor may it discriminate between nationals irrespective if they acquired the citizenship by birth or subsequently or on any other ground, notably gender or national or ethnic origin. A person can only lose his or her original citizenship, if he or she voluntarily acquires another nationality⁸.
14. The approach whereby the exercise of the right to return and to enter a territory, to which the person already has special ties, is conditioned upon the acquisition of a specific nationality falls short of the foregoing standards. The Commissioner therefore intends to

⁷ The right to return to one's country has been enshrined in Article 3, paragraph 2, of Protocol No. 4 to the ECHR. No one shall be deprived of the right to enter the territory of the state of which he is a national. Also Article 12§4 of the ICCPR states "No one shall be arbitrarily deprived of the right to enter his own country". See also Human Rights Committee General Comment on Article 12 of the ICCPR (November 1999): "§20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.

⁸ Cf. Article 15 of UDHR, Articles 12 and 24 of ICCPR, Article 9 of CEDAW, Article 7 of CRC as well as Article 5 of the European Convention on Nationality.

pursue urgent dialogue on all these issues with all concerned authorities and hopes that this position will be reconsidered and brought in line with international human rights standards.

The situation of the returnees to the adjacent areas

15. Returns of displaced persons took place on a large scale following the withdrawal of the Russian military forces from the “buffer zone” on 8 October. On 12 October, the UNHCR was able to close its temporary IDP camp in Gori which used to accommodate 2 000 displaced persons. Since 8 October, some 16 000 IDPs – 9 000 of whom had been placed in Tbilisi and 7 000 in Gori – have returned to the areas around the administrative border with South Ossetia. The 1 300 persons who remain displaced, mainly from villages in South Ossetia, are accommodated in collective centres in Gori. There are still some 25 000 displaced persons living in Tbilisi.
16. On 11 November 2008, 99 500 persons, approximately 85% of all displaced during the conflict, had returned to their homes in the former “buffer zone”. Still, the villages along the administrative border had a lower rate of return. During his visit, the Commissioner received reports of continued displacement from Akhagori and Perevi areas. According to the Georgian authorities, some 5 173 individuals have left Akhagori since August 2008, as well as half of the population of Perevi. In total, the UNHCR estimates that 37,500 persons will continue to be displaced over the winter.
17. The local population gave detailed descriptions of the climate of fear prevailing in the area. In conversations with the Commissioner, the returnees living in these areas said that their primary concern was security. They said that South Ossetian militia came to their villages. They also mentioned that they heard shots at night, and that remnants of war were still present in the area. All returnees whom the Commissioner met requested increased Georgian police presence and more frequent EUMM patrols, in particular at night.
18. A few families and younger persons who had returned to villages in the northern part of former “buffer zone”, such as Dvani, had decided to leave again due to security incidents. According to the international organisations, in Perevi, part of the population had left after the South Ossetian militia had entered the village and taken over checkpoints. This movement of the local population reportedly stopped when the Russian forces took control, and people started to return.
19. Apart from security, a second urgent need which still needs to be addressed is adequate shelter. The majority of the displaced whose houses have been partially damaged or destroyed had returned. Those who had had their houses completely destroyed would need to wait until spring in order to return. The displaced persons asked to be informed of how they could obtain the compensation that the Government had promised. 15 000-20 000 USD would be paid for a totally destroyed house. According to the returnees, this amount was insufficient for rebuilding a home. For partially damaged houses the Government had promised 10 000 USD.
20. Many returnees, including those who stayed on during the hostilities, reported that their work tools and crops had been stolen or lost and they were unable to harvest. Others pointed out that they could not work on their fields until the following year due to unexploded ordnance, including sub-munitions from cluster bombs. Many interlocutors said that the Government had promised them financial assistance to compensate for the lack of income from this year's harvest. The returnees who were sure of not having any unexploded ordnance on their properties had approached the authorities to receive aid. But they were afraid of informing the authorities of the existence of unexploded ordnance; apparently, they had been told to wait until an official survey of all villages in the area had been made and their village was officially declared free of explosive materials.

21. The returnees complained about their inability to buy or provide food for themselves and their family members. A few said that they had received one food distribution at the beginning of September and that the distribution of humanitarian assistance was insufficient and sporadic.
22. With winter approaching, many houses needed firewood for heat. Some villages had benefited from firewood distribution, but the majority remained unattended. The Georgian Government had distributed vouchers, giving them the right to cut a certain amount of wood, but these vouchers could no longer be used since the locals had no access to the South Ossetian forests which were reportedly the major source of firewood. The areas concerned were unsafe and there had been kidnappings reported directly linked to the collection of firewood. The UNHCR informed the Commissioner that they were taking measures jointly with other international actors to tackle the problems raised.
23. The Commissioner heard that most villages had access to potable water. However in certain villages such as Dvani, the drinkable water had habitually been brought from the neighbouring South Ossetian village. After the war, these local arrangements were no longer possible. According to UNHCR, there is a group of villages that previously received their drinking water from South Ossetia, but the provision was suspended by the de facto authorities after the conflict. The farmers also raised the lack of irrigation water.
24. According to returnees, schools are functioning with the exception of heavily damaged school buildings or villages along the border line. Major reconstruction work is needed in respect of those schools as well as medical centres and administrative buildings. The returnees asked for financial help to buy text books for pupils in grade 6 and above, since they have no money to buy them on the market.
25. The Commissioner was informed that hospitals and medical clinics had reopened but lacked supplies. The returnees were seriously worried about the Government's decision to cut off free medical assistance to people who remained in the conflict area by 15 November 2008. They, like other Georgians, are required to pay for medical services that include surgery, cases of chronic illness, long term treatment or hospitalisation. The returnees requested that they be given free health services for serious cases as they could not cover the expenses. Furthermore, they asked for basic health centres in their villages to care for their elderly, pregnant or physically disabled family members who could not travel long distances.
26. There was a high number of unemployed among the returnees. Only a few were working in reconstruction efforts of private companies, since not many of them could afford to pay for transportation and accommodation at the sites. All the returnees said they needed cash money. Despite the humanitarian assistance they received, they could not pay for electricity, gas, firewood, medicines, food, school books or transportation to Gori or Tbilisi. One village had reportedly had its electricity cut off due to non-payment.
27. The returnees requested livelihood and income-generating projects to enable them to pay bills. Several returnees raised with the Commissioner the problem of paying bank loans and house mortgages. There seemed to be very little information available on the issue of force majeure and the Government's plans to request the banks to restructure the loans of the displaced persons as well as granting them a grace period for payments.
28. The security situation is improving with the presence of the European Union Monitoring Mission (EUMM), but more frequent patrols seem necessary. The number of police posts and police officers in the area should increase. In order to tackle crimes and nightly incursions effectively, cross border contacts and cooperation need to be developed, at the technical level.

II. THE RIGHT OF THE DISPLACED TO ADEQUATE CARE AND SUPPORT

The situation of the displaced in Tbilisi

29. In Tbilisi, the Commissioner visited a former military hospital which had been transformed into a collective centre for displaced persons. Some 800 Georgians from South Ossetia (Patara Liakhvi, Didi Liakhvi, and Znauri areas) were accommodated in the centre. The displaced persons also included people from mixed ethnic background (e.g. Georgian and Ossetian) The material conditions were poor; electricity was installed only on the two first floors of the eight storey building, and only in the corridors. There was no functioning heating system. The displaced persons had themselves installed potentially hazardous electrical connections to ensure light and heating in the individual rooms. There were no kitchens on the different floors and food had to be prepared in very unsafe conditions.
30. Several rooms were flooded on a daily basis due to a defective sanitary and water-pipe system. The centre was potentially dangerous for the physical safety of people, particularly children. Mothers were complaining about lack of provision of baby food and food adapted to small children up to two years. The women also lacked hygiene items.
31. The displaced persons told the Commissioner that they were actively seeking information on how they could obtain access to their entitlements and benefits. But so far the Georgian authorities had refused to confer upon them the legal status of displaced persons, thereby postponing the payment of monthly allowances, compensation for their destroyed homes and other socio-economic support.
32. Several displaced persons asked the Commissioner if pledges of the international community, including the EU, of a total of 4.5 billion USD had been paid to the Government and they wondered why their situation had not improved in light of this substantial donation. Many of the persons interviewed in the former military hospital said that they did not want to move to the new houses that were built to accommodate them. They said that they had not been consulted on either the size of the houses, taking into account the size of the families, or on their location. They also claimed that hardly any farmland had been allotted; as a result, they felt that they would not be able to sustain themselves. They were also concerned about access to schools, health care and other forms of employment.
33. The Commissioner finds that the Government's response to the crisis, despite the considerable support from the international donor community and humanitarian actors, is still insufficient in practice. Humanitarian efforts need to be increased so that the returnees and the displaced can spend the winter in acceptable conditions.
34. Displaced persons must be given identification documents and granted legal status of IDPs, so that they can receive financial support and other legal entitlements and compensation. Furthermore, they must be allowed to register dead persons in order to receive the 10 000 Lari relief. Assertion of these rights and entitlements by the displaced persons should always be given due consideration.
35. The Government has certainly taken laudable actions in collaboration with the private sector, to provide a durable solution for all internally displaced persons including those in protracted displacement since the earlier conflicts at the beginning of the 1990s. However, it is important that displaced persons be provided with relevant information, consulted and invited to participate in the devising of a viable solution to their situation.
36. The Commissioner shares the views expressed by the UN Representative of the Secretary General on the Human Rights of Internally Displaced Persons, Professor Walter Kälin, that local integration in the areas to which the displaced persons have fled and safeguarding

their right to return are not mutually exclusive. Also, it remains necessary to integrate the more than 223 000 persons displaced in the early 1990s, many of whom still live in collective shelters in unacceptable conditions. The Government should start implementing the Action Plan for Internally Displaced Persons which it adopted in July 2008 without any further delay. The international community and non-governmental organisations should lend support to this endeavour, which would assist in restoring hope and dignity among this part of the Georgian population which has been marginalised for too long.

37. The Commissioner reiterates the principle that governments are obliged to respect the rights of internally displaced persons and provide protection and assistance to them in accordance with the UN Guiding Principles on Internal Displacement.
38. The Commissioner also visited a construction site of small cottages for displaced persons, each measuring 65 square meters in the outskirts of Gori. According to the Georgian authorities, a total of 3 984 new houses are being built in this region, mainly for those persons who fled the Tskhinvali region. 1 636 houses are being repaired and some 500 so-called “warm rooms” are being built for the returnees. These houses are being built by private companies and the Government will only pay for them once they are finished.
39. The Commissioner strongly recommends that a more participatory approach be applied to the provision of humanitarian aid and socio-economic support to the displaced. More information must be given by the authorities to these persons about their right to compensation and other entitlements and benefits. Their views must be given due attention in any devising of a Government plan for the recovery of the affected region. A stronger humanitarian presence would be advisable as well as continuous monitoring of the situation of returnees and the locals who stayed on during the hostilities. Current gaps in security and humanitarian protection need to be urgently addressed.

III. RIGHT TO BE PROTECTED AGAINST DANGER FROM REMNANTS OF WAR

40. Swift demining is an essential component of any stabilisation and normalisation process. As the Commissioner reported in September, Russian forces removed some 26,500 pieces of unexploded ordnance (UXOs) before withdrawing from the “buffer zone”. Despite these substantial efforts, many agrarian fields in the zone are still infected by cluster bomb sub-munitions and most of them will not be safe for agricultural purposes before next year. Non-governmental organisations like Halo Trust and Norwegian People’s Aid have continued the time-consuming work of clearing the area, mainly from cluster bomb sub-munitions (duds).
41. The Commissioner was informed that the Georgian army had themselves cleared up the UXOs from the strike on their military depot in the vicinity of Gori during the hostilities. In the city of Gori, very few unexploded devices had been found.
42. Halo Trust had carried out an initial survey of the clearance needs upon arrival in August 2008. The sub-munitions were at that time mainly located in residential and agrarian areas. This first survey showed a concentration of cluster bomb ‘duds’ along the main road between Gori and Tskhinvali, where the Georgian forces were retreating when the Russian troops were advancing.
43. The organisation has since removed some 900 sub-munition pieces and destroyed over 380 cluster munitions with the help of some 150 trained civilian volunteers. A more refined sub-surface assessment was planned. During the winter, clearance in the former “buffer zone” would have to be temporarily halted and the operation is expected to last for at least a year. However, no information had been given to these NGOs by either the respective sides to guide and facilitate this clearance.

44. Cluster bomb sub-munitions are considered by definition as unstable arms and need to be detonated in situ. Many farmers along this “cultivation corridor” object to their harvest being destroyed by such explosions, which complicates further the problem of mine clearance. There is a risk of an increased number of casualties when the farmers start working in their fields, since a number of unexploded ‘duds’ have sunk into the soil.
45. According to Human Rights Watch, there are three main types of ammunition found in the area: Russian AO 2, 5 RTM sub munitions and 9N210 as well as Israeli M095 and MK85. The Russian cluster bomb types exist in both parties’ arsenals, while the Israeli type can only be found in Georgian possession. This latter type is equipped with a self-destruction device, which has a failure rate of between 10 and 35% depending on how soft the surface of impact is.
46. The Georgian authorities have acknowledged the use of cluster bombs to try to stop the Russian troops’ advance on Dzara road and around the Roki tunnel. The Georgian officials have also officially acknowledged that Mk4 GRAD LAR ground rockets were loaded with MK85/M095 sub-munitions. According to recent reports, unexploded devices of this type have been found in the Georgian villages north and south of Tskhinvali, including in the former “buffer zone”. These reports point to a more extensive use of this weapon type than previously acknowledged by Georgian officials.
47. The Russian authorities have in this respect stated that: “Russian peacekeeping land forces did not use cluster munitions, including missiles for ‘Uragan’ rocket launcher”.⁹ They added that “so-called ‘cluster weapons’ in particular cluster bombs (types RBK-500 ShOAB-0.5, RBK-500 PTAB-2.5, RBK-500 AO-10SCh and RBK 500 ZAB-2.5) and similar antipersonnel and anti-armoured vehicle bombs, adopted by Russian Air Force, were not used by the during the above-mentioned conflict”.
48. The Commissioner believes that this issue merits further attention and therefore joins the international call for an international, independent and impartial investigation into the use of cluster bombs, including against civilians and civilian targets, during the conflict.
49. The use of cluster munitions against civilian population and targets is unlawful under humanitarian law because of their broad, long-term and indiscriminate effect. In May 2008 in Dublin, Ireland, 107 countries adopted a Convention banning cluster munitions. This convention prohibits use, production, stockpiling, transfer or trade of cluster munitions. On 3 December 2008, this Convention was opened for signature in Oslo, Norway. The Commissioner urges both States to join this treaty and reiterates his call to the parties to give precise information and data to the humanitarian actors carrying out the demining of the areas affected.

IV. RIGHT TO PROTECTION AGAINST LAWLESSNESS

The situation in the former “buffer zone”

50. Based on conversations with the returnees, it is clear that the security situation has improved since the Commissioner visited at the end of September 2008 and this is to a certain degree due to the presence of EU monitors. Their patrols have contributed to a sense of security, which in turn has encouraged the displaced persons to return home. However, tensions still persist along the administrative border.

⁹ Letter from Permanent Representation of Russian Federation to the Council of Europe, to the Commissioner, dated 21 November 2008.

51. The "step by step" approach applied to the withdrawal of Russian troops and a simultaneous return of Georgian police prevented a security vacuum, which could have been abused by roaming marauders and organised crime. The first ten days of the EUMM were said to be crucial for creating confidence among the parties and ensured an orderly transfer of control.
52. The EUMM conducted some 15 patrols per day up until 23.00. They visited the whole area of the former "buffer zone". Each patrol consisted of 4 to 5 persons, one of whom was a human rights expert and another an interpreter. The mission had developed forms so that returnees and persons displaced in collective centres could lodge complaints.
53. The mission has four regional sub-offices, in Poti, Zugdidi, Basaleti and Gori, in addition to its headquarters in Tbilisi. The Poti office would most probably be relocated to study the situation of displaced persons from the previous conflict in relation to Abkhazia and the possibility of moving them closer to home. In case of incidents they would contact the Georgian police to investigate. During the first week of November 2008, a South Ossetian had been killed by a sniper. The EUMM had invited both parties to investigate the incident.
54. The Council of Europe is providing training in the European Convention on Human Rights to the EUMM observers and making them aware of potential human rights challenges. At this stage, only the Basaleti sub-office had carried out human rights monitoring and reported cases of forced returns. The mission had initially adopted a cautious approach to human rights issues, mainly focusing on reporting to the different EU structures.
55. One consideration which was preventing more frequent nightly patrols was due to the fact that EU monitors were unarmed. In fact, one of the few issues on which many on each side appeared to agree – though not the EU member states – was that the mission should be carrying arms. The mission was planning to increase its number of patrols at night in response to the demand but consideration had to be given to staff security, working hours and the presence of unexploded devices.
56. The head of the EUMM further stated that the mission had established itself as a visible actor in the region, but it did not have access to either South Ossetia or Abkhazia. Its longer-term success hinged on whether the civilian monitors would be able to work in these regions. The mission's success was also intrinsically linked to progress in the Geneva discussions.
57. Informal contacts at the technical level had been made with the respective de facto authorities, but these had not led to any changes in access. However, these contact persons had been replaced due to recent changes in the de facto cabinet in South Ossetia. The head of the Russian forces had also been changed. The mission wanted to have good working relations with all parties involved, in particular with the Russian Federation. It was now communicating through the Russian interest section in the Swiss Embassy in Tbilisi.
58. Since October 2008, there had been a number of arrests by the Georgian police of Ossetians. They were suspected either of unlawfully carrying arms, possession of drugs or for looting and theft. Some Georgians had reportedly been kidnapped by South Ossetians when cutting firewood in the forest. The mission intended to set up a data base of detained, disappeared, kidnapped and missing persons. This would facilitate identification, tracing and exchange of persons between the parties.
59. The OSCE mission continues to monitor the adjacent areas to South Ossetia with its military observers.
60. The OSCE carried out some 5-6 patrols each day. These visits were not coordinated with the EUMM, because of the missions' distinct mandates. The OSCE mission has still not

been allowed to return to Tskhinvali and rebuild its presence. The de facto authorities indicated in discussions that they favoured a return of the mission, provided that its presence would be a stand-alone one, no longer reporting to the OSCE Mission to Georgia in Tbilisi. The mission's mandate will be renewed by the end of the year and there are suggestions of expanding the police and human rights components of the mission.

61. The international observers' missions expressed concern over the military build-up of Russian forces in South Ossetia and equally over the deployment of Georgian troops together with heavy artillery in the Gori district. Good communications channels and transparency measures were needed to avoid any new tensions. A memorandum of understanding was being negotiated between the EUMM and the Georgian Ministry of Defence in order to ensure advance notice of any troop movements. Such transparency measures from all sides would permit the EU to fully assume its role as guarantor for the ceasefire agreement signed by the parties.
62. The international missions anticipated that the somewhat tense security situation would prevail for the coming months. The Geneva discussions under the Sarkozy-Medvedev ceasefire agreement need to consider different security arrangement options in order to avoid any new frictions.

The situation in South Ossetia

63. According to the de-facto authorities of South Ossetia, 93 persons were arrested by local police between 21 August and 6 November 2008. Out of these, 57 individuals have been charged with theft, 26 persons for violating the curfew and 3 individuals for looting. As reported in September, the de-facto authorities are currently setting up a new police force with the assistance of the Russian Federation.

V. PROTECTION OF DETAINEES/PRISONERS OF WAR AND PERSONS IN HIDING

64. Ever since his first visit to the areas affected by the South Ossetian conflict in August 2008, the Commissioner has been actively pursuing the issue of exchanges of persons apprehended, imprisoned or taken hostage. He has also contributed to the clarification of the fate of missing persons, by supporting the process of exchange and return of the mortal remains of the victims of the conflict. In doing so, the Commissioner has cooperated with the Patriarch of the Georgian Orthodox Church and the ICRC.
65. Concrete results achieved during and immediately following the latest visit of the Commissioner include the release by the Georgian authorities of two Ossetians who had been apprehended by Georgian law enforcement officials on 8 October in the former "buffer zone", a minor (17 at the time of apprehension) and his father. The two persons were handed over at the Ergneti checkpoint on 12 November in the presence of the Commissioner after they had spent a month in detention. On 16 November 2008, the mortal remains of ten Georgian soldiers were returned to Tbilisi from Tskhinvali through the good offices of the Commissioner. The bodies were buried in a state funeral, and further DNA evidence was obtained for the purpose of identification.
66. The Commissioner is continuing to pursue his dialogue about certain outstanding issues with the relevant authorities, and in this he joined forces with the Patriarch of the Georgian Orthodox Church. The Commissioner trusts that the authorities concerned will observe the commitments made in order to build confidence, enable family reunification and eliminate the problem of hostage-taking.

67. Since 8 October 2008, a number of persons (ethnic Ossetians) have been apprehended in the former "buffer zone" by the Georgian police and many remain detained; some of them have been charged with criminal offences, such as illegal possession of arms or narcotics. The persons apprehended have included at least one minor (cf. the previous paragraph). Those arrests have been termed "illegal" by the de facto authorities in Tskhinvali; the Russian authorities have indicated that they consider that the persons were kidnapped by Georgian forces. Further, there have been some kidnappings of Georgians reported in South Ossetia and the adjacent areas.
68. From a human rights standpoint, it is important to ensure that any persons arrested in the former conflict areas are afforded all the necessary safeguards of the European Convention on Human Rights, in particular Articles 5 and 6. Any minors who are arrested should be given special attention to ensure that their physical and mental well-being is adequately protected. At the same time, a firm stance should be taken by all the relevant authorities against kidnapping and hostage-taking. A clear message must be delivered that such acts are serious crimes which will not be tolerated, and that perpetrators will be prosecuted.
69. Concerned family members of persons in detention have provided information to various international actors. The EUMM, as stated above, has started to compile the information they have gathered in a database. There is a need to pool such information systematically and further coordinate efforts aimed at the exchange and release of such persons.
70. In the cases of missing persons, it is important to "turn every stone" to avoid the risk of kidnappings perpetrated with the purpose of pressuring the other side for information or releases. The Commissioner maintains his proposal to set up an independent, international panel of experts to go through the outstanding cases of missing persons, once the identification work of mortal remains has been concluded.

VI. INTERNATIONAL ASSISTANCE AND PRESENCE

71. The UN presented its revised Flash Appeal of 109,311 USD for the Georgian crisis on 7 October 2008. Refinements had been made to the first Appeal presented on 18 August 2008 as regards food security, health and nutrition, protection and shelter. The revised Appeal also introduces a range of early recovery activities. These adjustments were made in light of changes on the ground and the Joint Needs Assessment (JNA), which served as the basis for the UN, World Bank and European Commission donor conference on 22 October 2008. The Appeal is part of the JNA and covers in practice activities until end of March 2009. The humanitarian needs of South Ossetia were assessed by the UN-system in mid-September and were found to be ably addressed by EMERCOM, leaving limited immediate needs unaddressed at that stage. However, the revised appeal does not reflect the latest situation in South Ossetia. According to the UN, the issue of access needs to be resolved in order to carry out a separate new assessment mission.

Access for international humanitarian organisations

72. International observer missions and humanitarian actors continue to be refused free and unconditional access from all directions to the areas of conflict. In the Commissioner's conversation with the de facto authorities of South Ossetia, their previously stated position was reaffirmed. Any international assistance would have to enter the region from the North, through the Roki tunnel. Currently, only the ICRC and EMERCOM are operating in the Tskhinvali region.

73. In his last report, the Commissioner drew attention to the draft law being prepared by the Georgian Government on occupied territories¹⁰. The Georgian Parliament adopted this draft law on 23 October 2008. The legislation provides for a special legal regime, applicable to both the “Tskhinvali region (former Autonomous District of South Ossetia)” and Abkhazia. It restricts the freedom of movement of foreigners and stateless persons by stipulating specific entry points to the two regions. It further restricts the exercise of economic activities, both commercial and non-commercial, and property rights in these areas. An exception clause for humanitarian activities has been incorporated¹¹. Ad hoc special permits can however be issued by the Georgian government, if the activity is deemed to serve the state interests of Georgia, peaceful settlement of the conflict, de-occupation or humanitarian purposes.
74. A number of questions were raised with the Commissioner in his discussions with the international community regarding this legislation’s compliance with the European Convention on Human Rights. The issues ranged from how this law would impact on the rights of the South Ossetian inhabitants, including the issuance of birth or marriage certificates, identification documents, inheritance issues, transfers of funds to cover the costs of an international presence or aid project. It was unclear what the envisaged permissions by the Georgian Government would mean in practice when it comes to the execution of activities or programmes. The practical impact could, according to some interlocutors, even be increased difficulties for the returnees.
75. The Minister for Reintegration informed the Commissioner that an implementation decree was being drawn up and would be submitted to the relevant actors for their comments in the coming weeks. An inter-agency committee was being set up to handle the special permits. A distinction had to be made between the nature of activities and the procedures to follow. The Georgian Government was not against activities, if deemed appropriate to them, in the occupied territories. An exemption existed for humanitarian aid, but there would be no exceptions as regards from which direction to access these territories. All international actors needed to enter from the south.
76. For the Commissioner it is of utmost importance that access is not politicised, that displaced persons are not faced with additional obstacles on their return and that international organisations are not hampered in their provision of aid to these traumatised victims.
77. The Commissioner reiterated his call to all concerned authorities to grant unimpeded access from all directions to all areas affected by the conflict for humanitarian and early recovery actors, so that they can reach internally displaced persons and other civilians at risk without delay. He further calls upon those authorities to refrain from any further steps that may impede or complicate access or the execution of the mandates of these actors.

The need for an independent and impartial investigation of violations of humanitarian law and human rights during the conflict

78. The Commissioner has in his previous reports pointed to the need for documenting and investigating violations of humanitarian law and human rights committed by all parties to the conflict. An international, independent and impartial fact-finding commission to investigate the course of events of the conflict would assist all parties and ensure that the truth is

¹⁰ Cf. Paragraphs 79 to 82 of CommDH(2008)33.

¹¹ Cf. Law of Georgia on Occupied Territories article 4(3) 3. In exceptional cases, the special permit for entry to the occupied territories may be issued according to rules provided by legal act of the Government of Georgia, if this serves the state interests of Georgia, peaceful settlement of the conflict, de-occupation or humanitarian purposes.

established. It would further be a useful contribution to the current international judicial institutions seized with the conflict, notably the European Court on Human Rights, the International Court of Justice and the International Criminal Court.

79. By 12 November 2008, the European Court of Human Rights had still not received the formal inter-state application by Georgia against the Russian Federation. Both parties have submitted by 7 November 2008 additional information on how they have implemented the President of the Court's decision on interim measures. Furthermore, the Court had received some 3,000 applications from individuals in South Ossetia against Georgia.
80. The EU approved on 2 December 2008 the mandate of an independent and impartial fact-finding commission, which will ascertain the origins and unfolding of the conflict. The commission will consist of 10 internationally recognised experts and shall investigate facts surrounding events leading up to and during the war, with reference to international law including human rights law. The team will draw on military, history, legal and human rights expertise. Its final report will be presented to the EU, the UN, the OSCE, the Russian Federation and Georgia on 31 July 2009. The commission will be chaired by the former Special representative of the Secretary General and head of the United Nations Observer Mission in Georgia (UNOMIG) Ambassador Heidi Tagliavini from Switzerland. All parties, including the Russian Federation and Georgia, have welcomed this EU initiative.

The need to address the monitoring gap and strengthen local human rights capacity

81. Most of the Commissioner's interlocutors made the point that current international efforts are to a large extent concentrated on security concerns and possible security arrangements and meeting the immediate material needs of the displaced and returnees.
82. Several actors, including non-governmental organisations, stated that the monitoring of the human rights situation in the areas affected by the conflict is insufficient. The new post-conflict situation calls for effective international, independent and impartial monitoring of the situation of the displaced persons and returnees. Special attention needs to be given to minority rights, and to issues of discrimination between new and old displaced persons.
83. The UN has in its revised Georgia crisis flash appeal of 7 October 2008 proposed two human rights technical advisers to be deployed to the region to advise UN agencies and the Georgian authorities on their human rights obligations, in particular relating to human rights institutions. A number of international missions will have their mandates reviewed in the next three months and all are proposing strengthened human rights work.
84. Swift analyses and timely sharing of information among all partners is important for any effective human rights work. Coordination of efforts in order to provide a rapid response to urgent situations as well as to patterns of violations of human rights or humanitarian law is under way at the local level.
85. It is important that the Geneva consultation group give priority to the situation of the displaced persons and the returnees and their human rights and that a human rights perspective is applied to all issues including status and security.